Preface

This is a new publication of materials developed by the American College of Bankruptcy. The College is an honorary association, founded in 1989, of bankruptcy and insolvency professionals, including attorneys, judges, law professors, accountants, investment bankers and others involved in the bankruptcy and insolvency community. Nominees for positions as fellows of the College are extended an invitation to join based on a proven record of the highest standards of professionalism and service. The College contributes to pro bono and educational projects, working through committees of fellows.

The College's Education Committee and Scholar-in-Residence have created several programs and projects for the College fellows and the Insolvency Community. One of the most popular projects is the Circuit Review, a discussion of important decisions from the various federal circuits relating to key issues for practitioners. The College's Review of reorganization materials has been published bi-annually for several years. We are now pleased to offer similar materials focusing on issues that arise in consumer bankruptcy cases.

We hope you will find the materials useful.

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AMERICAN COLLEGE OF BANKRUPTCY

CIRCUIT REVIEW of CONSUMER CASES

2013 Edition

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A. *ELIGIBILITY GENERALLY*

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Sood v. Business Lenders, LLC, 2012 U.S. Dist. LEXIS 95392 (D. Md. Jul. 10, 2012). There is no *per se* rule against a debtor filing a chapter 13 case while the debtor has chapter 7 case still pending. The court must determine whether the chapter 13 was filed in good faith.

SEVENTH CIRCUIT

In re Sidebottom, 430 F.3d 893 (7th Cir. 2005). A debtor may not file a chapter 13 while a chapter 7 case is pending with respect to the same debts.

NINTH CIRCUIT

Davis v. Bank of America, 2012 Bankr. LEXIS 3631 (B.A.P. 9th Cir. 2012). Debtor filed a petition for a chapter 12 bankruptcy. Trustee and some of Debtor's secured creditors filed an objection, arguing that Debtor was ineligible for chapter 12 bankruptcy because her debt exceeded the limit set forth in § 101(18). Debtor argued that the undersecured portion of each secured creditor's claim should not be counted in determining eligibility because her personal liability had been discharged in a previous chapter 7 bankruptcy. The court affirmed the bankruptcy court's finding that debtor was ineligible for a chapter 12 bankruptcy.

ELEVENTH CIRCUIT

In re Goerg, 844 F.2d 1562 (11th Cir. 1988). Although a decedent's estate is not a person that qualifies as a debtor under the Bankruptcy Code, the provision governing cases ancillary to a foreign proceeding still applies.

B. *CHAPTER 13 ELIGIBILITY –§ 109(e)*

FIRST CIRCUIT

Pellegrino v. Boyajian (In re Pellegrino), 423 B.R. 586 (B.A.P. 1st Cir. 2010). Debtors had below-median disposable income and did not propose to pay creditors in full. Therefore, pursuant to § 1325(b)(4)(A)(i), the applicable commitment period was thirty-six months. Because the court found that Debtors did not have sufficient income over the minimum commitment period to "make payments under a plan," it affirmed the bankruptcy court's finding that Debtors were not eligible for chapter 13 relief under §109(e).

THIRD CIRCUIT

In re Flanagan, 999 F.2d 753 (3d Cir. 1993) - The Bankruptcy Court dismissed *pro se* prisoners' chapter 13 petitions for failure to comply with the income requirements for chapter 13 relief set forth in § 109(e). Prisoners appealed, and the United States District Court for the Middle District of Pennsylvania dismissed the appeals as untimely. Upon appeal to the Third Circuit, that court vacated the district court order and remanded.

FOURTH CIRCUIT

Brown &Co. Sec. Corp. v. Balbus (In re Balbus), 933 F.2d 246 (4th Cir. 1991). Section 109(e) allows an individual with regular income to file chapter 13 provided the debtor's unsecured debt is less than (currently) $360,475 and secured debt is less than $1,081,400. A debt is secured only to the extent of the value of collateral. The valuation test of § 506(a) is used in determining whether there is a deficiency that is included with the debtor's unsecured debt.

SIXTH CIRCUIT

Glance v. Carroll (In re Glance), 487 F.3d 317 (6th Cir. 2007). The amount of mortgage liens executed by the debtor and spouse on jointly held real property, securing debt owed by only the non-filing spouse, were included to calculate the amount of "noncontingent, liquidated, secured debt" for determination of eligibility under § 109(e).

Comprehensive Accounting Corp. v. Pearson (In re Pearson), 773 F.2d 751 (6th Cir. 1985). Creditor objected to Debtors' amended chapter 13 plan alleging that Debtors were ineligible under §109(e). The objection was based on Debtors listing of a disputed debt in an amount in excess of the limits. The court discussed the meaning of the terms "disputed", "liquidated" and "contingent" for purposes of determining eligibility. The bankruptcy court held that Debtors met the eligibility requirements at the time of filing, based on the petition, and had made a good faith claim of eligibility; a later ruling that the debts exceeded the limit was not determinative. The appellate court found that the date of filing controls, not the subsequent amendment of filing. The appellate court reasoned that §109(e), which provides the eligibility computation, is based on the date of filing the petition, rather than on the findings made in a later hearing on the merits of the claim.

SEVENTH CIRCUIT

In re Knight, 55 F.3d 231 (7th Cir. 1995). In calculating whether an individual's debts exceed the chapter 13 eligibility cap, the

Seventh Circuit has noted the statute excludes contingent or unliquidated debts, but includes debts that are disputed. Thus, this Debtor exceeded the statutory cap and could not file chapter 13 even though he contested his liability for statutory fines for misbehavior while serving as a traffic court judge. The debt was not unliquidated because it was a fixed amount set by statute, and the debt was not contingent because all events necessary to establish liability had occurred. Debtor disputed only his liability, which meant the debt was counted toward the chapter 13 eligibility cap.

In re Day, 747 F.2d 405 (7th Cir. 1984). For purposes of the chapter 13 eligibility caps, the Seventh Circuit counts purportedly secured debts as unsecured to the extent the debt exceeds the value of the collateral.

EIGHTH CIRCUIT

Miller v. United States, 907 F.2d 80 (8th Cir. 1990). An unsecured creditor and the Office of the United States Attorney claimed that Debtor was not eligible for chapter 13 proceedings because the amount of the unsecured debt exceeded the dollar limitations (then $100,000) in § 109(e). The bankruptcy court denied the creditor's objection and confirmed the chapter 13 plan. The district court reversed and found that Debtor's debts exceeded the limits.

The issue was whether an undersecured debt should be treated as secured or unsecured. The court used the test of § 506(a) to determine the character of debts for purposes of § 109(e). Section 506(a) states that "an allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim." The Court of Appeals held, therefore, that the district court was correct in finding Debtor ineligible.

Barcal v. Lauglin (In re Barcal), 213 B.R. 1008 (B.A.P. 8th Cir. 1997). The three main issues in this case were: (1) whether the court should count disputed tax claims in determining a debtor's maximum debt for chapter 13 eligibility; (2) whether the liabilities in the case were non-contingent and liquidated; and (3) whether the court considered fully the amount and validity of the tax claims, or the merits of Debtor's objection as part of its analysis of Debtor's chapter 13 eligibility.

Section 109(e) states "only an individual with regular income that owes, on the date of the filing of the petition, non-contingent, liquidated, unsecured debts . . . may be a debtor under chapter 13." It excludes unliquidated and contingent debts. A disputed claim can be both unliquidated and contingent. The court held that disputed, non-contingent and liquidated debts must count toward the debt limitations for chapter 13 eligibility. "Contingent" liabilities are defined as those for which the obligation to pay does not arise until the occurrence of a triggering event reasonably contemplated by the debtor and creditor. Here, the court held that Debtor's liabilities were not contingent because they did not await a triggering event; instead, the obligations presently existed. "Liquidated" is defined as a debt that is "readily calculable" or "readily determinable." Thus, the court must ascertain whether the process for determining the claim is fixed, certain, or otherwise governed by a specific standard. Here, the court held that Debtor's tax liabilities were readily determinable and liquidated. The BAP also concluded that the bankruptcy court appropriately refused to resolve the tax dispute or to determine the merits of the tax claim.

TENTH CIRCUIT

In re Werts, 410 B.R. 677 (Bankr. D. Kan. 2009). A husband and wife may file a joint case when their individual debts are under the chapter 13 limit even though the total of their individual debts exceeds the limit. Although Debtors' undersecured mortgage debt was to be treated as fully secured for purposes of a chapter 13 plan, the unsecured portion was properly included in Debtors' unsecured debt for purposes of chapter 13 eligibility. The debt limit did not preclude conversion to chapter 13 since each debtor had debt that fell below the unsecured debt limit, each had regular income, and there was no requirement that the debts be consolidated.

ELEVENTH CIRCUIT

In re Verdunn, 89 F.3d 799 (11th Cir. 1996). The fact that Debtor contested a tax deficiency claim did not render it unliquidated. A liquidated debt is one that has been made certain as to the amount due by an agreement of the parties or by operation of law. If the amount of the debt depends upon a future exercise of discretion, not restricted by specific criteria, then the claim is unliquidated. On the date of his petition, Debtor's liquidated debt exceeded chapter 13's debt limits. Thus, the Court reversed and remanded with instructions that the case be dismissed.

In re Saylors, 869 F.2d 1434 (11th Cir. 1989). A *per se* rule barring the filing of a chapter 13 petition during the period between the debtor's receipt of a chapter 7 discharge and the filing of the final report by the chapter 7 trustee would conflict with the purpose of Congress in adopting and designing chapter 13 plans.

In re Waldron, 785 F.2d 936 (11th Cir. 1986). Individuals filing for relief under chapter 13 must owe some debt on the petition date in order to qualify. On the petition date, Debtors did not owe debts and were not financially distressed. The Court reversed and remanded with instructions that the case be dismissed for not being brought in good faith.

In re Hammonds, 729 F.2d 1391 (11th Cir. 1984). Benefits paid under a public welfare program—here, Aid to Families with Dependent Children—qualify as regular income for purposes of chapter 13 eligibility (citing *United States v. Devall*).

United States v. Devall, 704 F.2d 1513 (11th Cir. 1983). The legislative history to the Bankruptcy Code clearly indicates that the term "individual with regular income" permits almost any individual with regular income to propose and to have approved a reasonable plan for debt repayment based upon that individual's exact circumstances.

C. *DISQUALIFYING ACTIONS –§ 109(g)*

FOURTH CIRCUIT

Colonial Auto Center v. Tomlin (In re Tomlin), 105 F.3d 933, 938 (4th Cir. 1997). Section 109(g) authorizes the court to bar successive filings of bankruptcy petitions for a period of 180 days and may also allow the barring of a subsequent discharge of existing debt. *See also* § 349(a). (The barring of a subsequent discharge of existing debt under § 109(g) may be a minority view. *See 2 Collier on Bankruptcy* ¶ 109.08[1] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. Rev. 2012)).

Jolly v. Great Western Bank (In re Jolly), 143 B.R. 383 (E.D. Va. 1992), *aff'd*, 45 F.3d 426 (4th Cir. 1994). The bankruptcy court may dismiss a case with prejudice for cause, and bar subsequent filing for periods in excess of 180 days pursuant to § 105(a) without violating either §§ 109(g) or 349(a).

SEVENTH CIRCUIT

In re Dempsey, 247 F. App'x 21 (7th Cir. 2007). The Court ruled that a bankruptcy court may use its powers under § 105 to impose longer filing bans than the 180-day period directed in § 109(g). A one-year filing ban is not an abuse of the bankruptcy court's discretion when the debtor had proposed eight unconfirmable chapter 13 plans over a two-year period.

Reischel v. Manufacturers & Traders Trust Co., 222 F. App'x 521 (7th Cir. 2007). The Court upheld a 180-day filing ban under § 109(g) when the debtor failed to attend meetings and hearings.

In re Hogan, 138 F. App'x 838 (7th Cir. 2005). When the 180-day filing ban in § 109(g) expires during appeal, the appeal becomes moot.

EIGHTH CIRCUIT

Montgomery v. Ryan (In re Montgomery), 37 F.3d 413 (8th Cir. 1994). Debtor's chapter 13 proceeding was dismissed because Debtor did not attend a § 341 meeting. After Debtor refilled, a creditor moved to dismiss the second petition on the grounds that Debtor was not eligible. Under § 109(g)(1), an individual may not be a "debtor" if he has been a debtor in the preceding 180 days and the previous case was dismissed for "willful failure . . . to abide by orders of the court." Failure to attend a creditors' meeting constitutes failure to obey a court order. Debtor argued that dismissal of his second petition was not proper because the bankruptcy court, in dismissing the first petition, did not find a "willful failure." The Court of Appeals held that no specific finding of willfulness was necessary in the order dismissing the first petition because § 109(g) was not at issue until the creditor moved to dismiss the second petition. The court also found that the burden of establishing eligibility in bankruptcy lies with the party filing the petition. This applies to § 109(g) as well. When a § 109(g) issue is raised, the filing party must establish that failure to obey a court order was not willful. In this case, the burden was on Debtor to explain his failure to attend the § 341 meeting and, since he offered no explanatory evidence, the bankruptcy court's finding of ineligibility was not clearly erroneous.

In re Bigalk, 813 F.2d 189 (8th Cir. 1987). Debtors voluntarily dismissed their petition on three different occasions after the Bank filed a motion for relief from stay. In 1984, Congress addressed abuse of the bankruptcy process through § 109(g) (since redesignated subsection (f)), which states, "Notwithstanding any other provision of this section, no individual may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if . . . (2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay . . . ." Because Debtors' petition was submitted within 180 days of the voluntary dismissal of their chapter 13 petition, the petition at issue should not have been accepted for filing. The bankruptcy court, therefore, properly dismissed the petition.

NINTH CIRCUIT

Leafty v. Aussie Sonoran Capital, 479 B.R. 545 (B.A.P. 9th Cir. 2012). Appellee scheduled a trustee's sale of a chapter 13 debtor's property. On the day of the sale, Debtor dismissed her previous bankruptcy case and filed this case. The appellee then moved to dismiss the second bankruptcy case. The BAP concluded that the bankruptcy court's dismissal of the second case was proper because Debtor was ineligible under §109(g).

D. *CREDIT COUNSELING –§ 109(h)*

FIRST CIRCUIT

In re Fiorillo, 455 B.R. 297 (B.A.P. 1st Cir. 2011). The BAP found the credit counseling requirement under § 109(h) not to be jurisdictional in nature. The court also agreed with the developing approach of allowing bankruptcy courts to retain some discretion to waive the credit-counseling requirement in limited circumstances or to find "substantial compliance" sufficient to satisfy the dictates of § 109(h). Dismissal was not appropriate in this case because of Debtor's reasonable explanation for failing to receive prepetition counseling and the fact that he acquired counseling within fifteen days of filing. The Court also found the doctrine of estoppel applicable in this circumstance. Thus, the BAP affirmed the bankruptcy court's finding that Debtor complied with the "minimum requirements" of § 109(h).

SECOND CIRCUIT

Adams v. Zarnel (In re Zarnel), 619 F.3d 156 (2d Cir. 2010). Three unrelated Debtors each filed voluntary bankruptcy petitions but failed to comply with the credit counseling requirement in § 109(h). Following a hearing, the bankruptcy court decided to strike each Debtor's case. Although the UST requested dismissal, the bankruptcy court relied on its equitable powers under § 105(a) and determined that, absent bad faith, dismissal is an inappropriate remedy for a debtor's innocuous failure to obtain counseling prior to filing a bankruptcy petition because dismissal has the potential effect of limiting access to or the duration of the automatic stay in a subsequent filing. The UST appealed on the issue of whether the bankruptcy court had erred in ruling that the petitions of ineligible debtors had not commenced cases and could thus be struck rather than dismissed. On appeal, the district court also raised the question whether the UST had standing to appeal.

The Second Circuit ruled that, irrespective of any eligibility requirements, a bankruptcy petition commences a bankruptcy case and triggers the automatic stay. Section 301 provides that a voluntary case under the Bankruptcy Code is commenced by the filing with the bankruptcy court of a petition under a chapter by an entity that may be a debtor under that chapter. Under § 362, the filing of a petition operates as an automatic stay, but the stay is limited or does not arise if the debtor has filed one or more cases that were pending during the prior year and were dismissed. Section 109(h) provides that, with limited exceptions, an individual may not be a debtor unless the individual has received the required credit counseling. According to the Court, § 109 is an eligibility requirement for relief. If a petition by an ineligible debtor were not to commence a case, then the certainty that such a petition triggers the automatic stay would be lost. Accordingly, the Court concluded that each Debtor had commenced a case by the filing of their respective petitions, notwithstanding their failure to comply with the credit counseling requirement in § 109(h), and that the automatic stay had been triggered with respect to each Debtor. The Court remanded so that the bankruptcy court had an opportunity in the first instance to reconsider whether, given the Court's opinion, striking (rather than dismissing) Debtors' petitions was the appropriate disposition of the cases. The Court also ruled that because § 307 provides that the UST may raise and may appear and be heard on any issue in a bankruptcy case, evidencing congressional intent that the UST represent the public interest in bankruptcy cases, the UST also had standing on appeal.

THIRD CIRCUIT

In re Jong Hee Kang, 467 B.R. 327 (Bankr. D.N.J. 2012). The bankruptcy court held that Debtor's purported failure to obtain credit counseling did not establish cause for dismissal of the case and that the credit counseling eligibility requirements of § 109(h) are neither jurisdictional nor nonwaivable. Similarly, noncompliance with § 109(h) neither serves as an absolute mandate for case dismissal nor as a bar to court inquiry into (i) the debtor's motive for seeking dismissal, (ii) the impact upon creditors, and (iii) estoppel issues based upon the debtor's conduct and previous representations on the record.

FOURTH CIRCUIT

In re Dyer, 381 B.R. 200 (Bankr. W.D.N.C. 2007), *aff'd* 2007 U.S. Dist. LEXIS 53085 (W.D.N.C. July 20, 2007). Section 109(h) provides that an "individual may not be a debtor" unless the individual has received credit counseling from an approved provider within 180 days prior to filing a petition. The bankruptcy court may not invoke its equitable powers under § 105(a) to permit a chapter 7 case to go forward when the debtors were ineligible to file because they obtained credit counseling more than 180 days prior to filing their petition. The bankruptcy administrator's motion to dismiss was granted.

In re Hall, 347 B.R. 532 (Bankr. N.D. W. Va. 2006). The bankruptcy court held that Debtor, who was eighty-one years old, was entitled to a "disability waiver" of the requirement to receive credit counseling under § 109(h)(4) because Debtor was physically limited, hearing impaired, and suffering from numerous serious health issues.

In re Watson, 332 B.R. 740 (Bankr. E.D. Va. 2005). A debtor may be granted a temporary waiver of the requirement to file a certificate of counseling if the debtor files a certification that (1) describes exigent circumstances; (2) states that the debtor sought, but was unable to obtain, services from a nonprofit counseling agency during the seven-day period beginning on the date on which the debtor first made the request; and (3) sets forth circumstances satisfactory to the court. § 109(h)(3)(A). The statutory provision should be read as conjunctive and not disjunctive. As Debtor failed to show that Debtor made a request for credit counseling services, Debtor could not satisfy the eligibility requirements under § 109(h).

SIXTH CIRCUIT

In re Ingram, 460 B.R. 904 (B.A.P. 6th Cir. 2011). Debtor filed his chapter 13 petition but had not completed the required credit counseling in advance of his petition, as mandated by § 109(h). Debtor represented that he had begun the counseling before the filing, but did not complete it until after the filing. The bankruptcy court dismissed Debtor's case on eligibility grounds.

The Sixth Circuit BAP ruled that § 109(h) makes prepetition creditor counseling mandatory, and failure to complete this requirement, absent conditions that qualify a debtor for deferment under § 109(h)(3), render a debtor ineligible to maintain a case. Thus, Debtor's case was properly dismissed.

Simon v. Amir (In re Amir), 436 B.R. 1 (B.A.P. 6th Cir. 2010). The opinion in this case discussed, among other issues, whether a *pro se* debtor's failure to comply with § 109(h) requires dismissal of the debtor's case. The Sixth Circuit previously had not addressed whether § 109(h) relates to eligibility for bankruptcy relief. Courts, however, have discussed whether eligibility is jurisdictional in nature, and the Sixth Circuit has found that it is not. The Sixth Circuit BAP held the bankruptcy court did not abuse its discretion by denying Debtor's motion to dismiss his case for failing to comply with § 109(h). The appellate court reasoned that Debtor had ratified his filing by making numerous appearances and by filing pleadings in the bankruptcy court, including three motions to dismiss his own case, in which he did not allege that his § 109(h) defect made him ineligible to be a debtor. Only upon the bankruptcy court's decision to avoid a lien did he assert his ineligibility under § 109(h). Finding that the § 109(h)'s requirement was not jurisdictional, the court found that Debtor waived his right to move for dismissal by failing to meet the requirements of § 109(h). The court also noted that this was a case in which the debtor was attempting to use his own non-compliance strategically to have his case dismissed.

SEVENTH CIRCUIT

In re Thompson, 249 F. App'x 475 (7th Cir. 2007). The Seventh Circuit has not ruled on the question whether a petition that does not comply with § 109(h) is to be dismissed or stricken. This case presented the question, but the court ruled the issue moot because the 180-day ban on the automatic stay expired during pendency of the appeal. No other circuit-level decisions interpret the substantive requirements of § 109(h).

EIGHTH CIRCUIT

Duncan v. LaBarge (In re Duncan), 418 B.R. 278 (B.A.P. 8th Cir. 2009). Debtors filed a motion for exemption from credit counseling along with their bankruptcy petition. The bankruptcy court denied Debtors' request for waiver of the pre-petition credit counseling requirement and dismissed their case. The BAP affirmed. Section 109(h)(1) states "an individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received" the required credit "briefing." Section 521(b)(1) requires a debtor to file a certificate from the counseling agency that provided the mandated services. A debtor who fails to file a certificate of credit counseling with the petition is not eligible to be a debtor and dismissal of the case is appropriate. Because Debtors did not file a certificate of credit counseling with their petition, they were therefore not eligible to be debtors.

Debtors also did not qualify under any of the exceptions to the credit counseling requirement. The court explained the third exception under § 109(h)(3)(A)(iii), setting out an exigent circumstances exception, in some detail. To obtain a 30-day exemption from the pre-petition certificate requirement on the basis of exigent circumstances, the debtor must provide the court with a certificate that: (1) describes exigent circumstances that merit a waiver; (2) states that the debtor requested credit counseling but was unable to obtain the services within five days; and (3) is satisfactory to the court. The court held Debtors in this case did not provide a certificate sufficient to meet these requirements.

NINTH CIRCUIT

Gibson v. Dockery (In re Gibson), 2011 Bankr. LEXIS 5084 (B.A.P. 9th Cir. 2011). Debtor's case was dismissed because she did not comply with § 109(h)(1). The court found no basis for interpreting § 109(h) to allow courts discretion to determine whether the debtor has complied with the spirit of § 109 (h).

ELEVENTH CIRCUIT

In re Parker, 351 B.R. 790 (Bankr. N.D. Ga. 2006). The Trustee opposed Debtor's motion to dismiss his own case based on his failure to satisfy the credit counseling requirement set forth in § 109(h). The court denied the motion, holding that § 109(h) is not jurisdictional and is therefore waivable. Moreover, the court held that Debtor had, in fact, waived the right to raise the issue by failing to address it at various points earlier in the case.

II. WHERE TO FILE—28 U.S.C.A. § 1408

SIXTH CIRCUIT

Thompson v. Greenwood, 507 F.3d 416 (6th Cir. 2007). Two sets of debtors, residents of the Northern District of Mississippi filed voluntary petitions for bankruptcy in the Western District of Tennessee for reasons of convenience. The U.S. Trustee's Office for the Northern District of Mississippi moved to transfer the cases. The Sixth Circuit reasoned that "the equitable considerations cited by the debtors and the opinions of lower courts cannot trump the plain meaning of the statutory authority." The Sixth Circuit held that (1) the venue requirements of 28 U.S.C. § 1408 are mandatory; (2) that 28 U.S.C. § 1412 applies only to bankruptcy cases filed in proper venue; (3) that 28 U.S.C. § 1406 applies to cases, including bankruptcy, filed in an improper venue; and (4) that Bankruptcy Rule 1014(a)(2) must be interpreted to allow the transfer of improper venue only to a district in which the case could have originally been brought, only in the interest of justice, and in accordance with the plain language of § 1406.

SEVENTH CIRCUIT

In re Peachtree Lane Assocs., 150 F.3d 788 (7th Cir. 1998). There are no circuit-level cases in the Seventh Circuit about appropriate venue in consumer cases. In this chapter 11 case, the Seventh Circuit stated that the debtor's chosen venue is presumed to be proper and a party challenging it has the burden of showing improper venue by a preponderance of the evidence.

ELEVENTH CIRCUIT

In re Griggs, 679 F.2d 855 (11th Cir. 1982). If a bankruptcy petition is filed in the wrong venue, the court may retain or transfer the case in the interest of justice and for the convenience of the parties.

III. BANKRUPTCY PROFESSIONALS

A. *OBLIGATIONS OF DEBTORS' ATTORNEYS*

UNITED STATES SUPREME COURT

Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010). A law firm instituted an action in district court in 2006 seeking a declaration that bankruptcy attorneys would not be subject to the requirements of a "debt relief agency" under the 2005 BAPCPA amendments to the Bankruptcy Code. Specifically, the firm argued that attorneys are not expressly included in the statutory definition. Alternatively, even if the definition covered attorneys, the doctrine of constitutional avoidance precluded such inclusion because certain requirements of a debt relief agency would impinge on an attorney's constitutional rights: (1) the restriction on advising a client from incurring more debt in contemplation of filing for bankruptcy is either unconstitutionally vague or violates an attorney's First Amendment rights; and (2) the advertising disclosure requirements of a debt relief agency violate an attorney's First Amendment rights.

The Supreme Court ruled that consumer bankruptcy attorneys fall within the definition of "debt relief agencies" and must advertise themselves as such in accordance with BAPCPA. BAPCPA broadly defined a "debt relief agency" as "any person who provides bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration." Under § 526(a)(4), debt-relief agencies shall not advise an assisted person to incur more debt in contemplation of filing for bankruptcy, and cannot advise a debtor to manipulate the protections of the Bankruptcy Code by "loading up" on debt with the expectation of obtaining a discharge. The Court held that attorneys who provide qualifying services are indeed debt relief agencies within the meaning of the statute. None of the requirements imposed upon debt relief agencies violate an attorney's constitutional rights.

SECOND CIRCUIT

Connecticut Bar Association v. United States, 620 F.3d 81 (2d Cir. 2010). This case concerns facial challenges to certain BAPCPA amendments related to consumer debtors and their counsel: § 527(a) and (b), which require providing consumer debtors with basic information about bankruptcy; and §§ 528(a)(1) and (2), which prohibit a "debt relief agency"—made applicable to consumer bankruptcy attorneys by the Supreme Court's decision in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010)—from providing bankruptcy assistance services to a consumer debtor in the absence of a written contract with the debtor that sets forth certain specified information.

The Second Circuit ruled that BAPCPA disclosure requirements set forth in §§ 527 and 528 are constitutional on rational basis grounds because each was premised on an established factual predicate of "documented confusion and deception in the bankruptcy process" with respect to consumer debtors. The Court explained that §§ 527(a) and (b) compel certain disclosures but do not suppress attorneys' speech rights, and that § 528(a) is designed to prevent a debt relief agency from intentionally or negligently providing bankruptcy assistance to a debtor in the absence of an executed contract.

FOURTH CIRCUIT

***U.S. Tr. v. Jones* (*In re Alvarado*)**, 363 B.R. 484 (Bankr. E.D. Va. 2007). In addition to the State Rules of Professional Conduct, the Bankruptcy Rules impose specific ethical obligations on attorneys. *See, e.g.*, § 707(b)(4)(C). Attorneys owe duties of competence, care, and trust to their clients. The court found that Debtor's counsel failed to adhere to the minimum required standards of conduct by failing to pay the filing fee when Debtor's original petition was filed. Debtor's counsel did not comply with the duty of care that was owed to the client when counsel allowed the bankruptcy case subsequently to be dismissed. Debtor's counsel failed to effectively communicate with the client by providing information, counsel, or advice when these problems arose. These violations were sanctionable under the equitable power granted to the court by § 105.

B. *PRIOR APPROVAL*

SEVENTH CIRCUIT

In re Singson, 41 F.3d 316 (7th Cir. 1994). Section 327 does not direct prior court approval for appointment of a professional, but prior approval is strongly preferred as a matter of sound judicial administration. When prior approval has not been sought, the Seventh Circuit rejects the "extraordinary circumstances" standard used in some courts and instead only requires a showing of excusable neglect. In announcing these standards, however, the Court found that a pattern of "doing work first and seeking approval later" did not meet the excusable neglect standard. Similarly, a failure to be aware of the requirements for pre-approval is not excusable neglect. *See In re Cashen*, 56 F. App'x 714 (7th Cir. 2002).

ELEVENTH CIRCUIT

***Environmental Litigation Group, P.C. v. Crawford* (*In re Price*)**, 2007 Bankr. LEXIS 1366 (Bankr. N.D. Ala. Apr. 16, 2007). Law firm representing chapter 13 Debtor in a mass tort action sought a determination as to whether it was required to seek approval of its pre-petition contingency agreement in order to be entitled to payment. The court held that, pursuant to § 327(e), an application for approval of special counsel must be filed by a debtor (or a trustee) in all matters involving pre-petition non-bankruptcy causes of action.

In re Webb, 2005 Bankr. LEXIS 1407 (Bankr. N.D. Ga. Apr. 11, 2005). Chapter 13 debtor moved to employ a family lawyer for a child custody action unrelated to the bankruptcy case. The court ruled that there is no requirement for a chapter 13 debtor to seek permission to employ an attorney. Like any other professional, however, the family lawyer is required to file a fee application with the court for any fees being paid from assets of the estate.

In re Andy Gibb Organization, Inc., 81 B.R. 699 (Bankr. S.D. Fla. 1987). Chapter 7 Debtor filed a motion seeking approval for the employment of a bankruptcy attorney. The bankruptcy court's order denying the motion clarified that § 327(a) applies only to trustees seeking to employ professionals, and § 1107 is only applicable to chapter 11 debtors-in-possession. Prior approval to employ bankruptcy attorneys is neither required nor proper in a chapter 7 case.

C. *ATTORNEY'S FEES IN CHAPTER 7*

UNITED STATES SUPREME COURT

Lamie v. United States Trustee, 540 U.S. 526 (2004). Before 1994, § 330(a) authorized a court to award fees to a list of persons including "the debtor's attorney." That phrase was deleted in 1994 from what is now § 330(a)((1). Here, Debtor's attorney applied for payment of fees incurred while representing Debtor in a chapter 7 proceeding. The US Trustee objected on the grounds that 330(a) does not provide for compensation from estate funds for an attorney who was not employed by the estate and approved by the court under § 327. The bankruptcy court, district court and Fourth Circuit all held that § 330(a)(1) does not authorized the payment of attorney's fees unless the attorney was appointed under § 327.

The Supreme Court affirmed on the grounds of the statute's plain meaning. The Court rejected the petitioner's argument that it should look to legislative history because the current version of § 330(a)(1) is ambiguous in light of its predecessor. The Court conceded that "[t]he statute is awkward, and even ungrammatical; but that does not make it ambiguous on the point at issue. *Id*. at 534. The result under the statute's plain meaning is not absurd because compensation is available through other means. The Court's "unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding." *Id*. at 538.

FOURTH CIRCUIT

Johnson v. Richter, Miller & Finn (In re Johnson), 312 B.R. 810 (E.D. Va. 2004). The law firm that represented a creditor was approved by the bankruptcy court to serve as special counsel to the chapter 7 trustee. Debtor objected to the firm's fee application on the grounds that the lawyers had an actual conflict of interest that precluded the firm's retention under § 327(a). The district court affirmed the bankruptcy court ruling, which had found no conflict and had approved the law firm's fee application. There was no conflict of interest as the lawyers were interested in "enlarging the estate." *Id. at* 822. Section 327(c) does not require that an attorney never simultaneously represent a trustee and a creditor. The firm served both the interests of the trustee and the firm's creditor client. Its fee application was limited to services performed for the trustee and was not duplicative of services for the creditor.

SIXTH CIRCUIT

Thomas v. Robinson (In re Robinson), 189 F. App'x 371 (6th Cir. 2006). The bankruptcy court ordered disgorgement after the attorney did not file a creditor matrix and a bankruptcy petition together, and dismissed the debtor's chapter 7 petition. The appellate court held there was no error or abuse of discretion because the attorney did not offer to file a fee application, request leave to file an application, or object after his motion to withdraw from the case was granted and his fees disgorged.

In re Waldo, 417 B.R. 854 (Bankr. E. D. Tenn. 2009). Those portions of an attorney's "flat fee" or "no-look fee" contracted for but not paid prepetition are dischargeable, and attorneys may not ask for and receive post-dated checks from debtors to be cashed post-petition as payment of those fees.

SEVENTH CIRCUIT

In re Weinschneider, 395 F.3d 401 (7th Cir. 2005). The Court, reiterating the Supreme Court's holding in *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004), held that an attorney in a chapter 7 may not receive compensation from the estate unless the appointment is approved under § 327. Thus, a chapter 7 debtor could not collect attorneys' fees under § 330 for successfully defending against a chapter 7 trustee's turnover action.

Bethea v. Robert J. Adams Assocs., 352 F.3d 1125 (7th Cir. 2003). The Seventh Circuit adopted the view that a debtor's promise to pay his or her bankruptcy attorney creates an obligation that is discharged in a chapter 7. Thus, Debtors' attorneys violated the discharge injunction when they attempted to collect unpaid installments on a prepetition fee agreement.

EIGHTH CIRCUIT

In re Kohl, 95 F. 3d 713 (8th Cir. 1996). The Court of Appeals considered whether the attorney for a chapter 7 Debtor was entitled to compensation for services rendered in Debtor's previous chapter 7 and chapter 11 proceedings. The Court held that the attorney was not entitled to compensation. The Court cited § 330(a)(1), which states that "a court can award debtor's attorney compensation only for actual and necessary services . . . [and] an attorney fee application . . . will be denied to the extent the services were for the benefit of the debtor and did not benefit the estate."

NINTH CIRCUIT

Kekauoha-Alisa v. Ameriquest Mortg. Co. (In re Kekauoha-Alisa), 674 F.3d 1083 (9th Cir. 2012). The Court remanded the award of attorneys' fees for the determination of reasonableness when the underlying judgment was also remanded. On remand, the bankruptcy court "may consider evidence of a settlement offer to the degree such evidence is relevant to the calculation of reasonable attorneys' fees" under state law. Federal Rule of Evidence 408 does not preclude this admission based on the recent circuit decision in *Ingram v. Oroudjian* 647 F.3d 925 (9th 2011) (*per curiam*). The *Ingram* court adopted the reasoning of *Lohman v. Duryea Borough*, 574 F.3d 163 (3d 2009), holding that a district court may consider settlement negotiations in determining a fee award.

TENTH CIRCUIT

In re Wagers, 514 F.3d 1021 (10th Cir. 2007). In this post-*Lamie* case, Debtor assigned an expected substantial tax refund to his counsel as a retainer in anticipation of filing his complicated chapter 7 bankruptcy. The trustee sought turnover of the retainer. The Tenth Circuit, following *Lamie*, held that notwithstanding the assignment, the refund was property of the estate. It reversed the bankruptcy court's finding that the retainer was not property of the estate.

ELEVENTH CIRCUIT

Walton v. Clark & Washington, P.C., 469 B.R. 383 (Bankr. M.D. Fla. 2012). The U.S. Trustee brought a miscellaneous proceeding against a law firm in response to the firm's fee arrangements with various clients. The court had previously ruled that the law firm could not accept checks for services that were post-dated for a date following the petition date. The court held that such an arrangement constituted a willful violation of the automatic stay. The firm was permitted to enter into a dual payment arrangement, however, under which the firm would receive a small amount of compensation for pre-petition services and the debtor would have the option to retain the attorneys for post-petition services under a separate agreement.

***McTyeire v. Hunt* (*In re McTyeire*)**, 357 B.R. 898 (Bankr. M.D. Ga. 2006). Fees allegedly owed by chapter 7 Debtors to their bankruptcy attorney were discharged when Debtors' case was discharged. Subsequent state court collection actions initiated by the attorney against Debtors violated the discharge injunction. The attorney's unprofessional behavior in the case warranted disgorgement of fees paid, formal reprimand, and liability for Debtors' legal fees incurred in defending the state court actions.

In re Babies, 315 B.R. 785 (Bankr. N.D. Ga. 2004). Joint chapter 7 debtors employed out-of-state attorneys to complete their bankruptcy paperwork and ensure the proper filing of their case. The out-of-state attorneys subsequently retained an in-state attorney to review the paperwork, file the case, and attend the meeting of the creditors. A fee-splitting arrangement was entered into under which the out-of-state attorneys received 75% of the fee and local counsel received 25%. The court held that out-of-state attorneys representing individual chapter 7 debtors must be admitted *pro hac vice* before being entitled to a fee, despite the presence of local counsel.

In re Barber, 223 B.R. 830 (Bankr. N.D. Ga. 1998). The personal injury attorney for a chapter 7 debtor sought the award of a contingency fee stemming from a pre-petition agreement and post-petition settlement. The court held that although an application for the employment of special counsel should have been filed, the personal injury attorney was entitled to her fee because neither the debtor, nor debtor's bankruptcy attorney had advised the personal injury attorney of the existence of the bankruptcy case.

D. *ATTORNEY'S FEES IN CHAPTERS 12 AND 13*

FIRST CIRCUIT

Berliner v. Pappalardo (In re Sullivan), 674 F.3d 65 (1st Cir. 2012). Counsel filed a fee application for services rendered to chapter

13 Debtors. Prepetition, counsel had received a $4,000 retainer for fees and expenses under a retainer agreement specifically stating that the "fees could increase should the debtors' case prove unusually complex." In the fee application, counsel sought fees and expenses in an amount almost three times more than the retainer and original estimate, arguing that Debtors' case was "unusually complicated." The chapter 13 trustee objected. The bankruptcy court found that the fees and expenses were "much higher" than those in a typical chapter 13 case and that Debtors' case was "relatively uncomplicated." The court, therefore, limited counsel's payment to the amount of the retainer. Counsel appealed on the grounds that the bankruptcy court had failed to appreciate the complexities of Debtor's case, and that it had failed to sufficiently articulate its reasons for the significant fee reduction.

The First Circuit ruled that the lodestar method of calculating attorneys' fees does not require the bankruptcy court to provide a comprehensive, line-by-line analysis of time entries if the court's analysis is sufficiently detailed to allow an appellate court to ascertain the reasoning behind and basis for the fee award. The Court also held that the bankruptcy court need not identify and mechanically march through each and every factor enumerated in § 330 when it calculates reasonable attorneys' fees as long as the factors are taken into account. Here, because the bankruptcy court found insufficient evidence that Debtors' case was unusually complicated, it appropriately reduced the number of hours for which counsel should be compensated.

THIRD CIRCUIT

In re Engel, 124 F.3d 567 (3d Cir. 1997). Appellant was the lawyer who served as special criminal counsel for a chapter 11 debtor who sought post-conviction relief from a conviction for murdering his ex-wife. Appellant filed a fee application, arguing that § 330 established his legal right to be paid from the bankruptcy estate for services rendered. The Third Circuit held that any debtor-in-possession must receive court approval in order to employ an attorney or other professional, regardless of the source of compensation for the attorney so engaged. The Court also held that an attorney whose employment is approved under § 327 enjoys no presumption that his or her compensation will be paid from the estate under § 330. Finally, the court held that approval of the employment of special counsel under § 327(e) does not preclude the court from considering whether counsel's services benefitted the estate and from denying all compensation if no benefit had resulted.

In re Szymczak, 246 B.R. 774 (Bankr. D.N.J. 2000). In awarding fees to counsel for chapter 13 debtors, fees for services that are normal and customary should be limited to the fixed fee established by the marketplace, while those services that go beyond the normal and customary standard should be compensated using the lodestar formula.

FOURTH CIRCUIT

Boleman Law Firm, P.C. v. U.S. Trustee, 355 B.R. 548 (E.D. Va. 2006). The U.S. Trustee filed omnibus objections to chapter 13 attorney fee applications in 133 cases. The bankruptcy Court, after conducting trial with respect to eleven cases, sustained the trustee's objections and disallowed fees based on the failure of attorneys to keep time records in the cases. The bankruptcy court also refused to allow attorneys to present expert testimony on the reasonableness of their fees. On an attorney's appeal, the district court upheld the bankruptcy court's refusal to allow the law firm to provide expert testimony on the value of the services. Expert testimony is not necessary; the "[bankruptcy] judge is 'presumed knowledgeable as to fees charged by attorneys in general and as to the quality of legal work presented to him by particular attorneys.'" *Id.* at 552. The district court, however, reversed the bankruptcy court's denial of fees for lack of time records. "[I]n the Fourth Circuit . . . attorney's fees are established by the lodestar method, . . . [which] is the product of reasonable hours and a reasonable rate." *Id.* at 552-53. The applicant has the burden of proof. While actual time records "greatly" aid the court in making a decision, the unavailability of records "does not preclude further analysis—especially when . . . it is undisputed that the work for which compensation is sought was performed." The absence of time records "is clearly 'a proper basis for reducing a fee award.'" *Id.* at 553. The district court remanded for reconsideration, directing the bankruptcy court to review the evidence of attorney time and employ the lodestar factors to arrive at a reasonable compensation.

FIFTH CIRCUIT

Baker v. Peake (In re Fernandez), 478 F. App'x 138 (5th Cir. 2012). Appellant filed a bankruptcy petition under chapter 13 on behalf of Debtor. Following dismissal of the chapter 13 case without a confirmed plan, Appellant sought recovery of his approved legal fees from funds obtained by the chapter 13 trustee. The trustee instead paid those funds to Debtor's mortgage company. The bankruptcy court denied Appellant's relief, and the district court affirmed. Appellant suggested that ruling against him would "chill" the representation of chapter 13 debtors. But, such potential "chilling" does not represent a reason to ignore the Agreed Judgment. Appellant assented to the Agreed Judgment, and he could not later attack it merely "to suit the exigencies of self interest." *See New Hampshire v. Maine,* 532 U.S. 742, 749–51 (2001); *Browning Mfg. v. Mims* (*In re Coastal Plains, Inc.*), 179 F.3d 197, 205–07 (5th Cir. 1999); *United States v. McCaskey,* 9 F.3d 368, 378–79 (5th Cir. 1993) (*per curiam*).

SIXTH CIRCUIT

Boddy v. United States Bankruptcy Court (In re Boddy), 950 F.2d 334 (6th Cir. 1991). The "lodestar" method for determination of attorney's fees should be used rather than the "normal and customary" standard to determine reasonable fees under federal statutes. The issue was raised in the context of a request for fees in a chapter 13 proceeding following the bankruptcy court's allowance of a fixed fee based on its ruling that there is a maximum flat fee that can be awarded in a chapter 13 case for legal services considered "normal and customary." The Sixth Circuit acknowledged that a court can "take into account the typical compensation that is adequate for attorney's fees in Chapter 13 cases, as long as it expressly discusses these factors in light of the reasonable hours actually worked and a reasonable hourly rate."

SEVENTH CIRCUIT

In re Kindhardt, 160 F.3d 1176 (7th Cir. 1998). The Seventh Circuit approves the use of presumptively reasonable "no-look" fees. When one district's "no look" chapter 13 fee had not been adjusted in ten years and was equal to the "no look" chapter 7 fee in use in another district, the Seventh Circuit directed the bankruptcy judges of that district to review the fee guidelines. After remand, the Seventh Circuit then held a 20% increase within the bankruptcy court's discretion. *See also In re Geraci*, 138 F.3d 314 (7th Cir. 1998).

EIGHTH CIRCUIT

In re Clark, 223 F.3d 859 (8th Cir. 2000). The Court of Appeals considered, among other issues, whether to deny attorneys' fees based on an attorney's attempt to collect the flat fee for services the attorney knew had been performed by his non-attorney employee, resulting in excessive payments and an over-charge to the debtors. The Court denied the attorneys' fees, finding that the bankruptcy court has broad discretion to award or deny attorney fees and a duty to examine the reasonableness of them.

NINTH CIRCUIT

Schwartz-Tallard v. America's Servicing Co. (In re Schwartz-Tallard), 473 B.R. 340 (B.A.P. 9th Cir. 2012). The decision in *Sternberg v. Johnston*, 595 F.3d 937, 948 (9th Cir. 2010), *cert. denied* 131 S. Ct. 102 (2010), which held that a debtor may not recover attorneys' fees from a "damages action for a stay violation," does not bar a chapter 13 Debtor's recovery of appellate attorney fees when Debtor has been forced to defend an appeal brought by a sanctioned mortgage loan service creditor regarding that creditor's violation of the automatic stay. Here, Debtor was not pursuing a damages action; rather, Debtor was required to defend the lower court's decision as to sanctions.

TENTH CIRCUIT

Fitzgibbons v. Zeman (In re Matney), 365 F. App'x 126 (10th Cir. 2010). The Court held that reduction of a $13,750 fee request to $4,750 was appropriate in an unremarkable chapter 13 case when counsel neglected for 14 months to file the Rule 2016 fee disclosure, and when litigation with the IRS could have been resolved more effectively and efficiently.

In re Tahah, 330 B.R. 777 (B.A.P. 10th Cir. 2005). The chapter 13 debtor's attorney filed an application for additional fees. The bankruptcy court denied the application, finding that, under the local rule fee guidelines, the attorney had failed to meet his burden of establishing the existence of "extraordinary circumstances" justifying an award in excess of the local rule's presumptive fee. The BAP reversed and remanded; when fees are sought that exceed the amount of a presumptively reasonable fee, those fees must still be reviewed under § 330, regardless of the "extraordinary circumstances" standard contained in the bankruptcy court's chapter 13 guidelines. In addition, the bankruptcy court must provide findings of fact to allow review of its decision under § 330.

In re Busetta-Silvia, 314 B.R. 218 (B.A.P. 10th Cir. 2004). The chapter 13 debtor's attorney has the right to be paid for services performed prepetition; such services are administrative priority claims under §§ 330(a) and 507.

In re Gantz, 209 B.R. 999 (B.A.P. 10th Cir. 1997). Additional fees disallowed by the bankruptcy court cannot be collected from the chapter 13 debtor outside the plan.

ELEVENTH CIRCUIT

Grunau v. Waage (In re Grunau), 376 B.R. 322 (M.D. Fla. 2007). If a bankruptcy court reduces the fees requested in a chapter 13 attorney's fee application, it must provide notice and an opportunity for hearing. Moreover, the court must provide detailed calculations, using the lodestar method or some other approach to demonstrate how it arrived at its final fee determination.

In re Debtor's Attorney Fees in Chapter 13 Cases, 374 B.R. 903 (Bankr. M.D. Fla. 2007). Following an *en banc* hearing in which members of the local bar participated, the Tampa bankruptcy division of the Middle District of Florida: (1) increased the presumptively reasonable fee in chapter 13 bankruptcies to $3,300-$3,600, depending on the length of the plan; (2) permitted additional presumptively reasonable "*a la carte*" service fees for specified services; (3) allowed for a $250 presumptively reasonable add-on fee for cases involving non-Florida exemptions; (4) permitted applications for additional fees in extraordinary matters; (5) banned post-petition requests to a debtor for cash payments for services; (6) required that any approved post-petition fee be paid through the plan by the trustee; and (7) permitted a party in interest to challenge a fee if the debtor's case was dismissed before completion of the plan.

The presumptively reasonable fee was enacted to aid in the efficiency of the court. Attorneys are not expressly limited to charging such fee, however. If an attorney seeks a fee award in excess of the presumptively reasonable fee, the attorney must keep adequate time records, file a fee application, and attend a hearing on the merits of the fee. Additionally, despite its presumptive reasonableness, a debtor or party in interest may object to any fee request. If the fee is presumptively reasonable, however, the debtor or party in interest has the burden of rebutting the reasonableness presumption.

E. *DISGORGEMENT—§ 329*

THIRD CIRCUIT

In re Bressman, 327 F.3d 229 (3d Cir. 2003). The Third Circuit found that the bankruptcy court may order the disgorgement of fees received by an attorney when he or she has ignored reporting and court approval duties imposed by the Bankruptcy Code.

Fellheimer, Eichen & Braverman, P.C. v. Charter Technologies, Inc., 57 F.3d 1215 (3d Cir. 1995). Denial in their entirety of fees claimed by a chapter 11 Debtor's attorneys can be upheld as a proper exercise of the bankruptcy court's authority to deny fees to a professional person who represents or holds interests adverse to the interests of the estate, given evidence that Debtor's attorneys had abandoned their fiduciary obligations as counsel to Debtor.

SEVENTH CIRCUIT

In re Wiredyne, Inc., 3 F.3d 1125 (7th Cir. 1993). The court's power to order disgorgement of prepetition fees under § 329 is a matter of discretion. The existence of a conflict is a relevant factor in the analysis, but ultimately, the court should weigh the equities of the case in determining whether fees are unreasonable or excessive under § 329.

EIGHTH CIRCUIT

In re Zepecki, 277 F.3d 1041 (8th Cir. 2002). The Eighth Circuit required Debtor's attorney to disgorge sums previously received from Debtor. The Court stated it "has the authority to disregard a fee agreement between a debtor and counsel in determining the reasonableness of counsel's fees under section 329(a)." According to § 329, the attorney must show that the agreed compensation for legal services is reasonable. Debtor's attorney provided invoices detailing prepetition services. These were found reasonable and were approved. Additional prepetition fees the attorney claimed, however, were unreasonable or excessive. Therefore, Debtor's attorney was ordered to return to the bankruptcy estate the additional prepetition fees he had received.

NINTH CIRCUIT

***Kun v. Mansdorf (In re Woodcraft Studios, Inc*.)**, 464 B.R. 1 (N.D. Cal. 2011). The attorney who had represented a debtor-in-possession filed an interim fee application seeking attorney fees of $8,250, over and above his $5,000 retainer. Finding that the attorney had failed to disclose his status as a prepetition creditor of Debtor, the bankruptcy court denied all fees and directed that the retainer be disgorged. On the attorney's appeal, the district court affirmed and held that : (1) the attorney's failure to inform the bankruptcy court of his prepetition relationship with Debtor and the full circumstances surrounding his receipt and use of the $5,000 retainer provided the court with discretion to deny all of his fees, including his retainer; (2) the attorney's disclosure violations themselves were independent grounds for denying his fees, regardless of whether the undisclosed information would have materially affected the bankruptcy court's decision to approve his employment; (3) the attorney's retainer, no matter the type, was not immune from bankruptcy court review; and (4) alternatively, the attorney's lack of disinterestedness constituted grounds for denying fees.

In re Spickelmier, 469 B.R. 903, 914 (Bankr. D. Nev. 2012). In addition to imposing Rule 9011 sanctions, the court held that the work counsel performed for Debtors reflected a lack of competence and diligence that did not deserve to be compensated. Given the poor quality of the services rendered, the court found that the reasonable value of those services was zero dollars ($0.00). The court relied on Ninth Circuit authority holding that § 329(b) authorizes the court to "examine the reasonableness of a debtor's attorney fees and, if such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive." *Hale v. U.S. Trustee*, 509 F.3d 1139, 1147 (9th Cir. 2007) (internal quotation marks omitted). Pursuant to § 329, the court ordered that the attorney disgorge all monies paid by Debtors in this chapter 13 case.

ELEVENTH CIRCUIT

Clements v. Early (In re Church), 438 B.R. 334 (N.D. Ala. 2010). Pursuant to § 329, the bankruptcy court held that a debtor's attorney has a duty to disclose pre-petition fees received either in contemplation of or in connection with the chapter 13 bankruptcy. The attorney argued that she did not disclose any fees, because she did not receive them. Because the attorney failed to affirmatively prove that she did not receive a $1,200 payment prepetition, however, the bankruptcy court required her to repay the money into the estate and denied the remainder of her fee provided by the chapter 13 plan.

The district court reversed, holding that the bankruptcy court had erred in placing the burden of proof on the attorney. Because the bankruptcy administrator was the movant in the case, the movant had the initial burden of proving that the attorney received the payment.

In re Dellutri Law Group, 482 B.R. 642 (Bankr. M.D. Fla. 2012). The bankruptcy court required a consumer bankruptcy law firm to disgorge more than $50,000 in miscellaneous fees that the firm had charged to clients to compensate for overhead associated with keeping files. In the course of representing more than 2,000 chapter 13 clients over a five-year period, the firm had charged a nominal fee for administrative overhead that it had neither disclosed to the court nor included in its written fee agreement with clients.

In re Whitcomb, 479 B.R. 133 (Bankr. M.D. Fla. 2012). An attorney was forced to disgorge fees received post-petition when the attorney failed to disclose the amounts received and refused to provide additional services to Debtors until the fees were received.

In re Becker, 469 B.R. 121 (Bankr. M.D. Fla. 2012). The bankruptcy court allowed Debtor's attorney to retain fees that the court classified as excessive because the trustee failed to timely object to the excessive fee application. The court suggested that in the future, attorneys should be aware of the duty to report any payment or promise of payment not previously disclosed, and trustees should take greater care in reviewing and objecting to fee disclosures.

In re Alfieri, 468 B.R. 414 (Bankr. M.D. Fla. 2011). The court ordered Debtor's attorney to disgorge fees when the attorney took, for payment, a pre-petition security interest in a portion of Debtor's tax refund. The attorney failed to adhere to Florida Bar rules pertaining to receiving security interests from clients and did not initially disclose the security agreement to the court.

In re Dorn, 443 B.R. 555 (Bankr. M.D. Fla. 2011). The fact that the attorney's fees were significantly more than the average for the area did not warrant disgorgement. In applying the lodestar approach, the bankruptcy court concluded that the hourly rate and the time spent on the case was reasonable, as the attorney advertised her services as high-end and had significantly more client interaction than a normal consumer bankruptcy attorney.

In re Hackney, 347 B.R. 432 (Bankr. M.D. Fla. 2006). Attorney failed to disclose $12,000 in payments that he had received post-petition from Debtors. Following the trustee's motion for disgorgement, the attorney argued that the fees were for unrelated non-bankruptcy matters. The court was not persuaded that the services rendered were not in connection with the bankruptcy case and required the attorney to disgorge the $12,000 for failing to report the receipt of payment within 15 days as required by § 329 and Rule 2016.

In re Austin, 325 B.R. 529 (Bankr. M.D. Fla. 2006). Out-of-state non-licensed attorney received $20,000 from Debtor. The trustee moved for disgorgement of the amount on the grounds that the fee was unearned and excessive. The attorney argued that disgorgement was not proper under § 329 because: (1) he was not acting as an attorney, but merely as a "liaison" between Debtor and her attorney of record; and (2) the fee proceeds came from an exempt IRA, so they were not estate assets. The court ruled that the Bankruptcy Code does not recognize "liaison" status, and the fee was paid in connection with and in contemplation of filing bankruptcy. Moreover, § 329 is not limited to fees paid from estate assets, as a fee may be examined regardless of its source. The only role the source of the funds plays is in determining to whom the disgorged assets should be returned.

In re Whaley, 382 B.R. 38 (Bankr. M.D. Fla. 2002). Section 329 and Rule 2016(b) require the disclosure of all fees received by the debtor's attorney in connection with the debtor's bankruptcy case. Attorneys who violate the fee disclosure requirement may be sanctioned and/or forced to disgorge some or all of the fees they have received from the debtor. In this case, Debtor's attorney disclosed the initial fee received prior to filing Debtor's chapter 13 petition, but concealed the $500 fee received for converting Debtor's bankruptcy to a chapter 7. Utilizing its disgorgement powers, the court required the attorney to disgorge the concealed $500 payment, but the attorney was permitted to retain his initial fee.

In re Corbett, 145 B.R. 332 (Bankr. M.D. Fla. 1992). An attorney whose name had been removed from list of attorneys authorized to practice before the bankruptcy court was forced to disgorge all fees received from numerous chapter 7 debtors that the attorney had represented following his loss of authorization.

F. *MISCELLANEOUS*

FOURTH CIRCUIT

Debtor's Malpractice Claim

Grausz v. Englander, 321 F.3d 467 (4th Cir. 2003). The bankruptcy court denied the chapter 11 Debtor's discharge and also approved Debtor's counsel's fees charged in the case without objection by Debtor. Subsequently, Debtor filed a state court malpractice suit against his bankruptcy counsel based on counsel's representation in the bankruptcy proceeding. Counsel removed the suit to federal district court, which granted summary judgment for Debtor's counsel under principles of *res judicata*. The Fourth Circuit affirmed, holding that 1) the bankruptcy court, a court of competent jurisdiction, entered a final judgment on counsel's fee in compliance with the requirements of due process; 2) the parties were identical in both the fee application and the malpractice suit; and 3) the malpractice claim was based upon the same cause of action involved in the fee application. As to the third element, the court noted that "the bankruptcy court impliedly found that the [law] firm's services were acceptable throughout its representation of [Debtor]." *Id.* at 473. Debtor's malpractice claim addressed the same work that was approved by the bankruptcy court. (Although this was a chapter 11 case, the same principles apply in a consumer bankruptcy.)

Interim Fee Award

Gold v. Guberman (In re Computer Learning Centers, Inc.), 407 F.3d 656 (4th Cir. 2005). The bankruptcy court entered orders approving fees for the chapter 7 trustee and trustee's counsel. Full payment of the approved fees was not authorized, as the court indicated that the awards were interim and were subject to adjustment at the end of the case—that is, "subject to payment 'upon further order of [the bankruptcy] court.'" *Id.* at 661. The trustee and his counsel appealed the orders, contending that the bankruptcy court misconstrued § 326(a) in determining the trustee's fee and also erred in establishing the amount of prevailing rates for attorneys' fees. The district court affirmed, but the Court of Appeals dismissed because the bankruptcy court's fee orders were not final orders under 28 U.S.C. § 158(a). An order is final "only 'when it is no longer subject to modification by the bankruptcy court.'" *Id.* at 660.

Retroactive Employment of Professional

Binswanger Companies v. Merry-Go-round Enters., Inc., 258 B.R. 608 (D. Md. 2001), *aff'd* 24 F. App'x 135 (4th Cir. 2001). The district court affirmed the bankruptcy court's denial of retroactive employment of a real-estate broker who failed to seek appointment under § 327(a) before attempting to find a buyer for realty. The broker was well aware of the statutory requirement and chose to continue serving the bankruptcy estate without obtaining appointment. The broker failed to satisfactorily explain its failure to receive prior judicial approval or to demonstrate that its services benefitted the estate "in a significant manner," as required by *Atkins v. Wain, Samuel & Co. (In re Atkins),* 69 F.3d 970, 974 (9th Cir.1992). Neither did the broker satisfy "a more lenient test of 'excusable neglect.'" 258 B.R. at 613 (quoting *In re Singson*, 41 F.3d 316, 319 (7th Cir. 1994)). The Fourth Circuit affirmed, relying on the district court's reasoning.

IV. WHAT TO FILE

A. *JOINT FILINGS—§ 302*

THIRD CIRCUIT

In re Brannon, 476 F.3d 170 (3d Cir. 2007). When spouses file a joint chapter 7 petition, two separate bankruptcy estates are created. The bankruptcy court may thereafter decide to substantively consolidate the cases pursuant to § 302(b).

ELEVENTH CIRCUIT

In re Reider, 31 F.3d 1102 (11th Cir. 1994). The filing of a joint petition by a husband and wife does not result in automatic consolidation of the two Debtors' estates; joint administration is used as a matter of convenience and cost saving, but does not create substantive rights. The substantive consolidation of the spouses' jointly administered chapter 7 cases was an abuse of discretion because the spouses' separate assets and liabilities were readily identifiable and it would be inequitable to subject the wife's real estate to the claims of the husband's creditors.

B. *REQUIRED DOCUMENTS*

FIRST CIRCUIT

Segarra-Miranda v. Acosta-Rivera (In re Acosta-Rivera), 557 F. 3d 8 (1st Cir. 2009). The issue before the First Circuit was whether a bankruptcy court has authority to excuse compliance with the disclosure requirement of § 521(a)(1)(B)(v) after the time for filing the required information has expired. The Court found that when the missing information would be extraneous or irrelevant to the court, the "orders otherwise" provision of § 521(i)(1) does not compel dismissal of the case. The bankruptcy court's denial of Debtor's motion to dismiss was within its discretion.

SIXTH CIRCUIT

Stephenson v. Malloy, 700 F.3d 265 (6th Cir. 2012). A debtor's failure to disclose causes of action does not bar a trustee from pursuing previously undisclosed claims when ample evidence exists that the trustee knew about the lawsuit and failure to disclose was inadvertent. The court followed the reasoning of the Fifth, Tenth and Eleventh Circuits.

Auday v. Wet Seal Retail, Inc., 698 F.3d 902 (6th Cir. 2012). Failure to list an age discrimination claim in the schedules results in judicial estoppel against the debtor bringing the cause of action. On remand, however, the court left the door open for substitution of the bankruptcy trustee as plaintiff.

SEVENTH CIRCUIT

Mathews v. Potter, 316 F. App'x 518 (7th Cir. 2009). The rule stated in *Cannon-Stokes* is not absolute. In this case, the Seventh Circuit refused to apply judicial estoppel to an unscheduled administrative complaint (again against the U.S. Postal Service) in a chapter 7 in which Debtor claimed she had disclosed the complaint at the § 341 meeting. The court remanded for further evidentiary development of the record to determine whether the claim had been disclosed to the trustee.

See also Rainey v. U.S. Postal Serv., 466 F. App'x 542 (7th Cir. 2012) (upholding the reopening of a chapter 13 case to allow disclosure of a claim not disclosed during the pendency of the case).

Cannon-Stokes v. Potter, 453 F.3d 446 (7th Cir. 2006). The Seventh Circuit adopted the rule, followed in other circuits, that a debtor who denies owning an asset, including a legal claim, cannot realize on that asset once the bankruptcy is over. Thus, chapter 13 Debtor who failed to schedule an administrative claim against the U.S. Postal Service for retaliatory discharge could not pursue the claim after the closing of her case.

NINTH CIRCUIT

Samson v. Western Capital Partners, LLC (In re Blixseth), 684 F.3d 865 (9th Cir. 2012). If a debtor does not file a timely statement of intention with respect to personal property under § 521(a)(2)(A), the automatic stay on *all* of the debtor's personal property secured by the creditor's claim terminates, not just on the property that was scheduled as securing the claim.

TENTH CIRCUIT

In re Wilcox, 463 B.R. 143, (B.A.P. 10th Cir. 2011). The Code requires that the debtor file a "list of creditors" within 45 days of the filing of the petition. § 521(a)(1)(A). Failure to file the required list is a basis for dismissal of the petition. In this case, the chapter 13 Debtor's failure to file the list was fatal under the automatic provisions of the section. Debtor filed for relief in September 2010 and the bankruptcy court notified him of several deficiencies. Debtor timely filed the Statement of Affairs and other documents but failed to file a list of creditors separately. The Clerk's office filed a notice of dismissal pursuant to § 521 and Debtor thereafter filed an "Amended Matrix" and moved to vacate the clerk's dismissal. The bankruptcy court denied the motion to vacate. On appeal, the BAP affirmed.

In re Butcher, 459 B.R. 115 (Bankr. D. Colo. 2011). The plan filed in a chapter 13 must comply with the form prescribed by local rules. The bankruptcy court may by local rule require that all chapter 13 plans filed conform to a form plan that requires the debtor to file an amended plan if necessary to make payments on timely filed and allowed claims filed after the confirmation hearing. *See also In re Gordon*, 471 BR 614 (D. Colo. 2012).

In re Cloud, 356 B.R. 544 (Bankr. N.D. Okla. 2006). The bankruptcy court dismissed as to Debtor-husband who failed to timely file complete payment advices for the 60-day period, stating that the court had no discretion and that the case was "automatically dismissed by operation of statute." *Id*. at 545. Debtor apparently filed only part of the statements in time and there was no other information from which income could be deduced. *See also In re Wilkinson*, 346 B.R. 539 (Bankr. D. Utah 2006) (holding that Debtor's filing of paystubs with "year to date" information satisfied the requirement of § 521(a)(1)(B)(iv) because the stubs constituted other evidence of payments received within the 60-day period before the date of filing of the petition); *In re Lovato*, 343 B.R. 268 (Bankr. D.N.M. 2006) (holding automatic dismissal required when Debtor inadvertently failed to file one pay period's pay advice among the mass of other paperwork).

C. *AMENDMENTS*

ELEVENTH CIRCUIT

In re Robinson, 595 F.3d 1269 (11th Cir. 2010). Chapter 13 Debtor had a continuing duty to amend her schedule of assets to reflect a post-petition employment discrimination claim. A debtor seeking shelter under the bankruptcy laws has a statutory duty to disclose all assets, or potential assets to the bankruptcy court.

In re Waldron, 536 F.3d 1239 (11th Cir. 2008). A chapter 13 debtor has a continuing duty to disclose changes in his financial situation during the pendency of his bankruptcy case. It was not an abuse of discretion for the bankruptcy court to order Debtor to amend his schedules to disclose any settlement of a post-confirmation insurance claim. The disclosure of post-confirmation assets gives the trustee and creditors a meaningful tight to request, under § 1329, a modification of the debtor's plan based upon the ability-to-pay standard. Under this standard, creditors share both the gains and losses of the debtor.

Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282 (11th Cir. 2002). Debtor had a duty to disclose an employment discrimination claim that arose between the chapter 13 petition date and the date of conversion to chapter 7.

In re Doan, 672 F.2d 831 (11th Cir. 1982). The bankruptcy rule providing that "[a] voluntary petition, schedule or statement of affairs may be amended as a matter of course at any time before the case is closed" denies courts the discretion to deny leave to amend or to require a showing of good cause, in the absence of a debtor's bad faith or prejudice to creditors.

V. CREDITORS' MEETINGS

FIFTH CIRCUIT

In re Peres, 530 F.3d 375 (5th Cir. 2008). In a chapter 7 bankruptcy, the trustee commenced a creditor's meeting that was adjourned on three occasions. The third occasion was continued without a formal announcement as to the date of continuation. That meeting was then rescheduled, and the trustee filed objections to Debtor's claimed exemptions. Debtor argued that the court should apply a bright-line approach, advocating that if a trustee does not announce a specific date to which the meeting is being continued within 30 days of the last meeting held, then the meeting will be deemed to have been concluded on the last date it was convened. The Fifth Circuit, however, followed the majority approach—a case-by-case determination. Such an approach affords a trustee discretion, yet restrains a trustee's ability to indefinitely postpone a meeting of creditors. Thus, the trustee does not have to explicitly announce adjournment.

In looking at the delay in adjournment, the court considered four factors: (1) the length of the delay; (2) the complexity of the estate; (3) the cooperativeness of the debtor; and (4) the existence of any ambiguity regarding whether the trustee continued or concluded the meeting.

SIXTH CIRCUIT

Moyer v. Dutkiewicz (In re Dutkiewicz), 408 B.R. 103 (B.A.P. 6th Cir. 2009). The bankruptcy court addressed the question whether the trustee's objection to Debtor's claim of exemptions was untimely under Rule 4003(b), which requires that any objection to the debtor's claimed exemptions be made within 30 days after conclusion of the meeting of creditors, unless the court grants additional time. The parties agreed that the meeting required by § 341 was scheduled and held on a specific date, but disagreed as to when the meeting "concluded." The court noted the three approaches that have emerged in other districts: 1) the bright-line rule, under which the trustee must announce a specific date to which the meeting is adjourned or the meeting is deemed to have concluded on the last date it was convened; 2) the debtor's burden approach, under which the meeting is concluded either when the trustee declares it concluded or the debtor obtains a court order concluding it; and 3) a case-by-case approach, under which the court determines whether the meeting of creditors was concluded or adjourned on the basis of relevant facts and circumstances. The court rejected the debtor's approach but did not adopt either the bright-line or case-by-case approach because under both the trustee's objection was untimely.

VI. TRUSTEES

A. *CHAPTER 7 TRUSTEES*

UNITED STATES SUPREME COURT

Trustees' Duties

Schwab v. Reilly, 130 S. Ct. 2652 (2010). When a debtor is authorized to exempt an interest in an asset, the value of which may not exceed a certain dollar amount, and the debtor's Schedule C accurately describes the asset and the value of the claimed exemption is within the statutory dollar limits, the Chapter 7 trustee is not required to object to recover any value in excess of the dollar amount the debtor expressly declared exempt. The debtor is entitled to her exempt amounts from the proceeds of sale, but the estate is entitled to the balance if any exists.

Taylor v. Freeland & Kronz, 503 U.S. 638 (1992). A chapter 7 trustee cannot contest the validity of a claimed exemption after the period for objecting has expired and no extension has been obtained, even though the debtor had no colorable basis for claiming the exemption.

Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot., 474 U.S. 494 (1986). A chapter 7 trustee may not abandon property under § 554 in contravention of a state statute or regulation reasonably designed to protect the public health or safety from identified hazards. Rather, the bankruptcy court must formulate conditions that will adequately protect the public's health and safety before authorizing abandonment.

THIRD CIRCUIT

Trustees' Duties

In re Martin, 91 F.3d 389 (3d Cir. 1996). The chapter 7 trustee has a fiduciary duty to all creditors of the estate. In considering whether to approve the trustee's settlement of a claim with a particular creditor, the bankruptcy court must assess and balance the value of the claim being compromised against the value to the estate of accepting the proposed compromise, taking into account the following four criteria: (1) probability of success in litigation; (2) likely difficulties in collection; (3) complexity of the litigation and accompanying expense, inconvenience and delay; and (4) paramount interest of creditors. The trustee should inform the court and parties of any changed circumstances since entering into the settlement that might affect the court's approval, and the trustee is not required to champion a settlement that is no longer in the best interest of the estate.

In re BH & P, Inc., 949 F.2d 1300 (3d Cir. 1991). The Court rejected a *per se* rule that automatically disqualifies a chapter 7 trustee from serving in jointly administered cases when there are inter-debtor claims. In so holding, the Court rejected the opposite (majority) approach articulated in *In re Freeport Italian Bakery, Inc.*, 340 F.2d 50, 54 (2d Cir. 1965), requiring a showing of some actual injury before a trustee may be removed. Instead, the Court adopted a middle-ground position under which disqualification of a trustee is committed to the discretion of the bankruptcy court. Exercise of this discretion requires a case-specific inquiry predicated on full and timely disclosure of all relevant facts, assessing such factors as the nature and extent of the conflict, the likelihood that a potential conflict might turn into an actual one, and the perceptions of creditors and other parties in interest.

In re Lambertville Rubber Co., Inc., 111 F.2d 45 (3d Cir. 1940). The trustee is charged with an intimate knowledge of the estate he or she is administering. A trustee who pays claims out of time, and without the protection of an order of court affirmatively authorizing such conduct, acts at his or her own risk and must accept the consequences of bad judgment.

Fred Reuping Leather Co. v. Fort Greene Nat'l Bank of Brooklyn, 102 F.2d 372 (3d Cir. 1939). The bankruptcy trustee represents all creditors and may be relied on to press all proper objections to the claims of those whose standing is questionable. If the trustee defaults in this duty, then the court may upon application direct the trustee in this duty or, if the trustee is recalcitrant, remove him or her for disobedience, or permit a creditor to act in the trustee's name. Absent such leave of court, a creditor has no standing to institute proceedings to reject the claims of other creditors.

In re Wiener, 7 F. Supp. 691 (E.D. Pa. 1932), *aff'd*, *Brown v. Schwehm*, 72 F.2d 1010 (3d Cir. 1934). The duties of the trustee in bankruptcy are to collect, preserve, and liquidate assets of the estate. While in exceptional cases the trustee may be granted special powers to make expenditures to enhance the value of assets, ordinarily he or she has no authority and is under no duty to do so.

Trustees' Compensation

In re Lan Assocs. XI, L.P., 192 F.3d 109 (3d Cir. 1999). The Court held that in calculating the chapter 7 trustee's maximum compensation under § 326(a), a mortgagee's credit bid for property should not be included as monies disbursed or turned over. Rather, a trustee's compensation must be based only on moneys actually disbursed or turned over to parties in interest, not on constructive disbursements. The Court also held that the bankruptcy court may not consider the statutory cap in determining reasonable compensation for a trustee's services. Finally, the Court held that factors enumerated in the statute governing reasonable compensation for bankruptcy professionals are not all-inclusive and that the bankruptcy court may consider only those extra-statutory factors that are somehow pertinent to assessing the trustee's services.

Note that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") now treats chapter 7 trustee compensation as a commission, which appears to impact the court's reasonableness analysis.

Ward v. Roeder (In re Ward), 418 B.R. 667 (W.D. Pa. 2009). BAPCPA's new § 330(a)(7) directs that, in determining the amount of reasonable compensation to be awarded a chapter 7 trustee, the court shall treat such compensation as a commission based on § 326. Nevertheless, bankruptcy courts retain meaningful discretion in making their determinations as to what constitutes "reasonable compensation" and may award commissions that are lower than the statutory maximum based on consideration of the reasonableness factors enumerated in § 330(a)(3).

In re Garman, 413 B.R. 215 (Bankr. E.D. Pa. 2009). The opinion provides a good discussion of Third Circuit law for trustee compensation pre-BAPCPA and the statutory changes, emphasizing in dicta that "[t]he primary effect of the change should be that, in the majority of cases, a trustee's allowed fee will presumptively be the statutory commission amount." *Id.* at 230 (quoting *Collier on Bankruptcy*, ¶ 330.03[1][a] (15th ed. rev. 2009)).

Suits Against Trustees

In re VistaCare Group, LLC, 678 F.3d 218 (3d Cir. 2012). Abrogating *In re Lambert*, 438 B.R. 523 (Bankr. M.D. Pa. 2010), the Court held that, pursuant to the *Barton* doctrine, leave of the bankruptcy court is required before a party brings an action in another forum against a bankruptcy trustee for acts done in the trustee's official capacity. A party seeking leave of court to sue a trustee "'must make a prima facie case against the trustee, showing that its claim is not without foundation.'" *Id.* at 232, quoting *In re Nat'l Molding Co.*, 230 F.2d 69, 71 (3d Cir. 1956).

FOURTH CIRCUIT

Trustees' Duties

***Logan v. JKV Real Estate Servs.* (*In re Bogdan*)**, 414 F.3d 507 (4th Cir. 2005). The Fourth Circuit held that a Chapter 7 trustee has standing to sue on behalf of the bankruptcy estate for damages caused to creditors of the estate when those had creditors unconditionally assigned their claims to the trustee. In this case, the trustee uncovered a complex conspiracy under which a group of mortgage lenders had been fraudulently induced into making under-secured loans that enabled Debtor to purchase real estate. The Fourth Circuit held that the assignment of claims by the mortgage lenders constituted "property of the estate" that the trustee was authorized to "collect and reduce to money." *See also Rahmi v. Trumble* (*In re Bon-Air P'ship*), 464 B.R. 710, 717-18 (N.D. W. Va. 2011).

Williams v. Peyton (In re Williams), 104 F.3d 688 (4th Cir. 1997). The trustee has a duty to sell real property held by Debtor as a tenant-by-the-entirety in order to satisfy Debtor's joint creditors. The Fourth Circuit rejected Debtor's attempt to exempt the property, holding that a tenancy-by-the-entirety exemption applies only to non-joint creditors and has no effect on joint creditors.

Ford Motor Credit Co. v. Reynolds & Reynolds Co. (In re JKJ Chevrolet, Inc.), 26 F.3d 481 (4th Cir. 1994). Only the trustee has the authority to seek recovery of post-petition costs and expenses from the collateral of a secured creditor under § 506(c). Any such funds that a trustee might realize becomes an unencumbered asset of the estate available for distribution. *See also* §§ 541(a)(7) & 726(a). The estate's unencumbered assets are distributed to each class of unsecured creditors in accordance with the priority rules of § 507. If the estate's assets are insufficient to satisfy all of the claims of a particular class, the funds are divided among the claimants in that class on a *pro rata* basis. Allowing a claimant to proceed directly against a secured creditor would circumvent the Code's distribution scheme and result in an inequitable division of the estate.

Turshen v. Chapman, 823 F.2d 836 (4th Cir. 1987). The standard for removing a trustee for breach of duty is simple negligence. *Mosser v. Darrow*, 341 U.S. 267 (1951). As the bankruptcy court previously found that the trustee's actions were not improper under this simple negligence standard, *res judicata* precluded consideration of Debtor's counterclaim against the trustee for an alleged willful and deliberate breach of the trustee's duties.

In re Farmer, 786 F.2d 618 (4th Cir. 1986). Although the trustee plays a central role in a chapter 7 case, not all proceedings that occur in a chapter 7 case concern the trustee. The chapter 7 trustee is supposed to act "for all the creditors so as to maximize the distribution from the estate. The trustee distributes the property of the estate in accordance with the formula prescribed under 11 U.S.C. § 726." *Id.* at 620-21, quoting *In re Overmyer*, 26 B.R. 755, 758 (Bankr. S.D.N.Y. 1982). An individual creditor holding a nondischargeable claim must look exclusively to post-petition assets for recovery of that claim. As the Chapter 7 trustee has no interest in such post-petition assets, he or she is not a "party in interest" entitled to file a motion for an extension of time for filing a complaint objecting to discharge under § 523(c).

Trustees' Compensation

U.S. Trustee v. Porter, Wright, Morris & Arthur (In re J.W. Knapp Co.), 930 F.2d 386 (4th Cir. 1991). Attorneys for a chapter 7 trustee filed a fee application for services to the trustee in computing the distribution to creditors, reviewing and preparing checks, and reviewing and organizing returned checks. The bankruptcy court approved compensation even though the lawyers' services were the type of administrative services ordinarily required of the trustee pursuant to § 704. There were 928 creditors in this case, however, and the trustee was justified in seeking administrative assistance. The district court affirmed, but the Fourth Circuit reversed and denied the attorney fee. A court should consider whether an attorney's services are of the type reasonably expected to be performed by an attorney. "Only when unique difficulties arise may compensation be provided for services which coincide or overlap with the trustee's duties, and only to the extent of matters requiring legal expertise." *Id.* at 388. The large number of creditors "did not pose unique or complex legal issues." *Id.*

Suits Against Trustees

McDaniel v. Blust, 668 F.3d 153 (4th Cir. 2012). Principals of a chapter 7 debtor sued the chapter 7 trustee's counsel in state court for various acts of misconduct by counsel in connection with the filing of an adversary proceeding. The case was removed to federal district court, which found that the *Barton* doctrine applied and dismissed the suit as to trustee's counsel. On appeal the Fourth Circuit affirmed. Under the *Barton* doctrine, which applies to bankruptcy trustees, a plaintiff must obtain approval from the appointing bankruptcy court prior to filing suit against the trustee for acts committed in the trustee's official capacity. Moreover, "a bankruptcy trustee 'is an officer of the court that appoints him,' and therefore that court 'has a strong interest in protecting him from unjustified personal liability for acts taken within the scope of his official duties.'" *Id.* at 157. The trustee retained counsel to prosecute the adversary proceeding, and counsel's activities were within the scope of its employment even if some of its activities had not been directed by the trustee.

***Yadkin Valley Bank & Trust Co. v. McGee* (*In re Hutchinson*)**, 5 F.3d 750 (4th Cir. 1993). Chapter 7 Debtor and a mortgage creditor brought suit against the chapter 7 trustee alleging negligence in failing to expeditiously sell Debtor's dairy farm. The Court of Appeals found that, while § 704 imposes certain statutory duties on a chapter 7 trustee, it does not impose liability for breaching those duties. Rather, *Mosser v. Darrow*, 341 U.S. 267 (1951), establishes the standard for trustee liability. The Fourth Circuit discussed the Tenth Circuit's decision in *Sherr v. Winkler*, 552 F.2d 1367 (10th Cir. 1977), and the Sixth Circuit's decision in *Ford Motor Credit Co. v. Weaver*, 680 F.2d 451 (6th Cir. 1982), both of which held that the trustee is not personally liable for mistakes in discretionary matters, but only for willful and deliberate violations of statutory duties. The Fourth Circuit then refused to hold the trustee liable for delays due to factors outside the trustee's control. Additionally, the Court denied Debtor's demand for a jury trial, finding that the proceeding against the trustee was equitable in nature, because based on the court's equitable power to enforce fiduciary duties.

FIFTH CIRCUIT

Trustees' Compensation

In re McCombs, 436 B.R. 421 (Bankr. S.D. Tex. 2010). The bankruptcy court issued an order, subsequently certified for direct appeal, declaring that a judgment creditor had a valid and enforceable lien on excess proceeds from the chapter 7 trustee's sale of Debtor's homestead properties. Thereafter, the trustee filed an application for interim compensation, seeking $57,302.65 for the value of services related to the sale. The court held that the trustee performed his duties properly and deserved an adequate commission. The court noted that, in general, the primary duty of a chapter 7 trustee is to collect and reduce the property of the estate to money, and to close the estate as expeditiously as is compatible with the best interests of parties in interest. A chapter 7 trustee also has a fiduciary duty to maximize the distribution to creditors. Lastly, a chapter 7 trustee must act reasonably in performing his or her fiduciary duties to the estate's creditors.

SIXTH CIRCUIT

Trustees' Compensation

Lowenbraun v. Canary (In re Lowenbraun), 453 F.3d 314 (6th Cir. 2006). The *Barton* doctrine applies to prevent a defendant from pursuing libel and other claims against a trustee's counsel in state court; the trustee is immune from liability for judicial and extrajudicial statements.

Allard v. Weitzman (In re DeLorean Motor Co.), 991 F.2d 1236 (6th Cir. 1993). The chapter 7 trustee's attorneys are protected under the scope of the *Barton* doctrine from malicious prosecution actions by former defendants.

SEVENTH CIRCUIT

Trustees' Duties

There appear to be no cases at the circuit level regarding the duties of a chapter 7 trustee in a consumer context. Relevant cases talk about chapter 7 trustee duties generally. An example is *Koch Refining v. Farmers Union Cent. Exchange, Inc.*, 831 F.2d 1339 (7th Cir. 1987), holding that the duties of a chapter 7 trustee are to amass all of the estate's assets for *pro rata* distribution to creditors. The duties are similar to that of a trustee in a non-bankruptcy trust, and the trustee must protect the interests of creditors generally, even if doing so may harm a creditor individually. In asserting an action, a trustee may only bring a "general" claim that will benefit creditors as a whole. A trustee may not bring a "personal" claim when the action will only benefit specific creditors. *See Levery v Sys. Div., Inc (In re Tekenek, LLC)*, 563 F.3d 639 (7th Cir. 2009).

In re Vandeventer, 368 B.R. 50 (Bankr. C.D. Ill. 2007). A trustee is limited to collecting and liquidating assets that are part of the estate. The trustee may not administer a debtor's exempt assets merely because those assets will be liable for domestic support obligations. The trustee's only obligation is to notify the recipients of domestic support that they may enforce these rights during and after the bankruptcy filing.

Removal

In re Consol. Indus. Corp., 330 B.R. 712 (Bankr. N.D. Ind. 2005). Circumstances in which a trustee may be removed include "unjustifiable failure to pursue a cause of action belonging to the bankruptcy estate." The movant has the burden to prove cause, but it is not sufficient to prove only that the trustee failed to prosecute a cause of action belonging to the bankruptcy estate. Rather, the movant must prove that the trustee's failure to do so is unjustifiable or somehow outside the proper scope of the trustee's business judgment. *Id.* at 715-16.

In re University Ave. Properties, 55 B.R. 986 (Bankr. E.D. Wis. 1986). A chapter 7 trustee may be removed "for cause." The term "for cause" is not specifically defined, but a trustee will not be removed when the "trustee has not willfully and deliberately breached his fiduciary duties to the estate but has instead utilized his discretion in exercising business judgment." *Id.* at 991.

NINTH CIRCUIT

Removal

Dye v. Brown (In re AFI Holding, Inc.), 530 F.3d 832, 845 (9th Cir. 2008). Once assigned, a panel trustee can be removed from a pending bankruptcy case only if the court finds "cause" after notice and a hearing. Whether "cause" exists must be established by specific facts and determined on a case-by-case, totality-of-circumstances approach. "Cause" may include trustee incompetence, violation of the trustee's fiduciary duties, misconduct or failure to perform trustee's duties, lack of disinterestedness, or holding an interest adverse to the bankruptcy estate.

Trustees' Duties

Stine v Diamond (In re Flynn), 418 F.3d 1005 (9th Cir. 2005). Marketing and selling property jointly owned by Debtor and non-debtor and defending against a motion for relief from stay fall squarely within duties required of the trustee under § 704. Non-debtor, co-owner of property could not, therefore, be charged a *pro rata* share of the attorneys' fees incurred in performing these services.

Bennett v. Williams, 892 F.2d 822 (9th Cir. 1989). A trustee has a duty to preserve the assets of an estate and must exercise the measure of care and diligence that an ordinarily prudent person would exercise under similar situations. Although trustees may be held liable for intentional or negligent violations of duties imposed upon them by law, trustees have broad quasi-judicial immunity from suit for acts within the scope of their authority, when they have obtained the informed approval of the court on notice to the debtor.

Ferrette & Slatter v. U.S. Trustee (In re Garcia), 335 B.R. 717 (B.A.P. 9th Cir. 2005). The Code requires the trustee to collect and reduce to money the property of the estate and to close the estate as expeditiously as is compatible with the best interest of parties in interest.

TENTH CIRCUIT

Removal

In re Miller, 302 B.R. 705 (B.A.P. 10th Cir. 2003). The bankruptcy court denied Debtor's motion to remove his chapter 7 trustee for misconduct under § 324, finding that Debtor was very knowledgeable about the bankruptcy system; he had used it multiple times, violated court orders, not complied with Code sections or rules, and filed false or misleading papers with the court. Section 324 does not define "cause" for removal; courts must make the determination on a case by case basis. On appeal, the BAP noted that removal of a trustee is committed to the sound discretion of the bankruptcy court, and found no abuse of discretion.

ELEVENTH CIRCUIT

Trustees' Duties

Carter v. Rodgers, 220 F.3d 1249 (11th Cir. 2000). Debtor brought suit in district court against his chapter 7 trustee, alleging that the trustee breached his fiduciary duties in administering and liquidating Debtor's estate. The Eleventh Circuit adopted the "Barton Doctrine" which states that a debtor cannot sue a trustee, or other court-appointed officer, for acts performed in the trustee's official capacity, without first obtaining permission of the bankruptcy court to do so.

First Nat'l Bank v. Norris, 701 F.2d 902 (11th Cir. 1983). The bankruptcy court granted the chapter 7 trustee's objection to Debtor's claimed exemption, and Debtor appealed, arguing that the trustee lacked standing to object to Debtor's exemptions. The Eleventh Circuit affirmed, explaining that under § 704, the chapter 7 trustee has a duty to collect property of the estate, which necessarily involves determining whether given property is exempt.

Distribution Scheme

U.S. Trustee v. Fishback (In re Glados), 83 F. 3d 1360 (11th Cir. 1996). In a surplus case, the bankruptcy court held that the chapter 7 trustee could recover interest on his fees from the date of his appointment and that professionals retained by the trustee could receive interest on their fees from the date of the submission of their fee applications. After the district court affirmed, the Eleventh Circuit reversed. While the Court agreed that interest is recoverable on trustee and professional fees when § 726(a)(5) is read in conjunction with §§ 507, 503(b) and 330(a), interest is not calculated from date of counsels' employment or the submission of fee applications. Instead, interest is only recoverable from the date of entry of an order awarding the fees.

Varsity Carpet Servs. v. Richardson (In re Colortex Indus.), 19 F.3d 1371 (11th Cir. 1994). After conversion of Debtor's case from chapter 11 to chapter 7, a creditor filed a motion seeking administrative priority on the principal indebtedness incurred post-petition and any interest accruing thereon. The chapter 7 trustee objected to the creditor's motion. The Eleventh Circuit held that the creditor's claim was entitled to administrative priority and that § 726(a)(5) codifies the pre-Code "solvency exception," under which creditors may receive any surplus, including claims for interest arising post-petition, ahead of payment to the debtor.

Trustee's Rights to Keep Job

Walden v. Walker (In re Walker), 515 F.3d 1204 (11th Cir. 2008). After chapter 7 Debtor asserted that the chapter 7 trustee had a close relationship with Debtor's second largest creditor, the bankruptcy court held a ratification hearing at which the trustee testified that she had no prior business relationship with the creditor in question. The court ratified the trustee, but Debtor filed a motion seeking to remove the trustee, alleging that she had lied at the ratification hearing. After hearing substantial evidence showing that the trustee did have a pre-existing relationship with the creditor in question, the bankruptcy court found that the trustee had lied in her Verified Statement and in her oral testimony before the court, and removed the trustee. After the district court affirmed the bankruptcy court's orders, the trustee appealed to the Eleventh Circuit, arguing, among other things, that Debtor lacked standing to seek removal of the trustee and that there was insufficient legal cause to remove the trustee. The Eleventh Circuit affirmed, finding that § 324 authorizes a bankruptcy judge to remove a trustee *sua sponte* when, after notice and a hearing, the judge finds that the trustee lied under oath.

In re Schoen Enterprises, Inc., 76 B.R. 203 (Bankr. M.D. Fla. 1988). A creditor sought removal of the trustee on grounds of inactivity. The court granted the motion, removing the trustee pursuant to § 704, based on findings that the trustee: (i) failed to investigate or pursue potential preference actions; (ii) failed to respond to information requests from parties in interest; (iii) violated a court order by not employing an outside attorney; and (iv) failed to secure Debtor's financial records and to examine an officer of Debtor.

B. *CHAPTER 13 TRUSTEES*

THIRD CIRCUIT

In re Michael, 699 F.3d 305 (3d Cir. 2012). Undistributed plan payments held by the chapter 13 trustee at the time of conversion of the case to chapter 7, must be returned to the debtor at the time of conversion, pursuant to § 348(f), absent bad faith, and should not be distributed to creditors.

In re Hines, 723 F.2d 333 (3d Cir. 1983). Chapter 13 standing trustee's finding that Debtor's proposed plan met the requirements of §§ 1322 and 1325, and recommendation of confirmation satisfies any affirmative burden of showing good faith.

In re Melita, 91 B.R. 358 (Bankr. E.D. Pa. 1988). The bankruptcy court retains jurisdiction, following implementation of the United States Trustee System, to review chapter 13 trustee fees upon objection in individual cases.

FOURTH CIRCUIT

United States v. Santoro, 208 B.R. 645 (E.D. Va. 1997). As a chapter 13 trustee has a duty under § 1302(b)(5) to ensure that the debtor commences making timely payments, the district court found that the chapter 13 trustee had standing to challenge the withdrawal of certain administrative costs made by the employer under 5 U.S.C. § 5520a from the bankruptcy court's wage withholding order.

In re Bradby, 455 B.R. 476 (Bankr. E.D. Va. 2011). Unlike a chapter 7 trustee, a chapter 13 trustee does not have a duty to collect and reduce to money property of the estate under § 704(a)(1). Instead, § 1326(a)(2) mandates that the chapter 13 trustee distribute payments made by a debtor under a plan confirmed pursuant to § 1325. The chapter 13 trustee is required to assure the value of the payment stream under the chapter 13 plan is greater than the amount than would otherwise be distributed in a chapter 7 case.

FIFTH CIRCUIT

Matter of Maddox, 15 F.3d 1347 (5th Cir. 1994). In consolidated chapter 13 cases, the trustee moved to avoid liens as impairing debtors' exemptions under Mississippi law. The trustee's standing was challenged, and the court held that he had standing. Chapter 13 trustees have a broad array of powers and duties. Like the chapter 7 trustee, the chapter 13 trustee serves the interests of all creditors primarily by collecting payments from debtors and disbursing them to creditors. The chapter 13 trustee is "no mere disbursing agent." Chapter 13 trustees have various powers to ensure that such collections and disbursements occur equitably, according to the dictates of Congress. The chapter 13 trustee has the power to examine proofs of claims and object to the allowance of any claim that is improper. They also have standing to appear and be heard in a hearing to confirm a chapter 13 plan. As a part of this, the chapter 13 trustee also has standing to avoid liens.

SEVENTH CIRCUIT

Cable v. Ivy Tech State College, 200 F.3d 467 (7th Cir. 1999). In a chapter 13, the debtor also has express authority to sue and be sued on behalf of the estate as well.

Black v. U.S. Postal Service (In re Heath), 115 F.3d 521 (7th Cir. 1997). A chapter 13 trustee acts on behalf of the bankruptcy estate. Thus, a chapter 13 trustee cannot sue to recover a $50 garnishment fee levied against the debtor because any recover would go to the debtor personally and not to creditors.

In re Aberegg, 961 F.2d 1307 (7th Cir. 1992). Faced with a chapter 13 plan that proposed to make direct payments on a mortgage extending beyond the life of the plan, the Seventh Circuit authorized "direct payment" chapter 13 plans under which payment is made directly to a creditor and not through the chapter 13 trustee.

Lower courts have held that the language and reasoning of *Aberegg* still leaves them with substantial discretion to rule that particular payments in other contexts may not be made directly. *E.g.*, *In re Curran*, 2009 Bankr. LEXIS 2313 (Bankr. E.D. Wis. Aug. 20, 2009) (car loan); *In re Hanson*, 310 B.R. 131 (Bankr. W.D. Wis. 2004) (student loan).

NINTH CIRCUIT

Curry v. Castillo (In re Castillo), 297 F.3d 940 (9th Cir. 2002). Generally, a trustee is to gather, liquidate, and be accountable for property of the estate, ensure that the debtor performs his or her obligations, investigate the finances of the debtor, review proofs of claim and, when appropriate, oppose the debtor's discharge, be available to provide relevant information to parties-in-interest and, by court order, operate the business on a short-term basis. The trustee must also prepare the final report and an accounting for the administration of the estate.

Andrews v. Loheit (In re Andrews), 49 F.3d 1404 (9th Cir. 1995). The 13 trustee is saddled with a wide range of powers and duties, including the duties specified in §§ 704(2), (3), (4), (5), (6), (7) and (9), relating to information, accountability, investigation, objection to claims and to discharge, and the power to object to confirmation of a plan when it fails to comply with the Bankruptcy Code.

TENTH CIRCUIT

Richman v. Straley, 48 F.3d 1139 (10th Cir. 1995). A standing chapter 13 trustee has no property interest in continuing to serve as a standing trustee; the U.S. Trustee's appointment of a new standing chapter 13 trustee did not constitute a *de facto* removal of the current chapter 13 trustee and did not violate her due process rights.

ELEVENTH CIRCUIT

Ford Motor Credit Co. v. Stevens (In re Stevens), 130 F.3d 1027 (11th Cir. 1997). If a chapter 13 trustee distributes funds to a creditor in error, the trustee may recover the erroneous disbursement but must do so by separate action. The trustee cannot simply recover the funds by offsetting against funds due the creditor in other, unrelated chapter 13 cases.

Royals v. Massey (In re Denton), 370 B.R. 441 (Bankr. S.D. Ga. 2007). The bankruptcy court held that a chapter 13 trustee is immune from both damages and injunctive relief based on disbursement errors because the trustee is a quasi-judicial officer.

VII. DISMISSAL

A. *GENERALLY*

SECOND CIRCUIT

In re Somers, 448 B.R. 677 (Bankr. S.D.N.Y. 2011). The court found insufficient "cause" to dismiss as an "improper joint petition" under § 707(a), a joint chapter 7 petition filed by two women who had received a state marriage license, because (a) Debtors were legally married, (b) § 302(a) permits the filing of a joint petition by a spouse, and (c) the Department of Justice's recent directive that the Defense of Marriage Act ("DOMA") may not constitutionally be applied to same-sex couples constituted an "extenuating circumstance" that was appropriately considered in ruling on the motion to dismiss.

THIRD CIRCUIT

Perlin v. Hitachi Capital America Corp., 497 F.3d 364 (3d Cir. 2007). The Third Circuit's opinion provides a good discussion of the history and differences between § 707(a) and § 707(b), two separate subsections governing the dismissal of bankruptcy petitions filed under chapter 7. Subsection (a) governs the dismissal of all bankruptcy filings when cause has been shown. Subsection (b) governs the dismissal of only those filings involving primarily consumer debt, when granting relief would be an "abuse" of chapter 7. In adjudicating a motion to dismiss asserting bad faith under § 707(a), it is within the sound discretion of the bankruptcy court to consider a debtor's monthly income and expenses together with any other factors relevant to a debtor's good faith in filing for bankruptcy. The 2005 amendments to § 707(b) added by BAPCPA do not, by negative implication, prohibit a bankruptcy court from considering a debtor's income and expenses under § 707(a).

FOURTH CIRCUIT

***Mitrano v. United States* (*In re Mitrano*)**, 472 B.R. 706 (E.D. Va. 2012). After reviewing the split of case authority subsequent to *Marrama v. Citizens Bank*, 549 U.S. 365 (2007), the district court held that a chapter 13 debtor's right to voluntarily dismiss the case depends on good faith. There was cause for conversion of the case to chapter 7 "in light of [Debtor's] exceptional bad faith conduct," which included avoiding paying creditors, using chapter 13 to litigate claims, including substantial inaccuracies in his schedules, and proposing meager plan payments in the face of substantial priority claims.

Sood v. Bus. Lenders, LLC, 2012 U.S. Dist. LEXIS 95392 (D. Md. July 10, 2012). Reversing the dismissal of a chapter 13 case filed while a prior chapter 7 was still pending, the district court concluded that thereias no *per se* rule preventing a chapter 20 filing. Instead, on remand, the bankruptcy court must determine if the chapter 13 was filed in good faith or if other grounds existed for dismissal.

FIFTH CIRCUIT

Mallory v. Heitkamp (In re Mallory), 476 F. App'x 766 (5th Cir. 2012). The bankruptcy court granted the trustee's motion to dismiss on the undisputed basis of multiple missed payments, and did so with prejudice. Debtor filed a motion for reconsideration, which the bankruptcy court denied. On appeal, the Fifth Circuit noted that review of dismissal under § 1307 is for abuse of discretion under *Jacobsen v. Moser* (*In re Jacobsen*), 609 F.3d 647, 652 (5th Cir. 2010), and found that this dismissal was within the court's discretion.

Aetna Life Ins. V. Kollmeyer (In re Heritage Sw. Med. Grp PA), 464 F. App'x 285 (5th Cir. 2012). The bankruptcy court and the district court correctly found that the statutes of limitation and equitable tolling are not implicated when claims are initially timely filed and, thereafter, the case is stayed or administratively closed by one of those courts. Administrative closure does not have any effect on the rights of the parties and is simply a docket-management device according to *Mire v. Full Spectrum Lending Inc.,* 389 F.3d 163 (5th Cir. 2004). Dismissal "is appropriate *only* if the failure to comply with the court order was the result of purposeful delay or contumaciousness *and* the record reflects that the district court employed lesser sanctions before dismissing the action." *Id*. at 287 (quoting *Long v. Simmons,* 77 F.3d 878, 880 (5th Cir. 1996)).

SIXTH CIRCUIT

Michigan Nat'l Bank v. Charfoos (In re Charfoos), 979 F.2d 390 (6th Cir. 1992). Individual chapter 11 Debtor's case may be dismissed for bad faith, evaluated under "flexible and multiple standards" that include Debtor's pre-petition conduct.

Society Nat'l Bank v. Barrett (In re Barrett), 964 F.2d 588 (6th Cir. 1992). Upon motion by the creditor to dismiss Debtors' chapter 13 case for lack of good faith, the bankruptcy court's determination that the filing of the petition was in good faith based upon the totality of the circumstances was not clearly erroneous.

SEVENTH CIRCUIT

The Seventh Circuit has not defined what constitutes "cause" for dismissal. While § 707(a) enumerates three examples for cause, the consensus among bankruptcy courts is that the list is not exclusive. *See In re Sekendur*, 334 B.R. 609, 618 (Bankr. N.D. Ill. 2005); *In re Crooks*, 148 B.R. 867, 873 (Bankr. N.D. Ill. 1993).

B. *DISMISSAL FOR CAUSE—§ 707(a)*

THIRD CIRCUIT

In re Tamecki, 229 F.3d 205 (3d Cir. 2000). A debtor's lack of good faith in filing a bankruptcy petition is a proper cause for dismissal under § 707(a). At a minimum, good faith requires a showing of honest intention. Courts can determine good faith only on an ad hoc basis and must decide whether the debtor has abused the provisions, purpose, or spirit of bankruptcy law. Suspicious timing of a chapter 7 bankruptcy petition is an appropriate factor for the court to consider in analyzing bad faith.

FOURTH CIRCUIT

McDow v. Smith, 295 B.R. 69 (E.D. Va. 2003). In this pre-BAPCPA case, the district court held that a debtor's bad-faith acts or omissions may, in the totality of circumstances, constitute cause under § 707(a) for dismissal within the sound discretion of the bankruptcy court. Although the ability to repay debts and a lavish lifestyle are factors to be considered, those factors alone do not warrant dismissal.

In re Remember Enters., Inc., 425 B.R. 757 (Bankr. M.D.N.C. 2010). Relying on *McDow v. Smith*, 295 B.R. 69 (E.D. Va. 2003), the court found that the grounds for dismissal under §707(a) include "bad faith." The court noted with approval the factors identified by the Sixth Circuit in *Indus. Ins. Servs., Inc. v. Zick* (*In re Zick*), 931 F.2d 1124 (6th Cir. 1991). Because the court found none of the *Zick* factors present in this case, it declined to dismiss for bad faith.

In re Marino, 388 B.R. 679 (Bankr. E.D.N.C. 2008). Citing *McDow v. Smith*, 295 B.R. 69 (E.D. Va. 2003), and *Indus. Ins. Servs., Inc. v. Zick* (*In re Zick*), 931 F.2d 1124 (6th Cir. 1991), the court dismissed the case for bad faith, finding there was no sudden financial disaster, the debtor knew the obligation for attorney's fees was accruing, the bankruptcy was timed to prevent arbitration, and the primary purpose of the filing was to avoid the obligation for attorney's fees. The court found that it inequitable for Debtor to obtain substantial assets through the efforts of a law firm only to discharge its fees in a bankruptcy case.

FIFTH CIRCUIT

Matter of Atlas Supply Corp., 857 F.2d 1061 (5th Cir. 1988). Administratrix of estate of deceased 50% shareholder in debtor-corporation moved to dismiss the corporation's bankruptcy case but the bankruptcy court denied dismissal under § 707(a). The Fifth Circuit then analyzed the standard for dismissal under § 707(a). First, a bankruptcy judge may dismiss a case "only for good cause." The section does not, however, provide an exhaustive list of factors to be considered in deciding when good cause exists. The court simply must balance the equities and weigh the prejudices of a dismissal. Questions relevant to whether good cause exists are: (1) Does either party benefit from a dismissal? (2) Is the timing of the motion to dismiss prejudicial to the creditors? (3) Does the timing of the motion to dismiss indicate that the party sitting on her rights lost the right to file the motion?

In re Luu, 2009 Bankr. LEXIS 1397 (Bank S.D. Tex. May 28, 2009). The court found that Debtor and his counsel had unreasonably delayed the bankruptcy process by their failure to cooperate with the chapter 7 trustee, to provide the trustee with accurate and complete supporting documentation, to file accurate and complete schedules and the Statement of Financial Affairs, and more. These failures to cooperate were more than enough to qualify for court-ordered dismissal under § 707(a).

SIXTH CIRCUIT

Industrial Insurance Servs., Inc. v. Zick (In re Zick), 931 F.2d 1124 (6th Cir. 1991). The Sixth Circuit affirmed an appellee's motion to dismiss based on appellant's bad faith in bringing the petition, according to the court's discretion under §707(a). The Sixth Circuit held the appellant failed to carry his burden to prove good faith after it was questioned and despite the fact that good faith acts as a jurisdictional requirement. The formalities of an evidentiary hearing were not required, and failure to conduct such a hearing did not constitute prejudicial error under the circumstances.

NINTH CIRCUIT

Neary v. Padilla (In re Padilla), 222 F.3d 1184 (9th Cir. 2000). The grounds for dismissal listed in § 707(a) are intended to be illustrative, not exhaustive, but bad faith does not generally provide "cause" to dismiss a chapter 7 petition under § 707(a). The Code provides other remedies against debtors who have acted in bad faith. *See also Sherman v. SEC (In re Sherman)*, 491 F.3d 948 (9th Cir. 2007).

Leach v. United States (In re Leach), 130 B.R. 855 (B.A.P. 9th Cir. 1991). Although a debtor may voluntarily choose to place himself in bankruptcy, he does not enjoy the same discretion to withdraw his case once it has been commenced. The court may only dismiss, for cause, after notice and an opportunity for hearing. When dismissal would prejudice the interests of creditors, it is not an abuse of discretion for the bankruptcy court to deny a motion to dismiss, even if dismissal would have advanced the interests of the debtor.

TENTH CIRCUIT

In re Scrivner, 535 F.3d 1258 (10th Cir. 2008). Failing to turn over estate property as required by § 521(a)(4) can be a basis for authorizing the dismissal of a chapter 7 case for cause, including "unreasonable delay by the debtor that is prejudicial to creditors."

In re Daniel, 2009 Bankr. LEXIS 225 (B.A.P. 10th Cir. Feb. 17, 2009). A debtor who fails to file the payment advice information required by § 521(a)(1)(B)(iv) is subject to dismissal, whether automatically or by court order.

In re Domenico, 364 B.R. 418 (Bankr. D. N.M. 2007). When Debtor's prior case was dismissed for failure to pay the filing fee, the court could, and did, dismiss a second case under § 707(a)(2); the "nonpayment of fees . . . required under chapter 123 of title 28" was not limited to the payment of fees in the current case.

In re Merriam, 250 B.R. 724, 738 (Bankr. D. Colo., 2000). A debtor is required to attend the § 341 meeting, and the failure to do so can result in dismissal of the bankruptcy case under § 707(a)(1). Debtor's counsel is not necessarily required to attend.

In re Etcheverry, 221 B.R. 524 (Bankr. D. Colo. 1998), *aff'd* 242 B.R. 503 (D. Colo.1999). Under former § 707(a)(1), a debtor's chapter 7 case would not be dismissed simply because the debtor allegedly was able to repay current debt while still maintaining an adequate living standard. The ability to repay debt was not sufficient "cause" to dismiss the bankruptcy case based on debtor's alleged lack of good faith.

ELEVENTH CIRCUIT

In re Simmons, 200 F.3d 738 (11th Cir. 2000). The bankruptcy court denied Debtor's motion to dismiss and the district court reversed. In reversing the district court, the Eleventh Circuit held that § 707(a) clearly states that a case shall be dismissed only for cause, and that the burden of showing cause is on the moving party. The circuit court agreed with the bankruptcy court's finding that it would be in the best interests of the creditors for the debts to be resolved. The court also found that dismissal would allow the debtor to hinder creditors and further the debtor's abuse of the bankruptcy system.

C. *DISMISSAL FOR ABUSE—§§ 707(b)(1) AND (3)*

FIRST CIRCUIT

Sullivan v. Solimini (In re Sullivan), 326 B.R. 204 (B.A.P. 1st Cir. 2005). The creditor was the administrator of the probate estate of Debtor's deceased sister, who had obtained a judgment against Debtor in connection with a parcel of real estate the two had at one time jointly owned. Debtor lost the property in foreclosure, but a surplus existed after the sale. An interpleader action was commenced to determine who was entitled to the surplus from the sale. The bankruptcy court dismissed Debtor's fourth chapter 13 case based on the history of prior filings and dismissals, finding that Debtor's purpose in filing was to unreasonably delay and hinder the interpleader action. The BAP found that Debtor's purpose in filing this fourth chapter 13 case was not to find a way to satisfy the judgment obtained by the creditor, but rather to obtain the surplus proceeds from the foreclosure sale. Based on this, the bankruptcy court properly concluded that the purpose of the fourth filing was improper and that cause existed for dismissal.

THIRD CIRCUIT

In re Lanza, 450 B.R. 81 (Bankr. M.D. Pa. 2011). The bankruptcy court opinion provides a good discussion of the relationship between §§ 707(b)(1), (b)(2) and (b)(3). The court held that below-median debtors that are not subject to the means test under § 707(b)(2) may nevertheless face dismissal under the totality of the circumstances prong of § 707(b)(3) when they have the ability to repay a significant portion of their unsecured debt. *But see In re Walker*, 381 B.R. 620 (Bankr. M.D. Pa. 2008).

FOURTH CIRCUIT

McDow v. Dudley, 662 F.3d 284 (4th Cir. 2011). After the chapter 13 trustee moved to convert or dismiss Debtors' chapter 13 case, Debtors voluntarily converted their case to one under chapter 7. The U.S. Trustee then moved to dismiss the case for abuse under § 707(b)(1) on the ground that Debtors failed the means test under § 707(b)(2) because their monthly disposable income exceeded $2,000. Debtors moved for summary judgment, asserting that, by its terms, § 707(b) applies only to an individual debtor who files a case under chapter 7, but their case was initially filed under chapter 13. The bankruptcy court granted Debtors' motion and held that the language of § 707(b)(2) does not encompass converted cases. The U.S. Trustee appealed to the district court, which, acting *sua sponte*, dismissed the appeal for lack of subject matter jurisdiction. The Trustee then appealed to the Fourth Circuit. While the appeal was pending, the bankruptcy court entered a discharge order, which the Trustee also appealed. The Trustee argued that the bankruptcy court lacked jurisdiction to enter the discharge order while the case was on appeal, and that Rule 4004 (c)(1)(D) prohibits entry of discharge in a bankruptcy case if a motion to dismiss the case under § 707 is pending.

The Fourth Circuit ruled that an order by the bankruptcy court denying a motion to dismiss a case pursuant to § 707(b) is a final appealable order. The Court explained that orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger bankruptcy case. The Court found that denial of a § 707(b) motion disposes of a discrete dispute—it conclusively determines whether the bankruptcy case is an abusive filing. The Court also found that under BAPCPA, the means test is a mandatory threshold question that is subject to strict deadlines for the U.S. Trustee, so delaying appellate consideration of whether the case is an abusive filing could frustrate the principles of judicial economy and the goal that debtors allocate as much of their resources as possible to repaying their debts. The Fourth Circuit vacated and remanded.

Calhoun v. U.S. Trustee, 650 F.3d 338 (4th Cir. 2011). BAPCPA relaxed the requirement for dismissing a chapter 7 petition by changing the standard under § 707(b)(1) and (2) from substantial abuse to abuse. Although Debtors' disposable income, determined under the means test by subtracting allowable expenses from current monthly income, was insufficient to trigger a presumption of abuse under § 707(b)(2), the Fourth Circuit held the evidence amply supported the bankruptcy court's finding that chapter 7 relief would be an abuse of the provisions of that chapter under § 707(b)(3).

Kestell v. Kestell (In re Kestell), 99 F.3d 146 (4th Cir. 1996). From early on in the bankruptcy process, Debtor clearly communicated that he did not desire the equitable distribution of his assets among all creditors and a fresh start free from debt, but instead sought to avoid paying obligations to his former spouse. The Fourth Circuit concluded that Debtor's conduct constituted both substantial abuse under § 707(b) and an abuse of process under § 105(a). The court concluded § 707(b)(1) applies to cases filed under chapter 13 that are subsequently converted to chapter 7. *See also In re Lassiter*, 2011 Bankr. LEXIS 1927 (Bankr. E.D. Va. May 24, 2011).

FIFTH CIRCUIT

In re Cortez, 457 F.3d 448 (5th Cir. 2006). The bankruptcy court may dismiss a chapter 7 case for substantial abuse, which include any developments that occur before discharge is granted. Neither the statute nor any other provision in the Bankruptcy Code defines substantial abuse or indicates how it should be determined. In ascertaining whether a debtor has the ability to repay his or her debts out of future earnings, the court needs to consider whether the debtor has sufficient income to fund a chapter 13 plan. Such an abuse determination is necessarily forward-looking because it asks whether creditors would receive more from the debtors' future earnings in a chapter 13 than in a chapter 7. Thus, the phrase "continues to make" in § 707(b) indicates that a court may consider post-petition events occurring prior to the discharge in addition to the other items listed in §§ 707(b)(1) and (b)(3).

SIXTH CIRCUIT

Behlke v. Eisen (In re Behlke), 358 F.3d 429 (6th Cir. 2004). Chapter 13 Debtor's budget proposing to continue contributions to a retirement plan constitutes substantial abuse when Debtor has substantial retirement savings and sufficient income to pay 14-23% of his debt in a three- to five-year plan.

But see In re Phillips, 417 B.R. 30 (Bankr. S.D. Ohio 2009), noting that some courts view § 1322(f) as statutorily overruling the 6th Circuit's pre-BAPCPA's decisions in *Harshbarger* and *Behlke* because that section specifically excludes from § 1325(b)'s definition of "disposable income" the amounts required to repay retirement account loans. If the Code excludes certain retirement funds and loan repayments from a chapter 13 debtor's "disposable income," thereby protecting those funds from payment to unsecured creditors, the court saw no logical basis for including those funds in "disposable income" when conducting a hypothetical chapter 13 analysis under § 707(b)(3). Other *Behlke* factors were considered in this case, however, including the stability of the debtor's income, the existence of state law remedies available to ease the debtor's financial predicament, and whether bankruptcy was the result of an unforeseen, catastrophic event.

In re Krohn, 886 F.2d 123 (6th Cir. 1989). The court affirmed dismissal of Debtor's petition for chapter 7 bankruptcy, finding that the petition equated to substantial abuse under a totality of the circumstances review demonstrating dishonesty and lack of need.

Krohn was decided prior to the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), which lowered the standard from *substantial abuse* of chapter 7 to *abuse* and removed the presumption in favor of granting chapter 7 relief. Nevertheless, courts in the Sixth Circuit still apply a totality of the circumstances test for dismissing a petition as abusive.

SEVENTH CIRCUIT

Ross-Tousey v. Neary (In re Ross-Tousey), 549 F.3d 1148 (7th Cir. 2008). The 30-day deadline in § 704(b)(2) for motions to dismiss § 707(b)(2) for below-median income debtors is not jurisdictional in nature and can be waived if the debtor does not object to the timeliness of the motion.

The Court also held that denial of a motion to dismiss under §§ 707(b)(2) or (b(3) is a final appealable order.

EIGHTH CIRCUIT

Fokkena v. Chapman (In re Chapman), 447 B.R. 250 (B.A.P. 8th Cir. 2011). Debtors filed separate chapter 13 petitions and each of them confirmed a plan. Both of their cases were later converted to chapter 7. The U.S. Trustee moved to dismiss both cases under § 707(b)(2) and (3) for abuse. The bankruptcy court denied the Trustee's motion on the ground that § 707(b)(1) does not apply to cases commenced under chapter 13 and converted to chapter 7 post-petition. The Trustee appealed.

The BAP ruled that § 707(b)(1) applies to a chapter 7 case that has been converted from chapter 13, thus permitting dismissal of such a case under § 707(b)(2) and (3). Section 707(b)(1) provides the general rule that the court may dismiss or convert certain cases (with the debtor's consent) if the court determines that the granting of relief would be abusive. The word "filed" in § 707(b)(1) is used to identify the type of debtor ("filed by an individual debtor"), rather than a limitation on how the case arrived in chapter 7. Cases that were filed under chapter 13 and later converted to chapter 7 are considered to be "filed under" chapter 7 for purposes of § 707(b)(1). The court explained that limiting the abuse analysis only to individual debtors who originally filed under chapter 7 would create a potential loophole for debtors to abuse the system by filing and failing under chapter 13.

NINTH CIRCUIT

Price v. U.S. Trustee (In re Price), 353 F.3d 1135 (9th Cir. 2004). The primary factor defining "substantial abuse" is the debtor's ability to pay his or her debts as determined by the ability to fund a chapter 13 plan. A debtor's ability to repay debts, standing alone, will justify a § 707(b) dismissal.

Ng v. Farmer (In re Ng), 477 B.R. 118 (B.A.P. 9th Cir. 2012). Although BAPCPA changed the standard for dismissal under § 707(b) from "substantial abuse" to "abuse," new §707(b) is best understood as a codification of pre-BAPCPA case law and, as such, pre-BAPCPA case law is still applicable when determining whether to dismiss a case for abuse.

TENTH CIRCUIT

Stewart v. U.S. Trustee (In re Stewart), 175 F.3d 796 (10th Cir. 1999). Courts considered the totality of the circumstances in dismissing a chapter 7 case for substantial abuse under former § 707(b). Debtor in this case was a successful physician who had the ability to repay his debts in a reasonable time, had a stable source of future income, and had experienced no unique hardship. He filed his case shortly after unsuccessful litigation with his wife and former father-in-law in an attempt to discharge debts to them and to his children while taking a low-paying fellowship and purchasing an expensive vehicle. Finding that this evidenced a lack of good faith, the Tenth Circuit affirmed the bankruptcy court's dismissal of the case.

In re Doherty, 374 B.R. 288 (Bankr. D. Kan. 2007). Post-BAPCPA, bankruptcy courts in the Tenth Circuit continue to apply the "totality of circumstances" test even when debtors pass the "presumption of abuse" test under § 707(b)(1). The U.S. Trustee could not show that an above-median debtor was abusing the chapter 7 process in the totality of the circumstances when Debtor did not have stable income to support the Trustee's assertion that he would have $500 in monthly disposable income in a hypothetical chapter 13 case.

ELEVENTH CIRCUIT

In re Witcher, 702 F.3d 619 (11th Cir. 2012). The bankruptcy court found no presumption of abuse under the "means test" of § 707(b)(2) but did find that Debtors' bankruptcy petition demonstrated abuse under the "totality of circumstances" test in § 707(b)(3)(B). The district court affirmed. The Eleventh Circuit affirmed and held that a debtor's ability to pay his or her debts may be taken into account under the totality of circumstances test. The court emphasized the limited nature of its holding: "We do not decide whether a debtor's ability to pay his or her debts can alone be dispositive under the totality-of-the-circumstances test. Nor do we decide how much weight a bankruptcy court may properly give to the debtor's ability to pay as compared with other factors making up the totality of the circumstances. The questions of whether the ability to pay may be dispositive and, if not, what weight it should be given as compared to other factors, were debated in the pre-BAPCPA caselaw, and they continue to be debated post-BAPCPA." *Id*. at 623.

In re Kulakowski, 2011 Bankr. LEXIS 3284 (Bankr. M.D. Fla. Sept. 2, 2011). In dismissing the case for abuse under § 707(b)(1) and (b)(3), the court held that Debtor, who earned no income, needed to include the full amount of her non-filing spouse's income for purposes of the means test. Because Debtor and her non-filing spouse generally acted as an economic unit during their twenty-one year marriage, the full amount of the non-filing spouse's income and expenses should be included in the analysis of Debtor's income.

D. *DISMISSAL UNDER THE MEANS TEST—§ 707(b)(2)*

UNITED STATES SUPREME COURT

Allowed Expense Deductions

Ransom v. FIA Card Servs., N.A., 131 S. Ct. 716 (2011). Chapter 13 requires that debtors with above-median income calculate their disposable income by using the means test under chapter 7. It permits a standardized deduction for, *inter alia*, the expenses of car ownership.

Debtor claimed an ownership deduction for a car he owned free and clear of lien. An unsecured creditor objected on the grounds that the plan did not devote all of Debtor's disposable income to the repayment of creditors. The bankruptcy court agreed and denied confirmation of Debtor's plan. The BAP and Ninth Circuit affirmed.

The Supreme Court also affirmed, holding that a debtor who does not make a loan or lease payment may not take an ownership deduction. The Code allows debtors to claim "applicable" expenses, and an expense is not "applicable" if the debtor does not owe it. This reading is supported by the Code's context and purpose.

CMI

Hamilton v. Lanning, 130 S. Ct. 2464 (2010). A chapter 13 debtor who received a one-time employer buyout during the 6-month look-back period, giving her above-median income, was not required to be treated as an above-median debtor for chapter 13 purposes because the bankruptcy court could account for changes in her income or expenses that are known or virtually known at confirmation. The Court adopted a forward-looking approach to the issue, after considering the statutory language, Congress's probable intent and the practical consequences of a mechanical approach. Although this case only involved income, the Court suggested in dicta that a similar approach to expenses is appropriate.

FIRST CIRCUIT

Allowed Expense Deductions

Morse v. Rudler (In re Rudler), 576 F.3d 37 (1st Cir. 2009). The issue raised in this case was whether the means test for identifying an abusive chapter 7 petition allowed Debtor to deduct from his income the installment payments due for property he planned to surrender in the bankruptcy under § 707(b)(2). The BAP held that such a deduction was permitted because, at the time the disposable income calculation was performed, the payments remained "scheduled as contractually due." The First Circuit agreed and found that the plain language of § 707(b)(2)(A)(iii)(I) allows debtors to deduct payments due on a secured debt regardless of whether the debtor intends to surrender to collateral at a later date. Therefore, the court held, Debtor's inclusion of this deduction in his mean's test calculation did not create an abusive result and the plain language of § 707(b)(2)(A)(iii)(I) controlled.

THIRD CIRCUIT

CMI

United States Trustee v. Taborski (In re Taborski), 2013 Bankr. LEXIS 214 (Bankr. W.D. Pa. Jan. 18, 2013). "Current monthly income" is defined broadly under § 101(10A) and includes both bonus income and child support payments.

In re Baden, 396 B.R. 617 (Bankr. M.D. Pa. 2008). Unemployment compensation received during the six-month CMI period is not a "benefit received under the Social Security Act" and therefore must be included in the calculation of current monthly income.

Allowed Expense Deductions

In re Harmon, 446 B.R. 721 (Bankr. E.D. Pa. 2011). Debtor's monthly student loan payment is not an allowed expense deduction under the means test. Additionally, the obligation to repay a nondischargeable student loan does not constitute a "special circumstance" that rebuts the presumption of abuse under § 707(b)(2)(B). The opinion provides a good discussion of the arguments both for and against treating student loans as special circumstances.

FOURTH CIRCUIT

CMI

Johnson v. Zimmer, 686 F.3d 224 (4th Cir. 2012). The Fourth Circuit found that there is no statutorily mandated approach for defining "household" under the means test. Rather than applying the heads-on-beds approach or income-tax-dependent method, the Court concluded that the purposes of the Bankruptcy Code are best served by the "economic unit" approach, which determines the size of a household based on whether the individuals operate as a single economic unit and are financially interdependent.

In re Siler, 426 B.R. 167 (Bankr. W.D.N.C. 2010). A debtor may rebut the presumption of abuse under the means test by showing special circumstances that justify adjustments or additional expenses. § 707(b)(2)(B)(i). The Bankruptcy Code does not define "special circumstances," but merely gives two nonexclusive illustrations: (1) a serious medical condition or (2) "a call or order to active duty in the Armed Forces." § 707(b)(2)(B). Debtor in this case, who was above-median, cited three special circumstances to rebut the presumption of abuse: (1) retirement plan contributions; (2) 401(k) loan payments; and (3) student loan payments. The court held none of these three obligations met the "special circumstances" requirement of the statute.

McDow v. Meade (In re Meade), 420 B.R. 291 (Bankr. W.D. Va. 2009). The court held that the yearly bonus Debtor received during the six-month period preceding the petition date had to be apportioned for means test purposes.

Allowed Expense Deductions

***Morris v. Quigley* (*In re Quigley*)**, 673 F.3d 269 (4th Cir. 2012). Citing the Supreme Court's decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010), the Fourth Circuit held that projected disposable income should take into account adjustments "in the debtor's income or expenses that are known or virtually certain at the time of confirmation." Accordingly Debtor, who was above-median, was not permitted to deduct "average monthly payments on account of secured debts," otherwise permitted by § 707(b)(2)(A)(iii), when the debtor intended to surrender the collateral. *See also In re Sterrenberg*, 471 B.R. 131 (Bankr. E.D.N.C. 2012) (holding debtor could not deduct debt payments on residence, boat, and vehicle to be surrendered).

FIFTH CIRCUIT

Allowed Expense Decutions

In re Brown, 376 B.R. 601 (Bankr. S.D. Tex. 2007). The U.S. Trustee filed a motion to dismiss the bankruptcy case pursuant to § 707(b)(2). He argued that the presumption of abuse arose because Debtors were not allowed to claim a vehicle ownership expense under local standards issued by the IRS if they did not have a monthly note or lease payment. The Court held that such a note is required.

CMI

In re Oliver, 350 B.R. 294 (Bankr. W.D. Tex. 2006). The means test consists of a statutory formula for determining whether the debtor's income in excess of his expenses is sufficient to permit him to pay a specified amount or percentage of his nonpriority, unsecured debts during a five-year period in a chapter 13 bankruptcy proceeding. If so, the statute creates a rebuttable presumption that the case is abusive. This presumption may be rebutted if the debtor presents evidence of special circumstances. When determining whether there is a presumption of abuse, the court looks to whether a debtor's current monthly income (1) exceeds the applicable state median or (2) is equal to or less than it. A debtor whose "current monthly income" exceeds the applicable state median is subjected to the "means test."

SIXTH CIRCUIT

Allowed Expense Deductions

Hildebrand v. Kimbro (In re Kimbro), 409 F. App'x 930 (6th Cir. 2011). This case presented the question whether a debtor with above-median income, when using chapter 7's means test for purposes of calculating projected disposable income as required for confirmation of a chapter 13 plan, may deduct a vehicle's "ownership expense" when the vehicle is free and clear of liens. The BAP held that such debtors may claim the expense without regard to whether they are still making payments or own the vehicle free and clear. The Fourth Circuit reversed and remanded for consideration in light of the Supreme Court's opinion in *Ransom v. FIA Card Servs. (In re Ransom),* 131 S. Ct. 716 (2011).

CMI

Blausey v. U.S. Trustee (In re Blausey), 552 F.3d 1124 (9th Cir. 2009). The Internal Revenue Code's method of determining taxable income does not apply to the Bankruptcy Code's calculation of CMI: income not specifically excluded by §101(10A), such as private disability benefits, is included within CMI even if the income is not taxable under the Internal Revenue Code.

Allowed Expense Deductions

Drummond v. Welsh (In re Welsh), 711 F.3d 1120 (9th Cir. 2013). The trustee objected to Debtors' chapter 13 plan on the grounds of lack of good faith because, *inter alia*, that Debtors proposed to make payments on secured claims for luxury items. The Ninth Circuit agreed with the bankruptcy court and the BAP that payments to secured claims are authorized in the means test. Section 707(b)(2)(A)(iii) allows payments on secured debt to be deducted from CMI, unless payment on the outstanding amount of the secured claim is unnecessary because the debtor will be surrendering the property or avoiding the lien securing the claim. If payment on the outstanding amount is necessary, the debtor may deduct the average payment amount from his or her CMI, regardless of whether the collateral is necessary to the debtor. In BAPCPA, "Congress chose to remove from the bankruptcy court's discretion the determination of what is or is not "reasonably necessary." It substituted a calculation that allows debtors to deduct payments on secured debts in determining disposable income. That policy choice may seem unpalatable either to some judges or to unsecured creditors. Nevertheless, that is the explicit choice that Congress has made. We are not at liberty to overrule that choice." *Id*. at 1134 (footnote omitted).

Egebjerg v. Anderson (In re Egebjerg), 574 F.3d 1045 (9th Cir. 2009). A debtor's obligation to repay loans from a retirement account is not a "claim" or "debt" under the Bankruptcy Code. Therefore, a debtor may not deduct payments on such loans as monthly payment "on account of secured debts" under § 707(b)(2)(A)(iii).

Parks v. Drummond (In re Parks), 475 B.R. 703, 709 (B.A.P. 9th Cir. 2012). Payments for expenses not specifically listed under § 707(b)(2), such as voluntary 401(k) contributions, are not deductible from a debtor's CMI.

Failure to Complete Financial Management Course

In re Norton, 2012 Bankr. LEXIS 499 (Bankr. D. Alaska Feb. 14, 2012). Debtors may not use a certificate of completion of a financial management course obtained during a prior bankruptcy case. A new bankruptcy filing requires a debtor to retake the financial management course.

In re Gates, 2007 Bankr. LEXIS 4211 (Bankr. E.D. Cal. Dec. 12, 2007). Debtor is "disabled" within the meaning of § 109(h)(4), and therefore exempted from § 727(a)(11), if Debtor is incarcerated and unable to attend a personal financial management course.

In re Knight, 349 B.R. 681, 683-84 (Bankr. D. Id. 2006). Debtor's desire to file a certificate of his completion of a financial management course constitutes "cause" to reopen a bankruptcy case that was closed without entry of discharge.

TENTH CIRCUIT

CMI

In re DeThample, 390 B.R. 716 (Bankr. D. Kan. 2008). A single distribution from Debtor-wife's employee retirement plan that she received during the six months immediately preceding the filing of chapter 13 is part of CMI, but Debtors properly excluded it in calculating "projected disposable income" for confirmation purposes under § 1325(b)(1)(B) because the draw was not taken on a planned or periodic basis.

Allowed Expense Deductions

Zeman v. Liehr (In re Liehr), 439 B.R. 179 (B.A.P. 10th Cir. 2010). Debtors could not deduct monthly mortgage payments on property they were surrendering, applying *Lanning* on the expense side.

In re Wilson, 454 B.R. 155 (Bankr. D. Colo. 2011). Deductions on Form B22B are not permitted for debts secured by assets that the debtor intends to surrender. The rule in *Ransom v. FIA Card Servs., N.A*, 131 S.Ct. 716 (2011), is "equally applicable" in chapter 7 cases. Thus, Debtor would be denied the standardized IRS housing deduction because he lived with his girlfriend and had no rent expenses.

In re Scarafiotti, 375 B.R. 618 (Bankr. D. Colo. 2007). The IRS list of "other necessary expenses" is exclusive. Therefore Debtor's retirement plan contributions and repayments do not qualify as an "other necessary expense."

ELEVENTH CIRCUIT

CMI

In re Rivers, 466 B.R. 558 (Bankr. M.D. Fla. 2012). In calculating income for the objective means test of § 707(b)(2), the court adopted the "snapshot" approach and held that a chapter 7 debtor may deduct the monthly mortgage payment for a home being surrendered in the bankruptcy. The Supreme Court's chapter 13 decisions in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010), and *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716 (2011), which held that real circumstances must be considered in determining "projected disposable income" in a chapter 13 case, do not affect the expenses that a chapter 7 debtor may list under § 707(b)(2).

If the presumption does not arise or is rebutted, a court may consider whether the case is abusive under § 707(b)(3)'s totality of the circumstances test. *See also In re Walker*, 383 B.R. 830, 835 (Bankr. N.D. Ga. 2008) (holding that failure to pass the means test "subjects the debtor to a presumption that granting relief would be an abuse, but 'passing' the means test does not result in a presumption that granting relief is not an abuse").

In re Ralston, 400 B.R. 854 (Bankr. M.D. Fla. 2009). Disposable income under the means test is calculated by taking the debtor's current monthly income as defined in § 101(10A) and subtracting the allowable monthly expenses listed in § 707(b)(2). Amounts scheduled as contractually due to secured creditors may be included even though the debtor intends to surrender the security and will not actually be making the payments. Actual monthly expense amounts specified under the National Standards and Local Standards are applicable for a vehicle even if the debtor owns the vehicle free and clear. If the debtor's current monthly income, less allowed expenses, exceeds the statutory thresholds for disposable income, the filing is presumed abusive. The presumption of abuse may be rebutted, however, by the debtor's showing of "special circumstances" pursuant to § 707(b)(2)(B)(i).

Standing

In re Curcio, 387 B.R. 278 (N.D. Fla. 2008). Prior to determining the issue of abuse on its merits, a court must first, pursuant to § 707(b)(6), determine the eligibility of the creditors to bring the motion. Section 707(b)(6) effectively "creates a threshold test to determine whether a 'party in interest,' other than the Court or U.S. Trustee may bring a motion to dismiss for abuse under § 707(b)." Specifically, if the debtor's CMI is below the applicable median income, a "party in interest" is not eligible under § 707(b) to bring the motion to dismiss.

E. *MISCELLANEOUS*

THIRD CIRCUIT

Attorney liability

In re Taylor, 655 F.3d 274 (3d Cir. 2011). Several statements in the lender's motion for relief from stay were false or misleading and would support sanctions against the lender's attorney. The attorney failed to make a reasonable inquiry prior to making those representations, because the attorney relied on a computer system run by a third-party vendor to supply the information with which, as her client determined in advance, she should be provided. The Third Circuit's opinion provides a good discussion of Rule 9011 and the factors considered in determining the reasonableness of an attorney's inquiry before making representations.

Landon v. Hunt, 977 F.2d 829 (3d Cir. 1992). In affirming an award of sanctions under Rule 9011 for filing an involuntary bankruptcy petition in bad faith, the Court noted that Rule 9011 is the bankruptcy equivalent of Fed. R. Civ. P. 11; therefore, cases interpreting Rule 11 are applicable to analysis of the propriety of sanctions under Rule 9011.

VIII. CONVERSION

A. *VOLUNTARY*

UNITED STATES SUPREME COURT

Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365 (2007). The Supreme Court considered whether a debtor's right to convert a case filed under chapter 7 to chapter 13, pursuant to § 706(a), is absolute. Citing Debtor's bad faith in misrepresenting the value of his vacation property and his failure to disclose the transfer of the property to a spendthrift trust within one year of the chapter 7 bankruptcy petition, the Court found that Debtor forfeited his right of conversion. The Supreme Court affirmed the First Circuit, finding support in §§ 105(a) and 1307(a). *See Marrama v. Citizens Bank of Massachusetts* (*In re Marrama*), 445 F.3d 518 (1st Cir. 2006).

THIRD CIRCUIT

In re Michael, 699 F.3d 305 (3d Cir. 2012). At any time during the chapter 13 case, the debtor has a near absolute right to convert to chapter 7. Undistributed plan payments held by a chapter 13 trustee at the time of conversion must be returned to the debtor absent bad faith.

In re Myers, 491 F.3d 120 (3d Cir. 2007). The decision whether to covert a chapter 13 case to chapter 7 lies within the sound discretion of the bankruptcy court, just as does the decision whether to dismiss the case outright.

FOURTH CIRCUIT

In re Finney, 992 F.2d 43 (4th Cir. 1993). Debtor made undisclosed post-petition transfers of real estate with the "intent to hinder, delay, or defraud his creditors." Debtor sought to convert the chapter 7 case to chapter 11 under § 706(a). The bankruptcy court denied conversion on "equitable grounds" and "for good cause shown." On appeal, the district court found no clear error and held that a bankruptcy court may, in its discretion, deny a § 706(a) motion upon finding that immediate re-conversion from chapter 11 to chapter 7 would be appropriate under § 1112(b). The Fourth Circuit held Debtor's recalcitrance and fraud during the chapter 7 proceedings, and his resort to the § 706(a) motion only after his discharge was denied, constituted an abuse of process sufficient to trigger § 105(a).

SIXTH CIRCUIT

Copper v. Copper (In re Copper), 426 F.3d 810 (6th Cir. 2005). There is no "absolute right" to convert a chapter 7 case to chapter 13 when the bankruptcy court finds, based upon the facts of the case, that the motion was filed in bad faith or represents an attempt to abuse the bankruptcy process. *See also Marrama v. Citizens Bank of Massachusetts (In re Marrama)*, 549 U.S. 365 (2007).

Liberty Nat'l Bank & Tr. Co. v. Burba (In re Burba), 42 F.3d 1388 (6th Cir. 1994). A debtor has an absolute right to convert the case from chapter 13 to chapter 7.

SEVENTH CIRCUIT

In re Salem, 465 F.3d 767 (7th Cir. 2006). Although § 706(a) allows conversion of a chapter 7 petition to a chapter 11, 12, or 13 petition "at any time," conversion cannot occur in a district other than the one in which the case is pending, absent a transfer.

EIGHTH CIRCUIT

Advanced Control Solutions, Inc. v. Justice, 639 F.3d 838 (8th Cir. 2011). Following conversion from chapter 13 to chapter 7, Debtor was allowed to convert back to chapter 13 after the bankruptcy court found that Debtor could not rebut the presumption of abuse arising from the means test under § 707(b)(2), and Debtor moved to convert his case back to a chapter 13. One of Debtor's creditors argued that Debtor should not be allowed to re-convert pursuant to § 706(a), but the Court of Cppeals, affirming the district court, held that § 706(a) does not abridge the clear grant of authority that § 707(b)(1) provides to bankruptcy courts to allow a chapter 7 case to be converted to chapter 13.

NINTH CIRCUIT

Nady v. DeFrantz (In re DeFrantz), 454 B.R. 108 (B.A.P. 9th Cir. 2011). Bankruptcy courts within the Ninth Circuit have historically considered the right to convert from chapter 13 to chapter 7 to be absolute, due to the language of § 1307(a), which gives the debtor a non-waivable right to convert to chapter 7 at any time. The Supreme Court's ruling in *Marrama v. Citizens Bank*, 549 U.S. 365 (2007), which permits a bankruptcy court to exercise its discretion to deny a debtor's request to convert from chapter 7 to chapter 13 when the debtor has acted in bad faith, did not change this result.

TENTH CIRCUIT

Section 706(a) Conversion to Chapter 13

In re Miller, 303 B.R. 471 (B.A.P. 10th Cir. 2003). The BAP held that a chapter 7 debtor whose case had not previously been converted could convert to another chapter and that bankruptcy courts had no discretion to deny conversion in the absence of a statutory basis. According to the BAP, courts holding to the contrary "appear to be erroneously engrafting the good faith requirements of §§ 1307 and 1325 onto a conversion process initiated by the debtor." This case had been abrogated by *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007).

See also In re Ortega, 434 B.R. 889 (Bankr. D. Kan. 2010) (holding that debtors who were converting to chapter 13 to avoid nondischargeability trial costs, but who had committed no other act of bad faith, were not barred from conversion); *In re Gier*, 986 F.2d 1326 (10th Cir.1993).

In re Young, 237 F.3d 1168 (10th Cir. 2001). The Court held that Debtor, who sought to convert his chapter 7 case to chapter 13 in order to reduce payment on nondischargeable debt, was not proceeding in bad faith when bankruptcy court found Debtor's plan had been filed in good faith under the standards laid out in *Flygare v. Boulden*, 709 F.2d 1344, 1347-1348 (10th Cir. 1983).

Section 706(a) Conversion to Chapter 11

In re George Love Farming, LC, 366 B.R. 170 (Bankr. D. Utah 2007). The bankruptcy court held that it had discretion to deny Debtor's motion to convert from chapter 7 to chapter 11, given Debtor's bad faith. Applying *Marrama*, and citing *In re Nursery Land Dev., Inc*., 91 F.3d 1414, 1416 (10th Cir. 1996), the court held that its inquiry should consider factors historically applied to motions to convert or dismiss a chapter 11 case for bad faith, including: (1) whether the debtor has one asset; (2) whether the debtor's pre-petition conduct has been improper; (3) whether there are only a few unsecured creditors; (4) whether the debtor's property has been posted for foreclosure, and the debtor has been unsuccessful in defending against the foreclosure in state court; (5) whether the debtor and one creditor have proceeded to a standstill in a prior forum, and the debtor has lost; (6) whether the filing of the petition effectively allows the debtor to evade court orders; (7) whether the debtor has no ongoing business or employees; and (8) whether there is a lack of possibility for reorganization.

Section 1307(a) Conversion to Chapter 7

In re Garcia, 434 B.R. 638 (Bankr. D. N.M. 2010). A dismissed chapter 7 case cannot be converted to chapter 13 under § 1307(a). Debtor sought to convert to avoid the effect of a stipulated settlement with the chapter 7 trustee.

Section 1307(d) Conversion to Chapter 11 or 12

In re Campbell, 313 B.R. 871 (B.A.P. 10th Cir. 2004). A family farmer seeking to convert his chapter 13 case to chapter 12 should be permitted to do so, even though chapter 12 had expired on the date of his petition but had been extended retroactively to a date before the petition. Thus, chapter 12 relief was available to Debtors on the date they filed.

ELEVENTH CIRCUIT

In re Waczewski, 241 F. App'x 647, 650 (11th Cir. 2007). Chapter 7 debtor moved to convert the case to a chapter 13 bankruptcy. Although conversion of the case was not the central issue, in a footnote the bankruptcy court noted a split in the decisions over whether a bankruptcy court can disallow conversion based on the debtor's bad faith, in light of language in § 706(a) permitting debtors a "one time absolute right" to convert to a chapter 13 proceeding. The bankruptcy court also noted that the Supreme Court ultimately decided that bankruptcy courts can deny conversion based on the debtor's bad faith. *See Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007).

In re Kay, 185 B.R. 873 (Bankr. M.D. Fla. 1995). After the case was converted to chapter 7, Debtor filed a motion to convert back to chapter 11. The bankruptcy court held that Debtor's previous unsuccessful attempts to reorganize and cause further delay to creditors precluded re-conversion to chapter 11. Although a debtor is entitled to breathing room, the debtor's right to convert is not unlimited and must be balanced against the legitimate rights of creditors. The decision to convert is within the discretion of the bankruptcy court based on the court's determination of what will be most beneficial to the parties in interest.

B. *INVOLUNTARY*

SECOND CIRCUIT

Procel v. United States Trustee (In re Procel), 467 B.R. 297 (S.D.N.Y. 2012). Appellant-Debtor contended that the bankruptcy court erred when it denied his motion to dismiss his chapter 13 petition and instead granted the United States Trustee's motion to convert the chapter 13 petition to a chapter 7 liquidation. The trustee argued that in *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007), the United States Supreme Court questioned the viability of Second Circuit precedent that the debtor's right to dismiss is absolute. Noting the split in lower courts (including lower courts within the Second Circuit) since *Marrama* on whether the right to voluntary dismissal is absolute, the district court reversed the bankruptcy court by holding that the absolute right to voluntary dismissal under § 1307(b) is still binding precedent in the Second Circuit.

FOURTH CIRCUIT

Quarles v. U.S. Trustee, 194 B.R. 94 (W.D. Va. 1996). The district court held that the bankruptcy court did not abuse its discretion under § 1112 when it converted Debtor's chapter 11 case to chapter 7 because Debtor repeatedly violated the orders of the bankruptcy court to file a disclosure statement and a plan for reorganization.

SEVENTH CIRCUIT

In re McDonald, 118 F3d. 568 (7th Cir. 1997). When cause is established, the bankruptcy court has discretion to dismiss or convert the case.

EIGHTH CIRCUIT

Alexander v. Jensen-Carter (In re Alexander), 236 F.3d 431 (8th Cir. 2001). Debtor filed a chapter 13 bankruptcy petition indicating that one piece of real property was his home, but claiming another piece of real property—his employer's—as his homestead and asserting an exemption. Following the chapter 13 trustee's objection to the asserted homestead, the bankruptcy court converted the case to chapter 7. In the chapter 7 case, Debtor again listed his employer's real property as his homestead because Debtor lived there at the time of the conversion. The Court of Appeals affirmed the bankruptcy court's holding that Debtor could not claim his employer's address as his homestead post-conversion. Pursuant to § 348(f), property of the debtor's estate in a converted chapter 7 case is the property of the estate as of the date of the original chapter 13 filing. Since Debtor did not live at his employer's property when he originally filed his chapter 13 case, he could not claim it as his homestead in his chapter 7 case.

Zepecki v. Harlan (In re Zepecki), 1998 U.S. App. LEXIS 6299 (8th Cir. 1998). Debtor commenced a voluntary chapter 7 bankruptcy case, which he then converted to a chapter 13. Debtor's ex-wife filed a motion to convert the case back to chapter 7 because Debtor had tried to hide the proceeds of a real estate transaction during the chapter 7 meeting of creditors. The bankruptcy court ruled that Debtor's actions warranted conversion back to a chapter 7 case. The appellate court affirmed, determining that Debtor's petition was filed in bad faith due to his attempts to hide the real estate sale proceeds from his ex-wife and other creditors entitled to them.

Molitor v. Eidson (In re Molitor), 76 F.3d 218 (8th Cir. 1996). Debtor defaulted on a contract deed for a home purchase and attempted to manipulate the Bankruptcy Code to retain possession of the home by filing multiple chapter 13 cases. Following his third chapter 13 filing, Debtor voluntarily moved to dismiss the case. One of Debtor's creditors moved to have the bankruptcy case converted to chapter 7. The bankruptcy court denied Debtor's motion to dismiss the case and instead converted the case to chapter 7 under § 1307(c) on the basis of Debtor's bad faith and abuse of the bankruptcy process. The bankruptcy court's decision was affirmed by the appellate court.

In re Graven, 936 F.2d 378 (8th Cir. 1991). Debtors filed a bankruptcy petition under chapter 12. Debtors subsequently moved to dismiss their bankruptcy case, but the trustee moved to involuntarily convert the case to chapter 7 under § 1208(d) because of fraudulent transfers Debtors made pre-petition and their post-petition misconduct. The bankruptcy court denied Debtors' motion to dismiss and disagreed with Debtors' argument that § 1208(b) requires immediate dismissal of a case upon the debtors' request. The bankruptcy court granted the trustee's motion to convert. The appellate court affirmed that holding, noting that a court may convert a case to chapter 7 despite the debtors' petition for dismissal if fraud is established and "the public good requires" conversion.

Rudd v. Laughlin, 866 F.2d 1040 (8th Cir. 1989). Debtors filed their sixth chapter 13 petition in four years. The trustee moved to convert the case to chapter 7, arguing that Debtors had abused the bankruptcy system and had unsecured debts exceeding the limitations for chapter 13. Debtors argued that the bankruptcy court did not have jurisdiction to convert their case to chapter 7 if they were ineligible to be debtors in a chapter 13 case. The bankruptcy court held that it had jurisdiction over Debtors' case and converted it to chapter 7. The appellate court affirmed, ruling that the bankruptcy court had jurisdiction to convert even though Debtors were ineligible to be in a chapter 13 bankruptcy case originally.

NINTH CIRCUIT

Shulkin Hutton, Inc., P.S. v. Treiger (In re Owens), 552 F.3d 958 (9th Cir. 2009). It was not an abuse of discretion for the bankruptcy court to grant a creditor's motion to dismiss a chapter 13 case rather than to grant Debtor's later-filed motion to convert to chapter 7 when Debtor had substantial future income-earning capacity and creditors would not be well served by conversion of the case to chapter 7.

TENTH CIRCUIT

Section 1307(c) Conversion to Chapter 7

In re Alexander, 363 B.R. 917 (B.A.P. 10th Cir. 2007). Citing *In re Gier*, 986 F.2d 1326,1329 (10th Cir. 1993), the BAP held that bankruptcy courts may dismiss (or convert) for cause when the totality of circumstances demonstrates that the "provisions, purpose or spirit" of chapter 13 have been abused.

In re Armstrong, 303 B.R. 213 (B.A.P. 10th Cir. 2004). Courts apply the *Flygare* factors in determining whether a debtor's chapter 13 case should be involuntarily dismissed or converted under § 1307(c). In this case, Debtor was a serial was filer who, according to the court, proceeded in bad faith after violating the confirmation order in a previous chapter 11 case, thereby demonstrating a lack of motivation and sincerity.

In re Brock, 365 B.R. 201 (Bankr. D. Kan. 2007). Once cause to convert or dismiss is found, the court must determine which remedy is in the best interests of creditors. Because numerous unanswered questions about this debtor's assets remained, the court converted the case to chapter 7 so that a trustee could make further inquiries.

Section 706(b) Conversion to Chapter 11

In re Lobera, 454 B.R. 824 (Bankr. D. N.M. 2011). Conversion of a chapter 7 case to chapter 11 on the motion of party in interest is a matter of discretion, based on consideration of the benefit to all parties concerned. Conversion was denied in this case, involving an individual debtor not in business, because the movants did not show that a confirmable plan might be proposed and because this wage-earner debtor would be trapped in chapter 11 by virtue of § 1112(a)(3) against his will, contravening the fresh start policy.

IX. AUTOMATIC STAY

A. *GENERAL COVERAGE*

UNITED STATES SUPREME COURT

Citizens Bank of Maryland v. Strumpf, 516 U.S. 16 (1995). On appeal from the Fourth Circuit, the Supreme Court found that an administrative hold pursuant to § 553(a) does not violate the automatic stay. The placing of an administrative hold on Debtor's bank account does not constitute a setoff because the bank did not refuse to honor Debtor's debts on a permanent basis. The hold prevented Debtor from accessing the account while the bank pursued relief from the automatic stay. The hold was temporary, therefore, and the required intent to qualify as an offset was not present. The administrative hold was not an exercise of dominion over the debtor's account necessary to establish a violation of the automatic stay.

SECOND CIRCUIT

In re Ebadi, 448 B.R. 308 (Bankr. E.D.N.Y. 2011). Debtor moved to reopen his bankruptcy case and have the court vacate a state foreclosure sale of real property conducted by a creditor. Debtor also sought actual and punitive damages for willful violation of the stay. The court found that Debtor was a guarantor, with no ownership interest in the property at the time of foreclosure, and that the creditor had received actual notice of Debtor's bankruptcy filing prior to the commencement of foreclosure. The court found that the creditor had violated the stay and held that actual damages were warranted. The court reasoned that, although Debtor was merely the guarantor on the debt, commencement of foreclosure was "a significant step in a process that could lead to recovery of a deficiency judgment against [Debtor]," *id.* at 314, and, thus, it constituted a knowing violation of §§ 362(a)(1) and (a)(6). The court found, however, that the creditor did not act with malicious intent or bad faith, so punitive damages were not appropriate. The court also expressed concern about awarding punitive damages to a debtor who files bankruptcy solely to prevent foreclosure and without an intent to reorganize his or her financial affairs

THIRD CIRCUIT

In re Rodriguez, 629 F.3d 136 (3d Cir. 2010), *cert. denied*, 132 S. Ct. 573 (2011). Prepetition, chapter 13 Debtors had financed the purchase of their home with a purchase-money mortgage. The mortgage terms required Debtors to make monthly payments, a portion of which was to be deposited into an escrow account to cover taxes, insurance, other charges as they became due. Debtors fell behind on their mortgage payments and filed for bankruptcy protection. The lender filed a claim for the delinquent mortgage payments, but included in the claim only the amount that would have been paid out of escrowed funds, not the full amount that Debtors should have paid into the escrow account. Rather than claim the additional $2,000 as a prepetition claim, the lender revised the escrow analysis and increased Debtors' monthly escrow payments to make up the shortage. Debtors moved to enforce the automatic stay to prevent the lender from attempting to collect its prepetition escrow claims.

The Third Circuit ruled that a lender has a prepetition claim for unpaid escrow payments that a debtor was contractually obligated to make, even before a lender would have to disburse escrow funds to pay expenses as they become due. The Court explained that a claim under the Bankruptcy Code may be contingent, unmatured, disputed, and unliquidated; thus, a claim may exist for bankruptcy purposes before a right to payment exists under state law. The terms of the mortgage obligated Debtors to make escrow payments, so the lender had a claim for unremitted escrow payments. Although Debtors may not have become liable for the taxes, insurance, and other charges that the lender paid with their escrow funds until after their petition date, the lender's claim for escrow payments had already accrued when the payments were due and were contingent as of the petition date. Thus, because the lender had a prepetition claim for the delinquent escrow payments, which it should have included in its proof of claim, the lender's post-petition attempt to recapture these payments through a revised escrow analysis with increased escrow payments was a violation of the automatic stay. The Court remanded to the district court for a determination of whether the lender had willfully violated the stay.

McCartney v. Integra Nat'l Bank North, 106 F.3d 506 (3d Cir. 1997). Section 362(a) stays actions only against the debtor. In this case, the court held that the automatic stay extended to prevent a bank from initiating a deficiency judgment action against a chapter 13 Debtor's small business. To initiate an action against the business, under the Pennsylvania Deficiency Judgment Act (PDJA), the bank would have been required to name Debtor as a respondent, which would have violated the stay. Thus, the court did not strike the bank's deficiency claim against Debtor as guarantor of the business debt to the bank on the basis of the bank's failure to fully comply with the requirements of the PDJA.

Maritime Electric Co. v. United Jersey Bank, 959 F.2d 1194 (3d Cir. 1992). This case includes a thorough discussion of the scope and effect of the automatic stay. In this case, a corporation owned by the chapter 13 Debtor's father brought a conversion action against Debtor and Debtor's own corporation. Debtor then asserted a counterclaim against his father's corporation and a third-party complaint against his father. The Court of Appeals held that the automatic stay applied only to the conversion claim against Debtor, not to the claim against Debtor's corporation or any of Debtor's claims against his father or his father's corporation. Only the bankruptcy court with supervision over Debtor's bankruptcy could authorize relief from stay. Thus, the district court lacked authority to try a claim for punitive damages or to render judgment on the claim.

James v. Draper (In re James), 940 F.2d 46 (3d Cir. 1991). This case deals with the § 362(b)(4) exception to the automatic stay, which exempts "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." The Court of Appeals found that the judgment of a New Jersey state court in a civil forfeiture action obtained against Debtor fell under the § 362(b)(4) exception because a civil forfeiture action is one by a governmental unit to enforce its regulatory power to combat illegal drugs. Although the district court below correctly held the exception applicable, the district court nevertheless erred when it vacated the state court judgment because that judgment was not void *ab initio*; rather, it was merely erroneously decided, and thus only subject to direct attack in the state court.

***Gianakas v. Gianakas* (*In re Gianakas*)**, 917 F.2d 759 (3d Cir. 1990). This case deals with the exception to the automatic stay under § 362(b)(2) for the collection of alimony, maintenance or support from property not constituting estate property. The court held that whether an obligation is in the nature of alimony, maintenance, or support depends upon the intent of the parties at the time of the settlement, which is determined by three indicators: 1) the language and substance of the agreement in the context of surrounding circumstances; 2) the parties' financial situations at the time of the settlement; and 3) the function served by the obligation at the time of the settlement. Here, the court found that Debtor's obligation on a second mortgage was intended to serve as support for his wife and children, and thus the debt was unaffected by the automatic stay.

In re Ward, 837 F.2d 124 (3d Cir. 1988). At a foreclosure sale conducted without knowledge but in violation of the automatic stay extant in Debtor-husband's chapter 13 bankruptcy, a mortgagee acquired the property but failed to record the deed. The wife filed bankruptcy after the sale. The mortgagee wanted the stay in Debtor-wife's case vacated and the sale confirmed. The bankruptcy and district courts denied relief. The Court of Appeals affirmed, ruling that sale in violation of the stay is void *ab initio* and is of no effect. In addition, the purchaser failed to perfect its interest under New Jersey law by failing to record the deed.

Lee v. Schweiker, 739 F.2d 870 (3d Cir. 1984). In this case, the court held that a creditor cannot collect debts from property of the estate by setting off pre-and post-petition obligations. Debtor had received overpayments from the Social Security Administration (SSA). When the SSA discovered the overpayments, it began deducting part of Debtor's monthly benefits to recover the overpayments, and continued to do so even after Debtor filed her chapter 13 petition. The court held that the SSA did not have to return the amounts recouped before the petition was filed, but recoupment subsequent to the filing is barred by the automatic stay and those amounts had to be returned.

***Davis v. Sheldon* (*In re Davis*)**, 691 F.2d 176 (3d Cir. 1982). This case involved § 362(b)(1), which states that the automatic stay does not apply to block "the commencement or continuation of a criminal action or proceeding against the debtor." In this case, the Court of Appeals affirmed the decisions of the courts below to refuse to enjoin a pending state criminal prosecution against Debtor for issuing bad checks. The court cautioned federal courts from enjoining state court proceedings, especially criminal ones, and reasoned that any bankruptcy or other defenses based on federal law could be raised by a debtor in state court, and thus Debtor was not prejudiced by continuation of the criminal proceeding.

Hagaman v. State of N.J., Dep't of Environ. Protect. & Energy, 151 B.R. 696 (D.N.J. 1993). In this case, the court was asked to determine whether the police power exceptions to the automatic stay under §§ 362(b)(4) and (b)(5) are limited to "imminent hazards." The court found no such limitation and, therefore, the agency could proceed with its cleanup of Debtor's recycling business and remove all identifiable hazardous solid and liquid waste materials, regardless of whether they constituted "imminent" hazards.

FOURTH CIRCUIT

Md. Port Admin. v. Premier Auto. Servs. (In re Premier Auto. Servs.), 492 F.3d 274 (4th Cir. 2007). A mere possessory interest under an expired lease is insufficient to trigger the automatic stay under § 362(a). *See* § 362(b)(10).

Platinum Fin. Servs. Corp. v. Byrd (In re Byrd), 357 F.3d 433 (4th Cir. 2004). Creditor reduced several claims against Debtor to judgments, and Ddebtor appealed the judgments. During the pendency of the appeals, the judgment creditor filed an involuntary bankruptcy petition against Debtor. The plain language of § 362 stays appellate proceedings in actions originally brought against a debtor, even when it is the debtor who files the appeal. Debtor's appeals were continuations of actions originally brought by the judgment creditor.

Tidewater Fin. Co. v. Moffett (In re Moffett), 356 F.3d 518 (4th Cir. 2004). A creditor lawfully repossessed Debtor's vehicle because Debtor failed to make scheduled payments. Debtor filed a petition for relief under chapter 13. Debtor demanded possession of the vehicle pursuant to § 362(a) and the turnover provisions of the Code, but the creditor sought relief from the stay. The bankruptcy court ensured that the creditor's security interest in the vehicle was adequately protected in the bankruptcy plan and ordered the creditor to return the vehicle to Debtor. The district court affirmed that decision. The Court of Appeals held that Debtor's right to redeem the vehicle under state law was an asset of the bankruptcy estate, and because the plan provided for the exercise of the right of redemption the creditor was not entitled to relief from the stay. The Court held that "to hold otherwise would deprive . . . debtors of the rights and protections afforded to them by the Bankruptcy Code, and it would thereby undermine their chances for successful financial rehabilitation."

Birney v. Smith (In re Birney), 200 F.3d 225 (4th Cir. 1999). Debtor and his wife owned real property as tenants by the entirety. After a creditor obtained judgment solely against the wife, Debtor filed bankruptcy, but the wife did not. The trustee issued a report of no distribution and, prior to discharge, Debtor's wife died. The trustee reinvestigated and issued another report of no distribution. The creditor attempted to foreclose after Debtor received his discharge on the theory that lapse of the stay allowed his inchoate lien to attach to the property. The Court of Appeals held that § 362(a)(5) prevented the lien from attaching during the pendency of the stay and the discharge extinguished liability for the underlying debt.

***United States v. Gold* (*In re Avis*)**, 178 F.3d 718 (4th Cir. 1999). The IRS complied with the steps necessary to obtain a valid, perfected tax lien against Debtor's after-acquired property pursuant to §§ 6312 and 6323 of the Tax Code when an involuntary petition was filed against Debtor. The Fourth Circuit ruled that automatic attachment of the IRS's prepetition federal tax lien to property that became property of the estate under § 541(a)(5) by reason of the debtor's post-petition inheritance was an "act" to create a lien on Debtor's property barred by § 362(a)(5).

FIFTH CIRCUIT

In re Turner, 462 B.R. 214 (Bankr. S.D. Tex. 2011). Bank, who held a secured and an unsecured claim against chapter 13 Debtors, froze Debtors' accounts, used auto debiting functions to pay loans owed to the bank, and called Debtors to inquire if they would be paying their debts outside the chapter 13 bankruptcy. The bankruptcy court held that the bank had willfully violated § 362(a)(7), although the violation resulted in no actual damages to Debtors since all money was returned to the accounts. The court additionally held that stress and anxiety alone do not equate to actual damages; more is required. Thus, while the bank violated the automatic stay three times, the court did not award any punitive damages or attorney's fees to Debtors.

SIXTH CIRCUIT

Harchar v. United States (In re Harchar), 694 F.3d 639 (6th Cir. 2012). The IRS's manual processing of a debtor's post-confirmation tax refund did not violate the confirmed chapter 13 plan, the debtor's right to due process or the automatic stay because the tax refund in question did not arise from the same tax period as the tax claim resolved by the chapter 13 plan.

SEVENTH CIRCUIT

Redmond v. Fifth Third Bank, 624 F.3d 793 (7th Cir. 2010). Payoff letters sent at Debtor's request as part of a state foreclosure action did not violate the automatic stay. The payoff letters were not acts of collection but simply the lender's position as to what was owed in response to Debtor's demand.

Thompson v. General Motors Acceptance Corp., 566 F.3d 699 (7th Cir. 2009). Retaining a repossessed automobile is in itself an act to exercise control over the automobile and thus is an act in violation of the stay.

In re Kuehn, 563 F.3d 289 (7th Cir. 2009). A university's withholding of college transcripts until Debtor paid her prepetition debt for tuition violated the automatic stay during the pendency of the bankruptcy case and the bankruptcy discharge after the case was closed.

Cox v. Zale Delaware, Inc., 239 F.3d 910 (7th Cir. 2001). Provided there is no coercion or harassment, a creditor's offer of reaffirmation, including the sending of a letter containing the offer directly to a represented debtor, is not an act to collect a debt and does not violate the automatic stay. *See also In re Duke*, 79 F.3d 43 (7th Cir. 1996).

EIGHTH CIRCUIT

Small Business Admin. v. Rinehart, 887 F.2d 165 (8th Cir. 1989). The issue was whether the creditor's act of "holding," without notice, a portion of Debtors' farm program payments for an administrative setoff after Debtors filed their bankruptcy petition violated the automatic stay. The Court of Appeals court held that it did violate the stay. The filing of a voluntary petition in bankruptcy results in an automatic stay of most actions by creditors to satisfy their claims against debtors, including "any act . . . to exercise control over property of the estate," and "the setoff of any debt owing to the debtor." §§ 362(a)(3) & (7). The scope of the automatic stay is intended to be broad. The court held the creditor's act was an act "to exercise control over the property of the estate," which is not allowed by § 362(a)(3).

NINTH CIRCUIT

California Franchise Tax Board v Kendall (In re Jones), 657 F.3d 921 (9th Cir. 2011). The taxing authority did not violate the stay by pursuing collection of post-petition taxes against property of the debtor. "For post-petition creditors, the stay of collection from property of the estate remains in effect 'until such property is no longer property of the estate.'" *Id*. at 927 (quoting § 362(c)(1)).

Palmdale Hills Property, LLC v. Lehman Commercial Paper (In re Palmdale Hills Property, LLC), 654 F.3d 868 (9th Cir. 2011). The automatic stay "does not prevent a plaintiff/debtor from continuing to prosecute its own claims nor does it prevent a defendant from protecting its interests against claims brought by the debtor" even if "the defendant's successful defense will result in the loss of an allegedly valuable claim asserted by the debtor." *Id.* at 875. Bankruptcy courts, therefore, differentiate between actions for affirmative relief against the debtor's estate, which are stayed, and defensive actions, which are not.

Sternberg v. Johnston, 595 F.3d 937 (9th Cir. 2010). A creditor has a duty to restore the status quo upon learning of the debtor's bankruptcy. "We have held on several occasions that the automatic stay imposes on non-debtor parties an affirmative duty of compliance." *Id.* at 943.

Burkart v, Coleman (In re Tippett), 542 F.3d 684 (9th Cir. 2008). The automatic stay does not void a chapter 7 debtor's unauthorized post-petition sale of his or her residence to a good-faith third-party purchaser; the stay does not apply to sales or transfers of property initiated by the debtor.

Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210 (9th Cir. 2002). "The scope of protections embodied in the automatic stay is quite broad, and serves as one of the most important protections in bankruptcy law." *Id.* at 1214.

Chugach Timber Corp. v. Northern Stevedoring & Handling Corp. (In re Chugach Forest Prods., Inc.), 23 F.3d 241 (9th Cir. 1994). As a general rule, "[t]he automatic stay of section 362(a) protects only the debtor, property of the debtor or property of the estate. It does not protect non-debtor parties or their property. Thus, section 362(a) does not stay actions against guarantors, sureties, corporate affiliates, or other non-debtor parties liable on the debts of the debtor." "Without doubt, 'a creditor's knowing retention of property of the estate constitutes a violation of' section 362(a)." *Id.* at 246.

Wekell v. U.S., 14 F.3d 32, 33 (9th Cir. 1994). The automatic stay went into effect even though Debtor's husband filed the petition on her behalf, perhaps without authority, and, therefore, the filing of bankruptcy was *ultra vires*.

Ford v. Civic Center Square (In re Roxford Foods, Inc.), 12 F.3d 875 (9th Cir. 1993). The automatic stay does not prevent adversary proceedings against the debtor in the bankruptcy court in which the debtor's bankruptcy is pending, as application of the stay in the home bankruptcy court would be illogical and would not serve the purposes underlying the automatic stay.

Eisinger v, Way (In re Way), 229 B.R. 11, 14 (B.A.P. 9th Cir. 1998). A counterclaim by a non-debtor, even in a case in which a defense does not violate the stay, is still subject to the stay.

TENTH CIRCUIT

TW Telecom Holdings Inc. v. Carolina Internet Ltd., 661 F.3d 495 (10th Cir. 2011). Reversing prior precedents that had allowed a debtor in bankruptcy to pursue an appeal of a judgment against it, the Tenth Circuit ruled the automatic stay of judicial proceedings against a debtor under § 362(a)(1) prevented the Court from proceeding with the chapter 11 debtor's appeal of a judgment against it. A footnote explained that the opinion had been circulated to the *en banc* court, which unanimously agreed to overrule the prior precedents. The Court held that § 362(a)(1) requires a stay of "all appeals in proceedings that were *originally brought* against the debtor, regardless of whether the debtor is the appellant or the appellee."

Valley Transit Mix of Ruidoso, Inc., v. Miller, 928 F.2d 354 (10th Cir. 1991). A party that claimed a mechanic's lien on real property, based on work it had performed for a lessee of the property, sought to foreclose its lien on the owner-lessor's interest in the property. The Court ruled that when the lessee filed bankruptcy, the automatic stay imposed by § 362(a)(6) on "any act to collect . . . or recover a claim against the debtor" applied to the lien claim even though the claimant was trying to collect only from the owner's interest in the property. Therefore, § 108(c) applied to toll the time New Mexico law gave the claimant to commence a suit to enforce its lien.

Gonzales v. IRS (In re Silver), 303 B.R. 849 (B.A.P. 10th Cir. 2004). The BAP ruled that the IRS's post-petition tax liens were void because they had been imposed in violation of § 362(a)(6), which stays attempts to "collect, assess, or recover" a prepetition claim against the debtor. Although the IRS had imposed the post-petition liens under Internal Revenue Code § 6901 against third parties to whom Debtor had transferred property, the IRS had imposed the liens in an effort to collect its claim against Debtor for unpaid prepetition income taxes.

ELEVENTH CIRCUIT

Jacks v. Wells Fargo Bank, N.A. (In re Jacks), 642 F.3d 1323 (11th Cir. 2011). Chapter 13 Debtors filed a class action lawsuit against a mortgage lender (althought the class was never certified) alleging, *inter alia*, that the mortgage lender violated the automatic stay by recording fees and costs for post-petition services on its internal records. The Court held that the lender's posting of charges was not an act in violation of the stay under §§ 362(a)(3),(a)(5) or (a)(6) because the lender took no action during the bankruptcy case to collect the fees.

Williford v. Williford (In re Williford), 294 F. App'x 518 (11th Cir. 2008). Husband and wife filed a joint chapter 13 case while their divorce case was pending. Two weeks after the bankruptcy filing, the state court entered a decree of divorce. Debtor-husband appealed the decree and the state appellate and state Supreme Court affirmed the original decree. No one informed the bankruptcy court of the divorce proceedings or decree. After the decree was final in state court, Debtor-husband filed a motion seeking to overturn confirmation of the plan in the joint case on grounds of fraud on the court. It became clear at the hearing that Debtor-husband, acting *pro se*, actually wanted the divorce decree vacated. The bankruptcy court ruled that the stay should be annulled for cause even though the decree was technically entered in violation of § 362(a). The Court of Appeals affirmed, acknowledging its own law that "actions taken in violation of the automatic stay are void and without effect," *United States v. White*, 466 F.3d 1241, 1244 (11th Cir. 2006), but finding that the annulment was warranted because it served the dual purposes of the automatic stay and preventing interference with the state circuit court's jurisdiction. The dual purposes of the automatic stay are "(1) reliev[ing] the debtor from financial pressure during the pendency of bankruptcy proceedings" and (2) "protect[ing] creditors by preventing the premature disbursement of the bankruptcy debtor's estate." *Carver v. Carver*, 954 F.2d 1573, 1576 (11th Cir. 1992).

Florida Department of Revenue v. Omine (In re Omine), 485 F.3d 1305 (11th Cir. 2007), *withdrawn pursuant to settlement*, 2007 U.S. App. LEXIS 30645 (11th Cir. June 26, 2007). The bankruptcy court held that the state violated the automatic stay when it sent letters directing Debtor's employer to begin garnishing Debtor's wages and when it offset Debtor's prepetition tax refund. The bankruptcy court awarded attorney's fees, costs and actual damages. On appeal, the state asserted that its actions were protected by § 362(b)(2). The Court of Appeals held that actions to take Debtor's income were violations of the stay because Debtor's post-petition income was essential to Debtor's ability to make plan payments; thus, that income was property of the estate. Any action to take that income violated the stay.

Motors Acceptance Corp.n v. Rozier (In re Rozier), 376 F.3d 1323 (11th Cir. 2004). Debtor filed a chapter 13 case after his vehicle was repossessed. Debtor sought turnover on the basis that the vehicle was property of the estate and protected by the automatic stay. The

Court of Appeals certified to the Georgia Supreme Court the question whether Debtor retained legal title or an ownership interest in the vehicle after repossession. The state court ruled that a debtor maintains ownership post-repossession until the creditor complies with the disposition or retention procedures under Georgia law. The vehicle was therefore subject to the stay and the creditor was in contempt for refusing to return the vehicle. *Contra, Charles R. Hall Motors, Inc. v. Lewis (In re Lewis)*, 137 F.3d 1280 (11th Cir. 1998) (holding that, under Alabama law, a debtor does not retain any ownership interest in a car once repossession occurs, and even if a debtor retained a statutory right to redeem the vehicle under state law, that right is insufficient to implicate the automatic stay and make the vehicle subject to turnover).

B.F. Goodrich Employees Federal Credit Union v. Patterson (In re Patterson), 967 F.2d 505 (11th Cir. 1992). Freeze of Debtors' credit union accounts by creditor upon bankruptcy filing violated the automatic stay when the credit union also dishonored checks against the account and refused to accept deposits to cover the checks. *See also Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995) (holding that a temporary administrative freeze on debtor's account did not violate the automatic stay when the creditor immediately filed a motion for setoff).

Borg-Warner Acceptance Corp. v. Hall, 685 F.2d 1306 (11th Cir. 1982). Debtors financed the purchase of consumer personalty under credit agreements with Borg-Warner. A final order denying stay relief to Borg-Warner was issued due to a finding that it lacked an enforceable security interest. The Court of Appeals ruled that Borg-Warner could take no action to regain the property and actions taken in violation of the automatic stay are void and without effect.

B. *EXCEPTIONS—§ 362(b)*

FIRST CIRCUIT

Soto-Rios v. Banco Popular De Puerto Rico (In re Soto-Rios), 662 F.3d 112 (1st Cir. 2011). A creditor submitted for recording the last of three mortgage deeds two years before Debtor filed bankruptcy. Due to the registrar's delay, the deeds were not recorded at the time of Debtor's bankruptcy filing. The Court affirmed the decision of the lower court in favor of the creditor, holding that the creditor did in fact have a prepetition "interest in property" thus satisfying the exceptions to the automatic stay and the strong-arm provision.

SECOND CIRCUIT

United States of America v. Colasuonno, 697 F.3d 164 (2d Cir. 2012). The district court resentenced Debtor-defendant to four months in jail after he was found to have willfully violated probation by failing to pay ordered restitution. Debtor appealed, arguing that, because he had filed for bankruptcy under chapter 7 after his initial sentencing, the automatic stay temporarily relieved him of his restitution obligations and precluded the district court from revoking his probation for failing to make restitution payments. The Second Circuit held that for purposes of § 362(b)(1), the criminal action did not end when the judgment of conviction became final, but rather continued through satisfaction of the judgment and, thus, the stay did not prevent the government from enforcing the conditions of Debtor's probation, including the requirement to pay restitution.

FOURTH CIRCUIT

Bd. of Supervisors v. Royal (In re Royal), 137 F. App'x 537 (4th Cir. 2005). The county operated a landfill next to Debtors' mobile home park. Debtors were forced to open new wells after the landfill contaminated wells that had previously supplied drinking water to the park. The county sought to address the environmental situation by requiring Debtors to tap into and use water from the authority's water system. Debtors refused. Arguing that water from the new wells was safe to drink, Debtors demanded that the county clean up the contamination instead. Debtors filed for bankruptcy protection after the county threatened to use its eminent domain power to obtain the portion of their property that contained the new wells. The Fourth Circuit agreed with the bankruptcy court, which had held that , as a matter of law, the proposed eminent domain taking did not qualify for the automatic stay exception under § 362(b)(4). The county was not "enforcing" its police and regulatory power, as required under § 362(b)(4), because it was not compelling compliance with or correcting violations of any public benefit law. Plaintiffs were not entitled to a § 362(b)(4) exception because the proposed use of the eminent domain power was not to correct a public benefit violation. The Court declined to become the first court to allow a municipal entity to invoke the § 362(b)(4) exception despite the fact that Debtors were not accused of violating any pre-existing public health or safety regulations.

***Simonini v. Bell* (*In re Simonini*)**, 69 F. App'x 169 (4th Cir. 2003). In Nevada, Debtor-husband was charged with five felony violations for writing bad checks with an intent to defraud. Both spouses then filed for chapter 7 bankruptcy relief. Later, Debtor-husband was arrested pursuant to a warrant issued in Nevada. He then filed a complaint against the creditors to whom he had written the bad checks. He sought injunctive relief under § 105(a), arguing that the Nevada criminal prosecution was, in essence, a debt collection on behalf of the creditors. The district court recognized that § 362 did not stay the criminal prosecution. The district court held that an injunction under § 105(a) was available, however, and permanently enjoined Debtor-husband's prosecution by the district attorney. The district attorney appealed. The Court of Appeals held that given the clear language of § 362(b) excepting all criminal prosecutions from the automatic stay, and the fundamental policy against federal interference with state criminal prosecutions, an injunction barring a Nevada state criminal proceeding was not necessary or appropriate to carry out the provisions of the Bankruptcy Code or to prevent an abuse of the process.

***Hutson v. Am. Preferred Prescription* (*In re Hutson*)**, 1999 U.S. App. LEXIS 2605 (4th Cir. 1999). The Court of Appeals reaffirmed that the filing of a bankruptcy petition operates as a stay to a wide range of actions and proceedings against a debtor. The Court then concluded that the stay is effective as against actions that arose prior to the filing of the petition; despite the broad meaning given the term "claim" in the Bankruptcy Code, it does not apply to actions that arose post-petition.

In re Husain, 364 B.R. 211 (Bankr. E.D. Va. 2007). Debtors attempted to reaffirm certain debts on automobiles to aid in their "fresh start" post-bankruptcy discharge. In a well-reasoned decision, the bankruptcy court found that the "ride through" continued to exist post-BAPCPA. Debtors' compliance with § 362(h) rendered § 521(d) inapplicable. The discharge injunction remains in effect until Debtors defaulted either on payment or insurance requirements and the creditor was prevented from enforcing its security interest until such time.

SEVENTH CIRCUIT

Eden v. Robert A. Chapski, Ltd., 405 F.3d 582 (7th Cir. 2005). Attorneys' fees awarded in a divorce proceeding are a debt in the nature of alimony, maintenance or support and thereby constitute a nondischargeable debt. The divorce proceeding that resulted in the award of the attorneys' fees, therefore, was excepted from the automatic stay under § 362(b)(2) as the commencement or continuation of an action for the establishment or modification of an order for alimony, maintenance, or support.

Alpern v. Lieb, 11 F.3d 689 (7th Cir. 1993). A pre-bankruptcy motion to impose Rule 11 sanctions in a suit separate from the bankruptcy filing could continue and was excepted from the automatic stay under § 362(b)(4) as an action pursuant to governmental police or regulatory powers.

EIGHTH CIRCUIT

Thomas v. Money Mart Fin. Servs. (In re Thomas), 428 F.3d 735 (8th Cir. 2005). The bankruptcy court concluded that the creditor had the right to enforce Debtor's checks because they were "presented" for purposes of the exception to the stay under § 362(b)(11). The Court of Appeals affirmed. "[T]he presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument" is excepted from the stay by § 362(b)(11). In addition, because a Missouri statute provides a defense to enforcement of a negotiable instrument only after the obligor has received its discharge and the debtor had not received her discharge at the time the creditor presented the checks, the creditor was not prohibited by Missouri laws from enforcing the debt.

Erikson v. Polk, 921 F.2d 200 (8th Cir. 1990). Debtors argued that the appellees violated the automatic stay by sending a letter notifying Debtors of the expiration of their lease. The Court of Appeals held that § 362(b)(10) provides an exception to the automatic stay for nonresidential leases.

NINTH CIRCUIT

Sternberg v. Johnson, 595 F.3d 937 (9th Cir. 2010). The commencement or continuation of an action to establish or modify domestic support obligations, or collect domestic support obligations from non-estate property is not stayed.

Leafty v. Aussie Sonoran Capital (In re Leafty), 479 B.R. 545 (B.A.P. 9th Cir. 2012). The automatic stay is inapplicable to any act to enforce any lien against or security interest in real property if (1) the case was filed in violation of a court order in a prior case prohibiting a future filing or (2) if the debtor is ineligible to be a debtor under § 109(g) (i.e., where debtor was the debtor in another case within preceding 180 days that was dismissed for willful failure to abide by court orders or for failure to appear before the court in proper prosecution of the case or was voluntarily dismissed by the debtor after a motion for relief from stay was filed). In such cases, in accordance with § 362(b)(21), no stay goes into effect with respect to actions to enforce liens on real property.

Advanced Ribbons & Office Prods., Inc. v. U.S. Interstate Distrib. (In re Advanced Ribbons & Office Prods., Inc.), 125 B.R. 259 (B.A.P. 9th Cir. 1991). "If the debtor was correct that the section 362(a)(6) stay prevented the foreclosure of third party property that is pledged to secure a debt of the debtor, the utilization of sections 1201 and 1301 to stay acts against an individual that secured a debt of the debtor would be unnecessary." The automatic stay of § 362(a) stays actions against a debtor or property of a debtor's estate, but not acts against a non-debtor's property that is pledged to secured a debtor's obligations. This limitation is supported by §§ 1201(a) and 1301(a), which extend the stay to individuals who are co-debtors with the debtor on a consumer debt. That stay is not extended to co-debtors in chapter 11 or chapter 7 cases, however, and is not extended to the property of co-debtors in those cases.

TENTH CIRCUIT

Garrett v. Cook, 652 F.3d 1249 (10th Cir. 2011). In 2004, the defendant in a civil suit pending in state court filed a bankruptcy petition. In 2010, Debtor-defendant improperly attempted to remove the still-pending state court action to federal district court. On remanding the case to state court, the district court awarded fees and costs to the plaintiff based on the improper removal. The Tenth Circuit determined that the § 362 automatic stay did not bar the district court's award because the fees and costs were entirely due to "voluntary, post-petition litigation" initiated and undertaken by Debtor-defendant.

Sovereign Bank v. Hepner (In re Roser), 613 F.3d 1240 (10th Cir. 2010). Section§ 546(b)(1)(A) makes a bankruptcy trustee's avoidance rights subject to any "generally applicable law" that allows perfection of an interest in property to relate back and to defeat intervening interests, and Colorado certificate of title law gives a perfected purchase money security interest (PMSI) in a vehicle priority over certain liens that arose during the time (up to 20 days) after Debtor took delivery of the vehicle but before the PMSI was perfected. Thus, § 362(b)(3) provided an exception to the automatic stay that permitted post-petition perfection of the PMSI.

Beaumont v. Dep't of Veteran Affairs, 586 F.3d 776 (10th Cir. 2009). A government agency that determined it had overpaid disability benefits because the recipient failed to report an inheritance began recouping the overpayment from future benefits, and continued the recoupment during the recipient's bankruptcy case. The bankruptcy court found that the recoupment did not violate the automatic stay imposed by § 362(a) because the agency's obligation to pay benefits and Debtor's obligation to repay the overpayment arose from a single integrated transaction, and it would be inequitable for Debtor to receive the inheritance, fail to satisfy his obligation to inform the agency of the inheritance, continue to receive benefits as if he had not received the inheritance, and then be able to discharge the overpayment in bankruptcy. The Tenth Circuit affirmed, adopting the bankruptcy court's opinion as its own.

ELEVENTH CIRCUIT

Florida Dep't of Revenue v. Rodriguez (In re Rodriguez), 367 F. App'x 25 (11th Cir. 2010). Debtor owed child support arrearages at the time he filed a chapter 13 case and the State of Florida filed a proof of claim. Debtor proposed a modified plan that paid only part of his monthly post-petition child support payments. The plan was confirmed without objection by the State, which then sent letters to Debtor seeking payment of the post-petition arrearages. The bankruptcy court held that the State had violated the automatic stay, but the district court reversed. The Court of Appeals agreed with the district court that § 362(b)(2) provides an exception to the automatic stay for "the collection of a domestic support obligation from property that is not property of the estate." The State was bound by the terms of Debtor's confirmed plan pursuant to § 1327(a), however, and on that basis could not collect child support not provided for by the plan during the pendency of the case.

Griggs v. City of Gadsden Revenue Dep't, 327 F. App'x 186 (11th Cir. 2009). Debtor, who was convicted of numerous violations of city ordinances, was on probation at the time she filed her bankruptcy petition. After she was jailed for violating her probation, she brought an adversary proceeding in bankruptcy court asserting that the City had violated the automatic stay. The Court of Appeals affirmed the bankruptcy court's ruling that the City's actions were covered by §§ 362(b)(1) and (b)(4) as the commencement or continuation of a criminal action or proceeding or actions to enforce a governmental unit's police or regulatory power.

Walker v. Gwynn (In re Walker), 157 F. App'x 171 (11th Cir. 2005). Before his bankruptcy filing, Debtor was convicted of grand theft, imprisoned, and ordered to pay restitution on his release. In his bankruptcy case, Debtor listed the restitution debt he owed to the victim of his crime, but he failed to pay. A hearing was held on the question whether to revoke Debtor's probation for failure to pay restitution and the creditor to whom the restitution was owed participated. Debtor moved to hold the creditor in contempt and for an award of sanctions, alleging that the creditor's statements at the hearing were untrue and that if restitution were paid, the creditor would gain an unfair advantage over other creditors. The Eleventh Circuit held that the creditor's actions were covered by the exception to the stay under § 362(b)(1) for criminal proceedings.

Wood v. Commissioner of Internal Revenue (In re Wood), 138 F. App'x 168 (11th Cir. 2005). Debtor filed a chapter 11 case and confirmed a plan that discharged all dischargeable tax claims. After confirmation, the IRS issued a notice of deficiency for pre-bankruptcy taxes it alleged that Debtor owed. He asserted that the automatic stay barred the notices. The Court of Appeals ruled that the notices did not violate the stay because the taxes at issue were nondischargeable and the issuance of notices of tax deficiency and any audit to determine tax liability are excepted from the stay by §§ 362(b)(9)(A) and (B).

Carver v. Carver, 954 F.2d 1573 (11th Cir. 1992). Chapter 13 Debtor was jailed for civil contempt action in state court because he failed to pay a debt for which he was liable under his divorce decree. He then sought and obtained damages for violation of the stay against his ex-wife and her attorney. The Eleventh Court held that the exception from the automatic stay relating to collection of alimony, maintenance or support from property that is not property of the state, § 362(b)(2), is very narrow. In many cases, the best forum in which to resolve issues about alimony, maintenance and support is state court, and bankruptcy courts should liberally grant motions for relief from stay or abstain under 28 U.S.C. § 1334(c)(1) to allow resolution of such issues in state court.

Barnette v. Evans, 673 F.2d 1250 (11th Cir. 1982). When Debtor was prosecuted for a worthless check in state court, the bankruptcy court enjoined the county prosecutor and complaining witness—a creditor in Debtor's case—from continuing the prosecution. Without citing § 362(b)(1), which excepts from the automatic stay "the commencement or continuation of a criminal action or proceeding against the debtor," the Court of Appeals held that there was no stay because there had been no criminal conviction and the debt had not been discharged; nor was there an immediate danger of injury or a federally protected right of the debtor that was being infringed.

C. *TERMINATION—§ 362(c)(3)*

THIRD CIRCUIT

***Bankers Trust Co. of California, N.A. v. Gillcrese* (*In re Gillcrese*)**, 346 B.R. 373 (Bankr. W.D. Pa. 2006). The court relied on the plain language of § 362(c)(3), which provides for a termination of the automatic stay on the 30th day after the petition date in certain successive cases commenced by repeat filers, and held that the provision only applies to debts or property of the debtor. The stay remains in effect beyond the 30 days after filing with respect to property of the estate.

FOURTH CIRCUIT

***Daimler Chrysler Fin. Servs. Am., LLC v. Jones* (*In re Jones*)**, 591 F.3d 308 (4th Cir. 2010). The Court held that § 362(h) requires debtors to indicate on the statement of intention that they will either (1) redeem the property or (2) reaffirm the debt. If the debtor does not so indicated, then the automatic stay terminates with respect to the otherwise encumbered property.

EIGHTH CIRCUIT

Perry v. Secretary of HUD (In re Perry), 223 B.R. 167 (B.A.P. 8th Cir. 1998). The BAP had to decide whether to grant Debtor's motion for a stay pending appeal after the bankruptcy court terminated the automatic stay. The court found that Debtor had used the bankruptcy court to frustrate the creditor's foreclosure remedies through serial filings that were not pursued. In such a case, any harm to the debtor is outweighed by the harm to the creditor from granting a stay, and public policy weighs against the grant of a stay in such circumstances.

NINTH CIRCUIT

Reswick v. Reswick (In re Reswick), 446 B.R. 362 (B.A.P. 9th Cir. 2011) When an individual debtor commences a second bankruptcy case within a year of the earlier case's dismissal, except when dismissal was under § 707(b), the automatic stay terminates in its entirety—that is, it terminates as to the debtor, the debtor's property, and property of the estate, on the 30th day after the second petition date.

TENTH CIRCUIT

In re Duran, 483 F.3d 653 (10th Cir. 2007). The Tenth Circuit adopted the district court's opinion affirming the bankruptcy court's ruling that a creditor did not violate the automatic stay by repossessing the chapter 13 Debtor's truck less than 10 days after the court granted the creditor's motion for stay relief. Although Rule 4001(a)(3) ordinarily stays an order granting stay relief for 10 days, § 362(e)(1) provides that the stay "is terminated" 30 days after a creditor files a motion for stay relief unless the court rules that the stay should remain in effect. Rules adopted by the Supreme Court cannot "abridge, enlarge, or modify any substantive right." The automatic stay termination provided by the statute is a substantive right, so the Rule cannot suspend that termination.

Holcomb v. Hardeman (In re Holcomb), 380 B.R. 813 (B.A.P. 10th Cir. 2008). The BAP ruled that a new BAPCPA provision—§ 362(c)(3)(A), which usually terminates the automatic stay in 30 days "with respect to the debtor" if the debtor had a prior bankruptcy case pending within one year that was dismissed—is plain and unambiguous, and terminates the stay with respect to the debtor and the debtor's property, but not with respect to property of the estate.

ELEVENTH CIRCUIT

In re Radson, 462 B.R. 911 (Bankr. S.D. Fla. 2011). Debtor filed a *pro se* chapter 13 case and did not move to extend the automatic stay during the 30-day period of § 362(c)(3). He had a case pending in the one-year period before the filing of the second case, so the automatic stay terminated. Debtor obtained counsel who sought to continue the stay pursuant to the court's equitable powers under § 105(a). The bankruptcy court refused to extend the stay because Debtor could not have proved that the second case was filed in good faith, there was an objection to the extension by a creditor, and failure to file the motion was not due to counsel's inadvertence

In re Thornes, 386 B.R. 903 (Bankr. S.D. Ga. 2007). To determine whether a debtor meets the "good faith" requirement of §§ 362(c)(3) or (c)(4), the court must employ a "totality of circumstances" test. This is the same test used in good faith determinations under other provisions of the Code.

In re McKinnon, 378 B.R. 405 (Bankr. S.D. Ga. 2007). The automatic stay in an individual's chapter 11 case is not subject to the requirements of §§ 362(c)(3) or (c)(4) if the debtor's prior case was a chapter 12 case, pursuant to the plain language of the statute.

In re Ajaka, 370 B.R. 426 (Bankr. N.D. Ga. 2007). Chapter 13 Debtor had filed one prior bankruptcy case in the one-year period before the filing of his second case. Debtor did not obtain an order extending the automatic stay during the first thirty days after filing, as allowed by § 362(c)(3). Debtor could not then proceed instead under § 362(c)(4) because that section only applies to debtors who have had 2 or more cases pending in the year before the filing of the current case. Therefore, the stay automatically terminated.

In re James, 358 B.R. 816 (Bankr. S.D. Ga. 2007). Chapter 13 Debtor had a prior bankruptcy case dismissed within the one-year period before filing the case at issue. When the bankruptcy court denied her motion to extend the automatic stay pursuant to § 362(c)(3), Debtor immediately moved to have the motion declared moot. She asserted that § 362(c)(3) affected the stay rights only against creditors who have taken collection action against the debtor prior to commencement of the case at issue. Since no creditor had taken any action, the stay could be extended. Section 362(c)(3) provides that "[t]he stay . . . with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case." The court ruled that this phrase has to be read in conjunction with the rest of the statute, and that § 362(c)(3) applies to all creditors regardless of any action or inaction before the filing of the current case.

In re Covert, 355 B.R. 327 (Bankr. N.D. Fla. 2006). Chapter 13 Debtor filed a motion to extend the automatic stay on the thirtieth day after the filing of the case. Debtor had a prior case that was dismissed in the one-year period immediately preceding the filing of the current case. Because the motion was filed too late for proper notice and hearing, the court ruled that the stay automatically expired pursuant to § 362(c)(3).

D. *NON-EXISTENCE—§ 362(c)(4)*

THIRD CIRCUIT

In re Ferguson, 376 B.R. 109 (Bankr. E.D. Pa. 2007). If the automatic stay under § 362(a) did not go into effect upon the filing of the case, because Debtor had two cases pending in the year before commencement of the case, the court may upon motion impose a stay on some or all of Debtor's creditors under § 362(c)(4)(B) provided that Debtor can prove that the present case was filed in good faith as to the creditors to be stayed.

FOURTH CIRCUIT

Tidewater Fin. Co. v. Williams, 498 F.3d 249 (4th Cir. 2007). If a debtor seeks to dismiss a chapter 13 case to avoid a creditor being granted relief from the stay, dismissal serves to bar the debtor from filing another bankruptcy petition for 180 days. § 109(g)(2). If the debtor files a chapter 13 petition within a year of dismissing a prior case, the automatic stay ceases to exist after 30 days. § 362(c)(3). If the debtor dismisses and re-files more than two chapter 13 petitions within a year, the automatic stay does not go into effect upon the filing of a third or subsequent petition. § 362(c)(4). The debtor bears the burden of rebutting, by clear and convincing evidence, a presumption that the most recent petition was filed in bad faith. § 362(c)(3)-(4).

Kreisler v. Goldberg, 478 F.3d 209 (4th Cir. 2007). Debtors claimed that the creditors violated the automatic stay under by pursuing a state ejectment action against Debtors' wholly-owned subsidiary. The Court held that the lower courts did not err in concluding that the automatic stay did not apply to the creditors' actions against Debtors' non-bankrupt subsidiary in the state court action because the ejectment action against Debtors' subsidiary was not against a bankruptcy debtor. It was therefore not an action to obtain dominion or control of property of Debtors' bankruptcy estate. This was because the non-bankrupt subsidiary was a separate entity created solely to hold title to property, and a judgment against it imposed no obligations or liability on Debtors. Furthermore, § 362(a)(3) was not applicable because the property lost due to the ejectment action affected only the value of Debtors' interests, not the nature and extent of Debtors' interest in the subsidiary.

EIGHTH CIRCUIT

Bates v. BAC Home Loans (In re Bates), 446 B.R. 301 (B.A.P. 8th Cir. 2011). Debtor filed a chapter 13 petition, but her case was dismissed about a year later for failure to make plan payments. Debtor filed a chapter 7 petition within a month of dismissal and received a discharge three months later. About three months after her discharge, Debtor filed her second chapter 13 petition, but her case was dismissed a few months later for failure to list her prior bankruptcy petitions. Debtor then filed yet another chapter 13, listing her first two bankruptcies but not the third. Debtor's lender proceeded with foreclosure proceedings, asserting that under § 362(d)(4) the automatic stay never went into effect given Debtor's prior petitions within the past year. Debtor appealed on the grounds that while the stay did not go into effect as to Debtor and Debtor's property, it was still in effect as to "property of the estate."

The Eighth Circuit BAP ruled that under § 362(d)(4), if a debtor had two or more bankruptcy cases pending within the previous year that were dismissed, and neither was a case that was re-filed under a chapter other than chapter 7 after dismissal under § 707(b), then the automatic stay under § 362(a) never goes into effect. No exception is made for "property of the estate." The Court explained that even if § 362(c)(3)(A) does distinguish between stays against the debtor and property of the estate, it is not proper to import an interpretation of § 362(c)(3) into (c)(4). In this case, therefore, the automatic stay never went into effect due to Debtor's prior petitions.

NINTH CIRCUIT

Nelson v. George Wong Pension Trust (In re Nelson), 391 B.R. 437 (B.A.P. 9th Cir. 2008). By the plain terms of § 362(c)(4), no stay arose in a chapter 13 case filed less than one year following dismissal of Debtors' two prior bankruptcy cases. The panel rejected Debtors' effort to "somehow convert the phrase in § 362(c)(4)(A)(i) providing that the § 362(a) automatic stay 'shall not go into effect' to one providing that 'the stay arises and is in effect, but may be terminated.'" Therefore, a post-petition foreclosure sale conducted by a mortgagee without moving for stay relief was not void, and the mortgagee was not liable for damages.

E. *DAMAGES FOR STAY VIOLATIONS*

SECOND CIRCUIT

Malicki v. Bernstein (In re Bernstein), 447 B.R. 684 (Bankr. D. Conn. 2011). A secured creditor filed a complaint seeking denial of chapter 7 Debtor's discharge pursuant to §§ 727(a)(2)(B) and/or 727(a)(4)(A) based upon Debtor's failure to disclose her interest in certain real property. Debtor filed a counterclaim for damages allegedly incurred as a result of plaintiff's willful violations of the stay, which consisted of a prohibited post-petition harassing telephone call and a visit to the subject property. With respect to the plaintiff's complaint, the court found that several facts undermined the conclusion that Debtor's failure to disclose her property interest was either "intentional or reckless" or "knowing or fraudulent" under §§ 727(a)(4)(A) and 727(a)(2)(B), respectively, including that Debtor's father had transferred the property interest to her at his own insistence and he continued to pay taxes on it, and that Debtor's failure to disclose her interest stemmed from her belief that she held no equity in the property. As to the counterclaim regarding the alleged stay violation, court found that the telephone call constituted a willful violation of the stay but that it had a *de minimus* impact upon Debtor (given that Debtor had suffered no monetary damages, incurred no attorney's fees, etc.) and that punitive damages were not appropriate, and the visit to the subject property did not violate the stay.

THIRD CIRCUIT

In re Myers, 491 F.3d 120 (3d Cir. 2007). The Court reaffirmed its holding in *In re Siciliano*, 13 F.3d 748 (3d Cir. 1994), that actions taken in violation of the automatic stay are void, but can be ratified retroactively if the stay is annulled pursuant to § 362(d). The Court stated that the most important factors in determining whether to annul the stay are: "(1) whether the creditor was aware of the filing or encouraged violation of the stay; (2) whether the debtor engaged in inequitable, unreasonable, or dishonest behavior; and (3) whether the creditor would be prejudiced." 491 F.3d at 129.

Solfanelli v. Corestates Bank N.A., 203 F.3d 197 (3d Cir. 2000). The Court of Appeals affirmed the bankruptcy court's award of punitive damages in the amount of $10,000 for a secured creditor's willful violation of the automatic stay. The secured creditor willfully garnished accounts containing post-petition funds that the creditor had no right to claim on the basis of its prepetition lien. The Court held that although the secured creditor did not act maliciously, its overzealous and negligent attachment of the post-petition funds, while it was aware of the automatic stay, justified the imposition of punitive damages.

In re Newlin, 29 B.R. 781 (E.D. Pa. 1983). The bankruptcy court assessed attorneys' fees against the IRS and held the IRS in contempt after the it violated the automatic stay by withholding a tax liability claim against Debtors. Although the bankruptcy court did not explicitly say so, the district court asserted that the contempt finding against the IRS was criminal, rather than civil, in nature. The district court held that the bankruptcy court did not have the power to impose criminal contempt sanctions against the IRS. The district court held that the bankruptcy judge, however, had authority under 28 U.S.C. § 2412(b) to impose attorneys' fees for violation of the automatic stay.

FOURTH CIRCUIT

***Citizens Bank v. Strumpf* (*In re Strumpf*)**, 37 F.3d 155 (4th Cir. 1994), *rev'd on other grounds*, 516 U.S. 16 (1995). The Court found that to award damages under § 362(k) the bankruptcy court need only find a willful violation of the automatic stay in the form of an intentional act with knowledge of the automatic stay. Thus, the award of attorney's fees, punitive damages, and nominal damages was not an abuse of discretion in this case.

Budget Serv. Co. v. Better Homes, 804 F.2d 289 (4th Cir. 1986). The bankruptcy court found that a lessor violated the automatic stay and the district court affirmed. On appeal, the Fourth Circuit found that "[t]he consequences of violation of the automatic stay provisions of § 362 are set out in § 362(h) which provides that 'an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.'"

Renier v. Merrell, 457 B.R. 484 (W.D. Va. 2011). The district court reiterated that the purpose of § 362(k) as "[t]o ensure the efficacy of the automatic stay, an individual may recover damages, costs, and fees for a 'willful violation' of the stay."

SIXTH CIRCUIT

***Transouth Fin. Corp. v. Sharon (In re Sharon)**,* 234 B.R. 676 (B.A.P. 6th Cir. 1999). The BAP reasoned the bankruptcy court appropriately interpreted §362(h) when it found that a violation of the automatic stay can be willful when the creditor knew of the stay and violated the stay intentionally. A party's belief that withholding possession of an asset will not violate a stay does not preclude the bankruptcy court's finding that an act of withholding possession is willful. An award of actual damages under § 362(h) for attorney fees was appropriate.

SEVENTH CIRCUIT

Aiello v. Providian Fin. Corp., 239 F.3d 876 (7th Cir. 2001). A credit card company asked Debtor to reaffirm her debt and threatened to allege fraud against her if she did not. Upon receiving the letter, Debtor said she suffered emotional distress and sued to recover damages for violation of the automatic stay. Characterizing the protection of the automatic stay as "financial in character," the Seventh Circuit ruled Debtor could not maintain an action for violation of the automatic stay unless she could show the type of loss within the contemplation of § 362—namely, financial loss.

Price v. Rochford, 947 F.2d 829 (7th Cir. 1991). The Seventh Circuit held that a claim for damages for an act taken in violation of the automatic stay survives termination of the bankruptcy, although the Court suggested in a footnote that such a case should be referred to the bankruptcy court in many circumstances.

EIGHTH CIRCUIT

Knaus v. Concordia Lumber Co. (In re Knaus), 889 F.2d 773 (8th Cir. 1989). This case deals with the award of attorneys' fees and punitive damages due to a violation of the automatic stay. According to § 362(h), "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." A willful violation occurs when the creditor acts deliberately with knowledge of the bankruptcy petition. In this case, a willful violation was present, supporting the award of attorneys' fees. A punitive damages award requires a finding of "appropriate circumstances" in addition to a willful violation. This means "egregious, intentional misconduct on the violator's part." The Court such conduct present in this case, supporting a punitive damages award as well.

NINTH CIRCUIT

Sternberg v. Johnston, 595 F.3d 937 (9th Cir. 2010). A debtor can recover emotional distress damages emanating from a violation of the automatic stay that arises immediately upon filing of a bankruptcy petition, even if the violation of the automatic stay was not egregious. The debtor can establish, without corroborating evidence, emotional distress damages from a violation of the automatic stay that arises upon the debtor's filing of a bankruptcy petition, if the circumstances make it obvious that a reasonable person would have suffered significant emotional harm. Debtor's actual damages from an attorney's violation of the automatic stay entitled Debtor to the recovery of attorney fees only for the work associated with enforcing the automatic stay and remedying the stay violation. Debtor was not entitled to recover fees incurred in prosecuting the adversary proceeding in which Debtor pursued his claim for those damages.

Dawson v. Washington Mutual Bank (In re Dawson), 390 F.3d 1139 (9th Cir. 2004). Not every willful violation of the automatic stay "merits compensation for emotional distress." The claimant must establish that he or she "suffered significant emotional harm" and that there is a "nexus between the claimed damages and the violation of the stay." In other words, "[t]he individual must be 'injured by' the violation to be eligible to claim actual damages."

TENTH CIRCUIT

Standard Indus., Inc., v. Aquila, Inc. (In re C.W. Mining Co.), 625 F.3d 1240 (10th Cir. 2010). A bankruptcy court found two creditors in contempt for violating the § 362(a) automatic stay imposed by the filing of an involuntary bankruptcy petition, voided their actions that violated the stay, and awarded attorney fees to the party that pursued the contempt motion. The Court found the creditors in contempt without actually holding a hearing. The Tenth Circuit rejected the creditors' claim that due process required an actual hearing; due process requires only reasonable notice and a meaningful opportunity to be heard, which had been provided to the creditors.

Johnson v. Smith (In re Johnson), 575 F.3d 1079 (10th Cir. 2009). Despite the dismissal of Debtors' chapter 13 case, the Tenth Circuit ruled that the bankruptcy court retained jurisdiction of Debtors' stay violation proceeding under § 362(k)(1). The purpose of that proceeding was not negated by dismissal because it would still serve to compensate for losses that were not extinguished by termination of the bankruptcy case and to vindicate the authority of the stay. The bankruptcy court did not abuse its discretion by basing a fee award on an attorney's verification without an evidentiary hearing since the stay violator had raised its objection to that procedure for the first time on appeal.

Under § 362(k), which allows for the recovery of damages and attorney fees for "any willful violation" of the automatic stay, the injured party must prove a willful violation by a preponderance of the evidence, not by clear and convincing evidence. A creditor who knew of the stay and intended the actions that constituted a stay violation commits a "willful violation" even if the creditor did not specifically intend to violate the stay.

In re Skinner, 917 F.2d 444 (10th Cir. 1990). Under § 105(a), the bankruptcy court has the power to impose monetary sanctions against a creditor on finding it in civil contempt for violating the automatic stay. In this case, the creditor sold Debtors' car after receiving notice of the automatic stay, and failed to return the car after learning its sale violated the stay. The bankruptcy court had awarded compensatory damages, attorney fees, and costs, but the creditor did not challenge the amount of the award in its appeal to the district court. Thus, it could not raise that question before the Court of Appeals.

In re Scroggin, 364 B.R. 772 (B.A.P. 10th Cir. 2007). A creditor had a continuing wage garnishment in effect under Kansas law when Debtor filed a chapter 13 bankruptcy petition, notice of which was sent to the creditor. The creditor claimed it mailed a release of garnishment form to the state court, but otherwise took no action to release the garnishment, which continued, forcing Debtor's attorney to take various actions to recover garnished funds and obtain release of the garnishment. Under § 362(k) (which was designated as (h) at the time), the bankruptcy court found that the creditor had willfully violated the automatic stay. The court awarded $7,000 in actual damages and attorney fees, and $5,000 in punitive damages. The BAP affirmed, ruling: (1) the creditor's appeal did not become moot when Debtor recovered the amounts the court awarded, because Debtor could be ordered to return the money to the creditor; (2) the creditor's alleged mailing of the release form to the state court was not sufficient under Kansas law to release the garnishment because the creditor did not serve the release on Debtor or her employer, as required by the applicable statute; (3) damages are allowable under § 362(k) if the creditor knew of the automatic stay and took intentional action that violated the stay, even if the creditor did not specifically intend to violate the stay; (4) the creditor's refusal to take affirmative action to get the garnishment stopped was intentional conduct; (5) the bankruptcy court's finding that the creditor's violation of the stay was willful was not clearly erroneous; and (6) the court did not abuse its discretion by awarding punitive damages because the creditor's inaction showed a reckless disregard for Debtor's federally protected rights.

In re Yates, 332 B.R. 1 (B.A.P. 10th Cir. 2005). Chapter 13 Debtors sought to enforce the automatic stay imposed by § 362(a) and to obtain an award of damages against a creditor that, despite being aware of the bankruptcy, refused to turn over a vehicle it had lawfully repossessed prepetition. The bankruptcy court found the creditor had willfully violated the automatic stay, awarded damages, and ordered the creditor to turn the vehicle over to Debtors. The BAP affirmed, concluding that the creditor's retention and continued possession of the vehicle after being notified of Debtors' bankruptcy constituted "an exercise of control" over property of the estate in violation of the automatic stay. The BAP also concluded that the creditor's refusal to return the vehicle after being notified of Debtors' bankruptcy was a "willful" violation of the automatic stay for which sanctions were mandated by § 362(k) (which was designated as (h) at the time).

ELEVENTH CIRCUIT

Russell v. Caffey (In re Caffey), 384 F. App'x 882 (11th Cir. 2010). An award of attorney's fees and sanctions against a child support claimant for obtaining funds from Debtor for his release from jail, post-petition, when the claimant knew of Debtor's bankruptcy, was appropriate due to the claimant's violation of the stay. The jailing of Debtor was for civil, not criminal, contempt and, therefore, not excepted from the stay by § 362(b)(1).

***Florida Dep't of Revenue v. Rodriguez (In re Rodriguez)*,** 367 F. App'x 25 (11th Cir. 2010). Because the State violated the terms of a debtor's confirmed chapter 13 plan, a finding of contempt and an award of attorney's fees was appropriate.

Florida Dep't of Revenue v. Omine (In re Omine), 485 F.3d 1305 (11th Cir. 2007), *withdrawn pursuant to settlement*, 2007 U.S. App. LEXIS 30645 (11th Cir. June 26, 2007)). The bankruptcy court awarded $1,000 of actual damages and $1,600 in attorney's fees and costs for the State's sending of two letters to Debtor's employer directing that the employer garnish Debtor's the wages, and a notice of offset of a prepetition tax refund. When additional collection letters were sent, the bankruptcy court awarded $12,740 in fees and costs. When the debtor received another notice of past-due support and a collection letter, the bankruptcy court made a third award of $1,045.12 in actual damages, $2,000 in sanctions, and $885 in attorney's fees. The Court of Appeals ruled that § 106(a)(3) precludes the imposition of punitive damages or sanctions against a State due to its sovereign immunity rights, and, the amount of any other award is limited by 28 U.S.C. § 2412(d)(2)(A).

Hardy v. United States (In re Hardy), 97 F.3d 1384 (11th Cir. 1996). Former chapter 13 Debtor brought an action alleging violation of the discharge injunction by the Internal Revenue Service when it attempted to collect a tax debt that had been discharged in Debtor's bankruptcy case. The Eleventh Circuit found that the bankruptcy court had jurisdiction to hear the matter under § 106(a) and had authority to issue a damage and sanction award under §§ 105 and 524. The court also has authority to award attorney's fees, limited by the requirements of 28 U.S.C. § 2412(d)(2)(A).

F. *MOTIONS FOR RELIEF FROM STAY*

THIRD CIRCUIT

In re Siciliano, 13 F.3d 748 (3d Cir. 1994). A bank moved for relief from the stay in order to validate a mortgage foreclosure sale that had already taken place, three days after the filing of Debtor's second petition. The Court of Appeals held that the bankruptcy court erred in dismissing the motion for relief and holding that the foreclosure sale was void. Section 362(d) specifically includes annulment as among the types of relief available to a party in interest, and thus the Court reasoned that the bankruptcy court could have annulled the stay pursuant to § 362(d) and validated the foreclosure sale.

In re Alcide, 450 B.R. 526 (Bankr. E.D. Pa. 2011). The bankruptcy court held that the servicer of a mortgage did not have standing to move for relief from stay as to the mortgaged property, either on the theory that the servicer was a party in interest because it was the holder of the mortgage, or under the theory that the servicer was acting as agent for its corporate parent, which was the putative holder of the mortgage. The court held that to establish itself as a party in interest entitled to seek relief from stay to foreclose on a property, the mortgage servicer must demonstrate that "(1) the initiation of the stay relief motion in the bankruptcy court is within the scope of authority delegated to the servicer by its principal and (2) the principal itself is a party in interest (i.e., its principal is a party with the right to enforce the mortgage." *Id.* at 539. In this case, the servicer could not establish that it had authority from the mortgage holder to initiate legal proceedings to enforce the mortgage.

FOURTH CIRCUIT

***Lee v. Anasti* (*In re Lee*)**, 461 F. App'x 227 (4th Cir. 2012). Appeal arose from what originally began as a real property dispute in South Carolina state court between Debtor and her brother over real property. Congress granted broad discretion to bankruptcy courts to lift the automatic stay to permit enforcement of rights against property of the estate. Thus, the Fourth Circuit found that the bankruptcy court did not abuse its discretion in granting the motion to lift the stay pursuant to § 362(d)(1).

Tidewater Fin. Co. v. Williams, 498 F.3d 249, 259 (4th Cir. 2007). If a debtor seeks to dismiss a chapter 13 case to avoid the grant of relief from stay to a creditor, the dismissal serves as a bar to the debtor's filing of another bankruptcy petition for 180 days. § 109(g)(2). If a debtor files a chapter 13 petition within a year of dismissing a prior case, the automatic stay ceases to exist after 30 days. § 362(c)(3). If the debtor dismisses and re-files more than two chapter 13 petitions within a year, the automatic stay does not go into effect upon the filing of a third or subsequent petition. § 362(c)(4). The debtor bears the burden of rebutting, by clear and convincing evidence, a presumption that the most recent petition was filed in bad faith. §§ 362(c)(3)-(4).

***Wiencko v. Ehrlich* (*In re Wiencko*)**, 99 F. App'x 466 (4th Cir. 2004). "Three factors are considered in determining whether cause exists for lifting a stay under § 362(d), whether: (1) the issues in the case involve only state law, so the expertise of the bankruptcy court is unnecessary; (2) modifying the stay will promote judicial economy and whether there would be greater interference with the bankruptcy case if the stay were not lifted because matters would have to be litigated in bankruptcy court; and (3) the estate can be protected properly by a requirement that creditors seek enforcement of any judgment through the bankruptcy court." (citing *In re Robbins*, 964 F.2d 342, 346 (4th Cir. 1992).

***Gen. Elec. Capital Auto Lease v. Eron* (*In re Eron*)**, 17 F. App'x 138 (4th Cir. 2001). Debtor filed for relief under chapter 13 and listed the creditor as holder of a lease in their confirmed plan. The Court of Appeals held that the creditor was entitled to relief from stay when Debtor failed to take some affirmative act to extinguish or limit the creditor's lien.

***Stith v. Bankers Trust Co.* (*In re Stith*)**, 1998 U.S. App. LEXIS 5087 (4th Cir. 1998). Debtor filed a chapter 13 petition, triggering the automatic stay under § 362. The bankruptcy court lifted the stay, finding that Debtor failed to make mortgage payments on his residence as required under the plan. Debtor appealed that order and sought a stay from the district court. Subsequently, the bankruptcy court dismissed the bankruptcy petition because Debtor materially defaulted on the plan by failing to pay a secured claim of the Internal Revenue Service as provided by the plan. The district court dismissed Debtor's appeal from the bankruptcy court's order lifting the automatic stay as moot, finding that dismissal vested the property of the estate in the entity in which the property was vested immediately prior to the commencement of the proceedings. Therefore, whether the stay was properly lifted was moot because, even if the stay should not have been lifted, it terminated when the bankruptcy proceeding was dismissed. The Court of Appeals affirmed on the reasoning of the district court.

Lewis Settlement Group, Inc. v. Mirza, 2010 U.S. Dist. LEXIS 80638 (E.D. Va. Aug. 10, 2010). The district court affirmed the bankruptcy court's holding that the appellant did not carry its burden of proof under § 362(g). Citing the statute, the Court reiterated that "'the party requesting such relief has the burden of proof on the issue of the debtor's equity in property,' the burden of proof 'on all other issues' falls on the party opposing the lift of the stay." § 362(g).

SIXTH CIRCUIT

Laguna Assocs. Ltd. Partnership v. Aetna Cas. & Sur. Co. (In re Laguna Assocs. Ltd. Partnership), 30 F.3d 734 (6th Cir. 1994). The Sixth Circuit held that a debtor's lack of good faith in filing the petition provides cause for lifting the stay to allow foreclosure. Bad faith can be reason for dismissal of a petition, and the Court did not see any substantive difference between the cause requirement for dismissal of a petition under § 1112(B) and the cause requirement for relief from an automatic stay under § 362 (d)(1). Thus, lack of good faith can constitute cause for lifting an automatic stay.

SEVENTH CIRCUIT

Redmond v. Fifth Third Bank, 624 F.3d 793 (7th Cir. 2010). Bringing circuit practices in line with other circuits, the Seventh Circuit ruled that a creditor must return a seized asset—a repossessed automobile in this case—to the bankruptcy estate and move for relief from the automatic stay instead of holding the property until the debtor provides proof of adequate protection.

EIGHTH CIRCUIT

Martens v. Countrywide Home Loans (In re Martens), 331 B.R. 395 (B.A.P. 8th Cir. 2005). In this case, a mortgagee sought relief from the automatic stay. Section 362(d) provides statutory grounds for granting relief from the stay that are in the disjunctive. The court, therefore, must grant relief if the movant either proves cause or proves that there is no equity in the property and that it is not necessary for a successful reorganization. Cause means "any reason whereby a creditor is receiving less than his bargain from a debtor and is without a remedy because of the bankruptcy proceeding." A creditor is entitled to relief if the debtor is not making mortgage payments and there is insufficient equity in the property to adequately protect the creditor. Here, the court held that cause existed to grant relief from the automatic stay.

NINTH CIRCUIT

Johnson v. Righetti (In re Johnson), 756 F.2d 738 (9th Cir. 1985). In deciding whether to grant relief from the automatic stay, a bankruptcy court is generally called upon to decide a limited set of issues: the adequacy of protection for the creditor, the debtor's equity in the property and the property's necessity to an effective reorganization. A creditor's claim or security is not finally determined in the relief from stay proceeding.

Edwards v. Wells Fargo Bank, N.A. (In re Edwards)*,* 454 B.R. 100 (B.A.P. 9th Cir. 2011). A creditor who holds a duly recorded trustee's deed is the presumptive title owner of property and, thus, has "some interest" in the property. As a result, the creditor undoubtedly "has a sufficient 'colorable' claim required for standing" to proceed with a motion for relief from stay.

Veal v. American Home Mortgage Servicing (In re Veal)*,* 450 B.R. 897 (B.A.P. 9th Cir. 2011). To establish standing to prosecute motion for relief from stay, the alleged assignee of Debtors' mortgage had to demonstrate that it had a colorable claim to receive payment pursuant to mortgage note, either by showing that it was a "person entitled to enforce the note," pursuant to Article 3 of the Uniform Commercial Code, or by showing that it had ownership or another property interest in note.

Kronemyer v. American Contractors Indemnity (In re Kronemyer)**,** 405 B.R. 915 (9th Cir. 2009). Section 362(d)(1) provides that "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay . . . (1) for cause, including the lack of adequate protection of an interest in property of such party in interest." Although the Bankruptcy Code does not expressly define "cause" for relief from stay under § 362(d)(1), courts determine its existence on a case-by-case basis. Among factors appropriate to consider in determining whether relief from the automatic stay should be granted to allow state court proceedings to continue are considerations of judicial economy and the expertise of the state court, as well as prejudice to the parties and whether bankruptcy issues are exclusively involved.

TENTH CIRCUIT

Miller v. Deutsche Bank Nat'l Trust Co. (In re Miller), 666 F.3d 1255 (10th Cir. 2012). Before Debtors filed a chapter 13 bankruptcy, a bank had brought a foreclosure action against them and obtained an order from a Colorado state court authorizing sale. Their bankruptcy filing imposed the § 362 automatic stay and halted the foreclosure proceeding. Reversing the lowers courts, the Tenth Circuit ruled that the bank had not shown it was entitled to stay relief. The central dispute was whether the bank was a "party in interest" under § 362(d), so it could obtain stay relief. The Court noted that the Bankruptcy Code does not define "party in interest," but that courts have ruled the phrase refers to "either a creditor or debtor of the bankruptcy estate." "Creditor" is defined as "an entity that has a claim [a "right to payment'] against the debtor," and the Court looked to Colorado law to determine whether the bank satisfied that definition. Under Colorado's version of the Uniform Commercial Code, a note indorsed in blank is payable to the bearer of the note, "and may be negotiated by transfer of possession alone." The bank had presented evidence that the note on Debtors' property had been indorsed in blank, but failed to present evidence that the bank possessed the note. Therefore, the bank did not prove it was a creditor of Debtors, or a "party in interest" entitled to seek stay relief. Although the Colorado state court found the bank had standing to foreclose, that ruling was not a final judgment and had no preclusive effect.

G. *MISCELLANEOUS*

FIRST CIRCUIT

Lomagno v. Salomon Bros. Realty Corp. (In re Lomagno), 429 F.3d 16 (1st Cir. 2005). After the bankruptcy court dismissed Debtors' bankruptcy petition based on issues raised *sua sponte*, Debtors appealed and also filed a motion to stay the dismissal pending appeal. The motion was denied by the BAP. While the dismissal was on appeal to the BAP, the debtor's home was sold to a creditor through a foreclosure sale. Subsequent to the sale, the BAP issued an order reversing the bankruptcy court's dismissal of the case. Debtors argued that the BAP's reversal of the dismissal reinstated the automatic stay *retroactively*. The bankruptcy court rejected this argument because Debtors had the right to pursue a stay of the dismissal, and did to a certain point, but failed to provide any explanation for why they did not diligently follow through on their motion for a stay pending appeal. The First Circuit affirmed the decision of the BAP.

SIXTH CIRCUIT

Co-debtor stay

Internal Revenue Serv. v. Westberry (In re Westberry), 215 F.3d 589 (6th Cir. 2000). The IRS instituted a collection action against Debtor's non-filing spouse for federal income and self-employment taxes incurred by Debtor. The appellate court, in reviewing the meaning of consumer debt, differentiated tax obligations from other debts and rejected the "profit motive test" used in consumer protection statutes. Thus, for purposes of the co-debtor stay, a debtor's liability for federal income and self-employment taxes is not a consumer debt.

NINTH CIRCUIT

Effect of Violation: Acts Taken in Violation of Stay are Void

Gruntz v. County of Los Angeles (In re Gruntz), 202 F.3d 1074 (9th Cir. 2000) (*en banc*). "The automatic stay is self-executing" and "sweeps broadly, enjoining the commencement or continuation of any judicial, administrative, or other proceedings against the debtor." In light of this broad sweep, actions, including judicial proceedings, "taken in violation of the automatic stay are void." *Id.* at 1081-82 (citing *Schwartz v. United States (In re Schwartz),* 954 F.2d 569, 571 (9th Cir. 1992)*; Phoenix Bond & Indemnity Co. v. Shamblin (In re Shamblin),* 890 F.2d 123, 125 (9th Cir. 1989)).

Griffin v. Wardrobe (In re Wardrobe). 559 F.3d 932, 934 (9th Cir. 2009). Citing *Gruntz* and *Schwartz*, the Court reiterated that "[a]ctions taken in violation of the automatic stay are void" *ab initio*. If actions taken by a state court in violation of an automatic stay are void, so too must be analogous actions taken by the board of a state administrative agency.

X. PROPERTY OF THE ESTATE

A. *GENERALLY*

FIRST CIRCUIT

Santiago v. Rivera (In re Santiago), 478 B.R. 516 (B.A.P. 1st Cir. 2012). The debtor's right to a tax refund originating from pre-petition earnings is property of the bankruptcy estate under § 541. The BAP did not reach the issue of whether the tax refund was considered Debtor's disposable income, and thus not subject to the wild card exemption because the trustee failed to object to the confirmation of the plan.

SECOND CIRCUIT

THIRD CIRCUIT

In re Jackus, 442 B.R. 365 (Bankr. D.N.J. 2011). Debtor's beneficial interest in an annuity issued to fund payments under a structured settlement of her personal injury claims was property of the estate under § 541(a) that, pursuant to § 541(c)(1)(A), could be sold under New Jersey law despite anti-assignment provisions in the annuity. The court found that in bankruptcy, the focus of the inquiry shifts from the best interests of the debtor to the best interests of the debtor's estate and its creditors. The court approved the transfer, and found that ultimately the transfer was in the best interests of all three (the estate, its creditors, and Debtor) under the facts of this case.

SEVENTH CIRCUIT

In re Meyers, 616 F.3d 626 (7th Cir. 2010). Chapter 7 Debtor filed bankruptcy on September 25, approximately 73.42% into the year. Debtor's income had been relatively constant for the prepetition period and remained so for the rest of the year. Post-petition, Debtor received a tax refund resulting from excess withholding. The chapter 7 trustee requested a *pro rata* share of Debtor's tax refund (73.42%) as property of the estate based on the number of prepetition days in the prior tax year.

The Seventh Circuit ruled that a tax refund, even if received post-petition, represents and is rooted in a prepetition asset and is thus part of the bankruptcy estate under § 541(a), based on the number of prepetition days in the taxable year for which the refund was issued. When a debtor's income remains fairly constant throughout the tax year, a *pro rata* allocation by the number of prepetition days fairly allocates a tax refund between the prepetition and post-petition periods.

EIGHTH CIRCUIT

Lovald v. Falzerano (In re Falzerano), 454 B.R. 81 (B.A.P. 8th Cir. 2011). Prepetition, Debtor received a life estate in a ranch, upon the death of his wife, with a remainder interest in their children. One child was excluded from the wife's will, which prompted Debtor and the heirs to enter into a settlement agreement to avoid a will contest. The settlement agreement provided that Debtor would retain his wife's personal property (which included her cattle) until he no longer needed them, and use the profits from the land and cattle to pay his living expenses. Debtor thereafter managed the probate estate's cattle. Sometime later, Debtor filed his chapter 7 petition. The chapter 7 trustee filed a complaint, pursuant to § 542, against the heirs of the probate estate to recover rent for the pasture and the value of the hay Debtor provided to the probate estate's cattle, alleging that the heirs were liable to the bankruptcy estate under an unjust enrichment theory. After trial, the bankruptcy court entered judgment in favor of the heirs, finding that they had not been unjustly enriched because Debtor received fair compensation, for services rendered, in the form of net profits.

The Eighth Circuit BAP ruled that an action to collect a disputed debt based on an unjust enrichment claim is not a debt that is "matured, payable on demand, or payable on order" within the meaning of § 542(b), nor is it a basis for collecting a debt under § 542(a). The court explained that § 542(a) permits a trustee to compel turnover only from entities that have control of estate property or its proceeds at the time of the turnover demand. Here, the heirs did not have control of any proceeds from the ranch and cattle that Debtor managed; Debtor was entitled to retain, and retained, such proceeds. Moreover, the trustee did not allege that the heirs possessed property of the estate, only that they owed Debtor payment on account of an alleged unjust enrichment claim. A demand based on an unjust enrichment claim is at best a disputed debt that would not be payable unless and until the trustee prevailed on its claim. Thus, the court found that the trustee's demand for turnover was beyond the scope of § 542.

NINTH CIRCUIT

Cal. Franchise Tax Bd. v. Kendall (In re Jones), 657 F.3d 921 (9th Cir. 2011). In a chapter 7 case, property of the estate under § 541 includes property held on the petition date. In a chapter 13 case, § 1306 adds to this property all property acquired between the chapter 13 petition filing date and the date the case is closed, dismissed or converted. This period of inclusion of additional property of the estate ends upon plan confirmation under § 1327(b) if the debtors elect to have property of the estate re-vested in them when their plan is confirmed.

TENTH CIRCUIT

In re Graves, 609 F.3d 1153 (10th Cir. 2010). Two months before filing bankruptcy, Debtors irrevocably elected to apply one year's tax overpayment to the next year's tax liability. The chapter 7 trustee sued Debtors under § 542 for turnover of the overpayment. The Tenth Circuit concluded that property of the bankruptcy estate included Debtors' contingent reversionary interest in the portion of the prepayment that was attributable to their prepetition earnings, but § 542 did not apply because Debtors never had "possession, custody, or control" of the overpayment during the bankruptcy case. Once Debtors' tax liability for the next year was determined, however, if they qualified for a refund, they would be required to turn over to the trustee any portion of the refund that was attributable to the estate's contingent reversionary interest.

Miller v. Bill & Carolyn Ltd. Partnership (In re Baldwin), 593 F.3d 1155 (10th Cir. 2010). When a married couple filed a chapter 7 bankruptcy, one of them owned a 99% interest as a limited partner in a limited partnership. Her parents were trustees of a trust that owned the other 1% as the general partner. The Court held that although the partnership had been established as a family estate-planning device, it could still operate its business for the purposes expressly stated in the partnership agreement, and the trustee could not force its judicial dissolution under Oklahoma law. In a separate appeal, however, the Court ruled that the trustee's notice of withdrawal and offer to buy the general partner's interest for $3,000, or sell the bankruptcy estate's 99% interest for $297,000, was valid and binding under the withdrawal provisions of the partnership agreement. The agreement's requirement that the offer to buy must be "on identical terms" as the offer to sell did not mean the total prices must be identical; rather, the requirement was satisfied by a proposal to buy or sell each percentage point of ownership interest for the same amount. The fact the provision did not account for the management and control differences between the general and limited partner interests did not make it unenforceable under Oklahoma law, even if it might be inequitable.

Olah v. Baird (In re Baird), 567 F.3d 1207 (10th Cir. 2009). The parents of a child injured during childbirth brought a malpractice claim against the doctor, who filed a chapter 7 petition while the suit was in its early stages. The creditors argued that the right to consent to settlement of the claim was property of the estate, and asked the trustee to "sell" that right to them. The trustee refused on the grounds that, under the terms of Debtor's malpractice insurance policy, there was no asset that he could assume and assign. The creditors sued in the bankruptcy court, which ruled for the trustee. The court found that the contract was executory and, because the trustee did not timely assume the policy, it was not property of the estate. The district court affirmed and the creditors appealed to the Tenth Circuit. That Court reversed, holding that the liability insurance policy for a period that ended before bankruptcy was not an executory contract that was deemed rejected under § 365(d)(1) because the chapter 7 trustee had not acted to assume it within 60 days of the bankruptcy filing. Debtor had paid for the insurance for the relevant time, and his continuing obligation to cooperate in defending against claims was not so material that his breach would excuse the insurance company from defending him. Under § 541(c)(1), the policy became property of the estate despite a provision prohibiting its assignment to any third party without the insurer's consent. Whether the trustee could further assign the policy was governed by Utah law, which does not allow non-assignability clauses in insurance policies to be enforced once a covered loss has occurred. The Court concluded that a covered loss occurred when, during the policy period, the creditors sued Debtor for negligence. The trustee could therefore assign the policy or otherwise exercise Debtor's remaining rights under the policy.

In re Wagers, 514 F.3d 1021 (10th Cir. 2007) (*per curiam*), *aff'g & adopting opinion pub. at* 355 B.R. 268 (B.A.P. 10th Cir. 2006). This decision eliminated a popular option for a debtor to pay an attorney to represent him or her in a chapter 7 bankruptcy. Under the Supreme Court's decision in *Lamie v. United States Trustee*, 540 U.S. 526 (2004), chapter 7 debtors' attorneys cannot be paid from property of the bankruptcy estate under § 330(a)(1) except when they are employed by case trustees as authorized by § 327. The Tenth Circuit concluded that, under Kansas law, a retainer Debtors had given their attorneys, consisting of cash and assignments of potential tax refunds, remained Debtors' property until the attorneys earned the fees by performing services. Therefore, the cash not applied to prepetition fees, as well as the assigned tax refunds (about $50,000), became property of the estate when Debtors filed bankruptcy. Those assets could not be applied to pay fees Debtors incurred post-petition because the chapter 7 trustee did not hire the attorneys to represent the estate.

In re Montgomery, 224 F.3d 1193 (10th Cir. 2000). Earned income tax credits, prorated to the date of the bankruptcy filing, are property of the estate under § 541.

McGavin v. Segal (In re McGavin), 189 F.3d 1215 (10th Cir. 1999). The Court of Appeals affirmed the imposition of constructive and resulting trusts in favor of the bankruptcy estate on property Debtor had transferred to his wife and a limited partnership created for his children's benefit. Debtor had continued to use the property as collateral for loans, the proceeds of which he controlled and used for personal and business transactions for his benefit. A constructive trust was properly imposed because Debtor had structured his assets to make himself judgment proof while retaining equitable and beneficial interests in the assets.

In re Fingado, 995 F.2d 175 (10th Cir. 1993). Under § 541(a)(2)(A), property of a debtor's bankruptcy estate includes interests of the debtor and the non-debtor spouse in community property that is under the debtor's "sole, equal, or joint management and control." State law determines whether property is community property. After the New Mexico Supreme Court answered a certified question by declaring that property Debtor and his wife had acquired through an instrument showing joint ownership was presumed to be community property, the Tenth Circuit ruled the property at issue was community property and, therefore, was also property of Debtor's bankruptcy estate.

In re Barowsky, 946 F.2d 1516 (10th Cir. 1991). In a chapter 7 case, the portion of the debtor's income tax refund that is attributable to the prepetition portion of the tax year during which the debtor filed bankruptcy constitutes property of the bankruptcy estate.

Jubber v. Ruiz (In re Ruiz), 455 B.R. 734 (B.A.P. 10th Cir. 2011). A chapter 7 trustee moved to require Debtors to turn over the amount of money that had been in their checking account on the day they filed bankruptcy. Debtors had written checks prepetition that cleared their account post-petition, and they claimed that they were not responsible for turnover of those funds. The court held (1) the money in the checking account became property of the estate under § 541, (2) Debtors had "possession, custody, or control" of the money during the case, and (3) Debtors could be compelled under § 542(a) to turn over to the trustee the amount that had been in the account on the day they filed bankruptcy.

In re Crowson, 431 B.R. 484 (B.A.P. 10th Cir. 2010). A chapter 7 debtor and her non-debtor spouse were entitled to a federal tax refund for the year during which they filed bankruptcy that arose from Debtor's wage withholdings and three tax credits that were treated as refundable overpayments: the earned income credit, the additional child tax credit, and the recovery rebate credit. The BAP ruled a prior decision—*In re Kleinfeldt*, 287 B.R. 291 (B.A.P. 10th Cir. 2002)—provided no guidance for dividing the joint refund because that decision was limited to the very narrow situation in which only one spouse has income and that spouse's wage withholdings generate the entire refund. Instead, the BAP relied on the approach and formulas the IRS would use to allocate tax liabilities and credits between a decedent's estate and the surviving spouse, or between spouses for purposes of offsetting only one spouse's refund against a prior liability. The court concluded that in this case it must determine what each spouse's refund or liability would be on a hypothetical separate tax return, divide Debtor's hypothetical refund or liability by the sum of both spouses' hypothetical refunds, and apply the resulting fraction to the joint refund to arrive at Debtor's (and therefore the bankruptcy estate's) share. Applying those calculations resulted in the estate being entitled to slightly less than one-half of the joint refund.

Kleinfeldt v. Russell (In re Kleinfeldt), 287 B.R. 291 (B.A.P. 10th Cir. 2002). The BAP ruled that a non-debtor spouse who had paid no withholding or estimated taxes was not entitled to any portion of a tax refund produced by Debtor's withholding tax payments, even though the couple filed a joint tax return. Consequently, the refund was property of Debtor's bankruptcy estate under § 541(a)(1).

ELEVENTH CIRCUIT

Bracewell v. Kelley (In re Bracewell), 454 F.3d 1234 (11th Cir. 2006). Chapter 7 Debtor's right to crop disaster payment based on events prior to the filing of the petition, as a result of legislation enacted after the filing, is not property of the estate because Debtor did not possess any property interest in the payment or any right to compensation for the lost crops until the legislation was passed. Payment did not constitute "proceeds" because it did not result directly from the sale or exchange of prepetition crops but, rather, from legislation authorizing financial assistance for crops already lost at the time of the bankruptcy filing.

Motors Acceptance Corp. v. Rozier (In re Rozier), 376 F.3d 1323 (11th Cir. 2004). In response to the Court's certified question, 348 F.3d 1305 (11th Cir. 2003), the Supreme Court of Georgia ruled that, under Georgia law, legal title to a repossessed motor vehicle remains with the debtor until the creditor disposes of the vehicle or retains it in accordance with the Uniform Commercial Code. *Motors Acceptance Corp. v. Rozier,* 597 S.E.2d 367 (Ga. 2004). Because both legal title and the right of redemption of a motor vehicle remain with a defaulting debtor even after repossession, the vehicle remained part of Debtor's bankruptcy estate and the bankruptcy court properly held the creditor in contempt for violation of the automatic stay in refusing to relinquish it to Debtor after the filing of the chapter 13 case.

Witko v. Menotte (In re Witko), 374 F.3d 1040 (11th Cir. 2004). After the filing of Debtor's chapter 7 bankruptcy case, a state court denied alimony to Debtor in a pending divorce proceeding. Debtor thereafter obtained a judgment against the attorney representing him in the divorce proceeding for malpractice in failing to obtain an alimony award. Under Florida law, the action against the attorney did not arise until Debtor suffered harm through the post-petition entry of the divorce judgment denying alimony. Because the malpractice action did not exist at the time of the filing of the bankruptcy case, it was not property of the bankruptcy estate.

Parker v. Wendy's Int'l, Inc., 365 F.3d 1268 (11th Cir. 2004). Because Debtor's unscheduled employment discrimination claim remained an asset of the bankruptcy estate under § 554, the doctrine of judicial estoppel did not preclude the chapter 7 trustee from prosecuting the claim.

Bell-Tell Federal Credit Union v. Kalter (In re Kalter), 292 F.3d 1350 (11th Cir. 2002), and ***Charles R. Hall Motors, Inc. v. Lewis (In re Lewis),*** 137 F.3d 1280 (11th Cir. 1998). Applying Florida law in *Kalter* and Alabama law in *Lewis*, the Court determined that, upon a secured creditor's repossession of a motor vehicle, the debtor has no ownership interest in it under applicable state law, other than a right of redemption. Accordingly, the motor vehicle itself is not property of the estate, and the bankruptcy court erred in concluding that the secured creditor violated the automatic stay by failing to return it.

Kalter did not cite *U.S. v. Whiting Pools, Inc.,* 462 U.S. 198 (1983), but *Lewis* distinguished it: "Unlike the IRS tax levy and seizure in *Whiting,* the repossession in this case effectively transferred 'ownership in the property' from the debtor to the creditor." *Lewis,* 137 F.3d at 1285 n.8 (citation omitted).

Johnson v. Alvarez (In re Alvarez), 224 F.3d 1273 (11th Cir. 2000). After the commencement of Debtor's chapter 7 bankruptcy case, he filed a malpractice action against his attorney for negligently disregarding his instructions to file under chapter 11. Because the harm occurred upon the filing of the bankruptcy case, it was property of the estate. Property of the estate includes interests that arise simultaneously with the filing of the case under § 341(a), which specifies that property of the estate includes interests of the debtor "as of" the filing, not "before" or "prior to" the filing.

First Nat'l Bank of Atlanta v. Willis, 908 F.2d 859 (11th Cir. 1990). The post-petition increase in the value of a whole life policy on the chapter 7 Debtor's life, in which creditor had a security interest, was property of the estate that was not subject to the creditor's security interest, when increase in value was attributable to the post-petition payment of premiums.

Southtrust Bank of Alabama, N.A. v. Thomas (In re Thomas), 883 F.2d 991 (11th Cir. 1989). Whether a debtor's interest in property is property of the estate is a federal question, but the nature and existence of a debtor's right to property is governed by state law. Under Alabama law, a secured creditor with a purchase-money security interest in a mobile home under a conditional sales contract has legal title, and the debtor has only a right to possession, contingent on fulfilling the financial obligation to the creditor. Property of the estate includes only the debtor's right to possession, not the mobile home itself. The creditor did not file a proof of claim in Debtor's chapter 13 case, but that did not affect its lien. Because property of the estate includes only the right to possession, confirmation of the plan did not vest title to the mobile home in Debtor free and clear of the creditor's interest under § 1327.

In re Wilson, 694 F.2d 236 (11th Cir. 1982). An excessive fee charged by Debtor's attorney, which the bankruptcy court required the attorney to refund, was property of the estate in which Debtor may claim an exemption.

Doan v. Hudgins (In re Doan), 672 F.2d 831 (11th Cir. 1982). Debtor's income tax refund was property of the estate, even though amount of the refund did not become fixed until the end of the tax year, which occurred after the bankruptcy filing.

B. *INHERITED PROPERTY*

THIRD CIRCUIT

***Elliott v. PNC Bank, N.A.*, (*In re Kiesewetter*)**, 2011 U.S. Dist. LEXIS 11057398 (W.D. Pa. Sept. 28, 2011). In this case, Debtor was the beneficiary of a marital trust that had been established by her former husband. Although a valid spendthrift provision in the marital trust protected the future income distributions to Debtor from being property of the estate, because Debtor became entitled to distributions from the marital trust by "bequest, devise, or inheritance" within 180 days of the filing of her petition, those distributions received or required to be made within that period became property of the estate post-petition under § 541(a)(5)(A).

FOURTH CIRCUIT

Birney v. Smith (In re Birney), 200 F.3d 225 (4th Cir. 1999). Pre-petition, Debtor and his non-debtor wife owned real property as tenants by the entireties. The wife died post-petition, vesting her husband with sole ownership of the property. Creditor argued that Debtor's previously claimed exemption in the property was no longer permissible and that the property reverted to property of the estate pursuant to §541(a)(5)(A), which provides that property acquired by a debtor within 180 days after the petition date through bequest, devise, or inheritance becomes property of the estate. The Court held that a tenant by the entireties does not inherit a co-tenant's interest in property upon the co-tenant's death; instead, the surviving co-tenant continues full ownership of the property alone. Therefore, § 541(a)(5)(A) was inapplicable.

U.S. v. Gold (In re Avis), 178 F.3d 718 (4th Cir. 1999). The automatic stay prohibits perfection of an IRS tax lien on property inherited by a debtor post-petition that becomes property of the estate pursuant to § 541(a)(5)(A). An IRS tax lien attaches to after-acquired property of a tax debtor and is perfected by "operation of law" at the time the debtor acquires the property. The Court held, however, that post-petition attachment and perfection of an IRS tax lien "by operation of law" constitutes an "act" that is stayed by § 362(a)(5).

von Gal v. BB & T Corp., 2007 U.S. Dist. LEXIS 49035 (W.D. Va. July 6, 2007). Post-petition, following the death of his mother, Debtor inherited a 50% interest in her estate, but proceeded to make unauthorized withdrawals from and to convert funds held in her bank accounts. The bankruptcy trustee and a creditor sued the bank for improper negotiation, conversion and failure to exercise reasonable care. In affirming the bankruptcy court's dismissal of the adversary proceeding for lack of standing, the district court held that the trustee could have no greater rights in the property—here, the claims against the bank—than Debtor had. Under applicable state law, parties may not benefit from their own wrongdoing. Therefore, the court concluded that Debtor had no legal or equitable interest in any funds he wrongfully withdrew from the bank. Consequently the trustee was barred from sharing in any recovery from the bank.

FIFTH CIRCUIT

In re Hurst, 8 F.3d 22 (5th Cir. 1993). Section 541(a)(5) specifically provides that property inherited more than 180 days after the filing of the bankruptcy petition is not included in the estate. The Fifth Circuit found, however, that this also applies to an *interest* in inherited property. Thus, if an individual inherits an interest on specific property before the 180 days, that property can still be included as part of the bankruptcy estate.

SEVENTH CIRCUIT

In re Chenoweth, 3 F.3d 1111 (7th Cir. 1993). The Seventh Circuit held that a debtor "acquires or becomes entitled to acquire" a "bequest, devise, or inheritance" under § 541(a)(5)(A) at the time of a testator's death, rather than at the time the testator's will is admitted to probate. This holding makes it more likely that entitlement to the property will take place within 180 days of the filing of the petition, making the property part of the bankruptcy estate.

In Lybrook, 951 F.2d 136 (7th Cir. 1991). The Seventh Circuit held that conversion from chapter 13 to chapter 7 does not remove property from the estate that was inherited more than 180 days after the filing of the original petition. The 1994 addition of § 348(f) changes this result, however, unless the debtor converts the case in bad faith.

NINTH CIRCUIT

Woodson v. Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610 (9th Cir. 1988). An unmatured life insurance policy fully exempt under state law, Cal. Civ. Proc. Code § 704.100(a), as of the petition date matured post-petition. The proceeds of the policy became property of the estate under § 541(a)(5)(C). The policy proceeds were subject to a different state exemption statute than the unmatured policy, Cal. Civ. Proc. Code § 704.100(c), and were only partially exempt to the extent necessary for the support of the debtor and his family. The Ninth Circuit applied the lesser conditional exemption statute to prevent any incentive to manipulate the date of bankruptcy by characterizing the policy proceeds as after-acquired property.

Wolf v. Salven (In re Wolf), 248 B.R. 365 (B.A.P. 9th Cir. 2000). Cash and real estate received post-petition was property of the estate, and the wildcard exemption applicable to Debtor's post-petition inheritance was the smaller one available at the time he filed his petition, not an increased one subsequently passed by the legislature at the time the inheritance was received.

TENTH CIRCUIT

Peters v. Wise (In re Wise), 346 F.3d 1239 (10th Cir. 2003). Under § 541(a)(5)(B), property of a debtor's bankruptcy estate includes an interest in property that the debtor acquires within 180 days after filing for bankruptcy as a result of either a property settlement with the debtor's spouse or a divorce decree. The Tenth Circuit ruled that any award of maintenance to a spouse in Colorado is a personal statutory right, not a property right, and that Debtor's personal right to future maintenance was not an interest in property under § 541(a)(5)(B). As a policy matter, bringing post-petition alimony into the bankruptcy estate would jeopardize the debtor-spouse's fresh start and substantially interfere with her ability to support herself in the future.

In re Hall, 441 B.R. 680 (B.A.P. 10th Cir. 2009). The BAP held that although the chapter 7 Debtor-wife's father died less than 180 days after she filed bankruptcy, § 541(a)(5) did not bring into the bankruptcy estate property that passed to her as a result of (1) a transfer-on-death deed, (2) a payable-on-death beneficiary designation for certificates of deposit and U.S. bonds, and (3) a beneficiary designation under an individual retirement account. These transfers were not made by "bequest, devise, or inheritance," as required for § 541(a)(5) to make them property of the estate. Furthermore, under Kansas law, Debtor-wife had no legal or equitable interest in these assets when she filed bankruptcy, as was required for them to constitute property of the estate under § 541(a)(1).

C. *POST-PETITION PROCEEDS, PROFITS AND EARNINGS*

THIRD CIRCUIT

***Firtel v. Bernheim* (*In re Bernheim*)**, 62 B.R. 739 (D.N.J. 1986). Debtor had an ownership interest in a real estate corporation. The question was whether distributions of commissions from the corporation to Debtor constituted "earnings" to be excluded from the estate on the grounds that they were earned post-petition. The court held that the distributions were not a result of services performed by Debtor; rather, they were essentially profits on the real estate corporation's stock that had been acquired pre-petition, and thus the distributions constituted estate property under § 541(a)(6).

In re Shepherd, 12 B.R. 151 (E.D. Pa. 1981). This case explains the differences between chapter 7 and chapter 13 with respect to future earnings. In this case, Debtor was a school teacher who had authorized his employer to periodically deduct money from his salary to pay to a credit union for public school employees. These payroll deductions continued after Debtor filed for relief under chapter 13. The earnings from which the credit union payments were deducted thus constituted property of the estate, and the post-petition payments had to be disgorged.

FOURTH CIRCUIT

Beaman v. Shearin (In re Shearin), 224 F.3d 346 (4th Cir. 2000). A law firm partner's pre-petition capital account, representing the partner's capital contribution to his law firm, and the portion of the partner's year end profits allocable to pre-petition work, even when not distributed until post-petition, constitute property of the estate. The Fourth Circuit, citing § 541(a)(6), affirmed the decision of the lower courts and held that the chapter 7 Debtor could not retain his prepetition interest in the firm and the profits stemming from it after they had become property of the estate. The firm's practice of allocating and distributing profits at year-end—here, post-petition—did not take them out of the bankruptcy estate. The Court also found no error in the bankruptcy court's allocation of a portion of the profits to pre-petition work, which constituted property of the estate, and its conclusion that earnings from services for post-petition work were not property of the estate.

West Virginia State Tax Dep't v. Mullins (In re Mullins), 2009 U.S. Dist. LEXIS 90691 (S.D.W. Va. Sept. 30, 2009). The West Virginia State Tax Department was held to have a secured claim against the chapter 13 Debtors' property, other than post-confirmation future earnings or income, despite the fact that the Tax Department did not file its notice of lien for failure to pay post-petition state income taxes until post-petition and post-confirmation. The Court opined that, upon confirmation of a chapter 13 plan, a debtor's pre-petition property and any after-acquired property through the date of confirmation vest in the debtor under § 1327(b) so as to no longer constitute property of the estate subject to the automatic stay. Any property acquired after confirmation, including post-petition earnings, become property of the estate pursuant to § 1306(a)(2) and are protected by the stay.

Breen v. Guttman (In re Breen), 2007 U.S. Dist. LEXIS 33715 (D. Md. May 8, 2007). The chapter 7 bankruptcy trustee and the bankruptcy court have jurisdiction and authority to control the settlement of causes of action brought in state court litigation by

Debtor, which relate both to Debtor's pre- and post-petition wage claims against his former employer. Debtor's state court lawsuit involved claims for pre-petition earnings, which constitute property of the estate, and post-petition earnings, which are excluded from property of the estate under § 541(a)(6). The trustee ultimately settled the entirety of the claims against the former employer in the state litigation, and the bankruptcy court approved the settlement. In affirming, the district court held, *inter alia*, that the bankruptcy court possessed "related to" jurisdiction over the state litigation as the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy, and the bankruptcy court provided Debtor with a full and fair opportunity to present evidence establishing the existence and value of the post-petition claims at an evidentiary hearing before approving the proposed settlement. Therefore, Debtor was entitled to the proceeds of the settlement allocated by the bankruptcy court to Debtor's post-petition wage causes of action, and the estate was entitled to those allocated to the pre-petition wage causes of action.

Stackhouse v. Plumlee (In re Plumlee), 236 B.R. 606 (E.D. Va. 1999). Pre-petition, Debtor agreed to merge his company with another, ECI, but ECI abandoned the merger post-petition. After Debtor had been discharged and the chapter 7 case closed, Debtor won a jury verdict against ECI for fraud based on ECI's pre-petition activities related to the failed merger. The parties ultimately entered into a post-judgment settlement agreement. One of Debtor's creditors successfully reopened the bankruptcy case, and the bankruptcy trustee obtained summary judgment in an adversary proceeding that the settlement proceeds constituted property of the estate. In affirming the decision of the bankruptcy court, the district court held that because Debtor's claim against ECI, which led to the jury verdict and the ultimate settlement payment, was "sufficiently rooted" in pre-petition activities—despite the fact that the merger was not abandoned and some of Debtor's injuries did not occur until post-petition—the payment constituted proceeds from property of the estate under § 541(a)(6).

SEVENTH CIRCUIT

The Seventh Circuit has ruled that a number of types of payments qualify as "[p]roceeds . . . of or from property of the estate" and do not qualify as "earnings from services performed by an individual debtor after the commencement of the case," and therefore are included as property of the estate under § 541(a)(6). Payments qualified as such include: disability payments (*In re Stinnett*, 465 F.3d 309 (7th Cir. 2006)); professional goodwill (*In re Prince*, 85 F.3d 314 (7th

Cir.1996)); worker's compensation claims (*In re Yonikus*, 996 F.2d 866 (7th Cir. 1993); and the fair value of services rendered under a contingency-fee agreement *(In re Carlson*, 263 F.3d 748 (7th Cir. 2001). In contrast, the Seventh Circuit has held that military retirement pay qualifies as earnings from services performed after the commencement of the case and therefore such pay is not property of the estate. *In re Haynes*, 679 F.2d 718 (7th Cir. 2010).

Rainey v. United Parcel Serv., Inc., 466 F. App'x 542 (7th Cir. 2012). A chapter 13 estate includes all property acquired after the petition is filed and before the case is closed. Thus, debtors have a continuing duty to schedule newly acquired assets while the bankruptcy case is open.

In re Meyers, 616 F.3d 626 (7th Cir. 2010). The Seventh Circuit upheld use of the "pro rata by days" method of computing the portion of an income tax refund belonging to the bankruptcy estate. Although the Court said the method might not be appropriate in all cases, in this case the trustee showed that Debtor had a steady job and income to establish a prima facie case for turnover of that portion of the income tax refund attributable to the pre-filing period.

NINTH CIRCUIT

Jess v. Carey (In re Jess), 169 F.3d 1204 (9th Cir. 1999). The portion of a contingent fee earned pre-petition is property of the estate because this portion constitutes proceeds of an asset of the estate—the pre-petition contingency fee contract—rather than post-petition earnings.

Fitzsimmons v. Walsh (In re Fitzsimmons), 725 F.2d 1208 (9th Cir. 1984). The post-petition, but not pre-petition, earnings from services of a debtor operating a sole proprietorship in a chapter 11 case are property of the estate.

TENTH CIRCUIT

Christie v. Royal (In re Christie), 233 B.R. 110 (B.A.P. 10th Cir. 1999). The chapter 7 Debtors' post-petition earnings and the proceeds of a post-petition loan did not become property of their bankruptcy estate under § 541(a) just because Debtors used them to overpay a prepetition tax liability that was nondischargeable. The tax refund thus generated, therefore, was not property of the estate.

ELEVENTH CIRCUIT

Robinson v. Tyson Foods, Inc., 595 F.3d 1269 (11th Cir. 2010). Under the terms of the confirmation order, property of the estate did not vest in Debtor until the grant of a discharge. Consequently, Debtor's post-petition claim for employment discrimination was property of the estate under § 1306. Her failure to disclose the lawsuit in the bankruptcy case barred her assertion of the claim under the doctrine of judicial estoppel.

Waldron v. Brown (In re Waldron), 536 F.3d 1239 (11th Cir. 2008). Chapter 13 Debtor's claim arising from a post-confirmation automobile accident was property of the estate under § 1306(a), even though property of the estate re-vested in Debtor under § 1327(b). Section 1306(a) does not mention confirmation of the debtor's plan as an event relevant to what assets are property of the estate, and § 1327(b) does not address assets acquired after confirmation. The "estate transformation" approach adopted in *Telfair v. First Union Mortgage Corp.,* 216 F.3d 1333 (11th Cir. 2000), does not apply to entirely new property interests acquired by the debtor after confirmation and unencumbered by an existing obligation.

Telfair v. First Union Mortgage Corp., 216 F.3d 1333 (11th Cir. 2000). The home lender's improper application of post-confirmation mortgage loan payments after confirmation of Debtor's chapter 13 plan did not violate the automatic stay because Debtor's payments from post-confirmation earnings were not property of the estate. Under the "estate transformation" approach that the court adopted, property of the estate after confirmation includes only post-confirmation earnings that are necessary to make plan payments to the chapter 13 trustee.

D. *PROPERTY EXCLUDED FROM THE ESTATE*

UNITED STATES SUPREME COURT

Patterson v. Schumate, 504 U.S. 753 (1992). The Supreme Court held that § 541(c)(2) encompasses all "applicable nonbankruptcy law," whether state or federal, resolving the circuit split on this issue. Thus, an anti-alienation provision in a valid spendthrift trust created under state law is an enforceable "restriction on the transfer of a beneficial interest of the debtor," thereby excluding the trust assets from the bankruptcy estate. The ERISA-qualified pension plan in this case contained an anti-alienation provision that satisfied § 541(c)(2) as an enforceable "restriction on transfer." Debtor's interest in the pension plan was accordingly excluded from his bankruptcy estate.

THIRD CIRCUIT

In re Laher, 496 F.3d 279 (3d Cir. 2007). The Third Circuit held that the chapter 7 Debtor's retirement annuity was a trust under New York law, and therefore Debtor's interest therein was excluded from the bankruptcy estate under § 541(c)(2).

Orr v. Yuhas (In re Yuhas), 104 F.3d 612 (3d Cir. 1997). The Court held that a New Jersey law, stating that funds held in a qualifying Individual Retirement Account (IRA) are exempt from all claims of creditors, constituted a "restriction on the transfer" of the IRA funds. Pursuant to § 541(c)(2), Debtor's IRA was excluded from his bankruptcy estate.

Velis v. Kardanis, 949 F.2d 78 (3d Cir. 1991). This case dealt with § 541(c)(2), which excludes property from the bankruptcy estate to the extent that "a restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." Prior to the Supreme Court's decision in *Patterson v. Schumate*, 504 U.S. 753 (1992), the Courts of Appeal were split as to whether "applicable nonbankruptcy law" encompasses state spendthrift law only, or both state and federal law. Here, the Court of Appeals sided with the minority view, and held that the statute encompasses both state and federal law.

FOURTH CIRCUIT

Levin v. Wachovia Bank, 436 F. App'x 175 (4th Cir. June 28, 2011). Applicable state law governs the enforceability and extent of a spendthrift provision in a trust in determining if the trust income and/or principal is excluded from property of the estate of the debtor-beneficiary under § 541(c)(2). Under applicable Pennsylvania law, the spendthrift provisions at issue excluded all of the trust assets from property of the estate given that they expressly referenced both income and principal. While there is a split of authority as to whether termination of a spendthrift trust causes a debtor's remainder interest to become property of the estate, under applicable Pennsylvania law a spendthrift provision protects a beneficiary's remainder interests in trust assets if the spendthrift provision so provides.

Biegler v. Heep, 1999 U.S. App. LEXIS 1421 (4th Cir. Feb. 2, 1999). Exclusion of a debtor-beneficiary's interest in spendthrift trust assets from the bankruptcy estate depends on the beneficiary's interests "as of the commencement of the case" pursuant to §§ 541(a)(1) and (c)(2). In affirming the holding of the district court, the Fourth Circuit held that because Debtor's interests were contingent and subject to enforceable spendthrift trust provisions as of the petition date, the happening of the contingencies post-petition did not act to bring Debtor's interests in the trust assets into the bankruptcy estate.

Abbate v. Spear, 289 B.R. 62 (E.D. Va. 2003). Debtor's interest in an ERISA-qualified 401(k) plan is excluded from the bankruptcy estate pursuant to § 541(c)(2) and the Supreme Court's holding in *Patterson v. Shumate*, 504 U.S. 753 (1992). Under applicable Virginia state law, used by Debtors in scheduling their exemptions, a debtor is entitled to an unlimited IRA exemption. The Virginia exemption statute provides, however, that if a debtor claims an "exemption" under federal law for a 401(k) plan, the debtor is not entitled to the unlimited state law exemption for his or her IRA. The Virginia statute further limits the total amount a debtor can claim as exempt under the statute if the debtor has an interest in more than one "retirement plan." In affirming the decision of the bankruptcy court, the district court held that (i) the Virginia statute was not preempted by ERISA, (ii) a 401(k) plan constitutes a "retirement plan" under the Virginia statute, (iii) the debtor, who had both a 401(k) and an IRA and who had "exempted" the 401(k), was barred from claiming the unlimited exemption under the Virginia statute for the IRA, and (iv) the amount of the 401(k) "exempted" under § 541(c)(2) and *Patterson* was properly used by the bankruptcy court in reducing the amount of the allowed exemption for an IRA under the Virginia statute.

Internal Revenue Service v. Wingfield (In re Wingfield), 284 B.R. 787 (E.D. Va. 2002). The IRS, under statute, can obtain a lien in an individual's 401(k) plan. Because 401(k) plans are excluded from property of the estate, however, the IRS cannot use a lien in a debtor's 401(k) for purposes of establishing itself as a secured creditor of a debtor's estate.

Phillips v. Bottoms, 260 B.R. 393 (E.D. Va. 2000). An IRA does not constitute an ERISA-qualified plan so as to exclude a debtor's interest in an IRA from property of the estate under § 541(c)(2). Furthermore, funds rolled over from an ERISA-qualified plan into an IRA are likewise not excluded from property of the estate under § 541(c)(2). The funds do not retain their exempt status. ERISA does not contain language imposing an anti-alienation requirement on funds withdrawn from a qualified ERISA plan or rolled over into an IRA so as to bring such funds within the purview of § 541(c)(2).

Internal Revenue Service v. McIver (In re McIver), 255 B.R. 281 (D. Md. 2000). The present value of a future stream of payments to be received by a debtor under an annuities plan, which plan constitutes an enforceable spendthrift trust under applicable New York state law, is property of the estate with respect to determining the secured amount of an IRS tax lien claim. Under federal law, 26 U.S.C. § 6321, an IRS tax lien can attach to a person's interest in an enforceable spendthrift trust. Therefore, even though a debtor's interest in a spendthrift trust would be excluded from property of the estate with respect to other creditors under § 541(c)(2), 26 U.S.C. § 6321 constitutes applicable non-bankruptcy law for purposes of

§ 541(c)(2) causing annuity interests to remain property of the estate with respect to an IRS secured tax lien claim.

FIFTH CIRCUIT

In re Bradley, 501 F.2d 421 (5th Cir. 2007). A spendthrift trust is one in which the right of the beneficiary to future payments of income or capital cannot be voluntarily transferred by the beneficiary or reached by his or her creditors. Pursuant to § 541(c)(2), the property of a spendthrift trust is excluded from the bankruptcy estate if those assets are protected from the beneficiary's creditors under state law. Under Texas law, a spendthrift provision in a trust protects the trust property from creditors unless the settlor is also a beneficiary of the trust. As the Fifth Circuit recognized in this case, the rationale is that the debtor should not be able to escape claims of his creditors by himself setting up a spendthrift trust naming himself as a beneficiary.

In re Sewell, 180 F.3d 707 (5th Cir. 1999). The chapter 7 trustee objected to an exemption claimed by Debtor for her beneficial interest in an ERISA plan. The district court denied the motion and overruled the exemption on the grounds that the plan was excluded from the bankruptcy estate. The Fifth Circuit held that a debtor's beneficial interest in an ERISA plan containing the requisite alienation clause is excluded from "property of the estate," as an interest that the debtor held subject to a restriction on transfer enforceable under applicable nonbankruptcy law. This is true even assuming that, as result of allegedly disqualifying acts of Debtor's employer, the plan was not tax qualified under the Internal Revenue Code. Any plan governed by ERISA, whether tax qualified or not, is excludable from the bankruptcy estate.

SIXTH CIRCUIT

Daley v. Mostoller (In re Daley), 717 F.3d 506 (6th Cir. 2013). The trustee objected to Debtor's claimed exemption in an IRA on the grounds that Debtor had engaged in a prohibited transaction—signing an agreement pledging the IRA to secure any debts owed to the financial institution with which Debtor opened the account, even though no such debts were incurred—that disqualified the IRA from tax-exempt status. The bankruptcy court agreed with the trustee, ruling that the mere signing of the agreement was a prohibited transaction that resulted in loss of an exemption, and the district court affirmed. The Sixth Circuit reversed, holding that the mere existence of the agreement did not disqualify the IRA from exempt status.

SEVENTH CIRCUIT

In re Newman, 903 F.2d 1150 (7th Cir. 1990). Property of the chapter 7 estate does not include "(1) [a] debtor's interest in the distribution of the corpus of the spendthrift trusts; and (2) distributions of income from the trusts made to the debtor within 180 days following the filing of the bankruptcy petition." *Id*. at 1151.

EIGHTH CIRCUIT

Wetzel v. Regions Bank, 649 F.3d 831 (8th Cir. 2011). Prepetition, Debtor was beneficiary of a testamentary trust created by her late husband's will. The trust included a spendthrift provision stating, in relevant part, that all payments of principal and income payable, or to become payable, to the beneficiary shall not be subject to anticipation, assignment, pledge, sale or transfer in any manner, nor shall the beneficiary have the power to anticipate or encumber such interest, nor shall such interest, while in the possession of the executor or trustee, be liable for, or subject to, the debts, contracts, obligation, liabilities or torts of the beneficiary. After Debtor filed a chapter 11 petition, the chapter 11 trustee filed a declaratory judgment action seeking a determination that the trust income was property of Debtor's estate.

The Eighth Circuit ruled that the interests of a beneficiary of a valid spendthrift trust do not become property of the estate if the beneficiary files for bankruptcy. Generally, a beneficiary's net income from a trust is property of her bankruptcy estate under § 541(a)(1), which provides that the bankruptcy estate includes all legal or equitable interests of the debtor in property as of the petition date. There are some exceptions, however, one of which is § 541(c)(2). It provides that any restriction on the transfer of a beneficial interest of the debtor in a trust enforceable under applicable non-bankruptcy law is also enforceable under federal bankruptcy law. Thus, if a spendthrift provision in a trust is enforceable under applicable non-bankruptcy law—in this case, state law—then that restriction will remain enforceable even after the beneficiary files for bankruptcy. The Court explained that a beneficiary's interest in a spendthrift trust is entitled to the same protections and restrictions after the filing of a bankruptcy petition that were enforceable before the petition. Thus, the trust income was properly excluded from property of the estate.

NINTH CIRCUIT

Cal. Franchise Tax Bd. v. Kendall (In re Jones), 657 F.3d 921 (9th Cir. 2011). In a chapter 7 case, property of the estate includes property held on the petition date under § 541. In a chapter 13 case, § 1306 adds to this property all property acquired between the chapter 13 petition filing date and the date the case is closed, dismissed or converted. This period of inclusion of additional property of the estate ends upon plan confirmation under § 1327(b) if the debtors elect to have property of the estate re-vested in them when their plan is confirmed.

Ehrenberg v. Southern California Permanente Medical Group (In re Moses), 167 F.3d 470 (9th Cir.1999). To determine if a debtor's interest in a spendthrift trust is property of the estate under § 541(a), the trust must be valid as determined by state law. Applying California law, Debtor's Keogh Plan was a valid spendthrift trust for three reasons: 1) the plan contained an anti-alienation provision, 2) Debtor did not create or administer the plan, and 3) Debtor did not have the ability to terminate or amend the plan.

Birdsell v. Coumbe (In re Coumbe), 304 B.R. 378 (B.A.P. 9th Cir. 2003). Under Arizona law, the *res* of a debtor's trust was a valid spendthrift trust and not property of the estate, both because the trust contained a spendthrift provision and because it had multiple beneficiaries. Distributions from the testamentary spendthrift trust made within the 180-day period after the petition date, however, were property of Debtor's estate because distributions from a testamentary spendthrift trust constitute a post-petition "bequest" included in the estate under § 541(a)(5)(A).

TENTH CIRCUIT

Parks v. Dittmar (In re Dittmar), 618 F.3d 1199 (10th Cir. 2010). Debtors were former union employees of a company that established an equity participation program ("EPP") for union-represented employees, under which the company would contribute stock appreciation rights ("SARs") to the program if certain "payment events" occurred. Sometime after Debtors each filed bankruptcy petitions, a "payment event" occurred and the company distributed cash and stock to participating employees, including Debtors. The trustees in Debtors' respective bankruptcy cases moved to compel turnover of the distributions from the SARs, asserting that the SARs were property of the bankruptcy estate under § 541. The bankruptcy court and the BAP both held that the SARs were not property of the estate because Debtors did not have any prepetition interests in the SARs; Debtors had only a "hope, anticipation, or expectation" in the SARs because those distributions were entirely dependent upon the economic decisions of the company.

The Tenth Circuit ruled that Debtors had contingent prepetition property rights in the SARs that their employer provided to Debtors on account of its union obligations under collective bargaining agreements. Under § 541(a)(1), a debtor's bankruptcy estate includes, with enumerated exceptions, all legal or equitable interests of the debtor in property as of the commencement of the case. Contingent interests are property of the bankruptcy estate even if the rights do not accrue or are uncertain until a date after the bankruptcy filing. Here, Debtors' interest in the SARs was similar to an employee's interest in stock options: as long as the employee has a legal interest in the options prior to the employee's bankruptcy filing, the options are sufficiently rooted in the pre-bankruptcy past to become part of the estate. Like stock options, the fact that the SARs were contingent on post-petition events did not mean that Debtors' interest in them was not rooted in the pre-bankruptcy past. Accordingly, the Court held that the SARs were properly part of Debtors' respective bankruptcy estates and the trustee could seek turnover of the distributions.

Patrick A. Casey, P.A., v. Hochman, 963 F.2d 1347 (10th Cir. 1992). During a chapter 11 proceeding, one of the joint, individual chapter 11 Debtors invented a medical device. After the case was converted to chapter 7, he sold a license to produce the device, and later, he obtained a patent for it. The Tenth Circuit ruled that the device, the income from the license, and the patent were property of Debtors, not of their bankruptcy estate. Under §§ 348 and 541, the bankruptcy estate consisted of property Debtors had when they filed their bankruptcy petition, and property the estate acquired during the case. Generally, property a chapter 11 or chapter 7 debtor acquires after filing bankruptcy belongs to the debtor, not the estate, and the device this Debtor invented was not covered by any exception to that general rule.

Redmond v. Carson (In re Carson), 374 B.R. 247 (B.A.P. 10th Cir. 2007). Within the bounds of applicable Kansas law, Debtor permissibly assigned a tax refund to pay her attorney's flat-fee retainer before she filed bankruptcy, thus removing the attorney's share of the refund from the reach of both Debtor and her bankruptcy estate, and immediately making that share the attorney's property. Debtor's subsequent bankruptcy filing did not turn the single tax refund into two funds that could be subjected to the equitable doctrine of marshaling so that the bankruptcy estate might receive more of it, and even if it did, the two funds were not owned by a single debtor because the prepetition fund belonged to the bankruptcy estate and the post-petition fund belonged to Debtor. The bankruptcy court properly deducted the retainer from the full refund before dividing the remainder *pro rata* between the estate and Debtor.

Rupp v. Kunz (In re Kunz), 309 B.R. 795 (B.A.P. 10th Cir. 2004). Adopting the bankruptcy court's decision as its own, the BAP ruled that a debtor's interest in an ERISA-qualified retirement plan is excluded from the property of the bankruptcy estate by § 541(c)(2), and that the chapter 7 trustee may not exercise the debtor's right to withdraw funds from the plan. The trustee conceded the money in the plan was not property of the estate under *Patterson v. Shumate*, 504 U.S. 753 (1992), but argued Debtor's right to withdraw money from the plan did become property of the estate. The bankruptcy court had pointed out that the facts in *Patterson* were the same, and, since *Patterson*, four circuits had rejected arguments similar to the one the trustee was making in this case.

Carbaugh v. Carbaugh (In re Carbaugh), 278 B.R. 512 (B.A.P. 10th Cir. 2002). Money held in ERISA-qualified pension plans is excluded from the debtor's bankruptcy estate under § 541(c)(2), as declared in *Patterson v. Shumate*, 504 U.S. 753 (1992). Money Debtor had withdrawn from such a plan was no longer excluded from the estate, however, and ERISA no longer protected the money from the claims of Debtor's creditors.

ELEVENTH CIRCUIT

Menotte v. Brown (In re Brown), 303 F.3d 1261 (11th Cir. 2002). Under Florida law, a spendthrift clause in a self-settled trust created for the settlor's own benefit is void as to creditors. The settlor's right to receive income from the trust for life is property of the estate and is not excluded under § 541(c)(2), but the corpus was irrevocably conveyed for the benefit of charitable remaindermen and is not property of the estate.

Meehan v. Wallace (In re Meehan), 102 F.3d 1209 (11th Cir. 1997). Debtor's interest in an individual retirement account was excluded from the bankruptcy estate under § 541(c)(2) because it is exempt from garnishment under Georgia law. A restriction on alienation enforceable under applicable law results in exclusion of the interest under § 541(c)(2) even though the restriction is not contained in the IRA document itself.

E. *MISCELLANEOUS*

NINTH CIRCUIT

Warfield v. Salazar (In re Salazar), 465 B.R. 875 (B.A.P. 9th Cir. 2012). Debtors filed their chapter 13 petition, but failed to list pending income tax refunds for the prior year in their schedules. During the pendency of their case, Debtors received their state and federal tax refunds and used the funds to cover living expenses. Debtors did not amend their schedules to reflect receipt of the refunds. When they failed to confirm a chapter 13 plan, their case was converted to chapter 7. The chapter 7 trustee moved for an order compelling turnover of the prepetition *pro rata* amount of the tax refunds received by Debtors on the ground that those amounts were property of the estate. Debtors asserted that because they had already spent the tax refunds, these funds were no longer in their possession when their case was converted, and thus did not constitute property of the estate pursuant to § 348(f)(1)(A). The bankruptcy court agreed with Debtors and the trustee appealed.

The Ninth Circuit BAP ruled that funds spent in good faith by a chapter 13 Debtor before conversion of Debtor's case to Chapter 7 are not property of the estate upon conversion, within the meaning of § 348(f)(1)(A). The parties agreed that pursuant to § 541(a), the prepetition *pro rata* amount of the tax refunds Debtors received post-petition was property of the estate on the date Debtors filed their chapter 13 petition (notwithstanding Debtors' failure to disclose the refunds in their schedules). The parties also agreed that if Debtors had not spent the refund, they would be compelled to turn it over to the chapter 7 trustee under § 348(f), which applies to cases converted from chapter 13 to chapter 7. Section § 348(f)(1)(A) provides that upon conversion from chapter 13 to chapter 7, "property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion." The court explained that by its terms, § 348(f)(1)(A) contemplates that a debtor may have used up property of the estate and no longer possess it, and any such estate property used up prior to conversion of the case to chapter 7 is not property of the estate in the converted case. Accordingly, the court concluded that under § 348(f)(1)(A), the tax refunds Debtors spent before their case was converted were no longer property of the estate upon conversion. The Court noted, however, that a chapter 13 debtor's use of estate property prior to conversion to chapter 7 is nevertheless subject to "good faith" scrutiny pursuant to §§ 348(f)(2), 707(b)(3)(A) and 727(a)(2)(B). The court acknowledged that the language in § 348(f)(1)(A) may result in an anomalous result when compared to outcomes under unconverted chapter 13 cases or cases under chapter 7—a chapter 13 debtor would have to account to creditors for the tax refund, while a chapter 7 debtor would have turn over the refunds to the trustee—but the court found no absurdity in such a result. The Court applied the plain language of the statute and found for Debtors.

XI. EXEMPTIONS

A. *GENERALLY*

UNITED STATES SUPREME COURT

Schwab v. Reilly, 130 S. Ct. 2652 (2010). Chapter 7 Debtor owned a catering business when she filed her bankruptcy petition. In her schedules, Debtor listed her business equipment as exempt and valued the equipment at a dollar amount ($10,718) that fell within the statutory exemption limits under § 522(d). The chapter 7 trustee did not object to Debtor's exemption within the 30-day period provided under Rule 4003(b). After Debtor's equipment was appraised at $6,482 above Debtor's scheduled valuation and above the exemption limit, the trustee sought bankruptcy court approval to auction Debtor's equipment, distribute the exempt amount to Debtor, and retain the surplus for the benefit of the estate and its creditors. Debtor objected.

The Supreme Court ruled that a bankruptcy trustee need not object to a debtor's exemption claims if the debtor assigns a dollar value to the property that is within the statutory exemption limits. A debtor may exempt any property if its value falls within the statutory limits set forth in § 522(d), and § 522(l) provides that unless a party in interest objects, the property claimed as exempt on the schedules is exempt. Rule 4003(b) requires the trustee to object to the propriety of a debtor's exemptions within 30 days. The Court held that if a debtor states the value of the property sought to be exempted within the statutory limits, then a trustee need not object to preserve the estate's right to retain any potential excess value of the exempted property beyond the value that the debtor claimed as exempt. The Court explained that under the Bankruptcy Code, an exemption is treated as an interest in a debtor's asset not to exceed the statutory dollar limits, as opposed to the asset itself in its entirety. Thus, when a debtor has claimed an exemption of a value in property that is less than the exemption limit, the exemption claim is proper, but only up to the claimed value, and the trustee has no obligation to object to the exemption claim to preserve the right to claim any excess value. A debtor who seeks to preserve his or her right to claim the full property in kind as exempt must value the property either as "unknown," as "100% of fair market value," or at a dollar value above the exemption limits, such that the trustee would be put on notice to object within the 30-day period to preserve any rights with respect to such property. Here, Debtor assigned a value to the equipment that was within the exemption limits, so the trustee did not have to object and was still entitled to sell the property subject to the exemption claim, distribute the appropriate exempt amounts to Debtor, and retain the excess for the estate.

THIRD CIRCUIT

In re Orton, 687 F.3d 612 (3d Cir. 2012). The Court held that an exemption of the value of an oil and gas lease (even when the asset was scheduled at the same value in Schedule B) was insufficient to manifest an intent to exempt the entire asset. Accordingly, the trustee and not Debtor was entitled to any post-petition appreciation in the value of the asset that surpassed the dollar amount exempted. Debtor filed an emergency chapter 7 petition and listed as exempt his one-eighth interest in certain property subject to an oil and gas lease, and also listed his one-fourth interest in royalties from the oil and gas lease. Debtor valued the royalty interest at $1 because, as of the petition date, no oil or gas had been drilled. No party objected to the exemptions, but the trustee moved to close the case and to except any future royalty interest in the oil and gas lease from abandonment. On appeal, applying *Schwab*, the Court agreed with the bankruptcy and district courts that the trustee's motion was not an untimely attack on the claimed exemptions, and that Debtor only claimed an exemption in his interest in the assets and not the assets themselves.

In re Messina, 687 F.3d 74 (3d Cir. 2011). The court held that a trustee's objection to Debtors' attempt to exempt the full value of their former residence, which was filed 30 days after an amendment to Schedule C, was timely and valid under *Schwab*. Debtors listed exemptions in their residence under §§ 522(d)(1) and (d)(5) in the total amount of $37,150, and listed the estimated value of the residence at $230,000. Debtors informed the trustee that one of the mortgages was defective. Thereafter, the trustee commenced an avoidance action against one of the banks, and also moved to sell the home free and clear of all liens, claims, and encumbrances. The sale netted over $200,000 and a balance of $41,733 was after payment of subordinate liens, expenses and fees. The trustee filed a notice of settlement avoiding the mortgage and assigning it to the trustee under § 551. The trustee then moved to value Debtors' exemption at $0, asserting that Debtors had no equity in their home to which the exemption could attach; because of the continuing validity of the mortgage assigned to the trustee, Debtors' claimed exemption was subordinate to and did not extend to sale proceeds. Debtors cross-moved for payment of their exemption, asserting that under *Schwab*, the objection was untimely and one of the mortgages was void as of the petition date. The Court held that while the voidable mortgage was unsecured on the petition date, Debtors still had an obligation to pay it under New Jersey law and it was still valid as to Debtors. Accordingly, all equity in the residence was subject to the two mortgages. As of the petition date, therefore, there was no equity in the residence to exempt. The Court noted that Debtors could have protected their claim of exemption by also listing an exemption under § 522(g) in the proceeds of an avoidable mortgage.

NINTH CIRCUIT

Gebhart v. Gaughan (In re Gebhart), 621 F.3d 1206 (9th Cir. 2010). Debtors in two separate chapter 7 proceedings claimed homestead exemptions in their encumbered homes. The exemptions were approved, Debtors remained in their homes, and each Debtor received a discharge, but their bankruptcy cases remained open. A couple of years later, both Debtors' homes had appreciated and the chapter 7 trustees sought permission to sell the homes, remit to Debtors the amount of the interest in property that had been exempted, and use the excess to pay creditors' claims.

The Ninth Circuit ruled that a debtor's estate is entitled to post-petition appreciation in homestead-exempt assets as long as the bankruptcy case has not closed and the property has not been abandoned under § 554. Under § 522(b)(1), a homestead exemption does not permit the exemption of entire properties, but rather specific dollar amounts. Even when a debtor claims an exemption in an amount that is equal to the full value of the property as stated in the petition and the trustee fails to object, the asset itself remains in the estate if its value at the time of filing is higher than the exemption amount, and what is removed from the estate is an "interest" in the property equal to the value of the exemption claimed at filing. An exemption claimed under a dollar-value exemption statute is limited to the value claimed at filing, and any additional value in the property remains the property of the estate, regardless of whether the extra value was present at the time of filing or whether the property increased in value after filing. Thus, the chapter 7 trustees in these cases were entitled to sell Debtors' homes and retain any excess above Debtors' homestead exemptions for the benefit of estate creditors.

TENTH CIRCUIT

Marcus v. Zeman (In re Marcus), 1 F.3d 1050 (10th Cir. 1993). Exemption laws in effect on the chapter 13 petition date control, rather than exemptions applicable at time of the chapter 7 conversion

Campbell v. Stewart (In re Campbell), 313 B.R. 313 (B.A.P. 10th Cir. 2004). Confirmation of a chapter 13 plan, which re-vested property in Debtor, barred the trustee's objection to the homestead exemption because the bankruptcy court no longer had jurisdiction over that objection. The bankruptcy court's order sustaining the objection was vacated. Since the bankruptcy court had held that Rule 4003(b)'s 30-day window to object would not recommence in the event the case were converted to chapter 7, the panel adopted the minority view (prior to amendment of Rule 1019(2)) that a new opportunity to object to exemptions is triggered upon conversion of a chapter 13 case to chapter 7.

ELEVENTH CIRCUIT

Osborne v. Dumoulin, 428 F. App'x 871 (11th Cir. 2011). In a chapter 7 bankruptcy proceeding, Debtor can file an amended schedule of assets, removing an initially claimed homestead exemption and instead claiming additional personal property as exempt through use of the wildcard exemption.

In re Mathews, 307 F. App'x 266, 268 (11th Cir.2009). The Court of Appeals affirmed the bankruptcy and district courts' holdings that Debtor had not expressly disclaimed a tenancy by the entirety merely by checking the box "joint tenants with rights of survivorship" instead of checking "other" and writing in "tenancy by the entireties").

B. *GOVERNING LAW*

THIRD CIRCUIT

In re Porvaznik, 456 B.R. 738 (Bankr. M.D. Pa. 2011). Debtor filed a chapter 7 case in Pennsylvania, where she claimed residence. During the 730-day period before the filing date, she had resided with her husband in Louisiana where her husband, a member of the United States Air Force, was stationed. The chapter 7 trustee objected to Debtor's claim of federal exemptions, alleging that because she had not resided in Pennsylvania for a continuous 730 days preceding her filing date, § 522(b)(3)(A) required application of the state in which Debtor was domiciled for the 180 days before the filing, or for a longer portion of that period than any other state. Because Louisiana is an "opt-out" state, the chapter 7 trustee contended that Debtor was required to utilize its state law exemptions. The court found that Debtor's domicile was governed by her intentions with regard to her permanent residence and that her compulsion to live in another location because of the military service of her spouse did not make that location her domicile for purposes of determining which exemptions she could claim under § 522(b)(3)(A). Finding that Debtor intended Pennsylvania be her permanent or indefinite domicile, the court overruled the trustee's objection to Debtor's use of the federal exemptions.

FIFTH CIRCUIT

In re Camp, 631 F.3d 757 (5th Cir. 2011). Chapter 7 Debtor currently resided in Texas, but had not lived in Texas for 730 days immediately preceding the petition filing date, having been domiciled in Florida. He claimed exemptions under the Bankruptcy Code and the trustee objected. The Fifth Circuit held that while Debtor was not eligible for Texas state law exemptions, and while the Texas bankruptcy court had to look to the law of Florida, an opt-out state, to determine Debtor's eligibility for federal bankruptcy exemptions, the opt-out provision of Florida law was applicable only to Florida residents. The choice of Florida law comes from § 522(b)(3)(A), which states that it is not the law of the state of filing, but rather the law of the state in which the debtor lived for a majority of the 180-day period prior to the 730-day period prior to bankruptcy filing.

NINTH CIRCUIT

Arrol v. Broach (In re Arrol), 170 F.3d 934 (9th Cir. 1999). The plain language of § 522(b)(2)(A) points to the state's exemption laws, not to its conflict of laws rules. Therefore, the state law applicable in a given case is the state of domicile for the longer portion of the 180-day period prior to the bankruptcy filing.

Tanzi v. Comerica Bank-California (In re Tanzi), 297 B.R. 607 (B.A.P. 9th Cir. 2003). Involuntary Debtors were Florida residents for only eight days before the petition, but for more than 180 days before the order for relief. They were nevertheless obligated by § 522(b)(2)(A) to apply the exemptions applicable from the state in which they had been domiciled the longest during the previous 180 days.

TENTH CIRCUIT

Stephens v. Holbrook (In re Stephens), 402 B.R. 1 (B.A.P. 10th Cir. 2009). Examining the extraterritorial effect of Iowa's homestead exemption, when Debtors had moved to Oklahoma from Iowa within the 730 days before filing chapter 7 in Oklahoma, the panel found persuasive that the Iowa legislature had specifically included residency requirements for personal property exemptions, but no such restriction was in the homestead statute. The Iowa statutes did not "plainly limit its homestead exemption either to residents of, or real property located within, the state of Iowa." Remand was required for the bankruptcy court to determine whether the Iowa homestead exempts proceeds from the sale of an Iowa home and whether the proceeds were held for a "reasonable time," before being applied to a home in Oklahoma.

Busch v. Busch (In re Busch), 294 B.R. 137 (B.A.P. 10th Cir. 2003). The bankruptcy court properly lifted the automatic stay to allow the Utah court to determine if the chapter 7 Debtor's failure to pay a second mortgage, as ordered under the divorce decree, affected Debtor's equity in the former marital home. Although allowance of a debtor's exemption is a federal question, debtors' property interests are defined by state law, under *Butner v. United States*, 440 U.S. 48 (1979).

Carbaugh v. Carbaugh (In re Carbaugh), 278 B.R. 512 (B.A.P. 10th Cir. 2002). Under § 541(c)(2) and *Patterson v. Shumate*, 504 U.S. 753 (1992), funds held in an ERISA-qualified plan are not property of the chapter 7 bankruptcy estate, and the fact that ERISA plan proceeds in this case were comingled in a brokerage account did not make them exempt. The funds were not exempt under applicable Kansas law, and the bankruptcy court did not err in lifting the automatic stay to allow the state court to determine the interests of Debtor and his former wife in the retirement account.

C. *VARIOUS STATE EXEMPTIONS AND OPT-OUT*

1. Homestead Exemptions

THIRD CIRCUIT

In re O'Lexa, 476 F.3d 177 (3d Cir. 2007). The bankruptcy trustee objected to an exemption taken by the chapter 7 Debtor in the family residence co-owned with her non-debtor husband as tenants by the entirety. The Third Circuit held that § 522(b)(3)(B) entitled Debtor to a general exemption, under Pennsylvania law, in the family residence.

FOURTH CIRCUIT

In re Bunker, 312 F.3d 145 (4th Cir. 2002). The Fourth Circuit held that, under Virginia law, when a husband and wife file a joint chapter 7 petition and they have only individual creditors but for their mortgage lender, the spouses may exempt a home they own as tenants by the entirety to the extent of their equity, notwithstanding the joint administration or substantive consolidation of their individual bankruptcy estates. Section 522(b)(2)(B) provides that a debtor may exempt any interest in property in which the debtor had an interest as a tenant by the entirety or joint tenant to the extent that such interest is exempt from process under nonbankruptcy law. Virginia law provides that property held in a tenancy by the entirety is exempt from a judgment entered against one spouse. The Court held, therefore, that the Virginia statute served as the "nonbankruptcy law" prohibiting creditors with claims against individual spouses from reaching the entireties property. This result applies whether the married debtors file a joint petition or have cases that are substantively consolidated. In joint cases, the estates are treated as separate estates despite joint administration. In substantively consolidated cases, although each debtor's assets are pooled into a single estate, each debtor's interest in entireties property may still be exempted under § 522(b)(2)(B) to the extent such interest is exempt from process under applicable nonbankruptcy law. The Virginia law still applied and allowed each Debtor to exempt the entireties property from separate claims filed against them as individuals.

SIXTH CIRCUIT

In re Wengerd, 453 B.R. 243 (B.A.P. 6th Cir. 2011). Debtors filed a chapter 7 petition and stated therein that they intended to retain the home they owned and in which they resided. Debtors listed the fair market value of their home and the debt it secured, and claimed a homestead exemption in the home as permitted under applicable state law. At deposition, Debtors stated, however, that they in fact intended to sell their home and move, and that they had entered into contract for sale of the home. Debtors did not disclose the pending sale in their petition. Four days after their filing, the sale closed. The chapter 7 trustee objected to Debtors' homestead exemption and moved for an order for turnover of the sale proceeds, arguing that Debtors could not claim a homestead exemption if they were not going to reside in the home post-petition.

The Sixth Circuit BAP ruled that the right to a homestead exemption is determined as of the date the bankruptcy petition is filed, regardless of a debtor's intent with respect to the homestead property. As long as the debtor occupies the residence in question when the petition is filed, the debtor is entitled to claim the homestead exemption in the residence as permitted under applicable law. Thus, Debtors here were entitled to claim a homestead exemption in their home and were entitled to retain the proceeds of the sale within the exemption limit.

SEVENTH CIRCUIT

In re Lloyd, 37 F.3d 271 (7th Cir. 1994). Interpreting a Wisconsin statute permitting a homestead exemption in a dwelling and an amount of land "as is reasonably necessary for use of the dwelling as a home," the Seventh Circuit held it not clearly erroneous for a bankruptcy court to set aside three acres as the homestead.

In re Szekely, 936 F.2d 897 (7th Cir. 1991). Debtors have the right to live in their homestead rent-free until they receive the cash value of their exemption.

NINTH CIRCUIT

Wolfe v. Jacobson (In re Jacobson), 676 F.3d 1193 (9th Cir. 2012). Chapter 7 Debtor filed her bankruptcy petition to stay a foreclosure sale of her house by a judgment creditor. Debtor claimed her house was her principal residence and thus qualified for a homestead exemption under California law. The bankruptcy court granted the judgment creditor relief from stay to sell Debtor's house at auction and to remit a portion of the sale proceeds to Debtor as required by the California homestead exemption statute. The statute also provides that sale proceeds from the sale of the homestead lose their exempt status if a debtor does not reinvest them in a new homestead within six months of receipt. After Debtor failed to reinvest the sale proceeds in a new homestead within six months, the chapter 7 trustee initiated an adversary proceeding seeking turnover of the sale proceeds to the bankruptcy estate.

The Ninth Circuit ruled that under the so-called "snapshot" rule, bankruptcy exemptions are fixed at the time that a debtor files a chapter 7 petition. When a state—like California—has opted out of the federal exemption scheme, debtors are limited with respect to their bankruptcy exemptions to the state exemption statutes that apply in non-bankruptcy cases, and such statutes must be applied in their entirety. Here, California's homestead exemption provides that the debtor's share of proceeds from the sale of the debtor's homestead is exempt on the condition that the debtor reinvest such proceeds in a new homestead within six months. In the event that the debtor fails to do so, the proceeds lose their exempt status. Here, because Debtor failed to reinvest the proceeds, they lost their exempt status after the reinvestment period lapsed and reverted to property of the bankruptcy estate. Thus the chapter 7 trustee could properly seek turnover of these proceeds.

TENTH CIRCUIT

Duncan v. Zubrod (In re Duncan), 294 B.R. 339 (B.A.P. 10th Cir. 2003). In a sequel to *Zubrod v. Duncan (In re Duncan)*, 329 F.3d 1195, 1204 (10th Cir. 2003), applying Wyoming law, the non-debtor spouse was not entitled to a homestead exemption in property in which she resided, but in which she had no ownership interest. Moreover, the non-debtor was not entitled to claim an exemption from a bankruptcy estate.

2. Other Exemptions

THIRD CIRCUIT

Bohm v. Titus (In re Titus), 467 B.R. 592 (Bankr. W.D. Pa. 2012). In connection with fraudulent transfer claims, the chapter 7 trustee and a judgment creditor challenged Debtor's claimed exemption for "unpaid wages," the cash surrender value of his interest in a life insurance policy, and his retirement account, as well as certain contributions to each of those assets. The court first held that to the extent that the trustee successfully prevailed on a fraudulent conveyance claim against Debtor and his non-debtor spouse, the trustee could pursue assets claimed by Debtor as exempt, but that the judgment did not constitute a basis on which to challenge the claimed exemption. The court then overruled the objection to Debtor's claimed exemption of his retirement account under § 522(b)(3)(C) on the basis that it qualified under the requirements of that section as exempt from taxation. Accordingly, the court did not reach the issue of whether the account was excluded from property of the estate under § 541(c)(2). The court also overruled the objection to Debtor's exemption of the cash surrender value of a life insurance policy, finding that it was properly claimed as exempt under Pennsylvania law (42 Pa.C.S.A. § 8124(c)(6)). The court finally overruled the objection to additions to the assets that Debtor was held to have properly exempted, finding that the federal exemptions did not contain any "fraudulent conveyances" limitations like those that would apply under Pennsylvania law. Finding that Debtor's claimed wage exemption was for money earned in his capacity as a partner in a law firm, the court ruled that such funds did not qualify as "wages" and therefore did not qualify for exemption (42 Pa.C.S.A. § 1827(a)).

In re Kiesewetter, 2011 U.S. Dist. LEXIS 110573 (W.D. Pa. 2011). Debtor claimed, and the court applied, Florida exemptions law addressing rights in a family trust. Florida has "opted-out" of the federal exemptions. Affirming the decision of the bankruptcy court, the district court found that the Florida trust in which Debtor was a beneficiary qualified as a spendthrift trust and, by virtue of the restriction on alienation of Debtor's beneficial interest, did not become part of Debtors' bankruptcy estate under § 541(c)(2). Under § 541(a)(5)(A), however, any distributions from the trust that Debtor received or was entitled to receive within 180 days before the filing date were property of the estate. In addition, any future entitlement to receive distributions from the trust became Debtor's property and were subject to a claim of exemption under § 522(b)(3)(A).

FOURTH CIRCUIT

In re Cecil, 63 F. App'x 666 (4th Cir. 2003). The Fourth Circuit held that a bankruptcy court could condition Debtor's exemption in a worker's compensation award on his payment of the chapter 7 trustee's attorneys' fees spent pursuing the award. Debtor indicated on his schedules that his assets included his right to receive funds under a worker's compensation claim in a yet to be determined amount. Debtor received the award shortly after filing but did not disclose it for sixteen months. Although he was entitled to exempt the award under the Maryland statutory scheme, the court was entitled to exercise equitable powers in making Debtor pay the trustee's legal fees spent pursuing the award during the delay.

In re Morehead, 283 F.3d 199 (4th Cir. 2002). The Fourth Circuit addressed the issue of whether a debtor's right to receive payments under a privately purchased disability insurance policy is of a type that could be fully exempted under the West Virginia statute or only partially exempt to the extent necessary for support of the debtor. The West Virginia statute fully exempts "disability benefits" and only partially exempts "payment[s] under a . . . contract on account of illness, disability, death, age, or length of service." Here, Debtor purchased a disability income insurance policy on his own volition that provided $10,000 per month in income. The West Virginia statute mirrors the federal exemptions, in particular §§ 522(d)(10)(C) & (E). The Court rejected an analysis using the source of the disability payments or duration of the payments as a basis for classifying a debtor's disability policy. Instead, the Court examined the other types of benefits or payments that are entitled to full exemption versus partial exemption. The Court found that social security benefits and unemployment compensation, which are fully exempt under the statute, are the type of benefits on which no one lives lavishly. In contrast, payments under stock bonus and pension plans, which are included in the same provision as a "contract on account of a disability," are only partially exempt to the extent necessary to support the debtor because some individuals could live quite lavishly on the income from these types of benefits. Therefore, since Debtor's disability policy provided $10,000 each month and increased with a cost of living rider and was likely purchased to support the lifestyle he was accustomed to, it was only partially exempt to the extent necessary for his support as a contract on account of illness or disability.

Rief v. Guttman (In re Rief), 2008 U.S. Dist. LEXIS 118968 (D. Md. Jan. 15, 2008). The district court examined whether Debtor could exempt the cash surrender value of various life insurance policies. The chapter 7 trustee objected to Debtor's exemption of two types of life insurance policies. The first group included three life insurance policies in which the beneficiary was either the trustee named in Debtor's will or the will itself. The second group included two policies owned by Debtor that insured the lives of his children.

As to the first group, the court addressed whether the Maryland exemption statute, which allowed a claim for exemption in the cash surrender value of a life insurance policy "made for the benefit of" the individual's spouse, child or dependent relative, applied to the policies naming the will as the beneficiary. Debtor argued that since the policy named the will as the beneficiary and the beneficiaries of his will were his wife and children, the policy fit within that exemption. The court found that the exemption statute should not be read so broadly. Since the proceeds of the life insurance policy would flow into his probate estate, which could be reached by his creditors before his wife and children could obtain them, then the policy was not necessarily "made for the benefit of" his wife and children since creditors could benefit from it, at least in part.

The court also concluded that policies owned by Debtor insuring the lives of his children and naming him as beneficiary were not exemptible. The Maryland statute only exempted "money payable in the event of . . . death of any person." The cash surrender values of the policies were not "money payable in the event of . . . death"; the proceeds were not payable, given that the insured individuals were still alive.

In re Gibson, 300 B.R. 866 (D. Md. 2003). The chapter 7 trustee objected to Debtor's exemption of funds in her bank account that were previously in a § 401(k) plan and pending rollover into an Individual Retirement Account ("IRA"). The trustee argued that the funds were no longer protected by the Maryland exemption statute since they had been disbursed. The court held that the funds were still entitled to protection despite the pending rollover, because the Maryland exemption statute used broader language in exempting "money payable from" and "any interest in" a retirement plan. The cases cited by the trustee were based on exemption schemes with narrower language protecting an individual's "right to receive" funds. Such language has been interpreted as terminating the protection immediately upon distribution or the receipt of funds. The broader language of the Maryland statute did not cause the funds to lose their exemption status even though they were temporarily deposited into a regular checking account.

In re Norcia, 255 B.R. 394 (D. Md. 2000). The District of Maryland addressed virtually identical facts as those presented in *Bank of Am., N.A. (USA) v. Stine*, 252 B.R. 902 (D. Md. 2000) *aff'd sub nom. In re Stine*, 360 F.3d 455 (4th Cir. 2004), and held that when a debtor seeks to exempt and recover garnished wages that have been transferred from the debtor's employer to the judgment creditor in the 90-day period preceding bankruptcy, the Maryland statute excluding garnished wages from the cash exemption does not apply to frustrate the avoidance action.

Bank of Am., N.A. (USA) v. Stine, 252 B.R. 902 (D. Md. 2000), *aff'd sub nom. In re Stine*, 360 F.3d 455 (4th Cir. 2004). The District of Maryland interpreted the state exemption related to cash and personal property in the context of Debtor's avoidance of a wage garnishment as a preferential transfer. The creditor used the Maryland exemption statute as a defense to the preference avoidance brought under § 522(h). The Maryland statute provides that the exemption for cash and personal property does not apply to monies that have been garnished from the debtor pursuant to a wage attachment. In assessing avoidance under § 522(h), the Court had to determine whether Debtor could have exempted the property at issue. The creditor argued that since wage garnishments were excepted from the exemption statute, Debtor could not avoid the garnishment applied during the preference period. The Court found for Debtor, reading the statute as preventing a debtor from asserting the exemption at the time of attachment. Here, Debtor used the exemption to undo a preferential transfer to which the creditor was not entitled under federal law. The Court, however, required Debtor to adjust his schedules to reduce his other claimed exemptions by the amount he recovered in the avoidance.

FIFTH CIRCUIT

In re Soza, 542 F.3d 1060 (5th Cir. 2008). The chapter 7 trustee objected to the Texas state law exemption claimed by Debtors in an annuity purchased on the eve of their bankruptcy filing, on the theory that the purchase was in the nature of a fraud on creditors. While the holding dealt with substantive Texas law, the court also noted that Texas is not an opt-out state, which means that debtors have the option of electing federal or state exemptions.

SIXTH CIRCUIT

Zingale v. Rabin (In re Zingale), 693 F.3d 705 (6th Cir. 2012). Applying Ohio Revised Code § 2329.66(A)(9)(g) in this chapter 7 case, the Court held that the non-refundable portion of the federal Child Tax Credit is not a "payment" pursuant to the Ohio exemption statute.

Rhodes v. Stewart, 705 F.2d 159 (6th Cir. 1983). The trustee petitioned the bankruptcy court to apply exemptions in Tennessee bankruptcy statutes since Tennessee opted out of the federal exemption scheme, as permitted by § 522(b)(1). The bankruptcy court declared Tennessee's opt-out statute invalid and allowed Debtor to use the federal exemption statutes. The Sixth Circuit held that that the actions of the bankruptcy court reduced § 522(b)(1) to an exercise in " legislative futility."

SEVENTH CIRCUIT

Fowler v. Shadel, 400 F.3d 1016 (7th Cir. 2005). The sole shareholder of a corporation argued that under state law he had an equitable interest in the corporation's assets because he would take ownership of the assets in the event of a liquidation. The Seventh Circuit rejected the claim that this interest was enough to allow the shareholder to claim exemptions in the corporation's assets as part of the shareholder's bankruptcy.

In re Oakley, 344 F.3d 709 (7th Cir. 2003). For purposes of the Indiana exemption statute that makes a distinction between intangible and tangible property, currency is intangible property.

In re Polis, 217 F.3d 899 (7th Cir. 2000). Citing § 522(a)(2)'s rule that the value of exempt property is determined as of the date of the petition, the Seventh Circuit held that a "first approximation" of the value of a lawsuit is the probability of success times the value of the recovery. Thus, Debtor could exempt a Truth-in-Lending Act claim when Debtor had $900 in exemptions available and the statutory maximum of the claim was $1,000. Given the apparent defenses available, the probability of Debtor's recovery was less than 90%, and there was no evidence to suggest that the claim was worth more than $900.

EIGHTH CIRCUIT

Benn v. Cole (In re Benn), 491 F.3d 811 (8th Cir. 2007). Debtors, in consolidated chapter 7 cases, claimed state and federal income tax refunds as exempt. The trustees in both cases objected and the bankruptcy courts held that refunds based on money accumulated prepetition had to be turned over to the respective trustees. The BAP reversed, with each judge on the panel writing separately. On appeal, the Eighth Circuit held that the refunds were not exempt under Missouri law, rejected debtors' argument that any property not subject to attachment and execution under state law, such as a tax refund still held by the government, was exempt. Thus, anticipated tax refunds were property of the estate to the extend they were attributable to prepetition events.

NINTH CIRCUIT

State by State Opt-Out Status

Alaska: *In re Tinkess*, 459 B.R. 76 (Bankr. D. Alaska 2008). A debtor may claim the exemptions permitted by state law *or* federal bankruptcy law.

Arizona: *Tober v. Lang (In re Tober)*, 688 F.3d 1160 (9th Cir. 2012). Arizona law excludes federal exemptions.

California: *Little v. Reaves (In re Reaves),* 285 F.3d 1152 (9th Cir. 2002). California has elected to opt-out of the federal exemption scheme.

Hawaii: No state statute opts out of the federal exemptions, and Hawaii debtors have chosen both federal and state exemptions. *Coughlin v. Cataldo (In re Cataldo),* 224 B.R. 426 (B.A.P. 9th Cir. 1998) (applying state exemptions); *In re Reed,* 127 B.R. 244 (Bankr. D. Haw. 1991) (applying federal exemptions).

Idaho: *In re Antonie*, 432 B.R. 843 (Bankr. D. Idaho 2010). Idaho has elected to restrict the right of its residents to claim only state exemptions. *See also In re Andrews*, 225 B.R. 485 (Bankr. D. Idaho 1998).

Montana: *Drummond v. Urban (In re Urban),* 375 B.R. 882 (B.A.P. 9th Cir. 2007). Montana has opted out of the federal exemption provisions, § 31-2-106 MCA. The Uniformity Clause of the Constitution is not violated by § 522(b)(3), which allows states to opt out of the federal system but extends the domicile requirement from 180 to 730 days

Nevada: *In re Virissimo*, 332 B.R. 201 (Bankr. D. Nev. 2005). Nevada is an opt-out state under N.R.S. § 21.090(3).

Oregon: *Sticka v. Casserino (In re Casserino),* 379 F.3d 1069 (9th Cir. 2004). Oregon opted out of the federal bankruptcy exemption scheme and defines its own exemptions from the bankruptcy estate, under Or. Rev. Stat. § 18.395.

Washington: *In re Jones*, 31 B.R. 20 (Bankr. W.D. Wash. 1983). Washington debtors may use either the federal bankruptcy exemptions or the statutory state law exemptions.

State-by-State Exemptions Provisions

Alaska: Alaska Statutes §§9.380.010 (homestead); 9.38.020 (Books, clothing, family portraits, heirlooms, household goods, and musical instruments); 9.38.015 (burial plot, disability benefits); 9.38.017 (retirement benefits); 9.38.030 (alimony); 25.27.095 (child support).

Arizona: Arizona Revised Statutes §§ 33-1101 (homestead); 1121.01 (married people); §1126.C (security deposits); 1123 (household goods); 1124 (food and fuel); 1125 (clothing, music, jewelry, books and other personal property and one car); 1126 (life insurance proceeds, earnings of minor child, child support/alimony, health or disability benefits, annuity account, bank account, IRAs); 1130 (tools of the trade, farming implements, arms, disposable earnings).

California: Has two options: Option #1: California Code of Civil Procedure §§ 704.730 (homestead); 704.010(car); 704.020 (household items), 704.040 (jewelry); 704.080 (bank accounts); 704.200 (burial plot). Option #2: California Code of Civil Procedure §703.140(b) (Debtors with substantial home equity generally prefer Option #1).

Hawaii: Hawaii Revised Statutes §§ 651-92 (homestead); 651-121 (burial plot, clothing, jewelry, one vehicle, proceeds from exempt property sold within last 6 months, tools, books, uniforms, furnishings, fishing equipment, motor vehicle, and other personal property,) 651-124 (retirement benefits), 431:10-231 (disability benefits), 651-121 (wages).

Idaho: Idaho Code §§ 55-1003, 55-1004, & 55-1113 (homestead); 11-605 (appliances, books, clothing, family portraits, firearm, furnishings, musical instruments, pets, jewelry, vehicle and sentimental heirlooms), 11-604(personal injury recoveries); 11-604 (life insurance, alimony, child support).

Montana: Montana Code Annotated §§ 70-32-104 & 201 (homestead); 25-13-608(1)(d) & (f), & 33-15-513 (disability, illness, medical, surgical, or hospital proceeds or benefits); 31-2-106 (retirement benefits); 25-13-609(animals, appliances, books, clothing, crops, firearms, household furnishings, jewelry, musical instruments, and sporting goods); 25-13-608 (burial plot); 25-13-609 (vehicle, tools of the trade).

Nevada: Nevada Revised Statutes §§ 115.010 & 115.020 (homestead); 21.090 (library, household goods, farm equipment, tools of the trade, one car, child support, alimony, wages, life insurance policy, alimony, wild card); 687B.260, 270, 280, 290 (life insurance proceeds, health insurance proceeds, annuity contract).

Oregon: Oregon Revised Statutes §§ 18.428 (homestead); 18.345 (books, musical instruments, one motor vehicle, personal property, tools of the trade); 743.046 (life insurance proceeds); 743.050 (health or disability proceeds); 65.870 (burial plot); 348.863 (tuition savings account); 18.345 (alimony and child support).

Washington: Revised Code of Washington §§ 6.13.030, 13.080(3) (homestead); 16.15.020 (retirement accounts); 6.15.010 (clothing); 6.25.010 (photos); 6.15.010 (libraries, household goods, other personal property, one vehicle per person, child support, health aids, personal injury awards); 6.27.150 (personal earnings); 6.32.250 (spendthrift trust).

TENTH CIRCUIT

Lampe v. Iola Bank & Trust (In re Lampe), 278 B.R. 205 (B.A.P. 10th Cir. 2002). Although Debtors had obtained employment off of their farm, they were still engaged primarily in farming, justifying allowance of tool of the trade exemptions in farming equipment, under Kansas law, and the wife had a sufficient ownership interest in the equipment to support her own tool of the trade exemption under § 522(m).

ELEVENTH CIRCUIT

Silliman v. Cassell (In re Cassell), 688 F.3d 1291 (11th Cir. 2012). The chapter 7 trustee objected to Debtor's claimed exemption in her right to receive payments under a fixed life annuity she had purchased prepetition with inherited funds. The parties disagreed as whether, under the facts of the case, the annuity was exempt pursuant to Ga. Code Ann. § 44–13–100. The Eleventh Circuit certified two questions to the Georgia Supreme Court: 1) whether a single-premium fixed annuity purchased with inherited funds constitutes an "annuity" for the purposes of Ga. Code Ann. § 44–13–100(a)(2)(E); and 2) whether "a debtor's right to receive a payment from an annuity [is] 'on account of . . . age' for the purposes of Ga. Code Ann. § 44–13–100(a)(2)(E) if the annuity payments are subject to age-based federal tax treatment, if the annuitant purchased the annuity because of her age, or if the annuity payments are calculated based on the age of the annuitant at the time the annuity was purchased."

In re Solomon, 95 F.3d 1076 (11th Cir. 1996). The exemption in annuity contracts under Fla. Stat. § 222.14 requires the existence of an actual annuity contract before a series of payments may be exempt.

In re Schlein, 8 F.3d 745 (11th Cir. 1993). The head of household wage exemption does not apply to independent contractors.

In re Harrelson, 311 B.R. 618 (Bankr. M.D. Fla. 2004), *aff'd*, 143 F. App'x 238 (11th Cir. 2005). The court held that funds Debtor received in settlement of a work related injury retain their character as "workers' compensation benefits in the hands of the beneficiary" when they are invested in publicly traded securities.

D. *FEDERAL EXEMPTIONS—§ 522(d)*

1. Homestead Exemptions

FIRST CIRCUIT

In re Lawrence, 469 B.R. 140 (Bankr. D. Mass. 2012). The bankruptcy court held that the exemption under § 522(d)(1) is not limited to a debtor's "primary" residence, though it is limited to property the debtor is using as a residence at the time of the petition.

THIRD CIRCUIT

In re Graff, 457 B.R. 429 (Bankr. W.D. Pa. 2011). Holding that exemptions should be construed liberally in favor of debtors, the court found that Debtors' "residence" for purposes of § 522(d)(1) extended to both adjoining and appurtenant land. Accordingly, Debtors could exempt as part of their homestead exemption their mobile home, the single tract of property that they had purchased at the same time, and the oil and gas rights incident thereto.

FOURTH CIRCUIT

Lanier v. Beaman, 394 B.R. 382 (E.D.N.C. 2008). Chapter 7 Debtor claimed an exemption in his home and the 22-acre lot adjacent to it, asserting that the lot was part of his residence as defined under the Bankruptcy Code. The lot, however, was actually made up of two adjacent parcels of approximately 9 and 12 acres. Debtor's home was located on the 12-acre portion and a fence separated the two sub-lots. The 9-acre lot was used to raise rescued horses and was unencumbered. The court concluded that the 9-acre lot was not commingled with the other parcel as part of one residence because Debtor was not using it for residential purposes, non-family members used it to ride horses, and no residential structure sat on it. The district court held that the adjacent lot was not subject to Debtor's residential exemption.

2. Other Exemptions

UNITED STATES SUPREME COURT

Rousey v. Jacoway, 544 U.S. 320 (2005). Section 522(d) of the Bankruptcy Code permits debtors to exempt from the bankruptcy estate certain interests in property up to certain values, including an Individual Retirement Account, which constitutes a right to receive payment due to age.

FIRST CIRCUIT

In re Seeling, 471 B.R. 320 (Bankr. D. Mass. 2012). In an issue of first impression in the First Circuit, the bankruptcy court held that Debtor could use § 522(d)(12) to exempt an IRA that contained funds Debtor inherited as the beneficiary of an annuity. The bankruptcy court noted that its decision was "in agreement with what appears to be a consensus" among courts that have considered the issue.

THIRD CIRCUIT

In re Arbogast, 466 B.R. 287 (Bankr. W.D. Pa. 2012). Highlighting the importance of a thoughtful determination of whether to assert the federal or applicable state law exemptions, the court held that direct wage deposits that Debtor caused his employer to make into an account held by Debtor and his wife could constitute constructively fraudulent transfers to the extent that the account funds were later spent other than to acquire necessities. The court noted that had Debtor claimed exemptions under Pennsylvania law, much of the litigation being pursued could have been avoided. Nevertheless, the court held that Debtor could exempt his interest in a retirement account under § 522(b)(3)(C) without regard to whether funds that were deposited into that account represented fraudulent transfers.

In re Graves, 464 B.R. 225 (Bankr. E.D. Pa. 2012). Denying Debtor's claimed exemption in personal injury proceeds under § 522(d)(11)(D), the court found no evidence that any portion of the husband's personal injury settlement was attributable to the wife's loss of consortium. The court held, however, that to the extent that the wife possessed a claim for loss of consortium, any recovery on it would be her exclusive property and properly subject to exemption as an unliquidated potential payment on *account* of a "personal bodily injury."

Bierbach v. Walck (In re Walck), 459 B.R. 208 (Bankr. M.D. Pa. 2011). Addressing an amended exemption seeking to exempt insurance proceeds under § 522(d)(11)(C), the court found both the amendment and the asserted exemption to be proper. Holding that cause for denying an amendment to Debtor's exemption schedule must be established by a preponderance of the evidence and not by clear and convincing evidence, the court found that Debtor's amendment was not untimely although made after publication of the trustee's schedule of distribution. The court found insufficient prejudice to creditors or the estate in a prior notice of payment in full, holding that prejudice of a kind sufficient to deny amendment to a debtor's exemption schedule exists only when creditors would have taken different actions or asserted other positions had the exemptions been claimed earlier or when the late amendment impairs the trustee's ability to administer the estate. Finally, the court found, based on evidence adduced in the case, that the proceeds of the insurance would be necessary for Debtor to meet her basic needs based on her age, other assets and her limited ability to save for retirement, as required to § 522(d)(11)(C).

FIFTH CIRCUIT

Chilton v. Moser (In re Chilton), 674 F.3d 486 (5th Cir. 2012). The parties agreed that Debtors' inherited IRA was tax exempt, but disagreed over which section of the Internal Revenue Code rendered it so. Because transfer of the IRA took place before Debtors filed for bankruptcy, the issue was which provision rendered the inherited IRA exempt from taxation subsequent to the transfer. The court found that § 408 rendered the inherited IRA exempt from taxation following its transfer from the deceased to Debtors. Because § 408 is one of the sections named in § 522(d)(12), inherited IRAs are contained in an account that is exempt from taxation as that phrase is used in § 522(d)(12).

SEVENTH CIRCUIT

In re Clark, 714 F.3d 559 (7th Cir. 2013). Specifically rejecting holdings in other circuits, the Seventh Circuit held an inherited IRA not "retirement funds" within the meaning of §§ 522(b)(3)(C) or 522(d)(12), and hence not exempt.

EIGHTH CIRCUIT

Carpenter v. Ries (In re Carpenter), 614 F.3d 930 (8th Cir. 2010). Debtor received a lump sum payment, prepetition, of retroactive Social Security disability benefits. He asserted that the funds were exempt under 42 U.S.C. § 407, which provides that no money paid under the Social Security Act "shall be subject to . . . the operation of any bankruptcy or insolvency law." In addition, § 407(b) provides that no other provision of law, whenever enacted, may be construed to limit, supersede or modify § 407 without express reference thereto. The bankruptcy court sustained the trustee's objection, finding that the payments were part of the bankruptcy estate, and held that § 407 is merely an exemption that cannot be claimed if the debtor elects exemptions under § 522(d). The BAP reversed, and the Eighth Circuit affirmed. The Court found that § 407 conflicts with the Bankruptcy Code and, following *Hildebrand v. SSA (In re Buren)*, 725 F.2d 1080, 1084 (6th Cir. 1984), held that § 407 operates as a complete bar to the forced inclusion of Social Security benefits in the bankruptcy estate. Such payments become part of the estate only if the debtor chooses to include them.

In re Martin, 140 F.3d 806 (8th Cir. 1998). Debtor claimed the federal wild card exemption under § 522(d)(5). The Court of Appeals held that Debtor did not need to first take a homestead exemption in order to exempt up to $7,500 (the maximum then set out in § 522(d)(5)) of the unused amount of the homestead exemption under the wild card provision. That provision allows the exemption of an unused amount of the homestead exemption in order not to discriminate against a nonhomeowner.

NINTH CIRCUIT

Farrar v. McKown(In re McKown), 203 F.3d 1188 (9th Cir. 2000). An Individual Retirement Account qualified for an exemption under either state or federal law because § 522(d)(10)(E), is materially identical to Cal. Civ. Proc. Code § 703.140(b)(10)(E).

E. *PROTECTION OF EXEMPT PROPERTY—§ 522(c)*

FIRST CIRCUIT

Pasquina v. Cunningham (In re Cunningham), 513 F.3d 318 (1st Cir. 2007). The First Circuit affirmed the district court's finding that under § 522(c), proceeds from a post-petition sale of exempt homestead property are exempt from pre-bankruptcy debts. *See also In re Weinstein*, 164 F.3d 677, 682 (1st Cir. 1999) (detailing exceptions to this rule).

United States v. Hyde, 497 F.3d 103 (1st Cir. 2007). The district court ruled that a bankruptcy debtor's restitution order imposed in a criminal case creats a new obligation owed by the debtor to the plaintiff (here, the United States government). This obligation was unaffected by Debtor's homestead exemption and § 522(c). Thus, the government could enforce its garnishment order against the sale proceeds of Debtor's home. Debtor appealed, arguing that he retained the right to the homestead exemption even after converting his home to cash and that the exemption trumped the government's power to garnish the proceeds of his home to satisfy his obligation. The First Circuit did not reach to question whether the Massachusetts homestead exemption applied to cash acquired through the sale. Instead, it ruled that the proceeds from sale of Debtor's home were not protected, regardless of whether the exemption applied. The Court found that the government held a tax lien against Debtor's property and this lien triggered one of the stated exceptions to the homestead exemption—specifically, § 522(c)(2)(B).

THIRD CIRCUIT

In re Bell, 476 B.R. 168 (Bankr. E.D. Pa. 2012). In connection with the competing motions of a chapter 7 Debtor and his ex-employer regarding their respective rights in funds in an employee retirement account, the court held that because Debtor had asserted that his interest in the 401(k) plan was "excluded" from his bankruptcy estate pursuant to § 541(c)(2), the court did not need to reach the issue of whether a right to setoff preserved by § 553 could be asserted against exempt property otherwise protected under § 522(c)(1).

SEVENTH CIRCUIT

In re Hunter, 970 F.2d 299 (7th Cir. 1992). Interpreting Indiana law, the Seventh Circuit held that a creditor may not file a postbankruptcy lawsuit against entireties property claimed as exempt in the bankruptcy of one member of the entireties community.

Although the court only addressed Indiana law, the court's reasoning may extend to tenancy by the entireties created under other state's laws.

EIGHTH CIRCUIT

In re Crawford, 274 B.R. 798 (B.A.P. 8th Cir. 2002). Debtor attempted to exempt annuity payments and the trustee objected. The parties agreed that 25% of the total monthly annuity payments belonged to the bankruptcy estate and the remaining 75% was exempt. A creditor claimed an interest in the 25% because of a security interest. The trustee argued that the security interest was not properly perfected. The Court of Appeals held that an unperfected security interest is subordinate to the bankruptcy trustee. As between the creditor and the debtor, however, the secured interest remains valid. Under § 522(c), property that is exempted under § 522 remains liable for debts secured by an unavoided lien. Therefore, even though the bankruptcy court exempted 75% of the annuity payments, it did not avoid or negate the creditor's interest.

NINTH CIRCUIT

DeMarah v. United States (In re DeMarah), 62 F.3d 1248 (9th Cir. 1995). The debtor cannot avoid a tax lien that encumbers exempt property even to the extent the lien secures a penalty because § 522(c)(2)(B) overrides § 522(h), and § 522(c)(2)(B) enables the debtor to avoid liens securing a penalty.

United States, IRS v. Isom (In re Isom), 901 F. 2d 744 (9th Cir. 1990). The debtor's otherwise exempt property is still subject to the payment of a properly filed tax lien under § 522(c)(2)(B) because the lien rides through the bankruptcy case.

TENTH CIRCUIT

Lowther v. Lowther (In re Lowther), 52 F. App'x 476 (10th Cir. 2002). Debtor's former spouse was awarded a lien on the former marital home in the prebankruptcy divorce decree, and the lien survived the debtor's discharge under § 523(c), even if the home equity was exempt.

F. *PRE-BANKRUPTCY PLANNING*

SEVENTH CIRCUIT

Smiley v. First Nat'l Bank (In re Smiley), 864 F.2d 562 (7th Cir. 1989). The Seventh Circuit stated that a debtor is entitled to make full use of exemptions within the limits of the law, expressly rejecting decisions that consider the amount of non-exempt assets transferred into exempt assets as well as decisions that consider the debtor's desire to use the exemption laws to shield assets. Instead a court should look for evidence of extrinsic fraud. Thus, in announcing these decisions, the Court upheld denial of discharge to a debtor who converted nonexempt assets into exempt assets while negotiating with creditors for an out-of-court workout, concealing transactions and assets during the negotiations.

EIGHTH CIRCUIT

Norwest Bank Nebraska, N.A. v. Tveten, 848 F.2d 871 (8th Cir. 1988). Debtor converted almost all of his non-exempt property into exempt property the day before filing for chapter 11 bankruptcy. Debtor argued that his transfers constituted pre-bankruptcy planning. The Court of Appeals held that Debtor intended to defraud, delay, and hinder his creditors, and denied Debtor's discharge.

When a debtor claims a state-created exemption, as in this case, the scope of the claim is determined by state law. Under the Code, conversion of non-exempt to exempt property for the purpose of placing the property out of the reach of creditors, without more, will not deprive the debtor of an exemption. The practice is not considered fraudulent, without more. The rationale is that a contrary rule—barring the conversion of property into exempt form—would be extremely harsh, especially in those jurisdictions in which the exemption allowance is minimal. This blanket approval of conversion is qualified, however, by denial of discharge if there is extrinsic evidence of the debtor's intent to defraud creditors. A debtor's right to a discharge is determined by federal law and the Code provides that a debtor may be denied a discharge if he has transferred property with the intent to hinder, delay, or defraud a creditor within one year before the date of filing. The issue revolves around whether there is extrinsic evidence that the debtor transferred his property with the intent to defraud his creditors. The Court of Appeals found such extrinsic evidence in this case.

See also Hanson v. First National Bank, 848 F.2d 866 (8th Cir. 1988); *Panuska v. Johnson (In re Johnson)*, 880 F.2d 78 (8th Cir. 1989)

NINTH CIRCUIT

Gill v. Stern (In re Stern), 345 F.3d 1036 (9th Cir. 2003). Prepetition conversion of non-exempt property to exempt property, without more, is not a fraudulent transfer.

TENTH CIRCUIT

In re Warren, 512 F.3d 1241 (10th Cir. 2008). The Court would not go so far as to say that conversion of non-exempt assets to exempt assets on the eve of bankruptcy will never, by itself, demonstrate the required intent to defraud creditors. The Court relied on a number of specific facts to affirm the bankruptcy court's denial of discharge. The court especially emphasized the multiple sale transactions, including the irregular sale of a valuable coin collection, pre-payment of insurance, and the declared motive to avoid paying former business partners with whom they had had a falling out.

Jenkins v. Hodes (In re Hodes), 402 F.3d 1005 (10th Cir. 2005). Debtors entered in to an enforceable contract for improvements to an exempt homestead, putting down a deposit, before an involuntary chapter 7 was filed against them. Applying Kansas law, "the deposit is equitably converted into construction at the moment the contract is executed and the not-yet-complete construction is equitably converted into an exempt asset. For that reason, the deposit is part and parcel of the homestead and is exempt to the extent that the debtor actually uses it to improve the homestead."

ELEVENTH CIRCUIT

In re Jennings, 533 F.3d 1333 (11th Cir. 2008). Debtor, the sole shareholder of a firearms manufacturing business, became liable for a California tort judgment of approximately $21 million and subsequently filed bankruptcy. At or around the time of the judgment, Debtor paid a contractor $130,000 to improve a hangar on his Florida homestead. Debtor argued that he was permitted to convert nonexempt assets to exempt assets before the commencement of a bankruptcy case, even if the transfer was specifically intended to shield assets from creditors. The Court concluded that a debtor may convert non-exempt assets to exempt assets without violating § 727(a)(2)(A) so long as there is not an intent to hinder, delay, or defraud creditors. The Court noted the difficulty of determining intent in the case of a transfer of assets into a homestead. It held that circumstantial evidence may be used, given the unlikelihood that a debtor will provide direct evidence of intent. Consequently, the Court held the bankruptcy court's factual findings were not clearly erroneous and affirmed the initial finding of intent to defraud.

Havoco of America, Ltd. v. Hill, 790 So. 2d 1018 (Fla. 2001). In answering a certified question from the Eleventh Circuit, the court held that "[a] homestead acquired by a debtor with the specific intent to hinder, delay, or defraud creditors is not excepted from the protection of article X, section 4."

G. *AVOIDING POWER INTENDED TO PROTECT EXEMPTIONS—§ 522(f)*

UNITED STATES SUPREME COURT

Owen v. Owen, 500 U.S. 305 (1991). The debtor may avoid a judicial lien on homestead property even though state law creating the homestead exemption would permit enforcement of the lien. The fact that the state has opted out does not nullify the debtor's avoiding power.

Farrey v. Sanderfoot, 498 U.S. 1022 (1991). Section 522(f)(1) only authorizes the avoidance of liens fixed on an interest in property that the debtor acquired before the lien attached. Thus, the ex-spouse's judicial lien against the former marital residence, created by the parties' divorce decree, was not avoidable.

FIRST CIRCUIT

Wilding v. Citifinancial Consumer Financial Servs. Inc. (In re Wilding), 475 F.3d 428 (1st Cir. 2007). The First Circuit addressed the question whether § 522(f) permits a debtor to avoid a judicial lien if the lien existed at the filing of the bankruptcy petition but was satisfied after the bankruptcy case closed and before the debtor filed a motion to avoid. The bankruptcy court and the BAP concluded that § 522 does not allow such a lien avoidance. The First Circuit reversed, noting that "a debtor may avoid a judicial lien under § 522(f) even if he has satisfied the lien prior to filing a motion to avoid, so long as the lien in question impaired an exemption as of the bankruptcy petition date (or the later acquired property date) as reflected in the statutory definition of 'value' under § 522." The Court also noted that the creditor may have had equitable defenses to the motion to avoid its lien.

SECOND CIRCUIT

In re Heaney, 453 B.R. 42 (Bankr. E.D.N.Y. 2011). Debtor had acquired a $500,000 house with his non-debtor wife. Debtor sought to avoid various judicial liens on his interest in the real property pursuant to § 522(f), and claimed that a 50% ($250,000) interest in the property. The court disagreed, holding that because Debtor and has wife held the property as a tenancy by entirety, Debtor's interest in the property under § 552(f) was the entire value of the property.

THIRD CIRCUIT

In re Schick, 418 F.3d 321 (3d Cir. 2005). Chapter 13 Debtor moved to avoid, on exemption impairment grounds, a lien held by the New Jersey Motor Vehicle Commission (MVC) for unpaid motor vehicle surcharges and interest. The Third Circuit held that the MVC's lien for unpaid surcharges was a statutory lien, not a judicial lien. Thus, it was not avoidable by Debtor.

In re Miller, 299 F.3d 183 (3d Cir. 2002). In determining whether a judicial lien impairs an exemption claimed by a chapter 13 debtor in a residence owned jointly with a non-debtor, the correct approach to calculating the amount of "all other liens on the property" under § 522(f)(2)(ii) is to view the debtor as having a one-half interest in the residence, and attribute a corresponding one-half of the mortgage debt to the debtor.

Pristas v. Landaus of Plymouth, Inc., 742 F.2d 797 (3d Cir. 1984). Debtor purchased a washer and, subsequently, a rocker-recliner from the creditor-store under installment sale contracts. The contracts provided that "subsequent purchases made by the purchaser and the total payments hereof shall reflect the added cost and finance charge of the goods subsequently purchased." The contracts also stated that the purchased goods "shall be security for payment of the subsequent purchaser." The purchase price of the washer remained partially unpaid when Debtor purchased the rocker-recliner. The price of the rocker and finance charges were added to the total balance. Debtor defaulted and the creditor obtained a judgment against her. Debtor sought, under § 522(f)(2), to avoid a security interest in exempt household goods, asserting that once the washer secured not only its price but that of the rocker-recliner, it converted to an avoidable nonpurchase-money security interest.

The bankruptcy court held that, under *Page v. Wilson*, 150 Pa. Super. 427 (1942), the security interest created at the time the washer was purchased did not lose its purchase-money character when consolidated with the debt created by purchase of the rocker-recliner because the point at which each debt was satisfied could be ascertained and the PMSI in each item remained valid until that time. Thus, the security interest could not extinguished by § 522(f)(2). The district court agreed.

On appeal, the Court of Appeals upheld the bankruptcy court's decision not to avoid the lien under § 522(f)(1), finding that a purchase money security interest in consumer goods survives when the debt is consolidated with that incurred for subsequent purchases. The Court found, however, that the *Page* decision has been supplanted by the Pennsylvania Goods and Services Installment Sales Act, Pa.C.S.A. Tit. 69, §§1101-2303 (Purdon's Supp. 1984), which allows a creditor to consolidate original and subsequent purchases and to treat initial purchases as security for later ones. With no controlling state court decision on the subject, the Court found that the statute supplied an apportionment formula for the case at bar and that the security interest at issue retained its purchase-money character.

Gardner v. Pa. Dept. of Public Welfare, 685 F.2d 106 (3d Cir. 1982), *cert. denied.*, 459 U.S. 1092 (1982). The DPW confessed judgment against Debtor for default on reimbursement agreements executed by Debtor for public assistance. Each form contained standard PA confession-of-judgment language and, under applicable case law, judgments obtained by confession are avoidable judicial liens. The bankruptcy court permitted avoidance of DPW's lien on Debtor's real property under § 522(f)(1), finding that the lien was a judgment lien, not a security interest or equitable or statutory lien. The district court affirmed and the DPW appealed. The Third Circuit also affirmed.

The DPW argued that § 522(f)(1) was not intended to apply to states. The Court disagreed, citing § 106(c), which includes governmental entities within its definition, thereby treating government creditors like other creditors. The DPW also argued that if the Code allows such avoidance, it violates the 11th Amendment, but the Court found no such violation.

Young v. 1200 Buena Vista Condominiums, 477 B.R. 594 (W.D. Pa. 2012). The court reversed and remanded the bankruptcy court's decision, holding that a condominium association's lien for unpaid assessments is in the nature of a statutory lien and not a judicial lien or security interest that can be avoided on exemption-impairment grounds.

In re Holler, 2012 U.S. Dist. LEXIS 114335 (E.D. Pa. Aug. 14, 2012). The chapter 7 Debtors filed a joint petition, and scheduled their home as exempt as entireties property under Pennsylvania law. Debtors then sought to avoid separate but related individual judgments, owed to the same creditor, as impairing that exemption. The district court affirmed the bankruptcy court's holding that the judgments were not joint debts that could be asserted against the entireties property outside of bankruptcy, and that Debtors could avoid the creditor's judicial liens on the property.

Filomena White Realty, Inc. v. Taitt (In re Taitt), 2012 U.S. Dist. LEXIS 31719 (M.D. Pa. Mar. 9, 2012). The district court affirmed the bankruptcy court's decision that a judgment resulting from Debtors' default on a commercial mortgage was a judicial lien that could be avoided as impairing Debtors' exemptions under § 522(f)(1). The court rejected the judgment-holders' argument that because a mortgage-holder agreed to subordinate their interest in the residence to the judgment-lien holder, the judgment lien-holder's interest was transformed into a mortgage interest.

In re Coleman, 2012 Bankr. LEXIS 1114 (Bankr. D. Del. Mar. 16, 2012). Debtor moved to avoid a judicial lien as impairing her exemption in certain personal property, including a bank account. The judicial lien was held by Debtor's former spouse, who contended that it was for a "domestic support obligation" under § 101(14A) and, therefore, neither subject to discharge pursuant to § 523(a) nor avoidable under § 522(f)(1). After carefully analyzing each of the three components of the judicial lien, the court concluded that only one portion of the lien was for domestic support obligations. Accordingly, the court avoided only the portions of the lien that did not constitute domestic support obligations.

In re Hyeon Seok Shin, 2012 Bankr. LEXIS 3952 (Bankr. D.N.J. Aug. 23, 2012). The court held that a lien held by a landlord on certain of Debtors' personal property, including inventory from Debtors' sole proprietorship, was avoidable as a judicial lien that impaired their exemption. The court found that since the lien was avoidable under § 545(3), which allows a trustee to avoid a lien for rent, it was also avoidable under § 522(h). The court also found that Debtors were provided inadequate time to remove their personal property from the premises as allowed under the lease and, therefore, the property was not abandoned by Debtors and could still be claimed exempt.

In re Leach (Leach v. Wells Fargo Home Mortgage), 458 B.R. 185 (Bankr. W.D. Pa. 2011). Debtor brought three motions: 1) to approve a settlement between himself and his mortgagee to reform the mortgage to include the exempt parcel on which the home was situated; 2) to avoid a judicial lien on the parcel; and 3) to avoid a settlement with the chapter 7 trustee under which Debtor paid $6,500 to the trustee to avoid sale of the parcel on which the Debtor had nonexempt equity prior to reformation of the mortgage. The court approved the settlement—Debtor's first motion—even though it might enable Debtor to avoid the judicial lien on the grounds that it impaired his exemption in the property. The court also found the consensual mortgage lien, of lower priority than the judicial lien, could be utilized to avoid the judicial lien. The court also found that the fact that the judgment was for Debtor's alleged fraud was not grounds to deny him the homestead exemptions or deny the avoidance motion, but Debtor was not entitled to relief from the previous order approving the settlement between him and the trustee.

In re Phares, 2011 Bankr. LEXIS 5287 (Bankr. W.D Pa. Apr. 28, 2011). Debtor's case was reopened in 2011 in order to avoid a judgment lien held by a bank for a default judgment arising out a business line of credit guaranteed by Debtor and her now deceased spouse. Additionally, Debtor amended her schedules to adjust the value of the property claiming an exemption in it. The judgment lien creditor objected, asserting laches and that Rule 1009 barred Debtor from amending the schedules after the case was originally closed. The court found that sufficient prejudice existed to bar the avoidance action, and dismissed it under the doctrine of laches. Accordingly, the court did not reach the merits of the Rule 1009 argument.

In re Janitor, 2011 Bankr. LEXIS 5285 (Bankr. W.D. Pa. Jan. 4, 2011). Debtor claimed an exemption in property held as tenants by the entireties with her non-filing spouse pursuant to § 522 (b)(2). She then sought to avoid judicial liens held by two separate banks. The lienholders first argued that Debtor's effort to exempt property held by the entireties would sever the entireties interest. The court dismissed this argument, holding that release of a lien only as to the interests of the debtor spouse does not mean that the entireties interest is dissolved. The lienholders also argued, under *Napotnik v. Equibank & Parkvale Savings Assoc.*, 679 F.2d 316 (3d Cir. 1982), that Debtor could not use exemptions available under § 522(b)(3)(B) to avoid a judgment lien against both a husband and wife secured by entireties property. Citing *In re Brannon*, 476 F.3d 170, 175 (3d Cir. 2007), the Court held that a debtor-spouse filing individually may, by taking the federal exemptions, exempt certain entireties property in spite of the presence of an encumbrance thereon securing a joint debt.

FOURTH CIRCUIT

Botkin v. DuPont Community Credit Union, 650 F.3d 396 (4th Cir. 2011). Chapter 7 Debtor had no equity in her home when she filed for bankruptcy because she owed more than the home was worth. Debtor listed certain personal property as exempt, but did not claim a homestead exemption. Pursuant to § 522(f), the chapter 7 trustee moved to avoid a judicial lien held by a creditor on Debtor's home.

The Fourth Circuit ruled that a debtor need not claim an interest in encumbered property in order to avoid a lien on the property. For purposes of § 522(f), claiming an exemption in the property is not a precondition for avoiding a lien on the property if the lien impairs a potential exemption. The key inquiry is not whether the debtor currently has an interest in the property at issue, but whether the debtor would have an interest in the absence of any liens. Here, the judicial lien was impairing Debtor's exemption in her home. Thus it could be avoided.

Warthen v. Smith (In re Smith), 1 F. App'x 178 (4th Cir. Jan. 10, 2001), *cert. denied*, 532 U.S. 1052 (2001). The Fourth Circuit affirmed the decision of the lower courts, which had held that Debtor could not avoid a judgment creditor's lien on Debtor's real property because Debtor had failed to schedule an exemption in the real property. This holding, however, appears to have been overruled by *Botkin v. DuPont Cmty. Credit Union*, 650 F.3d 396 (4th Cir. 2011), which held that a debtor does not need to claim an exemption as a precondition to avoiding a lien that impairs an exemption. Furthermore, *Warthen*'s holding is arguably *dicta* because the Court also affirmed the lower courts' decision that the wholly unsecured judgment lien at issue was void under § 506(d). "Although the stripping down of a lien to some lesser amount is clearly prohibited [by the Supreme Court's ruling in] *Dewsnup* . . . [nothing in *Dewsnup*] would preclude a worthless lien from being "stripped off" to effectuate the broad policy goals of the bankruptcy laws." 1 F. App'x at 181.

McCoy v. Rosemont Auto Title Loan (In re McCoy), 2006 U.S. Dist. LEXIS 74365 (E.D. Va. Oct. 3, 2006), *aff'd* 219 F. App'x 326 (4th Cir. Feb. 27, 2007). The district court affirmed the bankruptcy court's finding that Debtor could not avoid a creditor's lien in her automobile as a nonpossessory, non-purchase money security interest in a tool of the debtor's trade under § 522(f)(1)(B)(ii). The district court held that Debtor's deduction of the costs of the automobile as business expenses on her tax returns was not relevant to whether the car was specifically suited to business use or peculiar to the debtor's trade—the applicable Fourth Circuit standard for determining what qualifies as a tool of a debtor's trade.

In re Jeffries, 2002 WL 202108 (M.D.N.C. Jan. 31, 2002). The district court held that in the case of a real property interest owned by Debtor as a tenant in common, the formula used under § 522(f)(2)—for purposes of determining the extent to which a lien impairs an exemption—should reduce the amount of other liens on the entire property proportionally with the value of the debtor's partial interest in the property. Otherwise, allowing a debtor who co-owns property to use the full amount of other liens on the entire property while utilizing only the value of the debtor's partial interest would, in some cases, provide a windfall to the debtor unintended by Congress. Section 522(f) is intended to protect in full, but not increase, a debtor's exemptions, and failing to calculate net equity before determining the debtor's interest confers more than the fresh start intended by Congress.

Wal-Mart Stores, Inc. v. Carpenter (In re Carpenter), 252 B.R. 905 (E.D. Va. 2000), *aff'd* 36 F. App'x 80 (4th Cir. June 3, 2002). An employer who sponsors Debtor's ERISA health plan has an equitable lien in proceeds recovered by Debtor from a third party tortfeasor for monies advanced by the employer to Debtor under the plan. Such an equitable lien does not constitute a judicial lien subject to avoidance under § 522(f)(1). The district court held that the Virginia statute exempting personal injury recoveries only exempts such recoveries from unsecured creditors' collection efforts; here, the employer's claim was based on a secured equitable lien. The court also held that the bankruptcy court's finding of an equitable lien did not create the lien, but rather recognized its existence. Expounding on this rationale, the court opined that the equitable lien was a security interest under the Bankruptcy Code, which arose from the employer's subrogation and reimbursement rights under the plan agreement, and not a judicial lien subject to avoidance.

SIXTH CIRCUIT

Brinley v. LPP Mortgage, Ltd. (In re Brinley), 403 F.3d 415 (6th Cir. 2005). Partial impairment is acceptable. The senior lien was reduced to the extent that it impaired Debtor's homestead exemption; however, the junior lien remained unaffected as not impairing the exemption.

Arango v. Third Nat'l Bank (In re Arango), 992 F.2d 611 (6th Cir. 1993). Appellant sought to avoid a judgment lien under § 522(f) in order to claim an exemption in real property that he owned with his wife as tenants by the entirety pursuant to § 522(b)(2)(B). The Sixth Circuit affirmed the lower court's decision to refuse to allow avoidance. First, the Court held that the bank's lien did not attach to the entireties interest, which was exempted pursuant to § 522(b)(2)(B), under Tennessee law. The bank was only Debtor's creditor and was unable to reach the jointly held property. Debtor argued that because his present possessory interest was exempt, he should also be able to avoid the judgment lien against his survivorship interest, which impaired his ability to convey the entire fee interest free and clear of the lien. The Court disagreed and found that the survivorship interest could be transferred under Tennessee law and was therefore not exempt under § 522(b)(2)(B). The Court did not address whether the lien impaired some other exemption under Tennessee law.

SEVENTH CIRCUIT

In re Willett, 544 F.3d 787 (7th Cir. 2008). During the pendency of a chapter 13, Debtors' life estate in a piece of real estate matured into a fee simple title that became property of the bankruptcy estate under § 1306. To avoid a judicial lien on the fee simple under § 522(f), the value of Debtors' interest in the fee simple was to be considered as of the date it became part of the bankruptcy estate. On the facts of the case, Debtors could not avoid a judicial lien on the fee simple because Debtor's unencumbered equity exceeded the value of the homestead exemption.

In re Schoonover, 331 F.3d 575 (7th Cir. 2003). The Seventh Circuit ruled that the 30-day time limit to object to exemptions in Rule 4003(b) does not prevent a creditor defending a lien under § 522(f) from asserting that the property securing the lien is not exempt.

In re Thompson, 867 F.2d 416 (7th Cir. 1989). Consistent with the rulings in some other circuits, the Seventh Circuit held that the lien avoidance provisions in § 522(f) are to be read consistently with the state exemptions the debtor elects. Thus, when a Wisconsin farmer claimed a state-law exemption in fifteen pieces of farm equipment valued at over $13,000 as "implements or tools of the trade," the lien avoidance provisions of § 522(f)(1)(B)(ii) allowed the farmer to avoid the liens on all of the equipment even though the federal exemption in tools of the trade was capped at $750 at the time of the case. If it had been in force at the time of the case, § 522(f)(3) would have capped the lien avoidance on the facts of this case at the statutory limit set out therein.

EIGHTH CIRCUIT

White v. Commercial Bank & Trust Co. (In re White), 460 B.R. 744 (B.A.P. 8th Cir. 2011). Prepetition, Debtors owned their home free and clear as tenants in common. Both Debtors filed chapter 7 petitions to stay foreclosure proceedings by a creditor that had obtained a judgment lien on Debtors' home. In their petitions, both Debtors claimed a homestead exemption in their respective halves of the home. The creditor moved for relief from the automatic stay on the basis of its judgment lien, and objected to Debtors' homestead exemptions.

Under § 522(f)(1), a debtor may avoid a judicial to the extent that the lien impairs an exemption to which the debtor would have been entitled under applicable law but for the lien itself. To determine whether a judicial lien is avoidable, the court should ask not whether the lien impairs an exemption to which the debtor is in fact entitled, but whether it impairs an exemption a debtor could have claimed in the absence of the judicial lien at issue. Here, the Court found that because Debtors owned their home free of any encumbrances before the creditor's judicial lien attached, they could have claimed a homestead exemption in the absence of the creditor's judicial lien. Thus, the creditor's judicial lien was avoidable under § 522(f)(1).

Kolich v. Antioch Laurel Veterinary Hosp., Inc., P.C. (In re Kolich), 273 B.R. 199 (B.A.P. 8th Cir. 2002). Creditor appealed an order of the bankruptcy court that avoided its judgment lien in part.

The judgment lien was second in priority, after a first deed of trust, but prior to a second deed of trust. Debtors argued that the bankruptcy court failed to properly apply § 522(f)(2)(A) by failing to include the amount owed to the second deed of trust in calculating the extent to which the lien could be avoided.

The BAP found the bankruptcy court was correct in determining that Debtors could avoid the lien even though they had no equity in the property. But, the bankruptcy court erred as a matter of law in not avoiding the lien in its entirety. The creditor pointed out that literal application of the mathematical formula allowed the debtors to use the second deed of trust, which was a wholly unsecured claim in bankruptcy, to erase a prior judicial lien. But § 522(f)(2)(A) refers to "all other liens on the property" and requires their inclusion in the calculation. The second deed of trust fell within that definition and should have been included in the calculation. However unsecured or undersecured the second deed of trust was under § 506(b), it was still a lien. From the value of the property, the court was to deduct all unavoidable liens plus Debtors' allowable exemption. The result was a negative number and thus the judgment lien was avoided in its entirety. The lien was avoidable even though it was prior to the second deed of trust and the holder of that deed of trust had only an unsecured claim in the bankruptcy case. The BAP reversed the bankruptcy court's decision, avoiding the creditor's lien in its entirety.

NINTH CIRCUIT

Culver, LLC v. Kai-Ming Chui (In re Kai-Ming Chiu), 304 F.3d 905 (9th Cir. 2002). Debtor may avoid a lien under § 502(f)(1) even though he had no interest in the property subject to the lien as of the date of the filing of the avoidance power action as long as he had an interest in the property when the lien arose.

Wolfson v. Watts (In re Watts), 298 F.3d 1077 (9th Cir. 2002). When there is no surplus equity at the time of the recording of a judgment, but between the recording and the date of bankruptcy a surplus develops, the judgment lien attaches to the existing surplus as of the petition date, subject to the debtor's avoiding power.

TENTH CIRCUIT

Willis v. Strother (In re Strother), 328 B.R. 818 (B.A.P. 10th Cir. 2005). The judgment creditor failed to perfect a statutory lien under Oklahoma law and its judicial lien impaired the homestead exemption, thereby allowing avoidance under § 522(f). Although Oklahoma's statute provided an exception to its homestead exemption for construction work on the home, that was preempted by the Bankruptcy Code. The court cited *In re Leonard*, 866 F.2d 335, 336

(10th Cir. 1989), for the proposition that while a state may determine what is exempt under the opt-out, "federal law determines the availability of the lien avoidance power."

Bank of Cushing v. Vaughan (In re Vaughan), 311 B.R. 573 (B.A.P. 10th Cir. 2004). Chapter 7 Debtors lost in a dischargeability proceeding under § 523(a)(2) and the creditor obtained a line by recording the money judgment entered by the bankruptcy court in the nondischargeability proceeding. The BAP held that, to the extent the judgment created a judicial lien post-petition, it was avoidable as a lien for prepetition debt that impaired the homestead exemption. Section 522(f) contains no restriction against avoidance as to judicial liens for nondischargeable debt, and § 522(c) provides, with no applicable exception, that exempt property is not liable for prepetition debt.

In re Morgan, 285 B.R. 344 (BAP 10th Cir. 2002) (table decision). The bankruptcy court acted too quickly in allowing Debtors' tool of the trade exemption and granting their motion to avoid a lien under § 522(f), when it granted the motion before expiration of the time to object to Debtors' amended exemption claims. Remand was required to determine the exemption objection.

ELEVENTH CIRCUIT

In re Lehman, 205 F.3d 1255 (11th Cir. 2000). Debtor was a tenant in common with his non-debtor spouse and the property was valued at $225,000 with a $165,000 mortgage lien. Debtor was entitled to a $5,312 homestead exemption under Georgia law, and the judicial lien in question was worth $53,878.19. The Court departed from the plain language of § 522(f)(2)(A) and allocated the equity in the property between the tenants in common to determine the impairment of Debtor's exemption.

Holloway v. John Hancock Mutual Life Ins., 81 F.3d 1062 (11th Cir. 1996). Debtors who admitted on their schedules to having no equity in their homestead were not permitted to claim a statutory homestead exemption in order to avoid a judgment lien on the home. The court ruled that a debtor must have some equity in a home before he or she can assert that a lien interferes the homestead exemption, entitling the debtor to avoid the lien under § 522(f).

H. *APPLICATION OF § 522(g)*

FIRST CIRCUIT

In re Hill, 562 F.3d 29 (1st Cir. 2009). The First Circuit considered whether Debtor's homestead exemption could be denied under § 522(g) when Debtor fraudulently transferred property but took back possession before filing under chapter 7. Finding that the statutory cap did not apply in cases—like this one—instituted before April 20, 2005, and that § 522(g) is limited to "property that the trustee recovers," the Court affirmed the BAP's decision overturning the bankruptcy court's denial of the homestead exemption. The Court made clear that § 522(g) does not include pre-petition transfers of property undertaken by the debtor to restore the "status quo ante." This case abrogated *In re Carpenter,* 56 B.R. 704 (Bankr. D.R.I. 1986).

TENTH CIRCUIT

Russell v. Kuhnel (In re Kuhnel), 495 F.3d 1177 (10th Cir. 2007). The Court examined the relationship between § 522(g) and Rule 4003(b), when the debtors had voluntarily given a security interest in a vehicle to a creditor. The trustee was able to attack Debtors' claimed exemption under § 522(g), and to obtain the release of the creditor's lien because of failure to timely perfect. The trustee's avoidance was not subject to Rule 4003(b)'s 30-day time for objection to exemptions, and the exemption was invalid. "[A] trustee action under § 522(g) is not contesting the exemption per se, but rather is asserting the fact that he or she has set aside a debtor's voluntary transfer." *Id.* at 1182.

See also Zubrod v. Duncan (In re Duncan), 329 F.3d 1195, 1204 (10th Cir. 2003), applying the same concept: "[W]e hold that Debtor is not entitled to claim a homestead exemption in property voluntarily transferred and recovered by the Trustee in an adversary proceeding, notwithstanding the Trustee's failure to object within the 30-day period of Fed. R. Bankr. P. 4003(b)."

In re Duncan, 329 F.3d 1195 (10th Cir. 2003). Debtor voluntarily transferred residential property that he owned in his own name to himself and his wife as tenants by the entirety, as part of a transaction that the chapter 7 trustee set aside as fraudulent to creditors. Thus, Debtor was barred from seeking to exempt his interest in the property, either on the theory that it was fully exempt as property that he owned as tenant by the entirety with his non-debtor spouse, or to the extent of the state homestead exemption. Debtor's intentional fraudulent transfer foreclosed any exemption claim, under § 522(g)(1). The chapter 7 trustee was not bound by Rule 4003(b), because of § 522(g).

ELEVENTH CIRCUIT

Levine v. Weissing, 134 F.3d 1046 (11th Cir. (Fla.) 1998). The conversion of nonexempt assets to exempt assets in the face of a known and existing creditor constitutes a fraudulent "transfer" within the meaning of § 101(54).

I. *REDUCTION UNDER §§ 522(o) AND (p)*

FOURTH CIRCUIT

In re Jones, 397 B.R. 765 (Bankr. D.S.C. 2008). The bankruptcy court first recognized that "[t]here is no case law concerning § 522(o) within this circuit". *Id.* at 769. Debtors surrendered, through foreclosure, one of their previous homes in which they had no equity and would not have been able to claim an exemption, in order to move into their current home that they owned free and clear and did exempt. The court held that the surrender was not fraudulent so as to require a reduction in the value of Debtor's interest in their current home under § 522(o).

EIGHTH CIRCUIT

In re Addison, 540 F.3d 805 (8th Cir. 2008). Debtor claimed an exemption in his homestead after transferring non-exempt funds to reduce the mortgage. Under § 522(o), the amount of a state homestead exemption is reduced to the extent that the value of the exemption is attributable to nonexempt property that the debtor converted into the homestead within ten years of filing for bankruptcy, if the conversion was made with the intent to hinder, delay, or defraud a creditor. The issue, therefore, was whether Debtor acted with intent to hinder, delay, or defraud a creditor when reduced the mortgage. The Court of Appeals applied the badges-of-fraud approach to determine Debtor's intent, and held that the facts did not support a finding of intent to hinder or delay. Thus, there was no reduction of Debtor's homestead exemption based on such an intent.

NINTH CIRCUIT

Greene v. Savage (In re Greene), 583 F.3d 614 (9th Cir. 2009). Section 522(p)(1)'s limitation on the amount of a debtor's homestead exemption does not apply if the debtor acquired the property more than 1215 days prepetition, even if the homestead exemption was asserted during that period.

In re Stanton, 457 B.R. 80 (Bankr. D. Nev. 2011). Section 522(o) reduced the amount of the homestead exemption that Debtor could claim as a result of the sale of nonexempt assets and the use of them to pay down the debt on the home.

In re McNabb, 326 B.R. 785 (Bankr. D. Ariz. 2005). In a decision that has been widely criticized, the court held that the cap under § 522(p) is not implicated when state law does not permit debtors to make the federal election.

TENTH CIRCUIT

Soule v. Willcut (In re Willcut), 472 B.R. 88 (B.A.P. 10th Cir. 2012). Applying § 522(o), the statute's "interest" refers to "equity" in "a debtor's home that was obtained through fraudulent transfer of non-exempt assets into exempt assets." The bankruptcy court's finding that the home had no realizable equity was affirmed.

Dykstra Exterior, Inc. v. Nestlen (In re Nestlen), 441 B.R. 135, 143 (B.A.P. 10th Cir. 2010). The court held § 522(p)'s cap on homestead equity applicable to each of the joint debtors under § 522(m), and ruled that "state law does not govern whether the § 522(p) cap is doubled." The decision of the Oklahoma Supreme Court in *In re Arnold*, 73 P.3d 861 (Okla. 2003), that a married coupled cannot claim two homesteads, "has no bearing on whether the § 522(p) ceiling is doubled."

J. *CAP UNDER § 522(q)*

FIRST CIRCUIT

Larson v. Howell (In re Larson), 513 F.3d 325 (1st Cir. 2008). The First Circuit considered whether a debtor's admission of liability for negligent homicide in state court, leading to the debt at issued, served to activate § 522(q)(1)(B)'s cap on state homestead exemptions. The Court affirmed the lower courts' finding that Debtor's admission of guilt limited the state homestead exemption to $125,000 (then, the amount of the statutory cap).

K. *CONSTITUTIONAL ISSUES*

FOURTH CIRCUIT

Sheehan v. Peveich, 574 F.3d 248 (4th Cir. 2009. The chapter 7 trustee challenged West Virginia's statute creating a scheme of exemptions applicable only in bankruptcy proceedings as invalid under the Supremacy Clause of the U.S. Constitution. The Fourth Circuit upheld the West Virginia statute because § 522(b)(1) affords states the authority to restrict their residents to exemptions enacted by their legislatures if they so choose. Therefore, Congress expressly delegated to the states the power to create state exemptions in lieu of the federal bankruptcy scheme and did not restrict states to creating exemptions equally applicable to bankruptcy and non-bankruptcy cases.

SIXTH CIRCUIT

Richardson v. Schafer (In re Schafer), 689 F.3d 601 (6th Cir. 2012). Two chapter 7 Debtors in unrelated cases claimed homestead exemptions under Michigan's bankruptcy-specific exemption statute, which applies only to debtors who file bankruptcy. Under Michigan law, non-bankruptcy debtors are allowed a homestead exemption that is substantially less—specifically, $30,000 for bankruptcy debtors versus $3,500 for non-bankruptcy debtors. Because Michigan has not opted out of the federal exemption statute under § 522(d), Michigan debtors can elect either state or federal exemptions. The chapter 7 trustees in both cases objected to the exemptions on the grounds that the Michigan statute violates the Bankruptcy and Supremacy Clauses of the U.S. Constitution.

The Court held Michigan's bankruptcy-specific exemption statute constitutional. The bankruptcy exemption system provides a uniform framework for bankruptcy among classes of debtors through geographic uniformity even though dissimilarities in state law provide different effects in various states.

Storer v. French (In re Storer), 58 F.3d 1125 (6th Cir. 1995). The Ohio statute at issue did not violate the Privileges and Immunities or Supremacy Clauses, and the "opt-out" provision of the Code does not violate the due process or equal protection principles of the Fifth Amendment.

SEVENTH CIRCUIT

In re Thompson, 867 F.2d 416 (7th Cir. 1989). The premise of *United States v. Security Industrial Bank*, 459 U.S. 70 (1982), is that § 522(f) does not violate the U.S. Constitution when it is applied prospectively. Therefore, although the Seventh Circuit would not suggest that every prospective curtailment of property rights is permissible, § 522(f) is constitutional when applied to agreements entered into after its enactment.

In re Sullivan, 680 F.2d 1131 (7th Cir. 1982). The Court upheld the Bankruptcy Code's exemption scheme, allowing state opt-out, against constitutional challenges on grounds of (1) uniformity, (2) preemption of state law that does not grant exemptions consistent with the overall scheme of the federal exemptions, and (3) improper delegation of congressional powers. In a later case, *Clark v. Chicago Municipal Emp. Credit Union*, 119 F.3d 540 (7th Cir. 1997), the Court commented that "the case law clearly reflects that the fresh start policy of the Bankruptcy Code does not require those states that have opted out of the federal exemptions to provide exemptions comparable, concomitant, or corresponding to the federal exemptions." *Id.* at 544.

EIGHTH CIRCUIT

In re Beckerford, 3 F. Cas. 26 (C.C.D. Mo. 1870). The Court in this case considered the constitutionality of exemption laws and, specifically, whether the then-extant statutes violated the constitutional provision authorizing uniform laws throughout the United States. According to the Court, to establish the uniformity contended for would have made it necessary for Congress to have virtually abrogated all state exemption laws. The Court held that "[e]xemption laws now exist in all the states, and are deservedly becoming more and more popular. There is something so humane underlying them, that court will not interfere unless they violate a plain mandate of the organic law." The exemption laws do not violate the Constitution.

NINTH CIRCUIT

Stinson v. Pitrat (In re Stinson), 36 B.R. 946 (B.A.P. 9th Cir. 1984). The court held that § 522(b)(1), which authorizes states to "opt out" of the federal exemption scheme, is constitutional notwithstanding objections based on uniformity, legislative intent, federal pre-emption, and congressional delegation of authority.

TENTH CIRCUIT

Kulp v. Zeman, 949 F.2d 1106 (10th Cir. 1991). In footnote 3, the Court found no merit in the argument that Colorado's exemption in pension and retirement benefits, which were available only in bankruptcy, violated the Uniformity Clause. The opt-out "expressly delegates to states the power to create bankruptcy exemptions." *See also In re Earned Income Tax Credit Exemption Constitutional Challenge Cases*, 477 B.R. 791 (Bankr. D. Kan. 2012) (holding Kansas bankruptcy-only exemption in earned income tax credits constitutional.).

Carlson v. Diaz (In re Carlson), 303 B.R. 478 (B.A.P. 10th Cir. 2004). Under Utah's statute, the owner of a mobile home was not required to own the real property on which the home is located in order to claim a homestead exemption in the mobile home.

Mayes v. Cherokee Nation (In re Mayes), 294 B.R. 145 (B.A.P. 10th Cir. 2003). Chapter 7 Debtor's attempt to avoid a judgment lien impairing an exemption was a suit for which the Cherokee Nation had sovereign immunity, and the Nation had not waived its federal immunity by suing Debtor in state court.

L. *MISCELLANEOUS*

FIRST CIRCUIT

Surcharge for fraud

Malley v. Agin, 693 F.3d 28 (1st Cir. 2012). The Court of Appeals adopted the Ninth Circuit's conclusion in *Latman v. Burdette*, 366 F.3d 774 (9th Cir. 2004), that when a debtor fraudulently conceals non-exempt assets, a bankruptcy court's equitable powers under § 105(a) authorize it to surcharge otherwise exempt assets as a remedy for the debtor's fraud on the court.

Bad faith

Hannigan v. White (In re Hannigan), 409 F.3d 480 (1st Cir. 2005). Debtor initially withheld the actual value of his homestead property. Upon realizing that the actual value of the homestead property was exempt, the debtor attempted to amend the homestead exemption to increase the stated value of the real property to the full, allowed amount of the exemption. The bankruptcy court, in observing that a fresh start is for an "honest but unfortunate debtor," denied the increase, citing bad faith action by the debtor. The First Circuit affirmed.

Procedural requirements

Massey v. Pappalardo (In re Massey), 465 B.R. 720 (B.A.P. 1st Cir. 2012). Debtors claimed 100% of the fair market value of their residence and their vehicle as exempt. The BAP affirmed the bankruptcy court's finding that Debtors' claimed exemptions were facially invalid since they failed to state values for the residence and the vehicle; Debtors improperly attempted to exempt the residence and the vehicle rather than the value of the assets.

THIRD CIRCUIT

In re Bosack (Walsh v. Bosack), 454 B.R. 625 (Bankr. W.D. Pa. 2011). Commissions earned on contracts entered into pre-petition, as to which no further action was required by Debtor, constituted pre-petition income. Commissions on post-petition contracts, as well as commissions as to which further action (here, service) was required by Debtor, were properly allocated as post-petition income and therefore not property of the estate. The preponderance of the evidence established intentional concealment or deliberate failure to disclose commissions earned prepetition when Debtor failed to turn over monies received after disclosure, which disclosure was first made at the meeting of creditors. Therefore, the court denied Debtor's attempt to amend the schedule of exemptions.

In re Tufano, 2011 Bankr. LEXIS 1399 (Bankr. M.D. Pa. Apr. 19, 2011). In a case with unusual facts, the court found that the evidence did not establish that Debtors acted in bad faith (under the standard articulated in *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007)) so as to make them ineligible to convert to chapter 13 for the purpose of amending their schedules to relist the title of their home and their exemptions. Debtors' had relied on their previous bankruptcy counsel's advice that the husband first transfer ownership of their residence from his sole ownership to joint ownership with his wife. The Court also credited Debtors' testimony that previous counsel had then advised them to conceal the timing of the transfer, which was made just before the bankruptcy filing. As a result of the transfer, Debtors scheduled the residence as exempt entireties property under Pennsylvania law. Overruling the trustee's objection, the court allowed Debtors to convert to a chapter 13 case and to amend their asset and exemption schedules.

FIFTH CIRCUIT

Smith v. H.D. Smith Wholesale Drug Co. (In re McCombs), 659 F.3d 503 (5th Cir. 2011). Prepetition, a judgment creditor filed an abstract of judgment against Debtor in the county's real property records. Thereafter, Debtor filed a chapter 7 petition, listed the home and vacant lot he and his non-debtor wife owned as community property, and claimed a homestead exemption therein. The chapter 7 trustee sold the home and vacant lot, netting excess proceeds after payment of the mortgage and other expenses. The trustee issued a check to Debtor and his wife for $125,000 (then the amount of the homestead exemption cap under § 522(p)). The judgment creditor then filed an adversary proceeding seeking the excess proceeds based on its asserted judgment lien. On direct appeal, Debtor's wife also raised additional arguments in support of her rights to the proceeds.

The Fifth Circuit ruled that a creditor's property interest in sale proceeds is governed by applicable state law. Under state law applicable in this case, a lien is unenforceable against homestead property, but the property or proceeds from its sale may be subject to seizure if the property ever ceases to be a debtor's homestead. Because the status of a lien is determined at the time of the bankruptcy filing, it was undisputed that Debtor's home and lot were homestead property entitled to protection when Debtor filed for bankruptcy. Thus, the judgment creditor lacked an enforceable lien at that time. The Court also ruled that the homestead exemption cap in § 522(p) does not operate to convert an unenforceable lien on homestead property into an enforceable one. The Court ruled that the new arguments raised by Debtor's wife on appeal, which were not designated in the record on appeal and included in the statement of issues pursuant to Rule 8006, were not preserved for appeal and were waived on direct appeal under 28 U.S.C. § 158(d)(2).

SIXTH CIRCUIT

Daley v. Mostoller (In re Daley), 717 F.3d 506 (6th Cir. 2013). The bankruptcy court held that the mere signing of an agreement containing a pledge of the assets of an IRA was a prohibited transaction that resulted in loss of a bankruptcy exemption in the asset. The district court affirmed, but the Sixth Circuit reversed. The Court held that the mere existence of a "cross-collateralization" agreement, under which the debtor granted a lien on the assets of an IRA to secure potential future debts, is insufficient to disqualify an IRA from exempt status; at most, it is the actual use of such an agreement and the prohibited extension of credit through the agreement in a later transaction that might disqualify.

NINTH CIRCUIT

Alsberg v. Robertson (In re Alsberg), 68 F.3d 312 (9th Cir. 1995). When property appreciates in value beyond the amount that is exempt, the post-petition appreciation belongs to the estate rather than to the debtor.

TENTH CIRCUIT

Surcharge

Scrivner v. Mashburn (In re Scrivner), 535 F.3d 1258 (10th Cir. 2008). The bankruptcy court had no equitable authority under § 105(a) to grant the chapter 7 trustee's request for a surcharge against Debtors' exempt property. A surcharge is inconsistent with the Code's specific provisions concerning exemptions, and there are other remedies available in the Code, including denial and revocation of discharge.

Denial of exemption

Gillman v. Ford (In re Ford), 492 F.3d 1148 (10th Cir. 2007). The chapter 7 Debtor's concealment of a personal injury cause of action was in bad faith, justifying denial of an exemption in the personal injury settlement. The Tenth Circuit found discharge of debt under § 523 "analytically similar to obtaining an exemption," justifying a preponderance of evidence standard.

ELEVENTH CIRCUIT

In re Hecker, 264 F. App'x 786 (11th Cir. 2008). The Court held that disallowance of a claimed exemption in a retirement trust fund was warranted as sanction for Debtor's noncompliance with bankruptcy court orders.

XII. PRIORITY ISSUES

A. *GENERALLY*

THIRD CIRCUIT

Goldberg v. New Jersey Lawyers' Fund for Client Protection, 932 F.2d 273 (3d Cir. 1991). Determining the priority of distribution of assets from an entity in bankruptcy is exclusively a question of federal law; state law may be relied on to the extent that it does not conflict with federal law. *See also American Surety Co. of New York v. Sampsell*, 327 U.S. 269, 272 (1946).

NINTH CIRCUIT

IRS v. Osborne (In re Osborne), 76 F.3d 306 (9th Cir. 1996). Contrary to the rule announced in *In re Pacific Atl. Trading Co*., 33 F.3d 1064 (9th Cir. 1994), for chapter 7 cases, priority claims that are not timely filed in chapter 13 cases should be disallowed.

United States v. Towers (In re Pacific Atl. Trading Co.), 33 F.3d 1064 (9th Cir. 1994). In chapter 7 cases, Congress intended priority claims to receive first distribution regardless of whether the proof of the claim was filed on time or late; the IRS's failure to file proof of its priority tax claim in a timely manner does not affect its entitlement to first distribution under § 726(a)(1).

B. *DOMESTIC SUPPORT OBLIGATIONS*

FIRST CIRCUIT

Smith v. Pritchett (In re Smith), 586 F.3d 69 (1st Cir. 2009). A state court entered a judgment against Debtor for $75,010 representing late alimony payment penalties. Debtor's ex-spouse, seeking to enforce the judgment, obtained an *ex parte* attachment to Debtor's homestead. A lien was recorded accordingly. Debtor then filed a chapter 13 petition. Debtor's ex-spouse filed a proof of claim in Debtor's bankruptcy and objected to confirmation of the plan. Debtor moved to avoid the ex-wife's lien. The bankruptcy court denied the motion, but the BAP reversed and the ex-spouse appealed. The question before the First Circuit was whether a clause in the debtor's separation agreement calling for a $50 per day penalty for late alimony payments constituted a "domestic support obligation," or whether it was intended as a punitive measure to deter late payment. The court found that it was punitive and not itself an alimony payment or a domestic support obligation. Therefore, the ex-wife's claim was a general unsecured claim, not entitled to priority, and it was subject to discharge under §§ 523(a)(15) and 1328(a)(2).

SECOND CIRCUIT

In re Rogowski, 462 B.R. 435 (Bankr. E.D.N.Y. 2011). Attorneys for Debtor's former spouse filed a claim for attorney fees granted in a state court divorce proceeding as a nondischargeable, priority domestic support obligation. The court noted that what constitutes alimony, maintenance or support is determined under federal bankruptcy law, not state law, although bankruptcy courts may refer to well-established state laws in making that determination. Citing New York law, the bankruptcy court held that the attorneys' fees satisfied the definition of "domestic support obligation" and were thus entitled to administrative priority status and were not dischargeable.

THIRD CIRCUIT

Gianakas v. Gianakas (In re Gianakas), 917 F.2d 759 (3d Cir. 1990). The court determined that an obligation to pay a second mortgage on the home of the non-debtor former spouse was in the nature of support and, therefore, constituted a domestic support obligation. In making that determination, the court identified three primary factors that guide the classification of obligations arising out of a divorce settlement: (1) the language and substance of the agreement; (2) the parties' relative financial circumstances at the time the obligations arose; and (3) the function served by the obligations.

In re Anthony, 453 B.R. 782 (Bankr. D.N.J. 2011). The court set forth four elements that must be present in order for a domestic support obligation to arise: (1) the payee of the obligation must be a person particularly related to the debtor, a child of the debtor, or a governmental unit; (2) the obligation must be in the nature of support at the time it arises; (3) the source of the obligation must be an agreement, court order, or other similar determination; and (4) the assignment status of the obligation must be consistent with § 101(14A)(D). In this case, the court determined that unpaid condominium fees could be reclassified as general unsecured claims. The court could not find that the fees were in the nature of support because there were no factual allegations regarding the nature of the obligation or the financial condition of the parties as of the time the obligation arose.

FOURTH CIRCUIT

Tilley v. Jessee, 789 F.2d 1074 (4th Cir. 1986). Determination of whether a debt is in the nature of a domestic support obligation will depend on the mutual intent of the parties when they executed the post-nuptial agreement. The spouse advocating for a finding that the debt is a domestic support obligation has the burden of establishing the requisite intent. The structure of the written agreement in *Tilley* indicated that the payments were separate from alimony, and the testimonial evidence only revealed the intent of the former wife that the payments be considered in the nature of alimony, support, or maintenance, and not that of the former husband.

The Court in *Tilley* was actually evaluating dischargeability, but the qualifications for dischargeability under §§ 101(14A) and 523(a)(5) have been used to determine the priority status of a domestic obligation under § 507(a)(1). *See In re Krueger*, 457 B.R. 465 (D.S.C. 2011). Moreover, the definition of a domestic support obligation, as opposed to a non-support domestic obligation, is additionally relevant in the context of chapter 13 plans given that non-support domestic obligations remain dischargeable notwithstanding § 523(a)(15).

See also Catron v. Catron (In re Catron), 164 B.R. 912 (E.D. Va. 1994), *aff'd* 43 F.3d 1465 (4th Cir. 1994) (interpreting the holding of *Tilley* and applying a four-factor test to determine domestic support obligations: (1) the substance and language of the document in question; (2) the financial condition of the parties at the time of the decree or agreement; (3) the function served by the obligation and intent of the parties at the time of the agreement; and (4) whether there is evidence to question the intent of a spouse or evidence of overbearing by either party).

FIFTH CIRCUIT

In re Tepera, 2012 Bankr. LEXIS 773 (Bankr. S.D. Tex. Feb. 9, 2012). Debtor filed a chapter 13 petition. The attorney who represented Debtor's former spouse in a divorce action filed a claim against Debtor's bankruptcy estate for fees, based on a state court judgment, in the amount of $129,388, asserting that the claim was entitled to priority under § 507(a)(1)(A) as a "domestic support obligation." Debtor objected to the attorney's claim, contending that the award was not a domestic support obligation because the attorney was not his spouse, former spouse, or child, or the parent, legal guardian, or responsible relative of his children. The bankruptcy court noted a split on the question whether an award made directly to an attorney in a divorce decree is a domestic support obligation under the Bankruptcy Code. The court, however, ultimately sided with the majority view that such an award is a "domestic support obligation" under § 101(14A), and is entitled to priority under § 507(a)(1)(A).

In re Hernandez, 2007 Bankr. LEXIS 4222 (Bankr. E.D. Tex. Nov. 15, 2007). The court held that the 2005 amendments grant first priority to certain domestic support obligations that are owed or recoverable by certain parties as of the date of the filing of the petition, but not to interest that accrues on a child support arrearage post-petition. Also, priority under § 507(a)(1) is limited to allowed unsecured claims. Thus, since any interest accruing on a child support arrearage after the filing of the petition is post-petition interest, and therefore unmatured, it is not entitled to priority.

EIGHTH CIRCUIT

Phegley v. Phegley (In re Phegley), 443 B.R. 154 (B.A.P. 8th Cir. 2011). The bankruptcy court considered whether an award arising out of marital dissolution proceedings was intended to serve as a domestic support obligation pursuant to § 101(14A) or as a property settlement. The BAP affirmed the bankruptcy court's conclusion that the attorney's fees and maintenance payments awards were intended to serve as domestic support obligations. The court first analyzed the definition of "domestic support obligation" under § 101(14A). If an obligation fits within this definition, it will be a priority claim pursuant to § 507(a)(1)(A) and will not be discharged in chapter 13 cases. If the obligation is not a domestic support obligation, it will not be excepted from discharge in chapter 13 cases under § 523(a)(15) or entitled to priority status. In deciding whether an obligation is a domestic support obligation or property settlement pursuant to § 101(14A), the court considered the following factors:

1) the language and substance of the agreement in the context of surrounding circumstances, using extrinsic evidence if necessary;
2) the relative financial conditions of the parties at the time of the divorce;
3) the respective employment histories and prospects for financial support;
4) the fact that one party or another receives the marital property;
5) the periodic nature of the payments; and
6) whether it would be difficult for the former spouse and children to subsist without the payments.

NINTH CIRCUIT

Beaupied v. Chang (In re Chang), 163 F.3d 1138 (9th Cir. 1998). Fees and expenses owed to a father and guardian *ad litem* in child custody proceeding are in the nature of child support under § 523(a)(5) and entitled to priority, even though not owed "to" a spouse, former spouse, or child.

TENTH CIRCUIT

Dewey v. Dewey (In re Dewey), 202 F.3d 281 (10th Cir. 1999), *affirming &adopting opinion of Bankruptcy Appellate Panel*, 223 B.R. 559 (B.A.P. 10th Cir. 1998). Construing prior § 507(a)(7) [now § 507(a)(1)], the court held that determination of whether an obligation is in the nature of support involves fact analysis under Tenth Circuit authority, including *Sampson v. Sampson* (*In re Sampson)*, 997 F.2d 717 (10th Cir. 1993). The bankruptcy court properly found a hold harmless obligation to be for support, entitled to priority under § 507(a)(7) and excepted from discharge under § 523(a)(5).

Taylor v. Taylor (In re Taylor), 478 B.R. 419 (B.A.P. 10th Cir. 2012). The BAP held that a former spouse's claim for overpayment of spousal support was not a domestic support obligation because the debt did not fall within § 101(14A)'s definition. The court cited pre-BAPCPA Tenth Circuit authority on examination of the parties' intent to create a support obligation and when that obligation arose, *Sampson v. Sampson (In re Sampson)*, 997 F.2d 717 (10th Cir. 1993). Although not a domestic support debt, the overpayment claim fell within § 523(a)(15), and was nondischargeable. Both parties appealed to the Tenth Circuit.

Miller v. Miller (In re Miller), 284 B.R. 734 (B.A.P. 10th Cir. 2002). Although a chapter 11 case, the BAP applied the same analysis it used in *Dewey v. Dewey (In re Dewey)*, 223 B.R. 559 (B.A.P. 10th Cir. 1998), *aff'd* 202 F.3d 281 (10th Cir. 1999), to find that an obligation for overdue house payments was for support and was entitled to priority under former § 507(a)(7).

C. *ADMINISTRATIVE EXPENSES*

THIRD CIRCUIT

In re Prindible, 115 F.2d 21 (3d Cir. 1940). When encumbered property is sold free and clear of liens, the costs of preserving the property are deductible from the proceeds of sale before the benefits of the security accrue to the lienor. General administration expenses, however, are not charged against pledged property except to the extent that the property is directly benefited or conserved thereby.

FOURTH CIRCUIT

Tidewater Fin. Co. v. Henson, 272 B.R. 135 (D. Md. 2001), *aff'd*, 57 F. App'x 136 (4th Cir. 2003). The Fourth Circuit applies a two-part test to determine if an expense is allowable as an actual and necessary administrative claim: (1) the claim must arise from a post-petition transaction with the debtor or trustee; and (2) the claim must be based on consideration that is supplied to and beneficial to the estate. The emphasis is on benefit to the estate as opposed to loss to the creditor. There is a narrow exception for pre-petition creditors when the debtor or trustee uses secured collateral post-petition in the operation of a business or otherwise to make an economic profit. The district court reasoned, however, that a secured lender with collateral that is merely decreasing in value does not generally have an administrative claim, and should instead seek adequate protection under § 361.

FIFTH CIRCUIT

Matter of H.L.S. Energy Co., Inc., 151 F.3d 434 (5th Cir. 1998). Administrative expenses are the "actual, necessary costs and expenses of preserving the estate," and are entitled to priority over the claims of other unsecured creditors. An "actual and necessary cost" must have been of benefit to the estate and its creditor. This case specifically extended "actual and necessary costs" to those incurred in order to comply with state law, even in the absence of a traditional benefit to the owner of the estate.

SIXTH CIRCUIT

Pension Benefit Guar. Corp. v. Sunarhauserman, Inc. (In re Sunarhauserman, Inc.), 126 F.3d 811 (6th Cir. 1997). The Sixth Circuit held that the lower court properly applied the benefit of the estate test to determine that only some of the funding contributions qualified as an actual and necessary administrative expense under Bankruptcy Code §§503(b)(1)(A) and 507(a)(1). (The test derived from *In re White Motor Corp*., 831 F.2d 106 (6th Cir. 1987), which was superseded by *In re Elder-Beerman Stores Corp*., 201 B.R. 759 (Bankr. S.D. Ohio 1996).) To determine whether a claim is an administrative expense under § 503, the Sixth Circuit applies a two-part test: 1) if it arose from a transaction with the bankruptcy estate; and 2) directly and substantially benefited the estate. In addition, the Court held it was appropriate to allocate the funding contribution to pre- and post-petition periods when only some of the liability in connection with the contribution occurred post-petition and, therefore, was entitled to administrative priority. The Sixth Circuit reaffirmed the lower courts' decision that only post-petition contributions are entitled to priority, so and administrative priority could not be granted to the full claim.

SEVENTH CIRCUIT

In re Weinschneider, 395 F.3d 401 (7th Cir. 2005). A chapter 7 debtor cannot recover attorneys' fees under § 503(b)(1)(A) for defending against the trustee's turnover action because that section only allows the recovery of necessary costs and expenses of preserving the estate, and Debtor was acting to protect his own property. Similarly, Debtor could not recover under § 503(b)(2) because it only allows for compensation and reimbursement awarded under § 330(a), and the Supreme Court ruled in *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004), that fees for the attorneys of chapter 7 debtors cannot be recovered under § 330.

EIGHTH CIRCUIT

In re Larsen, 59 F.3d 783 (8th Cir. 1995). The Court of Appeals decided that attorney's fees awarded as an administrative expense in a prior bankruptcy proceeding are not entitled to administrative expense priority in a subsequent bankruptcy proceeding. Debtors filed under chapter 11, and the reorganization plan was confirmed and the case was closed. They were unable to make the payments under the plan, so they sought further relief under chapter 12. That petition was dismissed as a bad faith filing and Debtors then filed a chapter 13 petition. It, too, was dismissed. Three years later, Debtors filed this chapter 7 proceeding. The attorney who represented Debtors in their unsuccessful reorganization cases asserted that his unpaid fees were entitled to priority as administrative expenses. The Eighth Circuit determined that "extending administrative expense priority to claims awarded in a different bankruptcy case furthers neither the purpose of preserving the Chapter 7 estate nor the overarching objective of creditor equality." The attorney-creditor was denied administrative expense priority for fees incurred in earlier reorganization cases.

Note: The Eighth Circuit has not addressed the administrative expense issue since § 507(a) was amended in 2005, giving administrative expenses second priority and domestic support obligations first priority.

NINTH CIRCUIT

Kadjevich v. Kadjevich (In re Kadjevich), 220 F.3d 1016 (9th Cir. 2000). Attorneys' fees awarded by a state court based on a party's bad faith failure to settle a prepetition fraud case are not entitled to administrative expense priority. Neither are costs incurred post-petition to finance a settlement of the prepetition litigation.

Abercrombie v. Hayden Corp. (In re Abercrombie), 139 F.3d 755 (9th Cir. 1998). A creditor requested administrative expense priority for attorneys' fees awarded post-petition by a state appellate court on the theory that the fees were caused by plaintiff's post-petition defense of the appeal. The Ninth Circuit held that because the award of attorney fees was made in an action commenced prepetition, based on a prepetition contract, the claim was prepetition in nature and was not an allowable administrative expense.

TENTH CIRCUIT

United States v. Dawes (In re Dawes), 652 F.3d 1236 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 2429 (2012). The Court held that the chapter 12 Debtor's capital gains tax liability, arising from a post-petition sale of farm assets, was not an administrative expense of the estate because the taxes were not "incurred" by the estate for purposes of § 503(b)(1)(B). The holding would also applicable in chapter 13, and the opinion discussed the identical features in the two chapters, under which the debtor, rather than the bankruptcy estate, is responsible for filing and paying post-petition federal income taxes.

McKowen v. Internal Revenue Service, 370 F.3d 1023 (10th Cir. 2004). Chapter 7 Debtor's tax liability arising out of an obligation as a responsible transferee under 26 U.S.C. § 6901(a) was a priority debt under § 507(a)(8)(iii). The Internal Revenue Code "provides that a person receiving property from a taxpayer who owes income taxes may be liable for the transferor taxpayer's tax debt," and the tax was assessable after chapter 7 had been filed. The taxes were nondischargeable under § 523(a)(1)(A).

Carlin v. United States (In re Carlin), 328 B.R. 221 (B.A.P. 10th Cir. 2005). Income taxes assessed within 240 days before a chapter 7 filing are unsecured priority taxes under § 507(a)(8)(A)(ii); that provision "make[s] no reference to a 'required' return and, therefore, in no way make[s] priority or dischargeability dependent on the filing of a return. The taxes were nondischargeable under § 523(a)(1)(A).

In re Busetta-Silvia, 314 B.R. 218, 223 (BAP 10th Cir. 2004). The BAP held that the chapter 13 Debtor's attorney was entitled to be paid for both pre- and post-petition services, as a priority administrative expense, if the fee is reasonable and necessary. Reading §§ 330(a), 507(a)(1) [now (2)], 503(b) and 1322(a)(2) together, "an attorney fee award under § 330(a) is entitled to a first [now second] priority . . . and must be paid in full under the terms of the Chapter 13 plan, unless the attorney agrees otherwise." Section 330(a)(4)(B) "places no distinction upon the timing of the services [in a Chapter 13 case]; i.e., requiring the services to have been performed after the filing of the bankruptcy petition." The bankruptcy court had ruled that prepetition fees must be paid in advance of the filing, and that unpaid prepetition fees were not entitled to administrative expense priority.

D. *WAGE CLAIMS*

Matson v. Alarcon, 651 F.3d 404 (4th Cir. 2011). Prepetition, Debtor implemented a severance benefits plan for its employees, under which employees who were terminated without cause and signed a severance agreement would be entitled to a severance payment in an amount based upon their length of service. Debtor reserved the right to amend or terminate the severance benefits plan at any time. Within 180 days before the petition date, Debtor terminated its employees, all of whom had signed the severance agreement but did not pay the severance payments. The terminated employees filed priority claims for the full amount of their severance payments. The trustee objected to full payment and proposed only a prorated portion of the severance pay based on the portion earned during the 180 days before bankruptcy.

The Fourth Circuit ruled that severance payments are earned upon termination and are thus entitled to priority treatment and full payment to the extent of the statutory cap in § 507. Subsection (a)(4) entitles an employee's claim for "wages, salaries, or commissions, including vacation, severance, and sick leave pay" to priority status if it is "earned" within 180 days of a debtor/employer's bankruptcy petition. For purposes of § 507, "earn" means to "receive as equitable return for work done or services rendered" or "to come to be duly worthy of or entitled to." An employee "earns" full severance pay at the time that the employee becomes entitled to it—the date of termination. Although the amount of severance compensation may be based on length of service, as was the case here, this method of calculation does not mean that an employee earns severance compensation over the entire course of his or her employment. Under § 507(a)(4), an employee "earns" the entirety of his or her severance compensation on the date the employee becomes entitled to receive such compensation. The Court reasoned that the purpose of severance pay is to compensate employees not for their work or services but for the losses that result from termination.

E. *LAYAWAYS AND DOWN PAYMENTS*

THIRD CIRCUIT

In re WW Warehouse, Inc., 313 B.R. 588 (Bankr. D. Del. 2004). In this pre-BAPCPA chapter 11 case, the court looked at the definition of "deposit" for the purpose of establishing a sixth priority (since 2005, seventh priority). After looking at the plain language of the statute and its legislative history, the court determined that a pre-paid gift certificate is not the ultimate purchase—that is, a final and complete transaction—and to relegate gift certificate holders to general unsecured status would perpetuate the problem Congress sought to remedy with this priority. Thus, the court held that a gift certificate is entitled to priority as a deposit. In so holding, the court found that the term "deposit" as used in § 507(a)(6) (now § 507(a)(7)) is not limited to partial payments in the nature of down payments, but includes non-final purchases in the nature of a credit for future goods or services.

In re DeAngelis Tangibles, Inc., 238 B.R. 96 (Bankr. M.D. Pa. 1999). The court found that regardless of whether the word "deposit" was used or whether full or partial payment was made in furtherance of an agreement to purchase collectables, claimants who paid money to a chapter 7 debtor were entitled to priority status in the absence of evidence presented by the trustee that the money was not a deposit. The court also held that priorities should be construed narrowly in order to ensure a more equal distribution of often limited resources.

NINTH CIRCUIT

Salazar v. McDonald (In re Salazar), 430 F.3d 992 (9th Cir. 2005). A "deposit" under § 507(a)(6) is not limited to partial payments, but includes advance payment of the full amount for goods or services up to the statutory limit. Thus, a portion of the creditors' fully prepaid payment for Debtors to install a residential swimming pool was a deposit, entitled to priority under § 507(a)(6).

F. *TAXES*

THIRD CIRCUIT

In re Calabrese, 689 F.3d 312 (3d Cir. 2012). In this nondischargeability case, the Court found that retail sales taxes collected by the individual Debtor in the course of operating his business were trust fund taxes under § 507(a)(8)(C), rather than excise taxes under § 507(a)(8)(E), and thus were entitled to priority. Debtor sought to expunge the claims of the New Jersey Department of Taxation, but the court, after an examination of the legislative history of the two subsections, a review of other circuit-level decisions on the issue, and a discussion of the public policy considerations, found that because sales taxes collected by a retailer never become property of the retailer, the taxes collected are more like trust fund taxes; therefore, they are entitled to priority under § 507(a)(8)(C) and are nondischargeable.

In re Taylor, 81 F.3d 20 (3d Cir. 1996). Here, the government argued that its claims, arising from more than three years before the petition date, were still entitled to priority because the three-year look-back period in § 507(a)(8)(A)(i) was suspended by the automatic stay during the pendency of Debtor's prior case. The court found that title 11 and title 26, in addition to interest in avoiding abuse of the bankruptcy system in order to avoid paying taxes, support the tolling of the look-back period during the intervening bankruptcy. Therefore, when less than three years has passed from the date the tax returns were due until the petition date, excluding the period of the prior bankruptcy filing, IRS claims for prepetition taxes are entitled to priority.

Note the Supreme Court's subsequent decision in *Young v. United States*, 535 U.S. 43 (2002), which held that the three-year look-back period pursuant to § 507(a)(8)(A)(i) was tolled during the pendency of Debtors' prior chapter 13 case. *See also* Bankruptcy Abuse Prevention & Consumer Protection Act of 2005, Pub. L. No. 109-8, § 705 (2005) (providing that 240-day look-back period is tolled for the length of time a stay against collection is in effect during a prior bankruptcy case, plus ninety days).

Carlisle v. U.S. Dep't of Justice (In re Carlisle), 320 B.R. 796 (M.D. Pa. 2004). The IRS objected to a proposed plan that did not take into account all of the IRS' claims. The bankruptcy court sustained the objection and denied confirmation, and the district court affirmed, holding that a plan must include payment in full for taxes due three years prior to the date the petition is filed.

In re Marcucci, 256 B.R. 685 (D.N.J. 2000). In analyzing whether an insurance surcharge was an excise tax entitled to priority under § 506(a)(8)(E)(ii), the court looked at whether the attributes of the state's claim, as determined by state law, more closely resembled a civil penalty intended to regulate conduct or an excise tax on persons enjoying a privilege intended to raise revenue for the state. The court found that the New Jersey motor vehicle insurance surcharge was similar to a civil penalty intended to regulate drivers' conduct that was imposed regardless of a driver's intention to use the roads in New Jersey. Thus, it was not within the meaning of an excise tax entitled to priority under the Bankruptcy Code.

In re Adams, 40 B.R. 545 (E.D. Pa. 1984). The court held that amounts Debtors owed to a city for sewer rents and water charges were not "property taxes" under state law and, therefore, were not entitled to priority.

FOURTH CIRCUIT

IRS v. Campbell, 242 B.R. 327 (W.D. Va. 1999). The district court found that a "penalty" incurred by Debtors pre-petition nevertheless constituted a tax for purposes of § 507(a)(8). The IRS had asserted a priority claim for unpaid employment taxes, categorized under 26 U.S.C. § 6672 as a "penalty." The district court applied Supreme Court precedent—*United States v. Sotelo*, 436 U.S. 268, 274 (1974)—to find the terminology irrelevant, and allowed the IRS's claim priority status under § 507(a)(8). *But see In re Cespedes*, 393 B.R. 403 (Bankr. E.D.N.C. 2008) (finding that a liability charged to debtor for early withdrawals from her IRA accounts was a penalty and not a tax for purposes of priority under § 507(a)(8)).

FIFTH CIRCUIT

Matter of Fein, 22 F.3d 631 (5th Cir. 1994). Under the plain language of the Bankruptcy Code, bankruptcy does not discharge a priority tax claim that has been neither assessed nor filed. Prepetition tax deficiencies resulting from improper losses attributable to chapter 11 Debtor's participation in tax shelter partnership as well as addition to taxes for substantial underpayment of tax that were not assessed until after confirmation of chapter 11 plan were priority taxes and, thus, confirmation of chapter 11 plan did not discharge tax claims. The court agreed that "[I]t is apparent to us that Congress has made the choice between collection of revenue and rehabilitation of the debtor by making it extremely difficult for a debtor to avoid payment of taxes under the Bankruptcy Code." *Id*. at 633, quoting *United States v. Gurwitch (In re Gurwitch),* 794 F.2d 584, 585-86 (11th Cir. 1986).

SEVENTH CIRCUIT

In re Groetken, 843 F.2d 1007 (7th Cir. 1988). A debtor's obligation under the Illinois Occupation Tax Act (i.e., sales tax) is a tax measured by "income or gross receipts" and therefore does not qualify for priority status and nondischargeability to the extent the taxes are more than three years old.

Rosenow v. Illinois Dep't of Revenue, 715 F.2d 277 (7th Cir. 1983). A debtor's obligation under the Illinois Use Tax Act is in the nature of a tax required "to be collected or withheld" within the meaning of the priority statute and is nondischargeable.

EIGHTH CIRCUIT

In re Waugh, 109 F.3d 489 (1996). Normally, § 507(a)(8)(A)(i) provides that taxes are dischargeable if the taxes were for a return that was due more than three years prior to a bankruptcy filing. The Court of Appeals determined, however, that § 108(c) and §§ 6503(b) and (h) limit this general rule. Debtor had previous bankruptcy filings when he filed for chapter 7 bankruptcy. The previous bankruptcy filings complicated the general priority rule under § 507(a)(8) for dischargeability of pre-petition taxes. The IRS argued that, because the automatic stay prevented it from collecting Debtor's taxes during his prior bankruptcy proceedings, the priority period of § 507(a)(8)(A)(i) should have been tolled during those prior proceedings. The Court of Appeals determined that §§ 108(c), 6503(b) and 6503(h) apply to § 507(a)(8)(A)(i) and, therefore, that Congress intended to toll the three-year priority period. Since the automatic stay prevented the IRS from collecting Debtor's tax, the three-year priority period was suspended while the automatic stay was in effect.

NINTH CIRCUIT

Ca. Franchise Tax Bd. v. Kendall (In re Jones), 657 F.3d 921 (9th Cir. 2011). The Ninth Circuit held § 507(a)(8) did not apply to suspend a tax liability to the California Franchise Tax Board because the Board could have sought relief from stay or collected the tax from chapter 13 assets that re-vested in Debtor upon plan confirmation. Thus, the tax debt was discharged.

Ilko v. Ca. State Bd. Of Equalization (In re Ilko), 651 F.3d 1049 (9th Cir. 2011). Debtor's responsible person liability to the Board of Equalization (BOE) for an unpaid portion of the audit assessment of Debtor's business was determined to be a "tax" within § 523(a)(1). The BOE was entitled to summary judgment on its claim that the tax judgment was excepted from discharge.

Severo v. Comm'r of Internal Revenue, 586 F.3d 1213 (9th Cir. 2009). The ten-year statute of limitations applicable to IRS's efforts to collect tax liabilities is tolled during the period when the automatic stay applies, plus an additional six months. The IRS's claim for taxes for which the return was due within three years prepetition was entitled to priority under § 507(a)(8)(A)(i) and was nondischargeable under § 523(a)(1)(A).

George v. Uninsured Employers Funds (In re George), 361 F.3d 1157 (9th Cir. 2004). The Ninth Circuit added a fifth element to the *Lorber* test. It held that a claim asserted by the California Uninsured Employers Fund was not a nondischargeable excise tax because under California law, failure to purchase workers' compensation insurance was not a "transaction" under § 507(a)(8)(E)(ii). Also, such a claim would not be an excise tax if granting priority to the claim could disadvantage any private creditors with like claims under relevant statutes.

DeRoche v. Arizona Indus. Comm'n (In re DeRoche), 287 F.3d 751 (9th Cir. 2002). The date of the "transaction" on which an excise tax is based, to determine the three-year period under § 507(a)(8)(E)(ii), is calculated from the date of the worker's injury.

Industrial Comm'n of Arizona v. Camilli (In re Camilli), 94 F.3d 1330 (9th Cir. 1996), *cert. denied*, 519 US 513 (1997). Reversing the BAP, the Ninth Circuit held that a claim by the Arizona workers' compensation agency is a nondischargeable "excise tax." The Court distinguished this case from *Lorber* on the ground that "at the time [debtor's obligation to reimburse the statutorily-created fund for failure to obtain workers' compensation insurance] arose, and the lien was established, it was wholly beyond the control of the debtor."

Cnty Sanitation Dist. No. 2 of Los Angeles Cnty v. Lorber Indus. of Cal., Inc. (In re Lorber Indus. of Cal., Inc.), 675 F.2d 1062 (9th Cir. 1982). The 9th Circuit approved the analysis in *In re*

Farmers Frozen Food Co., 221 F. Supp. 385, 387 (N.D. Cal. 1963) concluding that surcharges by a sanitation district for excess sewer use are fees and not taxes. In order for an assessment to be considered a tax, it must be:

1) An involuntary pecuniary burden, regardless of name, laid upon individuals or property;
2) Imposed by, or under authority of the legislature;
3) For public purposes, including the purposes of defraying expenses of government or an undertaking authorized by it;
4) Under the police or taxing power of the state.

An assessment is an "involuntary pecuniary burden" if it is a "non-contractual obligation imposed by state statute upon taxpayers who had not consented to its imposition." *Id.* at 1066. The Ninth Circuit held that determination of the voluntary nature of fees charged by a sanitation district must focus on the "inherent characteristics of the charges," and not on the motivation of the debtor.

Ca. Franchise Tax Bd. v. Jones (In re Jones), 420 B.R. 506 (B.A.P. 9th Cir. 2009), *aff'd* 657 F.3d 921 (9th Cir. 2011). Adopting the "estate termination" approach, which concludes that all property of the estate re-vests in the debtor at confirmation unless provided otherwise, the BAP held that the "three-year lookback period" for a post-petition tax was not tolled by a confirmed chapter 13 plan and also that equitable tolling was not appropriate.

State of Washington, Employment Sec. Dept. v. Hovan, Inc. (In re Hovan, Inc.), 96 F.3d 1254 (9th Cir. 1996). Washington state tax percentage-based penalties were punitive and thus, not entitled to priority as compensation "for actual pecuniary loss." Actual operation of the provision is key, not the state legislature's characterization or label.

Raiman v. State Bd. Of Equalization (In re Raiman), 172 B.R. 933 (B.A.P. 9th Cir. 1994). The BAP held that taxes imposed on a retailer's gross receipts by the California State Board of Equalization were a tax "on or measured by gross receipts" and were entitled priority under § 507(a)(8). The BAP distinguished between "exclusion" and "deduction," concluding that even though the California tax statute excluded certain listed items or transactions from gross receipts, Congress did not intend the term "gross receipts" to be strictly limited to those exclusions explicitly listed in the Code.

XIII. UNSECURED CLAIMS

A. *PROOFS OF CLAIM*

SIXTH CIRCUIT

Michigan Department of Treasury v. Hight (In re Hight), 670 F.3d 699 (6th Cir. 2012). Chapter 13 Debtor filed her petition in January and proposed a plan in February. In April, Debtor filed her state tax return, which showed that she owed taxes for the prior year, but Debtor did not pay the taxes owed. Debtor filed a protective proof of claim, under § 501(c), on behalf of the state's treasury department for the amount of her state tax liability, which would mean that this debt would be paid under Debtor's chapter 13 plan. The state treasury department objected to Debtor's filing of the proof of claim on its behalf, arguing that the tax liability was a post-petition claim under § 1305, such that only the creditor had the option of filing a claim.

The Sixth Circuit ruled that under §§ 502(i) and 507(a)(8), a debtor can treat a post-petition claim for a tax debt arising from the immediately preceding tax year as if it were a prepetition claim, and thereby file a protective claim for such tax debt under § 501(c). Although § 1305(a) provides that only creditors may file post-petition claims, this provision does not exclusively govern post-petition claims. Thus, Debtor was allowed to file a protective claim for her state tax liability for the year preceding her chapter 13 petition. The Court found this conclusion consistent with § 1322(a)(2), which requires that a debtor's chapter 13 plan provide for the full payment, in deferred cash payments, of all claims entitled to priority under § 507. Here, the tax claim was entitled to such priority.

B-Line, LLC v. Wingerter (In re Wingerter), 594 F.3d 931(6th Cir. 2010). Chapter 13 Debtors objected to the proof of claim filed by a leading purchaser of consumer bankruptcy claims that had purchased a claim in Debtors' case from a reliable intermediary who had bought the claim from the original creditor. The intermediary warranted the validity of the claim, and the purchaser reviewed the claim before and after its purchase. Upon Debtors' objection, however, the purchaser withdrew the claim because of the lack of supporting documents to submit with the claim. The bankruptcy court nevertheless held evidentiary hearings on the claim and sanctioned the purchaser for violating Rule 9011 and filing a proof of claim without a reasonable pre-filing inquiry.

The Sixth Circuit ruled that, as a preliminary matter, the purchaser's appeal was not moot because the bankruptcy court's holding that the purchaser's conduct was subject to sanctions would set a precedent for future cases. The Court also ruled that if a claimant's conduct is reasonable under the circumstances, then sanctions are not warranted. Here, the Court found that the purchaser acted reasonably by relying on the representations and warranties it had received from the intermediary with respect to the claim, and that it had sufficiently conducted its own investigation and review of the basis for the claim. The Court also explained that Rule 9011 contemplates that a claimant's good faith belief based upon reasonable inquiry is sufficient to file a proof of claim, even if the creditor does not have conclusive proof of the claim.

Hardy v. Cinco Fed. Credit Union (In re Hardy)*,* 755 F.2d 75 (6th Cir. 1985). When applying the liquidation, or best interests of creditors, test of § 1325(a)(4), property distributed under a chapter 13 plan must be reduced to present value. Here, Debtor's residence had sufficient equity to pay all claims in full. Therefore, the liquidation test requires plan payments to be reduced to present value and interest be paid on unsecured claims.

TENTH CIRCUIT

Jones v. Arross, 9 F.3d 79 (10th Cir. 1993). Debtor failed to give his ex-spouse notice of his bankruptcy filing, and failed to provide for her support claim in the plan; consequently, the ex-spouse failed to timely file an unsecured priority claim. The Tenth Circuit held that under Rules 3002 and 9006, there is no "excusable neglect" exception in a chapter 12 or chapter 13 case; thus, there was no legal basis to allow the ex-spouse to file a late claim. The Court noted the harshness of this outcome, but explained that because the claim was nondischargeable, the ex-spouse had two options: either to obtain relief from stay; or to wait until the case was dismissed or completed and then to bring a collection action against Debtor.

Jones v. Arross is most often asserted as stating an absolute bar to the late filing of an unsecured claim in a chapter 13 case.

B. *MISCELLANEOUS*

UNITED STATES SUPREME COURT

Johnson v. Home State Bank, 501 U.S. 78 (1991). Debtor defaulted on his farm mortgage, filed for chapter 7 relief, and received a discharge as to his *in personam* liability under the note. Thereafter, the bank proceeded with a foreclosure sale of the farm based on its *in rem* rights in the property. Debtor then filed a chapter 13 case and proposed to cure the mortgage through the plan, and the bank objected. The Tenth Circuit held that because the bank no longer held a "claim" against Debtor, its debt could not be treated in the chapter 13 plan. The Supreme Court reversed, holding that even though the bank held a claim enforceable only against Debtor's real property, this *in rem* right was similar to a non-recourse loan that can be provided for in a chapter 13 plan. Thus, the bank's *in rem* right against Debtor's property constituted a claim against Debtor for purposes of the Bankruptcy Code in general and chapter 13 specifically.

FIRST CIRCUIT

In re Furlong, 660 F.3d 81 (1st Cir. 2011). Debtor pursued various contract and tort claims in the course of his bankruptcy, but these claims were not completely listed on his schedules. The Court found that these claims were properly abandoned by the trustee; the trustee had had actual notice of some of the claims, and an opportunity to investigate and to choose to file a Notice of Intention to Abandon the listed claims.

FIFTH CIRCUIT

Class Certification

Wilborn v. Wells Fargo Bank NA (In re Wilborn), 609 F.3d 748 (5th Cir. 2010). Debtors filed a class action adversary proceeding in the bankruptcy court on behalf of themselves and other similarly situated debtors, alleging that a mortgage lender charged and collected unreasonable and unapproved post-petition professional fees and costs during the pendency of their bankruptcy proceedings, in violation of § 506(b). The lender argued that such fees and costs were permitted under the relevant loan documents. Debtors moved for and obtained class certification. The lender appealed, arguing that the court did not have jurisdiction over claims in other bankruptcy cases administered by other judges.

The Fifth Circuit ruled that under Rule 7023, which incorporates FRCP 23 (authorizing class actions), the bankruptcy court has power to certify a class of debtors whose petitions are filed within its judicial district, provided that the prerequisites for a class under FRCP 23 are satisfied. Class actions promote efficiency and economy in litigation, and permit multiple parties to litigate claims that otherwise might be uneconomical to pursue individually, and that such principles are no less compelling in the bankruptcy context. FRCP 23(b)(3) requires, however, that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Here, the Court found that the specific circumstances in the case would result in different judgments and damage awards, such that all the cases could not be heard together. Thus, class certification was not appropriate in this case.

Distribution Scheme

In re El Paso Refinery, L.P., 244 B.R. 613 (Bankr. W.D. Tex. 2000). A chapter 7 trustee moved to make additional interim distributions to a creditor in full payment of its allowed unsecured subordinated claim for contractual post-petition interest and attorney fees, which had been authorized by a compromise order. After the trustee's motion was granted, holders of allowed unsecured unsubordinated claims moved for reconsideration, contending that the trustee should distribute available funds to payment of post-petition interest on their claims before paying a creditor's subordinated claim. The court held that, according to the distribution scheme, all unsecured creditors must be paid first. The court made it clear that the distribution scheme under § 726 is the contemplated last step in the overall liquidation process of a chapter 7 case. The trustee is in charge of performing this distribution. The order of payment the trustee must make is as follows: (1) priority claims specified in § 507 must be satisfied. If any funds still remain after complete satisfaction of this first tier of claims, then (2) timely allowed unsecured claims are paid. If these claims are fully satisfied and monies are still left, then (3) tardy unsecured claims can be paid. After these claims are paid in full, and if money still remains, then (4) claims attributable to fines, penalties, or forfeitures, or for exemplary, punitive or multiple damages to the extent such claims are not in compensation for actual pecuniary loss, are next paid. If these claims are fully satisfied and money still remains, then (5) "payment of interest at the legal rate from the date of the filing of the petition" on any of the claims paid in the previously described distribution scheme. Finally, (6) if money still remains, the trustee turns that balance over to the debtor.

XIV RIGHTS OF SECURED CREDITORS

A. *PAYMENT OF SECURED CLAIMS*

1. Valuation of Property

UNITED STATES SUPREME COURT

Associates Commercial Corp. v. Rash, 520 U.S. 953 (1997). The creditor held a lien on a tractor truck Debtor-husband used in his freight hauling business. Debtors filed chapter 13 owing the creditor $41,171 on the truck. Debtors proposed a cram-down plan under which the creditor's secured claim would be paid $31,875—the value of the truck under a foreclosure-value standard. The creditor objected, arguing that replacement value was appropriate—that is, the amount that Debtors would have to pay to purchase a similar vehicle. The bankruptcy court adopted the foreclosure-value standard, and the district court and Fifth Circuit affirmed.

The Supreme Court reversed, holding that a chapter 13 debtor choosing the cram-down option must pay the amount required to obtain a similar asset for the same proposed use. In a footnote, however, the Court noted that replacement value "should not include certain items." Specifically, adjustments should be made when replacement value appears to be the same as retail value so that the creditor does "not receive portions of the retail price, if any, that reflect the value of items the debtor does not receive when he retains his vehicle, items such as warranties, inventory storage, and reconditioning. Nor should the creditor gain from modifications to the property—*e.g.*, the addition of accessories to a vehicle—to which a creditor's lien would not extend under state law. *Id.* at 965 n.6 (citation omitted). Although the Court did not recognize it, in many cases this calculation may approximate the foreclosure value.

THIRD CIRCUIT

In re Heritage Highgate, Inc., 679 F.3d 132 (3d Cir. 2012). The Court, *sua sponte*, raised the question of who has the burden of proof on a § 506(a) valuation issue. The Court considered and rejected the straightforward approaches of placing the burden of proof either on the secured party or on the debtor or any other party challenging the value stated in the proof of claim. Instead, the Court adopted a shifting burden approach. The claimed value of the collateral on the proof of claim is presumed correct. Then the challenger has the initial burden to introduce evidence supporting a different valuation. The secured creditor has the ultimate burden of persuasion by a preponderance of the evidence on the value of the collateral and the allowed amount of its secured claim.

In re Henry, 457 B.R. 402 (Bankr. E.D. Pa. 2011). The proper standard for valuing a car used by an individual chapter 13 debtor in his business is the replacement cost standard specified in *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997). The court declined to follow decisions that determine value based on some combination of prices listed in commercial publications that track used car prices in retail, private party, trade in, and auction sale transactions. Because the typical person in need of a used car may purchase a car from a retail dealer or a private party, the court held that the replacement price was something slightly less than the retail value established in the record. The amount of the discount from retail is based on evidence relating to a debtor's situation. Values listed in commercial publications are relevant evidence of the baseline retail value and the alternative private party value.

FOURTH CIRCUIT

Brown & Co. Sec. Corp. v. Balbus (In re Balbus), 933 F.2d 246 (4th Cir. 1991). The Fourth Circuit held that the value of secured property under § 506(a) should not include hypothetical costs of sale when there is no indication that the debtor intends to sell the property. The Fourth Circuit reviewed multiple approaches to the issue and ultimately determined that the second sentence of § 506(a), which directs that a court look at the "proposed disposition or use of" the property, would not allow hypothetical costs of sale to be deducted. Relying in part on *United Savings Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988), the Fourth Circuit reasoned that the proper valuation under § 506(a) is strictly the value of the collateral "in light of the purpose of the valuation and of the proposed disposition or use of such property."

See also Coker v. Sovran Equity Mortgage Corp. (In re Coker), 973 F.2d 258 (4th Cir. 1992). *But see In re Nuts & Boltzs, LLC*, 2010 Bankr. LEXIS 2458 (Bankr. D.S.C. July 6, 2010) (noting that *Balbus* and *Coker* were decided prior to the Supreme Court's decision in *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997), which held that replacement value is appropriate for determining property value). Note also the language of § 506(a)(2), added in 2005: "With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined."

NINTH CIRCUIT

Scovis v. Henrichsen (In re Scovis), 249 F.3d 975 (9h Cir. 2001). A secured loan may be separated into two distinct claims: a secured claim for an amount equal to the value of the collateral, and an unsecured claim for the difference, if any, between the amount of the loan and the value of the collateral. Valuation is significant because it determines a debtor's eligibility under § 109(e), and the extent to which a creditor is entitled to reasonable fees authorized by the security under § 506(b). *See also Batlan v. TransAmerica Commercial Finance Corp. (In re Smith's Home Furnishings, Inc.)*, 265 F.3d 959, 970 (9th Cir. 2001).

Pletz v. United States (In re Pletz), 221 F.3d 1114 (9th Cir. 2000). Bankruptcy courts have power to determine the value of a debtor's interest in property "in light of the purpose of the valuation and of the proposed disposition or use of such property." Because valuation is linked to its identified purpose, a particular valuation becomes irrelevant when the purpose behind it no longer exists. *See also Gold Coast Asset Acquisition v. 1441 Veteran St. Co. (In re 1441*

Veteran St. Co.), 144 F.3d 1288 (9th Cir. 1998).

Taffi v. United States (In re Taffi), 96 F.3d 1190 (9th Cir. 1996). When a chapter 11 or chapter 13 debtor intends to retain property subject to a lien, the purpose of valuation under the statute governing determination of secured status is not to determine the amount that the creditor would receive if it hypothetically foreclosed and sold the collateral; rather, the purpose of valuation is to determine how much the creditor will receive for the debtor's continued possession.

2. Interest rate

UNITED STATES SUPREME COURT

Till v. SCS Credit Corp., 541 U.S. 465 (2004). The Court imposed a "prime-plus" method for determining the appropriate interest rate under a chapter 13 plan, noting that the risk of default is a factor to consider.

Note, however, that post-BAPCPA § 511 requires payment of the full statutory rate of interest for tax claims.

FOURTH CIRCUIT

Florida Asset Fin. Corp. v. Dixon (In re Dixon), 228 B.R. 166 (W.D. Va. 1998). The district court held that an oversecured creditor of an individual chapter 11 debtor is presumed to be entitled to interest on its claim at the contract rate, including a default rate if applicable, but that equitable considerations such as the effect on other creditors' claims and the effect on the debtor may require deviation. In addition, the contract rate must not violate state usury laws, function as a penalty, or exceed the value of the collateral. The district court overturned the bankruptcy court's ruling that interest would only be allowed at the non-default contract rate, finding that the default rate could not be characterized as a 'penalty' merely because it was high at thirty-six percent. The district court relied on the Second Circuit's ruling in *Ruskin v. Griffiths*, 269 F.2d 827 (2d Cir. 1959) and on *In re Hollstrom*, 133 B.R. 535 (Bankr. D. Colo. 1991).

FIFTH CIRCUIT

Tax Ease Funding, L.P. v. Thompson (In re Kizzee-Jordan), 626 F.3d 239 (5th Cir. 2010). Prepetition, Debtors owed ad valorem property taxes on their home for the 2006 and 2007 tax years. Debtors took out a loan from a lender and, pursuant to a state statute, authorized the lender to remit the tax payment on their behalf. Debtors agreed under a promissory note to repay the loan over 10 years with an annual interest rate of 14.8% and, in return for the tax loan, the lender received a transfer of the taxing authorities' tax liens against Debtors' property. Debtors then filed a voluntary chapter 13 petition and proposed a plan under which they would repay the lender's loan at an annual rate of only 5%. The lender objected to the plan on the ground that § 511 provides that the interest rate on a tax claim is determined by non-bankruptcy law and may not be modified by the bankruptcy court; thus, its contract rate of 14.8% should be preserved.

The Fifth Circuit ruled that a third party who pays a debtor's taxes and receives a transfer of the taxing authority's tax lien holds a tax claim under § 511 the repayment terms of which may not be modified by the bankruptcy court. Here, applicable state law allowed for the transfer of a tax lien from the taxing authority to the third-party lender who paid Debtors' taxes. Accordingly, the lender was subrogated to the rights of the taxing authority, which would otherwise hold a tax claim under § 511, and the lender's right to the contract interest rate could not be modified and reduced under the plan.

In re T-H New Orleans Limited Partnership, 116 F.3d 790 (5th Cir. 1997). The Fifth Circuit affirmed adoption of the contract rate as the appropriate cram down interest rate, but did not specifically require that rate to be used. *See also In re Showtime Farms, Inc.*, 267 B.R. 541 (Bankr. E.D. Tex. 2000) (noting that the Fifth Circuit has not definitively established the market rate for chapter 12 or chapter 13 plans).

B. *LIEN STRIPPING*

UNITED STATES SUPREME COURT

Dewsnup v. Timm, 502 U.S. 410 (1992). Chapter 7 Debtor argued, under §§ 506(a) and (d), that she could redeem farm property from the bank by paying its fair market value, which was substantially less than the amount of the debt. The Supreme Court held that § 506(d) does not operate to strip the unsecured portion of the lien as determined under § 506(a), because the bank was secured by a lien that had been fully allowed under § 502. Thus, § 506(d) did not apply to the bank's undersecured claim because it nonetheless still held a claim that was both "allowed" and "secured."

For a recent commentary on *Dewsnup*, *see Woolsey v. CitiBank N.A. (In re Woolsey)*, 696 F.3d 1266, 1274 (10th Cir. 2012) ("Right or wrong, the Dewsnuppian departure from the statute's plain language is the law. It may have warped the bankruptcy code's seemingly straight path into a crooked one. It may not be infallible. But until and unless the Court chooses to revisit it, it *is* final.").

SECOND CIRCUIT

Wachovia Mortgage v. Smoot, 478 B.R. 555 (E.D.N.Y. 2012). Chapter 7 Debtors moved to "strip off" the lien of a wholly unsecured junior mortgage pursuant to § 506(d). Citing the decision of the Supreme Court in *Dewsnup v. Timm*, 502 U.S. 410 (1992), which held that an undersecured mortgage could not be stripped down, the district court reversed the bankruptcy court, and held that even when the senior lien exceeds the fair market value of the property in question, the junior lien cannot be stripped off.

In re Miller, 462 B.R. 421 (Bankr. E.D.N.Y. 2011). The court considered whether it could confirm Debtors' chapter 13 plans and strip off wholly unsecured junior mortgage liens against their respective principal residences, even though Debtors were ineligible to receive a chapter 13 discharge pursuant to § 1328(f)(1) because of a previous discharge under chapter 7. The court concluded that § 1328 does not preclude confirmation of a plan for a debtor who is ineligible to receive a discharge, and "neither 11 U.S.C. § 1325 nor any other provisions of chapter 13 provides that a plan may only be confirmed for a debtor who is eligible to receive a discharge." Thus, a chapter 13 debtor is permitted to strip off a wholly-unsecured mortgage lien and treat the lien as unsecured under a plan regardless of whether the debtor is eligible to receive a discharge; provided, however, that a debtor may strip off an inferior wholly unsecured mortgage lien only upon completion of plan payments, after satisfying the requirements of §§ 1325(a)(4) and 1325(b)(1).

Orkwis v. MERS (In re Orkwis), 457 B.R. 243 (Bankr. E.D.N.Y. 2011). Debtors filed an adversary proceeding against a mortgage servicer, seeking to avoid the second mortgage lien against debtors' residence on the grounds that it was wholly unsecured. The court held that § 1322(a)(4) gives a debtor the authority to modify the rights of a creditor when collateral securing the claim is valued at zero pursuant to § 506(a), but the attendant classification of such claim as unsecured is solely for the narrow purposes of § 506(a) and not for all purposes in the case. Accordingly, such valuation does not "avoid" any liens and does not result in the "stripping" of such lien. Rather, the lien may be deemed satisfied upon compliance with § 1325 and the lien may be removed from the property upon discharge.

THIRD CIRCUIT

In re Heritage Highgate, Inc., 679 F.3d 132 (3d Cir. 2012). The Third Circuit squarely decided for the first time that *Dewsnup v. Timm,* 502 U.S. 410 (1992)—which held that in a chapter 7 case liens may not be stripped under § 506(a) and they ride through beyond the closing of the chapter 7 case—does not apply to chapter 11 cases. The Court's rational was that § 506(a) applies by its terms to chapter 11 cases and that lien stripping is a necessary provision when collateral is retained by the chapter 11 debtor instead of being sold in a chapter 7 liquidation.

In re McDonald, 205 F.3d 606 (3d Cir.2000). In a chapter 13 case, if the debtor's principal residence is worth less than the amount due on the first mortgage, the second mortgagee is wholly unsecured and not protected by the anti-modification provision of § 1322(b)(2). Under § 506(a), the mortgagee's claim is wholly unsecured and, as a result, the mortgagee's mortgage lien is stripped off the debtor's residence.

In re Cook, 449 B.R. 664 (D.N.J. 2011). The district court affirmed the bankruptcy court's holding that in a chapter 7 case a junior mortgage lien on the debtor's home may not be stripped off under § 506(d) even if the amount of the first mortgage exceeds the value of the home. The district court reasoned that the Supreme Court in *Dewsnup v. Timm,* 502 U.S. 410 (1992), held that in a chapter 7 case a lien may be stripped off under § 506(d) only if the debt secured by the lien is invalid and, therefore, the claimant does not have an allowed claim. In contrast, the holder of the junior lien has an allowed claim because some or all of the original loan balance is still outstanding. The junior lien may not be stripped off.

FOURTH CIRCUIT

Hamlett v. Amsouth Bank (In re Hamlett), 322 F.3d 342 (4th Cir. 2003). The Fourth Circuit held that a secured creditor's failure to timely file a proof of claim does not extinguish its lien under § 506(d). Citing to the Seventh Circuit's ruling in *In re Tarnow*, 749 F.2d 464 (7th Cir. 1984), the Fourth Circuit determined that § 506(d) only empowers a bankruptcy court to void liens supporting a disallowed claim if it judges that those liens are invalid in substance.

Ryan v. Homecomings Fin. Network, 253 F.3d 778 (4th Cir. 2001). The Fourth Circuit decided that a chapter 7 debtor may not strip off a wholly unsecured consensual lien on his residence. The Supreme Court in *Dewsnup v. Timm*, 502 U.S. 410 (1992), addressed whether a chapter 7 debtor could strip down a partially unsecured lien, and Debtors in *Ryan* contended that its holding did not control the validity of stripping off entirely unsecured liens. There was no dispute that the first deed of trust on Debtors' residence exceeded the fair market value, and that the second deed of trust was completely unsupported by equity. Although the Fourth Circuit noted that there is disagreement between bankruptcy courts on the issue, it nevertheless followed its reading of *Dewsnup* and held that a chapter

7 debtor may not strip off a completely unsecured consensual lien under § 506(d).

First Mariner Bank v. Johnson, 411 B.R. 221 (D. Md. 2009), *aff'd mem.*, 407 F.App'x 713 (4th Cir. 2011). The district court held that a chapter 13 debtor can strip off a lien under §§ 506(a) and 1322(b)(2) when there is insufficient equity to cover any portion of the lien. There is consistent appellate support for this position. The anti-modification provision found in § 1322(b)(2) for claims secured by real property that is the debtor's principal residence does not protect junior creditors with wholly unsecured liens because they do not possess "secured claims" as defined by § 506(a). Only the rights secured by some remaining equity will be protected from modification, and the policy considerations underlying the anti-modification provision of § 1322(b)(2)—the promotion of home lending—do not extend to second mortgages.

FIFTH CIRCUIT

In re Kinion, 207 F.3d 751 (5th Cir. 2000). A secured creditor may remain outside the bankruptcy proceedings until an interested party objects to the allowed secured claim. Ordinarily, liens and other secured interests survive bankruptcy. Thus, a court cannot invalidate a secured creditor's lien without notice.

SIXTH CIRCUIT

Talbert v. City Mort. Servs. (In re Talbert), 344 F.3d 555 (6th Cir. 2003). A chapter 7 debtor may not "strip off" an allowed junior lien when the senior lien exceeds the fair market value of real property.

Lane v. Western Interstate Bancorp (In re Lane), 280 F.3d 663 (6th Cir. 2002). The Bankruptcy Code's antimodification provision permits modification of the rights of totally unsecured homestead mortgagees.

SEVENTH CIRCUIT

Ryan v. United States (In re Ryan), 2013 U.S. App. LEXIS 13710 (7th Cir. Jul. 8, 2013). The Seventh Circuit held that the Supreme Court's decision in *Dewsnup v. Timm*, 502 U.S. 410 (1992), applies in chapter 13 just as it does in chapter 7. Therefore, a chapter 13 debtor cannot strip down a federal tax lien to the value of his assets and have the unsecured portion declared void under § 506(d).

EIGHTH CIRCUIT

Fisette v. Keller (In re Fisette), 455 B.R. 177 (B.A.P. 8th Cir. 2011). Debtor was ineligible for a discharge under § 1328(f) because he had filed a chapter 7 case within one year of this chapter 13 filing.

Debtor's plan proposed to strip off the second and third liens on his principal residence (homestead) and treat the claims as unsecured because they were wholly without supporting value. The bankruptcy court denied confirmation. On appeal, Debtor asked the BAP to decide whether a chapter 13 debtor may strip off a wholly unsecured junior mortgage lien on his principal residence, and whether stripping off such a lien should be allowed in a case in which the debtor is ineligible for a discharge.

The Eighth Circuit BAP ruled that § 1322(b)(2) does not bar a chapter 13 debtor from stripping off a wholly unsecured lien on his principal residence. The court explained that the anti-modification clause of § 1322(b)(2)—which provides that a chapter 13 plan may modify the rights of holders of secured claims other than a claim secured only by a security interest in real property that is the debtor's principal residence—bars chapter 13 debtors from stripping down a secured creditor's claim when any portion of that claim is secured by the debtor's home. If the creditor's claim is at least partially secured under § 506(a), then § 1322(b)(2) applies and the lien cannot be stripped down. Here, however, the second and third liens were wholly unsecured and, therefore, could be stripped off. The court also ruled that a wholly unsecured lien can be stripped off even if the debtor is not eligible for a chapter 13 discharge. The court reasoned that a chapter 7 debtor's discharge, standing alone, does not deprive a mortgagee of its right to collect its debt *in rem*, and nothing in the Bankruptcy Code conditions a chapter 13 debtor's ability to modify a lien devoid of supporting value under § 1322(b)(2) on his or her eligibility for a discharge. Lien-stripping is not a "de facto discharge" because, by seeking to strip off a junior lien, a debtor seeks just to avoid the lien.

NINTH CIRCUIT

Enewally v. Washington Mutual Bank (In re Enewally), 368 F.3d 1165 (9th Cir. 2004). Chapter 13 Debtors filed an adversary proceeding against a mortgage creditor, seeking a judgment valuing non-residential property at an amount less than the outstanding loan amount, bifurcating the real estate lien into secured and unsecured claims, extending the term of repayment beyond the life of the plan, and disposing of the unsecured lien through the confirmed plan. The Ninth Circuit held that Debtors could not simultaneously invoke a modification of the secured creditor's claim, and the right to cure and maintain the secured claim over the life of the original loan.

Zimmer v. PSB Lending Corp. (In re Zimmer), 313 F.3d 1220 (9th Cir. 2002). Under the anti-modification provisions of § 1123(b)(5), a secured lien on a debtor's residence cannot be bifurcated. But if a lien is "wholly underwater," it is not a "secured" claim within § 1322(b)(2) and the antimodification provisions do not apply. Therefore, the avoidance of liens "associated with wholly unsecured claims" is not prohibited. *See also Lam v. Investors Thrift (In re Lam),* 211 B.R. 36 (B.A.P. 9th Cir. 1997).

Meyer v. Lepe (In re Lepe), 470 B.R. 851, 862 (B.A.P. 9th Cir. 2012). Courts in the Ninth Circuit are split on whether a "chapter 20" debtor—that is, a debtor who has received a chapter 7 discharge within four years prior to filing a chapter 13 case—can strip a wholly unsecured junior mortgage lien.

See Frazier v. Real Time Resolutions, Inc., 469 B.R. 889 (E.D. Cal. 2012) (permitting lien stripping by chapter 20 debtor; collecting cases and discussing three approaches to issue); *In re Hill*, 440 B.R. 176 (Bankr. S.D. Cal. 2010); *In re Tran*, 431 B.R. 230 (Bankr. N.D. Cal. 2010), *aff'd* on other grounds, *In re Tran*, 814 F. Supp. 2d 946 (N.D. Cal. 2011) (both finding that hapter c20 lien stripping is permissible and permanent upon plan completion and a finding of good faith). *But see In re Victorio*, 454 B.R. 759 (Bankr. S.D. Cal. 2011) (chapter 20 lien stripping is impermissible in absence of discharge).

TENTH CIRCUIT

Woolsey v. Citibank, N.A. (In re Woolsey), 696 F.3d 1266 (10th Cir. 2012). Applying *Dewsnup v. Timm*, 502 U.S. 410 (1992), the Court affirmed the bankruptcy court's refusal to confirm a chapter 13 plan that sought to strip the lien of a completely undersecured second-lien creditor under § 506(d). *In re Woolsey*, 438 B.R. 432 (Bankr D. Utah 2010). Debtor had explicitly rejected the Court's invitation to provide supplemental briefing on whether a portion of the secured claim could appropriately be modified under § 1322(b)(2) and appeal was limited to the "narrow question" of whether § 506(d) permitted the lien to be avoided subject to a chapter 13 plan, The Court found *Dewsnup* to control as long as it remained Supreme Court precedent. In dicta, the Court opined that while § 506(d) did not void the lien, it seemed likely that such a trust deed could be modified under § 1322(b)(2) and *Nobleman*. Because Debtors only argued for relief under § 506(d), and declined to seek relief under § 1322(b)(2), the Court limited its holding to the § 506(d) issue and affirmed the bankruptcy court's decision. This decision also contains a thorough discussion of jurisdictional issues arising from the appeal of arguably interlocutory bankruptcy orders.

Rushton v. State Bank of South Utah (In re Gledhill), 164 F.3d 1338 (10th Cir. 1999). Bank foreclosed on real property and obtained a deficiency judgment that it then sought to enforce against Debtor's other property. Debtors filed under chapter

7, the trustee sold the property, and the bank filed a secured claim for the judgment amount plus post-petition attorney's fees and costs under § 506(b). The trustee successfully objected to the fees. The Tenth Circuit ruled that the bank had exhausted its rights under the trust deed through the foreclosure and entry of a deficiency judgment. Thus, the bank could only assert its judgment rights in the bankruptcy case, which rights included the accrual of post-petition interest but not the recovery of post-petition fees or costs.

ELEVENTH CIRCUIT

McNeal v. GMAC Mortgage, LLC (In re McNeal), ___ F.3d ___, 477 F. App'x 562 (11th Cir. 2012). The court permitted the chapter 7 Debtor to strip off a wholly unsecured mortgage claim under § 506(d). The court determined that *Folendore* is controlling precedent in the Eleventh Circuit with regard to this specific issue, rather than the United States Supreme Court case of *Dewsnup v. Timm*. The court in *McNeal* distinguished *Folendore* from *Dewsnup* on the grounds that "*Dewsnup* only disallowed a 'strip down' of a partially secured mortgage lien and did not address a 'strip off' of a wholly unsecured lien."

In re Paschen, 296 F.3d 1203 (11th Cir. 2002). A debtor is permitted to modify a short-term loan on a mortgage secured by the equity in the debtor's primary residence. The court distinguished this case from *Nobelman v. American Savings Bank,* 508 U.S. 324 (1993), relying upon § 1322(c)(2), which allows modification of a claim secured by the debtor's primary residence if the last payment is due before the date on which the final chapter 13 plan payment is due. In *Paschen*, debtors were obligated under a short-term loan in the amount of $12,377.08, secured by their primary residence. The court ruled THAT the lender's proof of claim could be bifurcated into a secured amount equal to the total equity in the debtor's primary residence and the balance unsecured.

Tanner v. FirstPlus Financial, Inc. (In re Tanner), 217 F.3d 1357 (11th Cir. 2000). The anti-modification provision of § 1322(b)(2) applies only to undersecured first mortgages on homestead property. A chapter 13 plan may "strip off" a junior lien on the debtor's principal residence, notwithstanding the provisions of § 1322(b)(2) and *Nobleman v. American Savings Bank,* 508 U.S. 324 (1993), when the junior claim is wholly unsecured because the value of the residence is less than the amount of the debt secured by the senior lien. Consequently, the holding in *Nobelman* does not protect a lender who holds an inferior mortgage on a debtor's primary residence from modification once the lender's claim is determined to be completely unsecured. The plan may treat the claim secured by the junior lien as wholly unsecured. *See also American General Finance, Inc. v. Dickerson (In re Dickerson),* 222 F.3d 924 (11th Cir. 2000) (same).

Folendore v. United States Small Bus. Admin., 862 F.2d 1537 (11th Cir. 1989). The Court interpreted § 506(d) to permit a Chapter 7 debtor to strip off of a wholly unsecured lien, holding that an "allowed claim that was wholly unsecured . . . was voidable under the plain language of section 506(d)."

C. *DEBTOR'S RETENTION OF ENCUMBERED PROPERTY*

1. Ride-Through

THIRD CIRCUIT

In re Hart, 402 B.R. 78 (Bankr. D. Del. 2009). BAPCPA amendments to §§ 521(a) and 362(h), which have been held to supersede the holding in *In re Price*, 370 F.3d 362 (3d Cir. 2004), that a chapter 7 debtor who keeps payments current may retain collateral, only apply to personal property. As a result, the debtor still has the option under *Price* to retain real estate collateral if payments are kept current.

In re Anderson, 348 B.R. 652 (Bankr. D. Del. 2006). The bankruptcy court held that the 2005 BAPCPA amendments abrogated a chapter 7 debtor's ability, under *In re Price,*370 F.3d 362 (3d Cir. 2004), to retain personal property collateral by electing the so called "ride through" option and keeping current on payments. The creditor's security interest is not affected by the chapter 7 discharge, but the discharge injunction is understood to prohibit any action to recover the collateral unless there was a post-petition default.

The court started with §521(a)(2), as amended by BAPCPA, which provides that the failure of a chapter 7 debtor to file a statement of intention or to perform a stated intention does not "alter the debtor's or the trustee's rights with regard to such property . . . except as provided in section 362(h)." Under new §362(h), the stay is terminated and collateral is no longer property of the estate if the collateral is personal property and the debtor fails to file the statement of intention or to perform the statement of intention. The effect of these two sections is that *Price*'s ride-through option is no longer available. In addition, the court held that under new §521(d), upon the chapter 7 debtor's failure to file or to perform a statement of intention, the secured creditor may pursue its state law rights to recover collateral if the security agreement included an *ipso facto* clause.

FOURTH CIRCUIT

Daimler Chrysler Fin. Servs. Am., LLC v. Jones (In re Jones), 591 F.3d 308 (4th Cir. 2010). The Fourth Circuit affirmed the district court's ruling that the ride-through option was eliminated by changes to the Bankruptcy Code enacted in BAPCPA, pointing to §§ 521(a)(2)(C), 521(a)(6), and 362(h). A debtor is now expressly required, in accordance with a statement of intention, either to redeem, reaffirm, or surrender the property. In this case, Debtor had only indicated that he would "continue payments" on a vehicle; he failed to either redeem or reaffirm the property. The secured creditor obtained relief from the stay and repossessed the vehicle. The bankruptcy court had found the creditor's action invalid because Debtor was exercising the ride-through option recognized in *Home Owners Funding Corp. of Am. v. Belanger (In re Belanger)*, 962 F.2d 345 (4th Cir. 1992). The district court held, however, that BAPCPA eliminated the ride-through option. *But see Coastal Fed. Credit Union v. Hardiman*, 398 B.R. 161 (E.D.N.C. 2008) (permitting a "modified version of the 'ride-through' option" when the bankruptcy court rejects a reaffirmation agreement entered into by the debtor and secured creditor).

SEVENTH CIRCUIT

In re Edwards, 901 F.2d 1383 (7th Cir. 1990). The Seventh Circuit ruled that the options listed in § 521(a)(2) are exclusive. Thus, without reaffirmation or redemption the debtor may not simply continue to retain collateral while paying on the debt—a process commonly known as ride-through.

Although BAPCPA appears to codify the result in *Edwards*, the statute's express terms only apply to personal property, and ride-through may retain relevant for real property. *But see In re Amoakohene*, 299 B.R. 196 (Bankr. N.D. Ill. 2003) (pre-BAPCPA case relying on *Edwards* to prohibit ride-through on debt secured by real estate).

NINTH CIRCUIT

Dumont v. Ford Motor Credit Co. (In re Dumont), 581 F.3d 1104 (9th Cir. 2009). Following BAPCPA, a debtor must indicate in a statement of intent "that he will do one of four things: surrender, redeem, reaffirm, or assume an unexpired lease." When the debtor has not attempted to reaffirm a debt for personal property subject to a security interest, or to redeem or surrender that property, "ride-through" is not available to allow the debtor to retain that personal property by simply continuing to make payments under the contract.

ELEVENTH CIRCUIT

In re Taylor, 3 F.3d 1512 (11th Cir. 1993). A chapter 7 debtor may not retain collateral without either redeeming the property or reaffirming the debt.

2. Redemption—§ 722

FIFTH CIRCUIT

In re Jewell, 232 B.R. 904 (Bankr. E.D. Tex. 1999). An individual debtor may redeem tangible personal property intended primarily for personal, family or household use from a lien securing a dischargeable consumer debt, without regard to whether the debtor waived the right to redeem. The property must be exempted under § 522, or have been abandoned under § 554. The debtor can redeem the property by paying the lienholder the amount of the allowed secured claim. The court found that the Code is silent as to when the debtor must exercise the option to redeem under § 722. Nothing in § 722 indicates that the debtor is confined to any given period of time for exercising the right of redemption. The debtor must satisfy all four requirements to qualify: (1) both the property subject to the lien and the underlying debt must be consumer-related; (2) the debt secured by the lien must be dischargeable in bankruptcy; (3) the property must be exempted or abandoned under the Code; and (4) the debtor must pay the lienholder the amount of the allowed secured claim. If the debtor fails any of these requirements, redemption should be denied.

SIXTH CIRCUIT

General Motors Acceptance Corp. v. Bell (In re Bell), 700 F.2d 1053 (6th Cir. 1983). The Sixth Circuit held that redemption under § 722, and reaffirmation under § 524(c) are the exclusive methods by which defendants could retain possession of secured collateral. This case stated that § 722 requires lump-sum redemption—a holding since codified in § 722.

Triad Fin. Corp. v. Weathington (In re Weathington), 254 B.R. 895 (B.A.P. 6th Cir. 2000). Debtor sought to redeem his motor vehicle from the creditor's lien. The bankruptcy court held that Debtor would have to pay an amount equal to the vehicle's liquidation value, not its replacement value, and the BAP affirmed. The court distinguished the Supreme Court's holding in *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997), requiring the use of replacement value, on the grounds that *Rash* involved proper valuation in the context of confirmation of a chapter 13 plan. Value is determined on the basis of the proposed use and disposition of the collateral, and the disposition is different when a chapter 7 debtor redeems property than when a chapter 13 debtor continues making payments over time. In the later situation, the creditor faces the dual risks of loss of payments and loss of value due to depreciation. But there is no difference in the economic consequences to the creditor between surrender and redemption in chapter 7. The legislative history indicates that, in the redemption context, a creditor should be paid the amount it would have received if the property were repossessed and sold. That is the liquidation value, which best replicates what the creditor would receive at a wholesale auction.

Note that, post-BAPCPA, § 506(a)(2) appears to codify the Supreme Court's holding in *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997), thus changing the standard generally applied pre-BAPCPA by courts in the Sixth Circuit for valuing collateral and determining an allowed secured claim for redemption purposes under § 722. Courts must determine the price a retail merchant would charge for property of that kind, considering the age and condition of the property at the time of valuation.

NINTH CIRCUIT

Arizona Bank v. Carroll (In re Carroll), 11 B.R. 725 (B.A.P. 9th Cir. 1981). Under § 722, a chapter 7 debtor may redeem certain secured property by paying the creditor the approximate fair market value of the property or the amount of the lien, whichever is less. Redemption cannot be accomplished through installments, but only through a lump sum payment.

3. Reaffirmation—§ 524

a. General Requirements

FOURTH CIRCUIT

Coastal Fed. Credit Union v. Hardiman, 398 B.R. 161 (E.D.N.C. 2008). In discussing the existence of a modified form of the ride-through option, the district court cited to the general requirements of reaffirmation agreements as provided by § 524(c):

1) The agreement must be made prior to discharge;
2) The debtor must have timely received the disclosures in subsection (k);
3) The agreement must be filed with the bankruptcy court, together with a declaration or affidavit of the debtor's attorney if the debtor has one;
4) The debtor must not rescind the agreement by the later of discharge or sixty days after the agreement is filed with the bankruptcy court;

5) The bankruptcy court must hold any necessary hearing under subsection (d) for a debtor who is receiving a discharge and was not represented by an attorney during negotiations, but who seeks to enter into a reaffirmation agreement; and
6) The bankruptcy court must determine, if the debtor was not represented by an attorney during negotiations, that the agreement does not impose an undue hardship and is the best interest of the debtor.

The district court noted the large effect that representation by an attorney will have on approval of the reaffirmation agreement. The court ultimately held that if debtors comply with their obligations relating to the reaffirmation agreement and the bankruptcy court disapproves and rejects the agreement under § 524(c)(6), the automatic stay remains in place, the property remains part of the estate, the debtors are not in default by virtue of any *ipso facto* clauses, and, thus, the debtors may maintain possession of the property and continue to make payments on it.

SIXTH CIRCUIT

Salyersville Nat'l Bank v. Bailey (In re Bailey), 664 F.3d 1026 (6th Cir. 2011). The Court held a reaffirmation agreement unenforceable, under Kentucky law, because the agreement was premised on a mutual mistake that the bank was secured when, in fact, the bank was not.

Pertuso v. Ford Motor Credit Co., 233 F.3d 417 (6th Cir. 2000). Appellants alleged that the solicitation of a reaffirmation agreement violated the automatic stay provision pursuant to § 362 and violated the discharge injunction under § 524. The Sixth Circuit held that the automatic stay was not violated when the creditor sent a reaffirmation letter to Debtor. In addition, the Court held that § 524 does not impliedly create a private right of action for an asserted violation of an injunction, and that the remedy for such a violation is a contempt proceeding.

SEVENTH CIRCUIT

In re Turner, 156 F.3d 713 (7th Cir. 1998). The Seventh Circuit ruled that a debtor may not file a "unilateral reaffirmation"—that is, a document filed without the consent or signature of the creditor. An effective reaffirmation needs to have the signature and consent of both debtor and creditor.

NINTH CIRCUIT

Bay Federal Credit Union v. Ong (In re Ong), 461 B.R. 559 (B.A.P. 9th Cir. 2011). Debtors may reaffirm dischargeable debts, though in order to protect debtors from compromising their fresh start by making unwise agreements to repay such debts, the Code sets out various procedures and requirements for reaffirmation agreements, including disclosures relating to the legal ramifications of reaffirmation.

If a debtor seeking approval of a reaffirmation agreement is not represented by an attorney, the bankruptcy court must inform the debtor that reaffirmation is not required, describe the legal consequences of reaffirming a debt, and decide whether reaffirmation is in the debtor's best interest or poses an undue hardship. Once the requirements for a reaffirmation agreement sought by a debtor who is represented by an attorney are met, the agreement becomes effective and enforceable upon filing, unless there is a presumption of undue hardship.

Section 524(m)(1) raises a rebuttable presumption, for 60 days after an agreement is filed, that a reaffirmation agreement imposes an undue hardship on the debtor when the debtor's monthly income, less monthly expenses, is less than the scheduled payments on the reaffirmed debt. The bankruptcy court must review agreements when the presumption of undue hardship exists, and the court may disapprove a reaffirmation agreement, after notice and a hearing, if it is not satisfied that the presumption has been adequately rebutted. When the creditor is a credit union, however, there is no presumption of undue hardship, § 524(m)(2).

A court's authority to review a reaffirmation agreement under § 524(d) and to determine whether it is in the debtor's "best interest" is limited to cases in which the debtor is not represented by an attorney in the negotiation of the agreement. "A bankruptcy court 'may not disapprove an attorney certified reaffirmation agreement solely because the court believes it is not in the best interest of the debtor.' "

"The court 'cannot ignore the ramifications incident to a blanket assumption that reaffirmations [*sic*] agreements are enforceable if accompanied by an attorney declaration, when close scrutiny compels the conclusion that the elements set forth in § 524(c) are either lacking altogether, insufficient or void as having been filed in violation of Rule 9011.' " *Id*. at 564, *quoting In re Hovestadt,* 193 B.R. 382, 386 (Bankr. D.Mass.1996). "The only time a bankruptcy court should concern itself with an attorney-certified reaffirmation agreement is in the exceptional situation where there has been a Rule 9011 violation by the certifying attorney."

Bankruptcy Receivables Mgmt. v. Lopez (In re Lopez), 345 F.3d 701 (9th Cir. 2003). A reaffirmation agreement, with or without consideration, but based in part on the chapter 7 Debtors' discharged debt was invalid because the agreement was executed post-discharge and did not comply with the procedural requirements of § 524(c).

American Gen. Fin., Inc. v. Bassett (In re Bassett), 285 F.3d 882 (9th Cir. 2002). A legally-mandated statement of the debtor's right to rescind, recited in a reaffirmation agreement, was clear and conspicuous as required by § 524(c)(2)(A) and thus was enforceable. Instead of formulating a bright line rule mandating certain font, capitalization, or format requirements, the Court looked to the Uniform Commercial Code's definition of "conspicuous" as a term or clause written so that a reasonable person against whom it is to operate ought to have noticed it.

b. Presumed Abuse

THIRD C IRCUIT

In re Laynas, 345 B.R. 545 (E.D. Pa. 2006). Debtor and her car lender entered into a reaffirmation agreement. Debtor's § 524(k)(6)(a) Statement that was part of the reaffirmation package indicated that the debtor had sufficient uncommitted income available to make the payments on the reaffirmed car debt. Debtor's schedules, however, indicated that she did not have any income in excess of expenses with which to make the car payments under the reaffirmation agreement.

The court held that it was appropriate under §524(m) for the court to compare information on the §524(k)(6)(A) Statement to other information in the record. If the information in the record shows the debtor does not have enough free cash to fulfill the payment obligation of the reaffirmation agreement, but the Statement indicates to the contrary, a presumption arises under § 524(m) that paying the amount specified in the reaffirmation agreement will be an undue hardship on the debtor. It is up to the debtor to provide an explanation of the conflict that demonstrates to the court that there will be adequate cash available to fulfill the debtor's obligation under the reaffirmation agreement.

FIFTH CIRCUIT

Matter of Booth, 858 F.2d 1051 (5th Cir. 1988). A bankruptcy case can be dismissed for presumed abuse only if the debts are primarily consumer related. Factors to be considered include:

(1) circumstances surrounding the debtor's finances in the past, including:

(a) whether the debtor engaged in significant purchases on the eve of bankruptcy; and

(b) whether the debtor incurred cash advances or made consumer purchases which exceeded at that time his ability to pay.

(2) circumstances surrounding the debtor's finances in the future, including:

(a) whether the debtor has a stable income;

(b) whether the debtor's budget is reasonable; and

(c) whether the debtor could pay a substantial portion of his or her debts from future income in a chapter 13 case

(3) circumstances surrounding the debtor's truthfulness, including:

(a) whether the debtor's schedules and statements accurately reflect his or her true financial condition; and

(b) whether the debtor generally filed the case in good faith; and

(4) circumstances related to a legitimate need for filing, including:

(a) whether the bankruptcy was filed due to sudden illness, calamity, disability or unemployment; or

(b) whether the debtor's financial predicament could have been better addressed through private negotiations or the use of other state law remedies.

See also In re Dumas, 419 B.R. 704 (Bankr. E.D. Tex. 2009) (holding that BAPCPA now requires use of a totality test to determine whether a presumption of abuse should be imposed upon an above-median income debtor seeking chapter 7 relief).

c. Obligations of Attorneys

FOURTH CIRCUIT

In re Harvey, 452 B.R. 179 (Bankr. W.D. Va. 2010). The discretion of a bankruptcy court is triggered in regard to reaffirmation agreements only when (1) the debtor was not represented by an attorney during negotiation of the agreement, and (2) the debtor was represented by an attorney, the presumption of undue hardship under § 524(m) arose, and the attorney certified under § 525(k)(5)(B) that the debtor is nevertheless able to make the payments. Debtor's attorney in this case declined to sign a certification for the reaffirmation agreement because she had not been involved in the negotiation of the agreement; in fact, there had been no negotiation—the reaffirmation simply reinstated the original contractual terms. Recognizing potentially abusive practices by attorneys, the bankruptcy court strongly encouraged debtors' attorneys to participate in negotiations of reaffirmation agreements, especially in light of the statutory changes made by BAPCPA. The court interpreted the term "negotiations" broadly to incorporate situations in which no actual bargaining took place. Although the bankruptcy court stated that Debtor could likely make the payments on the reaffirmed debt without undue hardship, it denied the reaffirmation agreement because Debtor's counsel had not signed a certification. *See also In re Rodriguez*, 2008 Bankr. LEXIS 1877 (Bankr. E.D. Va. June 23, 2008); *In re Isom*, 2007 Bankr. LEXIS 2437 (Bankr. E.D. Va. July 17, 2007).

TENTH CIRCUIT

In re Shepard, 453 B.R. 416 (Bankr. D. Colo. 2011). Because the individual chapter 7 debtor was otherwise represented by an attorney during the course of chapter 7 proceedings, the bankruptcy court did not need to approve a reaffirmation agreement entered into between Debtor and a creditor. The fact that Debtor's attorney did not sign and file the affidavit described under § 524(c)(3) did not affect the enforceability of the reaffirmed debt or require the court to set a hearing for approval of the reaffirmation agreement otherwise filed in accordance with § 524(c). "When representing a Chapter 7 debtor, something as fundamental as whether a debtor should agree to be obligated to pay a debt which is otherwise dischargeable cannot be excluded from representation." *Id*. at 419. The fact that the attorney did not sign the affidavit could be indicative of other factors not going to the validity of the reaffirmation, such as the attorney's view that the agreement was not advisable.

d. Abusive Creditor Activities

SEVENTH CIRCUIT

Cox v. Zale Delaware, Inc., 239 F.3d 916 (7th Cir. 2001). In the event of an unfiled reaffirmation agreement, the Seventh Circuit provided several clear procedural rules. First, a suit for violation of the rules governing reaffirmation agreements in § 524(c) can only be brought as a contempt action for violation of the discharge injunction in § 524(a)(2). Second, if all the debtor wants to do is avoid enforcement of the reaffirmation agreement, the debtor can interpose failure to follow § 524 as a defense in any court action to enforce the agreement. Third, once the debt has been paid through the reaffirmation agreement, affirmative relief can be sought only in the bankruptcy court that issued the discharge by reopening the case; the court retains jurisdiction to enforce its injunctions.

4. Statement of intention

FOURTH CIRCUIT

DaimlerChrysler Fin. Svcs. America, LLC v. Jones (In re Jones), 591 F. 3d 308 (4th Cir. 2010). An individual chapter 7 debtor's failure to comply with §§ 521(a)(2) and (a)(6), which require the debtor either to reaffirm a debt secured by personal property or to redeem the property, terminates the automatic stay of § 362(a) as to the property. Prior to the enactment of BAPCPA the Fourth Circuit had allowed the "ride through" of a debt secured by a motor vehicle as long as the debtor continued to make loan payments. *Home Owners Funding Corp. of Am.v. Belanger (In re Belanger)*, 962 F.2d 345, 347-49 (4th Cir. 1992). *Jones* held to the contrary on the basis of BAPCPA amendments to § 521(a)(2), and the addition of §§ 521(a)(6) and 362(h).

NINTH CIRCUIT

Samson v. Western Capital Partners, LLC (In re Blixseth), 684 F.3d 865 (9th Cir. 2012). If a debtor does not file a timely statement of intention with respect to personal property under § 521(a)(2)(A), the automatic stay on *all* of the debtor's personal property secured by the creditor's claim terminates, not just on the property that was scheduled as securing the claim.

TENTH CIRCUIT

In re Rowe, 342 B.R. 341 (Bankr. D. Kan. 2006). In a case of first impression after the 2005 revisions of the Bankruptcy Code, the bankruptcy court held that a debtor's failure to file a statement of intent under § 521, opting to surrender or reaffirm, entitles the creditor only to relief from the stay, not to surrender of the collateral. Prior to the 2005 revisions, a number of courts, including the Tenth Circuit had left open the option for a debtor to "ride through" the bankruptcy process if he or she were current on monetary payments to the creditor, thus retaining the collateral without reaffirming. Post-amendment, this Debtor failed to file a statement of intent or to surrender the collateral. The bankruptcy court denied the creditor's motion for an order directing surrender, but granted the creditor relief to return to state court and foreclose.

This case leaves open the question whether, if the debtor had filed a statement of intent to surrender, the court would have had jurisdiction to order turn-over to the creditor

D. *HANGING PARAGRAPH*

1. What Constitutes a PMSI

THIRD CIRCUIT

In re Mancini, 390 B.R. 796 (Bankr. M.D. Pa. 2008). The hanging paragraph that appears after § 1325(a)(9) exempts a claim secured by a purchase money security interest in a motor vehicle from bifurcation under § 506(a) as long as the loan was made within 910 days of the filing of a chapter 13 case.

When a debtor is trading in one vehicle as part of the purchase of another, the trade-in vehicle may have negative equity because it is worth less than the outstanding balance on the loan it secures. Frequently, a debtor borrows the money to pay off the balance due on the trade-in vehicle from the lender financing the purchase of a new vehicle. The issue is whether combining the loan to pay off the balance due on the trade-in with the loan for the new motor vehicle disqualifies the entire loan from purchase money status. An alternative is to treat the loan for the new motor vehicle as a purchase money loan and the amount borrowed to pay off the trade in loan as a non-purchase money loan that is not protected by the hanging paragraph.

The bankruptcy court found that the Pennsylvania version of UCC Article 9 determined the result. The court focused in particular on Comment 3 to § 9-103, which gives some guidance as to the types of purchase-related charges and expenses that are properly classified under the definition in § 9-103(a) as part of the purchase money obligation. The court held that funds used to pay off negative equity are not sufficiently related to acquisition of the motor vehicle to be classified as a purchase money loan. The Court then looked to the two approaches courts follow when a claim is a PMSI only in part: the "transformation rule," which converts the entire claim into a non-PMSI; and the "dual status rule," which allows the PMSI portion to remain so. The Third Circuit adopted the latter in *Pristas v. Landaus of Plymouth, Inc.*, 742 F.2d 797 (3d Cir. 1984), and this court found that the hanging paragraph does not displace that approach.

FOURTH CIRCUIT

Wells Fargo Fin. Acceptance v. Price (In re Price), 562 F.3d 618 (4th Cir. 2009). The Fourth Circuit analyzed North Carolina law—namely Article 9 of the UCC as enacted in that state—to determine whether the hanging paragraph of § 1325(a) applies to the entire amount of a secured claim even though part of the claim relates to the financing of negative equity. In contrast with the rulings of the bankruptcy and district courts, the Fourth Circuit found that negative equity financing does create a purchase-money obligation because it enables the debtor to acquire rights in the new property and is "integral to the whole transaction in which the new vehicle was purchased." Under North Carolina law, a purchase money security interest requires only that the debt be incurred as all of part of the price of the collateral or for value given to enable the debtor to acquire rights in the collateral. The Fourth Circuit viewed the entire transaction (the trade-in of the old vehicle, negative equity financing, financing of the new vehicle, and a down payment) as a "package deal" that would not have occurred without the negative equity financing. *See also GMAC v. Horne*, 390 B.R. 191 (E.D. Va. 2008) (applying similar analysis under Virginia law).

In re Ellegood, 362 B.R. 696 (Bankr. E.D. Va. 2007). The provisions of the hanging paragraph create two protected categories of secured debt, and each requires that the creditor possess a purchase money security interest. The provisions of § 506 do not apply to a motor vehicle claim if the debt was incurred within the 910–day period prior to bankruptcy filing. Collateral other than a motor vehicle is also excluded from the application of § 506 if the debt was incurred within one year prior to the bankruptcy filing.

SIXTH CIRCUIT

Nuvell Credit Corp. v. Westfall (In re Westfall), 599 F.3d 498 (6th Cir. 2010). Negative equity financing qualifies as a purchase money security interest, barring bifurcation of the claim.

SEVENTH CIRCUIT

Howard v. AmeriCredit Fin. Servs., 597 F.3d 852 (7th Cir. 2010). The Bankruptcy Code does not define "purchase money security interest." Therefore, the Seventh Circuit looked to state law for the definition. Under this definition, the court held that a purchase money security interest includes amounts loaned in excess of the purchase price to cover expenses in connection with the purchase (such as a debtor's "negative equity" in a vehicle being traded in); therefore, the entire loan is subject to the protection of the hanging paragraph.

NINTH CIRCUIT

AmeriCredit Financial Servs. v. Penrod (In re Penrod), 611 F.3d 1158 (9th Cir. 2010). The creditor that financed Debtor's automobile purchase did not have a purchase money security interest in the "negative equity" of Debtor's trade-in for purposes of § 1325(a), which prohibits the bifurcation of secured claims in chapter 13 plans. Payment of the remaining debt on the trade-in was not an "expense" or "other similar obligation" within the UCC's definition of a "purchase-money obligation." Therefore, Debtor could bifurcate the claim into secured and unsecured portions in her chapter 13 plan.

Wells Fargo Financial Acceptance v. Rodriguez (In re Rodriguez), 375 B.R. 535 (B.A.P. 9th Cir. 2007). Pursuant to the "hanging paragraph" following § 1325(a)(9), a debtor cannot strip down a purchase money lien on a motor vehicle acquired for the debtor's personal use if the debt was incurred within 910 days before the petition date. "In essence, the hanging paragraph renders section 506 unavailable to debtors proposing plans affecting claims secured by 910 vehicles." Section 506, thus, does not apply if "(1) the creditor has a purchase-money lien, (2) the debt was incurred within 910 days before the petition date, and (3) the collateral is a motor vehicle acquired by a debtor for his or her personal use." *Id*. at 541.

The hanging paragraph does not affect a "910 creditor's" right to a deficiency claim if the surrendered motor vehicle securing it cannot be sold for a sum sufficient to satisfy the debtor's total debt.

TENTH CIRCUIT

Ford v. Ford Motor Credit Corp. (In re Ford), 574 F.3d 1279 (10th Cir. 2009). Debtors' chapter 13 plan proposed to bifurcate a "910-vehicle claim" by treating the negative equity portion of the financing as unsecured obligation. Debtors argued that negative equity was not part of the creditor's PMSI for purposes of the hanging paragraph following § 1325(a)(9). The Tenth Circuit held that negative equity financing is a singular transaction that is so tied to the debtor's purchase of the new vehicle that it is part of the PMSI under state law. Therefore, the plan had to provide for the full payment of the car lender's claim as required by the hanging paragraph.

Wells Fargo Bank, NA v. Griffin (In re Hunt), 550 F.3d 1002 (10th Cir. 2008). Appeal of an issue unique to chapter 13 (*i.e.*, treatment of a 910-vehicle under the hanging paragraph) was rendered moot upon Debtor's conversion to chapter 7.

Wachovia Dealer Servs. v. Jones (In re Jones), 530 F.3d 1284 (10th Cir. 2008). The bankruptcy court confirmed plans that did not provide for interest on "910-vehicles" (see the hanging paragraph, codified after § 1325(a)(9). On a direct appeal, the Tenth Circuit ruled that the confirmation requirements of § 1325(a) are mandatory, and that the hanging paragraph still requires interest on a 910-vehicle claim to ensure that the car lender receives the present value of its secured claim. The Court noted, however, that "when the holder of an allowed secured claim does not object, the bankruptcy court may interpret this silence as acceptance under § 1325(a)(5)(A)." Thus, a determination as to whether a creditor's silence constitutes acquiescence is left to the discretion of the bankruptcy court. *See In re Garner*, 399 B.R. 267 (Bankr. D. Utah 2009) (even if no party objects, bankruptcy court has affirmative duty to review plan to ensure compliance with the Bankruptcy Code)). *But see United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010) (Debtor noticed a plan that discharged interest on a student loan contrary to §§ 523(a)(8) and 1328(a); creditor had adequate notice but did not object, and plan was confirmed. Creditor objected three years after completion of plan. The Supreme Court held that even though the confirmed plan was inconsistent with the Bankruptcy Code, the confirmation order was not void and its finality made it binding on the creditor.)

ELEVENTH CIRCUIT

In re Graupner, 537 F.3d 1295 (11th Cir. 2008). The Court defined a purchase money security interest ("PMSI") as "a security interest in collateral to the extent that the item secures a debt for the money required to make the purchase. If an item of collateral secures some other type of debt, *e.g.*, antecedent debt, it is not purchase money." The court looked to U.C.C. § 9-103 Official Comment 3 to determine whether the inclusion of negative equity from a trade-in vehicle negates a PMSI in a newly purchased vehicle. Comment 3 requires "a close nexus between the acquisition of collateral and the secured obligation." The Court found that the financing of negative equity in a trade-in vehicle is an "integral part of" and "inextricably intertwined with" the purchase of the new vehicle. Accordingly, the Court found that a creditor has a PMSI in a vehicle even when negative equity is included in the transaction. The Court opined that excluding negative equity would negate the purpose of the "hanging paragraph" since Congress intended to prevent debtors from stripping liens on vehicles purchased within 910 days of a bankruptcy filing. *See also In re Freeman*, 956 F.2d 252 (11th Cir. 1992).

2. What Constitutes Personal Use

THIRD CIRCUIT

In re Maushart, 483 B.R. 627 (Bankr. M.D. Pa. 2012). The hanging paragraph appearing after § 1325(a)(9) precludes bifurcation of a secured motor vehicle loan only if the debtor purchased the motor vehicle for personal use. In this case, Debtor purchased a motor vehicle to use for his personal purposes and, in addition, to possibly earn additional income from his job by transporting work-related cargo. The bankruptcy court held that Debtor bought the motor vehicle for personal purposes; possible incidental work-related use did not undermine the fact that the motor vehicle was bought for personal use as required by the hanging paragraph after § 1325(a)(9).

In re Finnegan, 358 B.R. 644 (Bankr. M.D. Pa. 2008). The hanging paragraph that appears after § 1325(a)(9) precludes bifurcation of a secured motor vehicle loan only if the debtor purchased the motor vehicle for "the personal use of the debtor." The bankruptcy court held that Debtor's motor vehicle loan could be bifurcated because (1) Debtor purchased the motor vehicle for her husband's use, and (2) the husband used the motor vehicle for business purposes.

3. Surrender of Collateral

FOURTH CIRCUIT

Tidewater Fin. Co. v. Kenney, 531 F.3d 312 (4th Cir. 2008). The Fourth Circuit permits a secured creditor, under applicable state law, to exercise any contractual rights to a deficiency claim following surrender of the collateral by a chapter 13 debtor despite the hanging paragraph following § 1325(a)(9). Debtor's chapter 13 plan provided for surrender of the vehicle in full satisfaction of the undersecured debt, and the secured creditor amended its claim for the unsecured deficiency. Despite the clear effect in the hanging paragraph of excepting any such claims from bifurcation into secured and unsecured amounts under § 506, the Fourth Circuit allows creditors of those claims to assert state law Article 9 and contractual rights and to pursue an unsecured deficiency claim.

SEVENTH CIRCUIT

In re Wright, 492 F.3d 829 (7th Cir. 2007). The Seventh Circuit held that if a chapter 13 debtor surrenders collateral securing an undersecured debt covered by the hanging paragraph at the end of § 1325(a), the creditor will retain an unsecured claim for the balance of its unpaid debt that must be paid pursuant to any applicable provisions in the chapter 13 plan. The court reasoned that, although the hanging paragraph may preclude bifurcation under § 506(a), the creditor could rely on its state-law contractual entitlements to collect its deficiency.

TENTH CIRCUIT

Daimler Chrysler Fin. Servs. Ams. L.L.C. v. Ballard (In re Ballard), 526 F.3d 634 (10th Cir. 2008). Debtor's chapter 13 plan proposed to surrender a "910-vehicle" in full satisfaction of the claim, based on the argument that the hanging paragraph excludes application of § 506(a) to 910-vehicles. Thus, the surrender had to be in full satisfaction because there was no basis to bifurcate the 910-claim based on value. The Tenth Circuit held that the hanging paragraph does not abrogate a car lender's contractual and state-law rights to assert a deficiency claim in the bankruptcy case upon liquidation of its collateral.

ELEVENTH CIRCUIT

In re Barrett, 543 F.3d 1239 (11th Cir. 2008). Surrender of a vehicle purchased within 910 days of the filing of a bankruptcy petition does not *per se* satisfy the debtor's obligation under the promissory note; therefore, the lien holder may pursue an unsecured deficiency claim. The bankruptcy court should look to the underlying contract and applicable state law when deciding matters related to the unsecured deficiency claim.

E. *TREATMENT IN PLANS*

UNITED STATES SUPREME COURT

Rake v. Wade, 508 U.S. 464 (1993). The Court held that an oversecured mortgage creditor is entitled to pre- and post-petition interest on arrearages provided for in the chapter 13 plan. In 1994, however, Congress enacted § 1322(e), which requires that the cure amount "be determined in accordance with the underlying agreement and applicable nonbankruptcy law," for the specific purpose of overturning *Rake v. Wade*. Thus, § 1322(e) applies to any mortgage instruments entered into after October 22, 1994.

FIRST CIRCUIT

Eastern Savings Bank FSB v. LaFata (In re LaFata), 483 F.3d 13 (1st Cir. 2007). The First Circuit considered whether bifurcation of a mortgage claim into secured and unsecured portions is disallowed by § 1322(b)(2). Debtor mistakenly mortgaged a home that mostly stood on property he no longer owned as a result of a prior divorce settlement. The Court distinguished this case from *Nobleman v. American Savings Bank*, 508 U.S. 324 (1993), which held that §1322(b)(2) prevents bifurcation of a claim secured by a debtor's principal residence, and affirmed the bankruptcy court's ruling that the mortgage can be bifurcated into secured and unsecured claims based upon the appraised value of the portion of the home located on the debtor's mortgaged property and not on the portion of the home located on the other lot.

Pawtucket Credit Union v. Picchi (In re Picchi), 448 B.R. 870 (B.A.P. 1st Cir. 2011). The BAP determined that the bankruptcy court did not err in permitting modification of the creditor's secured claim and confirming Debtor's plan. These actions were consistent with § 506(a)'s bifurcation provision, and did not violate the anti-modification clause of § 1322(b)(2). The court observed that the definitions of "debtor's principal residence" and "incidental property" introduced by BAPCPA did not alter the scope of the anti-modification of debtor's principal residence clause.

Bell v. Bankowski (In re Bell), 2011 U.S. Dist. LEXIS 74580 (D. Mass. July 12, 2011). Debtor's chapter 13 plan proposed to change the terms of an existing mortgage by executing a new note and mortgage with different payments. The court held that the plan attempted to modify the note and mortgage in a manner impermissible under §§ 1322(b)(2) and (b)(5) because the plan substituted new payment terms and a new interest rate, and the payments extended beyond the life of the plan. The plan did not comply with § 1325(a)(5)(B) because it did not provide payments, over the life of the plan, equal to the present value of the creditor's secured claim. The district court affirmed the bankruptcy court's order denying confirmation.

Hamilton v. Wells Fargo Bank, N.A. (In re Hamilton), 401 B.R. 539 (B.A.P. 1st Cir. 2009). Debtor proposed to bifurcate a mortgage on a multi-family dwelling into a secured claim equal to the value of the property and an unsecured claim for the balance. Debtor also proposed to pay the entire secured claim through the plan by refinancing the mortgage as modified, and paying the arrearage as a balloon payment. The creditor did not accept the plan and Debtor did not surrender the property. Thus the BAP affirmed the bankruptcy court's finding that none of the § 1325(a) criteria for approving a plan were met.

THIRD CIRCUIT

Leeper v. Pennsylvania Higher Educ. Assistance Agency, 49 F.3d 98 (3d Cir. 1995). In *Bruning v. United States*, 376 U.S. 358 (1964), the Supreme Court determined that the IRS was entitled to collect post-petition interest on a nondischargeable tax debt from the debtor personally. In *Leeper*, the Third Circuit applied the *Bruning* rationale to a nondischargeable student loan in a chapter 13 case. The Court concluded that when a nondischargeable student loan is partially satisfied through a chapter 13 plan, post-petition interest continues to accrue during the pendency of the chapter 13 case, and remains a personal liability of the debtor upon completion of the plan and the issuance of a discharge.

Note that the Supreme Court in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010), held that when a debtor's confirmed chapter 13 plan specifically provides for the discharge of interest on a nondischargeable student loan, plan confirmation will not be disturbed in the absence of timely objection or appeal.

In re Szostek, 886 F.2d 1405 (3d Cir. 1989). Debtors confirmed a chapter 13 plan without providing for interest payments on a secured claim. The creditor did not make a timely objection. Four months after confirmation, the creditor sought to revoke confirmation under § 1330. The court determined that § 1327 affords finality a debtor's confirmed chapter 13 plan absent a showing of fraud.

FOURTH CIRCUIT

IRS v. White (In re White), 487 F.3d 199 (4th Cir. 2007). The Court held that Debtors' intention to surrender personal property, including apparel and certain household goods upon which the IRS could not levy without resort to litigation, did not constitute a "surrender" of the property under § 1325(a)(5)(C). Debtors did not intend to relinquish possession of the property until the IRS obtained a judgment subjecting the property to payment of the tax claim or until plan confirmation removed the bar to administrative levy. "If a secured creditor is legally foreclosed from immediately obtaining the property that a debtor proposes to surrender and the debtor does not in fact voluntarily relinquish all rights in the property, including the right to possession, to the secured creditor, then the debtor can in no way be said to have 'surrendered' any of his rights in the property." *Id.* at 207.

Deutchman v. IRS (In re Deutchman), 192 F.3d 457 (4th Cir. 1999). To extinguish or modify a lien, the debtor must take some affirmative step. No such step existed here because Debtor sought no preconfirmation adversary hearing or valuation hearing and failed to object to the IRS's proof of claim. Debtor merely characterized the debt as unsecured in the chapter 13 plan, which is not an affirmative step. Moreover, because the plan did not accurately characterize the IRS's claim, the plan did not "provide for" that secured claim.

FIFTH CIRCUIT

In re Williams, 168 F.3d 845 (5th Cir. 1999). Citing *Associates Commercial Corporation v. Rash*, 520 U.S. 953 (1997), the Fifth Circuit held that a plan's proposed treatment of secured claims can be confirmed if *one of three* conditions is satisfied: (1) the secured creditor accepts the plan, § 1325(a)(5)(A); (2) the debtor surrenders the property securing the claim to the creditor, § 1325(a)(5)(C); or (3) the debtor invokes the so-called 'cram down' power, § 1325(a)(5)(B). Also, if a secured creditor does not accept a debtor's chapter 13 plan, the debtor has *two options* for handling allowed secured claims: (1) surrender the collateral to the creditor; or (2) under the cram down option, keep the collateral over the creditor's objection and provide the creditor with the equivalent of the collateral's present value.

SIXTH CIRCUIT

Nuvell Credit Corp. v. Westfall (In re Westfall), 599 F.3d 498 (6th Cir. 2010). Bifurcation of a purchase money security interest that includes negative equity financing is not permitted and violates the "hanging paragraph" codified at the end of § 1325(a).

Shaw v. Aurgroup Fin. Credit Union, 552 F.3d 447 (6th Cir. 2009). The question on appeal before the Sixth Circuit was whether § 1325(a)'s provisions for the confirmation of a proposed chapter 13 plan are mandatory or discretionary. The Court held that the provisions in §1325 are mandatory and that a bankruptcy court does not have the discretion to confirm a plan that does not meet those requirements. Thus, bankruptcy courts lack discretion to confirm proposed chapter 13 plans that provide for bifurcation of purchase-money security interests held by creditors who financed purchases within 910 days pre-petition. As proposed, Debtor's plan failed to comply with the "hanging paragraph" of § 1325(a).

***AmeriCredit Fin. Serv., Inc. v. Long* (*In re Long)*,** 519 F.3d 288 (6th Cir. 2008). Chapter 13 Debtors' surrender of a vehicle purchased within 910 days of their petition did not operate to wipe out the undersecured creditor's deficiency claim under the "hanging paragraph" of § 1325(a)(9).

Tidewater Finance Co. v. Curry (In re Curry), 509 F.3d 735 (6th Cir. 2007). Debtor may modify the rights of a secured creditor under § 1322(b)(2) notwithstanding prepetition repossession of collateral, an automobile.

Ruskin v. DaimlerChrysler Servs. North America, L.L.C. (In re Adkins), 425 F.3d 296 (6th Cir. 2005). A secured claim may not be reclassified after post-petition repossession. *See also Chrysler Fin. Corp. v. Nolan (In re Nolan),* 232 F.3d 528 (6th Cir. 2000).

***Lane v. Western Interstate Bancorp* (*In re Lane)*,** 280 F.3d 663 (6th Cir. 2002). The Code's anti-modification provision permits modification of the rights of totally unsecured homestead mortgagees such as the second mortgagee in this case.

***Allied Credit Corp. v. Davis* (*In re Davis)*,** 989 F.2d 208 (6th Cir. 1993). The Code's home-loan anti-modification provision also applies to short term, non-purchase money loans that include a lien on rents and fixtures.

SEVENTH CIRCUIT

In re Escobedo, 28 F.3d 34 (7th Cir. 1994). Distinguishing the confirmation requirements of § 1325, the Seventh Circuit held that the requirements of § 1322 are mandatory. Thus, a plan that failed to pay priority tax claims in full was nugatory and properly dismissed even five years after confirmation.

In re Pence, 905 F.2d 1107 (7th Cir. 1990). Debtor's chapter 13 plan gave a secured creditor owed $47,000 property appraised at $58,000 and provided for a release of the creditor's lien against Debtor's residence. When the creditor later believed the property to be worth only $30,000, the creditor sought to enforce its lien against the residence. The Seventh Circuit held the creditor's claim essentially to be a collateral attack on the valuation of the property in the plan and ruled that the creditor was bound by the terms of the plan as confirmed.

EIGHTH CIRCUIT

Capital One Auto Fin. v. Osborn, 515 F.3d 817 (8th Cir. 2008). Debtor purchased a Chevrolet from creditor and when Debtor defaulted, the creditor repossessed the car. Debtor filed for chapter 13 relief three days later. In a chapter 13 case, the debtor has three options for secured claims under § 1325(a)(5): obtain the creditor's acceptance of the plan; retain the collateral but make full payment of the creditor's allowed secured claim; or surrender the collateral to the creditor. Debtor in this case chose the third option—surrender of the collateral.

The question was interpretation of the "hanging paragraph" at the end of § 1325(a)(9) for cars purchased less than 910 days before the chapter 13 bankruptcy. The majority position is since § 506(a) does not apply, the entire claim is secured, and therefore, under § 1325(a)(5)(C), surrender of the vehicle fully satisfies the claim. The minority view is that since § 506(a) does not apply, state law does, and surrender does not fully satisfy the claim. The Court of Appeals took the minority position and applied state law, holding an unsecured deficiency judgment is allowed.

NINTH CIRCUIT

AmeriCredit Fin. Servs. v. Penrod (In re Penrod), 611 F.3d 1158 (9th Cir. 2010) *cert. denied* 132 S. Ct. 108 (2011). The security interest in the negative equity of a trade-in vehicle that is rolled into the finance of a new vehicle is not a purchase money security interest and, therefore, does not qualify for protection from bifurcation under the hanging paragraph in § 1325(a).

Enewally v. Wash. Mut. Bank (In re Enewally), 368 F.3d 1165 (9th Cir. 2004), *cert. denied,* 543 U.S. 1012 (2004). Sections 1322(b)(2) and (b)(5) may not both be applied to the same claim to allow a debtor "to reduce the secured claim and repay it over a period longer than the plan." The Court reasoned that "(1) § 1322(b)(2) by itself does not permit the debtors to repay the secured claim over a period longer than the plan term; (2) a chapter 13 debtor may not invoke both a modification of a secured creditor's claim under § 1322(b)(2) and the right to 'cure and maintain' beyond the plan term as authorized under § 1322(b)(5); and (3) a modification of secured debt under chapter 13 must be accomplished in a manner consistent with § 1322(b)(2). Therefore, a debtor may not use § 506(a) in combination with § 1322(b)(5) to reduce the secured claim and repay it over a period longer than the plan term." *Id.* at 1172.

Internal Revenue Serv. v. Snyder (In re Snyder), 343 F.3d 1171 (9th Cir. 2003). When property subject to a security interest is not property of the bankruptcy estate, the creditor is not a secured creditor for purposes of confirmation. In this case, the IRS held a lien for unpaid taxes on Debtor's ERISA-qualified pension plan. The Court held that, under nonbankruptcy law, the pension plan was not property of the estate and, therefore, the IRS could not use the liens "to prevent [Debtor] from confirming a bankruptcy plan that could reduce or eliminate the IRS's non-lien debt." *Id.* at 1179.

Andrews v. Loheit (In re Andrews), 49 F.3d 1404 (9th Cir. 1995). The chapter 13 trustee has standing under § 1325(a)(1) to object to plan confirmation on the ground that the plan fails to adequately protect secured creditors. Section 1325(a)(5) does not confer standing on the trustee when there is no objection to confirmation from the secured creditors.

United States v. Barbier (In re Barbier), 896 F.2d 377 (9th Cir. 1990). The IRS may assert a claim secured by all of the debtor's property, even property that is exempt from levy under 26 U.S.C. § 6334. The fact that the property on which the IRS asserts a lien under 26 U.S.C. § 6321 is property that would be exempt from levy under 26 U.S.C. § 6334 does not bar the IRS from asserting a security interest in that exempt property.

Trejos v. VW Credit, Inc. (In re Trejos), 374 B.R. 210 (B.A.P. 9th Cir. 2007). The "hanging paragraph" in § 1325(a) does not prevent treatment of a purchase money security interest on vehicles purchased within 910 days of bankruptcy as an allowed secured claim. Because the "hanging paragraph" makes § 506 inapplicable to such a purchase money security interest, claims for debts owing on vehicles that fit the hanging paragraph description cannot be bifurcated based on the value of the collateral.

The panel also held that assignment of a purchase money security interest does not destroy the purchase-money status of the security interest.

Highland Federal Bank v. Maynard (In re Maynard), 264 B.R. 209 (B.A.P. 9th Cir. 2001). Property held as community property by Debtor and her husband was a part of the bankruptcy estate pursuant to § 541(a)(2). The fact that Debtor's husband had an interest in the property did not preclude Debtor from avoiding a lien on the property to the extent it exceeded the value of the property.

TENTH CIRCUIT

Taumoepeau v. Manufacturers & Traders Trust Co. (In re Taumoepeau), 523 F.3d 1213 (10th Cir. 2008). Debtor and the creditor-bank entered into a pre-confirmation stipulation that if Debtor missed a post-petition mortgage payment, creditor could obtain *ex parte* relief from the stay. Shortly thereafter, the bankruptcy court confirmed Debtors' plan that provided for the cure of all prepetition mortgage arrearages owing to the bank. Debtors subsequently defaulted on post-petition payments, and the bank obtained relief from stay and completed the foreclosure sale. When the purchaser sought to evict Debtors, they argued that the confirmed plan trumped the pre-confirmation relief from stay stipulation. The bankruptcy court and the BAP disagreed. The Tenth Circuit held that the confirmed plan only affected the prepetition mortgage arrearage, while the relief from stay order arose from a post-petition delinquency. Therefore, the confirmed plan did not vitiate the stipulation, the relief from stay order, or the subsequent foreclosure sale.

ELEVENTH CIRCUIT

First United Security Bank v. Garner (In re Garner), 663 F.3d 1218 (11th Cir. 2011). Prepetition, Debtor took out a 30-month loan for which he signed a promissory note with a 10.5% annual interest rate and gave a security interest in six vehicles. When Debtor filed his chapter 13 petition, it was undisputed that the lender was oversecured. Debtor's plan proposed to pay the outstanding debt to the lender in full with a "prime-plus" present value interest rate of 4.25% per year. The lender objected to the proposed interest rate, arguing that it was entitled to the contract interest rate of 10.5% post-petition and post-confirmation. The bankruptcy court determined that post-petition interest should be at the contract rate of 10.5% but that post-confirmation interest must be at the prime-plus rate of 4.25%. The lender appealed.

The Eleventh Circuit ruled that when a chapter 13 plan invokes the "cram down" power of § 1325(a)(5)(B), an oversecured creditor is only entitled to the contract rate of interest from the date of the debtor's bankruptcy filing until confirmation of the plan. Section 506(b) is an exception to the general rule that a creditor cannot claim interest accruing on debts during bankruptcy, and allows an oversecured creditor to recover post-petition interest, as well as costs and fees, as part of its allowed claim. Section 506(b) is inapplicable following confirmation, however. Interpreting § 506(b) to apply only post-petition, pre-confirmation is also consistent with decisions in other circuits that have addressed the temporal scope of § 506(b) in relation to § 1325(a)(5)(B)(ii). Section 1325(a)(5)(B)(ii) allows a debtor's plan to be confirmed if the value of property under the plan is not less than the allowed amount of the claim on the effective date of the plan. The Ninth and Second Circuits have read §§ 506(b) and 1325 together to mean that interest accrues under § 506(b) only until confirmation of the plan even though that section lacks an explicit temporal limitation. The amount of a secured claim is set at confirmation under §1325 and includes accrued post-petition interest at the contract rate under § 506(b). If §§ 506(b) and 1325(a)(5)(B) both applied post-confirmation, the creditor would receive a windfall: by accruing interest at the contract rate post-confirmation, interest upon interest would be compounded and exceed the present value of the claim under § 1325(a)(5)(B).

DaimlerChrysler Financial Servs. Americas LLC v. Barrett (In re Barrett), 543 F.3d 1239 (11th Cir. 2008). Although the so-called "hanging paragraph" to § 1325(a) precludes bifurcation of a claim secured by a so-called "910 vehicle," the provision does not permit a plan to provide for the surrender of the vehicle and to eliminate any deficiency claim.

Nuvell Financial Servs. Corp. v. Dean (In re Dean), 527 F.3d 1315 (11th Cir. 2008). When a secured claim is subject to the so-called "hanging paragraph" to § 1325(a), the plan must provide for payment of postconfirmation interest on the entire claim in order to comply with § 1325(a)(5)(B)(ii).

Graupner v. Nuvell Credit Corp. (In re Graupner), 537 F.3d 1295 (11th Cir. 2008). The creditor with security interest in motor vehicle financed within 910 days of a chapter 13 filing has a purchase-money security interest under Georgia law subject to the so-called "hanging paragraph" in§ 1325(a) even though the amount financed included "negative equity" arising from Debtor's trade-in of a vehicle worth less than the amount of the secured debt.

Hall v. Finance One of Georgia, Inc. (In re Hall), 752 F.2d 582 (11th Cir. 1985), *abrogated on other grounds by Finance One v. Bland (In re Bland),* 793 F.2d 1172, 1174 (11th Cir. 1986) (*en banc*). A chapter 13 debtor may use § 522(f) to avoid judicial liens and nonpossessory, nonpurchase-money security interests that impair her exemptions.

F. *MISCELLANEOUS*

FOURTH CIRCUIT

Zurich American Ins. Co. v. Tessler (In re J.A. Jones, Inc.), 492 F. 3d 242 (4th Cir. 2007). The type of notice to creditors that is adequate for the purposes of due process depends upon whether a creditor is known or unknown. An unknown creditor "is a claimant whose identity is wholly conjectural or 'whose interests or whereabouts could not with due diligence be ascertained by the debtor.'" *Id.* at 250. For unknown creditors, constructive notice, such as by publication, is "generally sufficient." Known creditors, requiring actual notice, include those actually known to the debtor and creditors "whose identities are 'reasonably ascertainable.'" The required search "'focuses on the debtor's own books and records.'" and will vary according to the "totality of the circumstances in each case." *Id.* In this case, a chapter 11, the creditor was the estate of a decedent killed in a highly publicized traffic accident. Debtor's employees were aware of the accident and of the likelihood of a lawsuit. Debtor, however, provided no actual notice of the bankruptcy proceedings to the estate, and the estate's representatives did not see the publication notices of the proceedings. The estate representatives did not became aware of the bankruptcy until several months after confirmation of the plan and after the bar date for filing claims. Thereafter, the bankruptcy court granted the estate an extension of the bar date so as to allow the filing of a claim; the court also found that the estate was not bound by the terms of Debtor's plan and granted relief from the automatic stay to allow the estate to pursue a wrongful death action in state court. The district court affirmed, as did the Court of Appeals, finding that the estate was entitled to actual notice.

FIFTH CIRCUIT

In re Velazquez, 660 F.3d 893 (5th Cir. 2011). Debtor filed for chapter 13 after defaulting on the deed of trust securing Debtor's home. The secured lender holding the note secured by the deed of trust filed a proof of claim that included amounts for post-petition attorney's fees and fees for preparation and prosecution of the fee application. The deed of trust required Debtor "to pay for whatever is reasonable or appropriate to protect lender's interest in the property *and* rights under this security agreement" (emphasis added). The bankruptcy and district courts both denied the fee application. The Fifth Circuit reversed. In reviewing the contractual language, the Fifth Circuit found "that consideration of [the applicable section] as a whole required construing 'and' to mean 'either or both' to effectuate the clear intent of the parties." In footnote 5, the court noted its disagreement with a recent Fifth Circuit panel decision, *Wells Fargo Bank v. Collins (In re Collins),* 437 F. App'x 314 (5th Cir. 2011), interpreting similar language in the court of affirming denial of fees for want of reversible error.

SIXTH CIRCUIT

Waldman v. Stone (In re Stone), 698 F.3d 910 (6th Cir. 2012). A bankruptcy court has power to discharge a debtor's debts and to disallow claims; a bankruptcy court, however, lacks power to award the debtor damages. Although the creditor in this case had not filed a proof of claim, as a secured creditor, a proof of claim was not required to preserve the creditor's right to recovery; in addition, the secured creditor had otherwise participated in the bankruptcy case. The Court affirmed the bankruptcy court's disallowance of the creditor's claim because bankruptcy courts are authorized to enter final judgments related to claims disallowance. In contrast, the Court concluded that affirmative claims against a creditor for punitive damages are not core and a debtor must prove facts beyond those necessary for claim disallowance. Thus, the bankruptcy court's judgment on such a claim was entered in violation of Article III. The Court ordered the bankruptcy court to recast its judgment on the affirmative claims as proposed findings of fact and conclusions of law.

Sutter v. U.S. Nat'l Bank (In re Sutter), 665 F.3d 722 (6th Cir. 2012). The Court found no equitable mortgage related to a loan when Debtors signed loan documents but not a mortgage and the lender later forged Debtors' signatures on a mortgage. The unclean hands doctrine applied to preclude the lender from obtaining equitable relief in the form of an equitable mortgage.

TENTH CIRCUIT

Secured Creditor's Standing

Miller v. Deutsche Bank Nat'l Trust Co. (In re Miller), 666 F.3d 1255 (10th Cir. 2012). The bank sought a foreclosure order in state court, and Debtors contested the bank's standing to bring the action. The state court disagreed and issued an order authorizing sale. Debtors then filed a chapter 13 petition and again argued unsuccessfully that the bank lacked standing because it had not produced the original note. The BAP affirmed based in part on the findings of the state court. The Tenth Circuit ruled that neither the Rooker-Feldman doctrine nor issue preclusion prevented the bankruptcy court from independently determining the bank's standing when it was seeking affirmative relief under federal bankruptcy law. The issue of standing is determined under state law, however, and Colorado requires physical possession of the note; thus, the bank's copy of the note was insufficient to establish standing to seek relief from the stay. The case was remanded to the bankruptcy court for a hearing and ruling on the bank's standing.

ELEVENTH CIRCUIT

Proofs of Claim

In re Bateman, 331 F.3d 821 (11th Cir. 2003). A secured creditor is not required to file a proof of claim in a chapter 13 case unless the secured creditor seeks to be paid through the plan. In the absence of a proof of claim, the secured creditor's lien survives the bankruptcy and the creditor may satisfy the lien by executing upon the collateral. A timely-filed proof of claim is prima facie evidence of both the validity and amount of the claim, rebutted only through the claim objection process. Failure to include any portion of a secured claim in the chapter 13 plan will not be considered a "constructive objection," and the unpaid amount survives the discharge.

XV. SPECIAL ISSUES ARISING UNDER CHAPTER 13 PLANS

A. *LENGTH OF PLANS*

THIRD CIRCUIT

In re Scarborough, 457 F. App'x 193 (3d Cir. 2012). Calculation for the maximum five-year length of Debtor's chapter 13 plan was not tolled during the period that the case was dismissed and then reinstated, nor during the period the case was pending on appeal, and did not commence upon confirmation.

In re Brady, 361 B.R. 765 (Bankr. D.N.J. 2007). Section 1325 does not require a minimum length for a debtor's chapter 13 plan if the above-median debtor has no disposable income, as calculated per the statutory formula. In such a case, a plan may be confirmed for less than five years even if the applicable commitment period for that debtor fove 5 years. (Note that the Supreme Court in *Hamilton v. Lanning*, 130 S. Ct. 2464, 177 L.Ed.2d 23 (2010) focused on calculation of the debtor's projected disposable income when the debtor's income or expenses have changed, rather than on the debtor's "applicable commitment period.")

FOURTH CIRCUIT

In re Girodes, 350 B.R. 31 (Bankr. M.D.N.C. 2006). Under a "plain meaning" reading of § 1325(b)(1), the applicable commitment period ("ACP") is a temporal, not a monetary, requirement. Use of the term "period" implies a period of time rather than an amount. Thus, the debtor must devote his or her projected disposable income to payment of unsecured creditors over a specific period of time and may not exit the plan before the ACP has ended, unless the debtor pays all unsecured creditors in full.

FIFTH CIRCUIT

In re Nahat, 315 B.R. 368 (Bankr. N.D. Tex. 2004). Courts must follow Congress's sixty-month limit on chapter 13 plans. The court agreed with Congress's reasoning that the limitation is to avoid "becoming the closest thing there is to involuntary servitude."

SIXTH CIRCUIT

Baud v. Carroll, 634 F.3d 327 (6th Cir. 2011). Debtors appealed the bankruptcy court's order sustaining the chapter 13 trustee's objection that Debtors' applicable commitment period had to be extended to 60 months, even though Debtors asserted that they had no excess disposable income. The district court held that the applicable commitment period is a minimum of 60 months for above-median debtors, but that this requirement does not apply when debtors have negative projected disposable income. The trustee appealed. The Sixth Circuit agreed that the applicable commitment period "imposes" a minimum plan length of 60 months for above-median-income debtors, but found no exception when debtors, like those in this case, have negative disposable income. The Sixth Circuit reasoned that the bankruptcy courts post-BAPCA should interpret "applicable commitment period" to fulfill BAPCA's purpose to maximize repayment to creditors. Pursuant to §1325(b)(4), "applicable commitment period" should apply to all debtors facing a plan objection, even debtors with a zero or negative projected disposable income. The Court remanded the case for Debtors to amend the plan.

EIGHTH CIRCUIT

In re Frederickson, 545 F.3d 652 (2008). If the trustee objects to the confirmation of a plan, the bankruptcy court may approve the plan only if:

a) the plan provides for payment of 100% of the claims; or
b) as required by § 1325(b)(1), "the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan."

The Court of Appeals held that the applicable commitment period is a temporal requirement that helps to determine how much a debtor is capable of repaying to his or her creditors. This comports with the congressional intent of BAPCPA "to ensure that debtors repay creditors the maximum they can afford." Debtor in this case had projected disposable income; therefore, in order to be confirmed, the plan had to extend over the entire 60-month applicable commitment period.

NINTH CIRCUIT

Danielson v. Flores (In re Flores), 2013 U.S. App. LEXIS 18413 (9th Cir. Aug. 29, 2013) (*en banc*). A divided Ninth Circuit panel ruled that the Supreme Court's ruling in *Hamilton v. Lanning*, 103 S. Ct. 2464 (2010), did not disturb the holding in *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868 (9th Cir. 2008), to the effect that § 1325(b)(1)(B) does not impose a minimum duration for a chapter 13 plan if the debtor has no projected disposable income; thus, in such circumstances, the 60-month "applicable commitment period" does not apply to above-median income debtors. 692 F.3d 1021 (9th Cir. 2012). On rehearing *en banc*, the Ninth Circuit overruled that aspect of *Kagenveama* and held that the statute permits confirmation only if the length of the proposed plan is at least equal to the applicable commitment period under § 1325(b)(4). The Court held, first, that the statute defines a temporal, rather than monetary, requirement for confirmation under § 1325(b)(1)(B). Second, the Court found that temporal requirement applicable without regard to the debtor's projected disposable income.

ELEVENTH CIRCUIT

Whaley v. Tennyson (In re Tennyson), 611 F.3d 873 (11th Cir. 2010). The "applicable commitment period" under § 1325(b)(4) for a chapter 13 debtor with "above-median" income is five years. To meet the requirements of the projected disposable income test of § 1325(b), such a debtor must propose a plan with a five-year term of five years, even if his or her projected disposable income is negative. "Applicable commitment period" is a temporal term. Section 1325(b)(4) prescribes minimum time periods for a chapter 13 plan to comply with the projected disposable income test, whereas § 1322(d) states maximum times.

B. *CLASSIFICATION OF CLAIMS*

SEVENTH CIRCUIT

In re Crawford, 324 F.3d 539 (7th Cir. 2003). Eschewing other formulations to decide when a claim classification is "unfair" and thus impermissible under § 1322(b)(2), the Court stated that bankruptcy should seek a result that is reasonable in light of the purposes of chapter 13. Classification should not be used to deny consideration of legitimate creditor interests. If without classification, however, the debtor is unlikely to be able to fulfill a chapter 13 plan and creditors will be worse off as a whole, then classification is a win-win outcome. Making clear it was not announcing a categorical rule, the Seventh Circuit found it was not an abuse of discretion on the facts of the case for the bankruptcy court to deny separate classification of nondischargeable child support claims.

EIGHTH CIRCUIT

In re Groves, 39 F.3d 212 (8th Cir. 1994). The Court of Appeals considered whether a chapter 13 plan that proposed to classify a student loan separately from other unsecured claims discriminated unfairly. The plan proposed to pay the student loan fully while other unsecured creditors would receive only 10-40% of their unsecured claims. Under § 1322(b)(1), the debtor may "designate a class or classes of unsecured claims but may not discriminate unfairly against any class so designated." Therefore, a chapter 13 debtor may separately classify unsecured claims if the following requirements are satisfied:

1) it complies with § 1122 of the Code; and
2) it does not result in unfair discrimination between the claims grouped separately.

The Court of Appeals held the separate classification impermissible in this case.

In re Leser, 939 F.2d 669 (8th Cir. 1991). The issue in this case involved whether a chapter 13 plan may separately classify unsecured claims for child support arrearages. The Court of Appeals held that the child support arrearages could be separately classified. Unsecured claims may be separately classified if they comply with § 1122 and do not result in unfair discrimination between the separately grouped claims. A four-part test is used to determine whether a proposed separate classification is fair:

1) whether the discrimination has a reasonable basis;
2) whether the debtor can carry out a plan without the discrimination;
3) whether the discrimination is proposed in good faith; and
4) whether the degree of discrimination is directly related to the basis or rationale for the discrimination.

NINTH CIRCUIT

Meyer v. Renteria (In re Renteria), 470 B.R. 838 (B.A.P. 9th Cir. 2012). Chapter 13 Debtor proposed a plan that separately classified one unsecured claim—a co-debtor consumer claim owed to Debtor's former attorney and guaranteed by Debtor's mother. The plan proposed to pay this unsecured claim in full with 10% interest, but all other unsecured claims would be paid nothing. The chapter 13 trustee objected to plan confirmation, alleging unfair discrimination. The bankruptcy court confirmed the plan on the ground that a plan provision calling for the separate classification and preferential treatment of a co-debtor consumer claim is not subject to § 1322(b)(1)'s prohibition against unfair discrimination.

The Ninth Circuit BAP ruled that § 1322(b)(1) permits a chapter 13 debtor to separately classify and prefer a co-debtor consumer claim over other unsecured claims. The Court noted that the "however" clause was added through a 1984 amendment to this provision, and it should be presumed that Congress had some purpose for doing so. The Court could derive no plain and unambiguous meaning from the text itself, concluded on the basis of the legislative history to the amendment that Congress intended to address prior case law denying confirmation of chapter 13 plans for unfairly discriminating against unsecured claims by providing for separate classification and full payment of co-signed debts. Accordingly, the Court held that whatever else the "however clause" may do, a court may not deny confirmation of a chapter 13 plan under § 1322(b)(1) solely because the plan prefers a co-debtor consumer claim over all other unsecured claims. The Court, however, declined to address the precise relationship between the "however clause" and the unfair discrimination rule, and intentionally have left unanswered the question of when (if ever) the preferential treatment of a co-debtor consumer claim violates the unfair discrimination rule.

Labib-Kiyarash v. McDonald (In re Labib-Kiyarash), 271 B.R. 189 (B.A.P. 9th Cir. 2001). The nondischargeable nature of debt is an insufficient basis, alone, for separate classification. Each case must be analyzed under the *Wolff* test to determine whether separate classification actually unfairly discriminates against other creditors. Debtor has the burden of proving that separate classification does not result in unfair discrimination. The panel held that separate classification of long-term student loan debt is not a *per se* violation of § 1322(b)(1), provided the *Wolff* test is satisfied.

AMFAC Distribution Corp. v. Wolff (In re Wolff), 22 B.R. 510 (B.A.P. 9th Cir. 1982), *superseded by statute on other grounds as recognized by In re Renteria*, 456 B.R. 444, 448 (Bankr. E.D. Cal. 2011), *aff'd,* 470 B.R. 383 (B.A.P. 9th Cir. 2012). The test for determining whether separate classification and differential treatment of unsecured claims is unfairly discriminatory under § 1322 is "(1) whether the discrimination has a reasonable basis; (2) whether the debtor can carry out a plan without the discrimination; (3) whether the discrimination is proposed in good faith; and (4) whether the degree of discrimination is directly related to the basis or rationale for the discrimination." Although the Ninth Circuit has not ruled on this issue in the chapter 13 context, it used this test in the chapter 11 context, construing § 1129(b). *See In re Ambanc La Mesa Ltd. P'ship*, 115 F.3d 650, 656 (1997).

In re Gallipo, 282 B.R. 917, 919 (Bankr. E.D. Wash. 2002). The court noted that it had confirmed plans providing separate classification of claims for criminal fines.

TENTH CIRCUIT

United States v. Dawes, 652 F.3d 1236 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 2429 (2012). After filing their chapter 12 petition, Debtors obtained permission from the bankruptcy court to sell certain farm assets, resulting in tax liabilities. Debtors then proposed a plan that classified the tax liabilities as general unsecured claims pursuant to § 1222(a)(2)(A), which treats certain priority claims (including tax obligations) as general unsecured claims. That would result in the discharge of those claims to the extent they were not paid under the plan. The IRS objected.

The Tenth Circuit ruled that post-petition income taxes incurred during chapter 12 proceedings are liabilities of the individual debtor and not the bankruptcy estate. The Court held that post-petition federal income taxes are not "incurred" by a chapter 12 "estate" for purposes of § 503(b)(1)(B)(i); for this reason, the taxes are not eligible for treatment as unsecured claims under § 1222(a)(2)(A). The Court explained that not every post-petition liability is automatically incurred by the estate, becoming its liability. Chapter 12 and 13 estates are not liable for post-petition federal income taxes because these estates cannot incur taxes. Thus the debtor—not the bankruptcy estate—bears the sole responsibility for filing and paying post-petition federal income taxes, and the debtor remains personally liable on these tax obligations during, after, and apart from the bankruptcy. The Court reasoned that allocating tax liability to the debtors personally in chapter 12 and 13 cases makes sense given that, upon plan confirmation estate property, including any post-petition income, reverts to the debtor; that income should be followed by any post-petition income tax liability. Accordingly, Debtors in this case remained liable for taxes incurred from the post-petition sale of their farm assets during the pendency of their chapter 12 bankruptcy. Because these taxes were not incurred by the chapter 12 estate, they were not subject to discharge under the plan.

C. *MODIFICATION, CURE, AND DEACCELERATION*

THIRD CIRCUIT

Modification

SLW Capital, LLC v. Mansaray-Ruffin (In re Mansaray-Ruffin), 530 F.3d 230 (3d Cir. 2008). Chapter 13 Debtor filed a proof of claim on behalf of a mortgagee, seeking to treat the claim as unsecured and to invalidate the associated lien through confirmation of her plan. The creditor did not object and the plan was confirmed. Upon subsequent challenge by the mortgagee, the court concluded that an adversary proceeding was required by bankruptcy rule and that the lien could not be invalidated through confirmation of the debtor's plan alone.

Note that the Supreme Court in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010), rejected a challenge to a confirmed plan, brought years after a timely appeal could have been filed, based on the legal error committed in confirming a plan that discharged the interest component of a student loan obligation without the filing of an adversary proceeding, as required under the Bankruptcy Rules, and without a finding of undue hardship, as required under the statute. It is unclear how the Supreme Court would view the due process issues described in *Mansaray-Ruffin* in the context of invalidating a lien.

Scarborough v. Chase Manhattan Mortg. Corp. (In re Scarborough), 461 F.3d 406 (3d Cir. 2006). The court determined that Debtor could modify a mortgage on property that served as Debtor's principal residence and also as additional income-producing property.

1st 2nd Mortg. Co. of NJ, Inc. v. Ferandos (In re Ferandos), 402 F.3d 147 (3d Cir. 2005). Chapter 13 Debtor sought to cram down a second mortgage on his principal residence on the ground that the claim was also secured by an insurance and tax escrow fund as well as an assignment of rents clause. The court determined that under New Jersey law, neither an assignment of rents nor a security interest in an insurance and tax escrow fund constitutes additional collateral. Therefore, the Code's anti-modification provision, § 1322(b)(2), applied and the mortgage could not be modified.

McDonald v. Master Fin., Inc. (In re McDonald), 205 F.3d 606 (3d Cir. 2000). The court determined that a wholly unsecured second mortgage was not protected by the anti-modification provision in § 1322(b)(2). Following *Nobleman*, the court applied § 506(a) to determine the secured status of the mortgagee's claim. Because the mortgage was wholly unsecured, the claimant did not hold a "secured claim" that would be protected under § 1322(b)(2).

Rankin v. DeSarno, 89 F.3d 1123 (3d Cir. 1996). Chapter 13 Debtors sought to modify the post-petition interest rate to be paid on oversecured real estate tax claims. The court determined that the tax liens did not qualify as "security interests" for purposes of § 1322(b)(2), because they were statutory liens and not consensual or voluntary obligations; therefore, they were not protected by the anti-modification clause. Nevertheless, the court determined that the creditors were entitled to receive the statutory rate of interest that was otherwise applicable.

Johns v. Rousseau Mortg. Corp. (In re Johns), 37 F.3d 1021 (3d Cir. 1994). The mortgagee obtained a prepetition foreclosure judgment on a mortgage that was secured by both real and personal property. Because the security interest extended to appliances and machinery, the court concluded that it was not protected from modification under § 1322(b)(2). The court also rejected the argument that modification was precluded because the mortgage had been "merged" into the foreclosure judgment. Although the mortgage was terminated, the "security interest" remained.

Hammond v. Commonwealth Mortg. Corp. (In re Hammond), 27 F.3d 52 (3d Cir. 1994). The language of the mortgage agreement extended the security interest to appliances, furniture, machinery and equipment. The court determined that this additional security interest removed the mortgage from the protection of the anti-modification clause.

Sapos v. Provident Inst. of Sav. in Town of Boston, 967 F.2d 918 (3d Cir. 1992). The court determined that securing a mortgage note by wall-to-wall carpeting, rents and profits takes the agreement outside the scope of the anti-modification provision in § 1322(b)(2).

Cure

In re Connors, 497 F.3d 314 (3d Cir. 2007). Debtors' principal residence was sold at a prepetition foreclosure sale. Debtors filed a chapter 13 petition during the state redemption period. The court determined that under § 1322(c)(1), the concept of "sold at a foreclosure sale" means sold at the fall of the gavel at the sheriff's sale, and not at the time that the deed is delivered by the sheriff to the purchaser. Following the fall of the gavel, the opportunity to cure a mortgage default is lost.

In re deLone, 205 F.App'x 964 (3d Cir. 2006). Debtor proposed a chapter 13 plan that would modified the terms of a mortgage, even though a foreclosure judgment had been entered prepetition. The debtor proposed making payments for five years through his plan, reinstating his mortgage and continuing payments for 30 years. The court determined that he could not modify the terms of his mortgage. If he intended to cure his default, the cure must be completed within the term of his chapter 13 plan. If he intended to satisfy the foreclosure judgment, the satisfaction would have to be completed within the term of his chapter 13 plan.

Smiriglio v. Hudson United Bank, 98 F. App'x 914 (3d Cir. 2004). Pursuant to § 1322(e), the amount necessary to cure a default is determined under state or other non-bankruptcy law.

Deacceleration

In re Roach, 824 F.2d 1370 (3d Cir. 1987). The court concluded that the right to cure under § 1322(b)(5) includes reversal of the acceleration of a mortgage. The resulting modification of the mortgagee's rights under the mortgage did "no more than return the debtor to full compliance with the mortgage and restore the original mortgagee-mortgagor relationship."

FOURTH CIRCUIT

Modification

Ennis v. Green Tree Servicing, LLC (In re Ennis), 558 F.3d 343 (4th Cir. 2009). Although BAPCPA added at § 101(13A) a definition of "debtor's principal residence" that does not depend on whether a residential structure is attached to real property, the anti-modification provision in § 1322(b)(2) continues to apply only to "a security interest in real property that is the debtor's principal residence." Under state law Debtor's mobile home, which was his principal residence, was classified as personal property. Accordingly, § 1322(b)(2) did not prohibit Debtor's plan from modifying the creditor's claim that was secured by the mobile home.

Murphy v. O'Donnell (In re Murphy), 474 F.3d 143 (4th Cir. 2007). The Court concluded that the refinancing of a home mortgage was not a substantial and unanticipated change in Debtors' financial condition. They received equity along with a corresponding amount of new debt in the refinancing and, therefore, their financial condition remained unchanged. As a result, the trustee's motion to modify Debtors' chapter 13 plan to increase payments was properly denied.

On the other hand, another Debtor's request to sell his condo, which had increased in value roughly 50% in the eleven months since confirmation, did demonstrate a substantial improvement in Debtor's financial condition. Furthermore, the rate of appreciation could not have been reasonably anticipated at the time of confirmation. Therefore, the bankruptcy court did not err in granting the trustee's motion to modify the plan.

In re Litton, 330 F.3d 636 (4th Cir. 2003). Section 1322(b)(2) prohibits modification of any fundamental aspect of a claim secured by the debtor's principal residence. On the other hand, a cure under § 1322(b)(5) merely reinstates a debt to its pre-default position, or it places the debtor and creditor back in their respective positions before the default. Debtor's plan properly proposed to pay all arrearages and maintain all payments over the life of the plan, and it did not propose a reduction in installment payments or the amount due the secured creditor, an extension of the final maturity date, or any other alterations of the parties' agreement. The plan, therefore, proposed a cure and not a modification.

Witt v. United Cos. Lending Corp. (In re Witt), 113 F.3d 508 (4th Cir. 1997). Section 1332(c)(2) does not permit a claim secured by Debtors' principal residence to be bifurcated into secured and unsecured claims even though Debtors' last payment on their home mortgage was due before their final plan payment. In enacting § 1322(c)(2), Congress gave no indication that it intended to overrule *Nobelman v. Am. Sav. Bank*, 508 U.S. 324 (1993). Instead, the provision allows debtors to pay the full amount due over the life of the plan. The statute's authorization of "payment of the claim as modified pursuant to section 1325(a)(5)" refers to modification of the payment, not of the claim itself.

Arnold v. Weast (In re Arnold), 869 F.2d. 240 (4th Cir. 1989). The doctrine of *res judicata* prevents modification of a confirmed chapter 13 plan unless the party seeking modification shows that after confirmation the debtor experienced a substantial and unanticipated change in his or her financial condition. Debtor's salary increase from $80,000 to $200,000 a year was a substantial change. An increase is such a large amount could not have been reasonably anticipated at the time of confirmation. Under these circumstances, a modification of the plan to require Debtor to increase payments to unsecured creditors was appropriate. Such a modification is not inconsistent with the Code's fresh start policy.

Cure

Lineberger v. Henry (In re Henry), 153 F. App'x 146 (4th Cir. 2005). Because Debtor's final mortgage payment was due before the commencement of her chapter 13 case, the debt was fully matured and could not be cured under the plan. Rather than proposing a permissible cure under § 1322(b)(5), the plan proposed a modification prohibited by § 1322(b)(2) because it extended the time of repayment and altered the interest rate.

FIFTH CIRCUIT

Modification

Pierrotti v. IRS (In re Pierrotti), 645 F.3d 277 (5th Cir. 2011). Chapter 13 Debtor proposed a plan in which he attempted to use § 1332(b)(2) to modify the IRS's claims for federal tax deficiencies into long-term debt payable over 15 years, to cure and maintain the tax debt under § 1332(b)(5). Debtor's tax deficiencies were fully matured, and due and payable prepetition. The IRS objected to Debtor's plan on the grounds that the proposed payment period was longer than the 5-year maximum statutory period of a debtor's plan. The bankruptcy court denied confirmation.

The Fifth Circuit ruled that a debt already due and payable before a debtor's chapter 13 filing may not be "maintained" under § 1322(b)(5), which applies only to long-term debts, such as home mortgages, with original payment terms establishing that a final payment will not be due until after the plan is set to terminate. Federal taxes are fully matured and immediately due and payable annually on April 15 for the preceding calendar year. Thus, Debtor could not modify his tax debt under § 1322(b)(5), and his plan was properly denied confirmation.

Cure

Grubbs v. Houston First American Sav. Ass'n, 718 F.2d 694 (5th Cir. 1983). The Fifth Circuit held that the language of § 1322(b)(5) states clearly, unambiguously and undeniably that a default may be cured within a reasonable time on a secured claim, but only a claim "on which the last payment is due after the date on which the final payment under the plan is due." This language prohibits the cure of pre-petition accelerated debts, the full payment of which is due before the filing of the petition. Deacceleration of such a debt is clearly a "modification" of the mortgagee's rights banned under § 1322(b)(2) and beyond the exception to that ban provided in § 1322(b)(5). Pre-petition deacceleration, therefore, is prohibited by the terms of the statute and must be interpreted as separable from the definition of "cure," which may be allowed under the statute.

SIXTH CIRCUIT

Cure

Deutsche Bank Nat'l Trust Co. v. Tucker, 621 F.3d 460 (6th Cir. 2010). Chapter 13 Debtor was in arrears on her home mortgage but sought to retain possession of her home. Debtor proposed a plan that would provide for the cure of the arrearage, as required under § 1322(b)(3). Debtor and the bank could not agree on the arrearage cure amount, however; the bank asserted the right to include fees and costs (including attorneys' fees), as permitted in the underlying note and mortgage; Debtor, on the other hand, disputed the inclusion of these amounts in the total arrearage based on § 506(b), which provides that a secured claim holder is entitled to fees, costs, and charges only if the collateral value is greater than the claim, and here the bank was undersecured.

The Sixth Circuit ruled that an undersecured creditor is entitled to the payment of fees and costs as part of the arrearage cure amount pursuant to § 1322(e) if the underlying contract provides for the payment of such fees and costs. Section 1322(e) states, "Notwithstanding . . . section[ ] 506 (b) . . . if it is proposed in a plan to cure a default, the amount necessary to cure the default, shall be determined in accordance with the underlying agreement and applicable non-bankruptcy law." Therefore, the Court concluded that when it comes to cure under § 1322(e), § 506(b) is beside the point if the parties' agreement states otherwise. Here, the underlying note and mortgage provided for the inclusion of fees and costs, and Debtor was obligated to include these amounts in the arrearage amount, notwithstanding the fact that the bank was undersecured.

Americredit Financial Servs., Inc. v. Nichols (In re Nichols), 440 F.3d 850 (6th Cir. 2006). The Court permitted modification to cure arrearages under the original plan that resulted from Debtor's unemployment. The plan was confirmed under § 1325(a)(5)(B)(i) even though delayed payments would not keep up with depreciation since the difference was not substantial. In addition, this was the first modification after three years of compliance with the original plan, the creditor had been paid a substantial amount, the facts did not suggest that Debtors were likely to default under the modified plan, and the law did not protect the creditor's contract right to a steady income stream.

Cain v. Wells Fargo Bank (In re Cain), 423 F.3d 617 (6th Cir. 2005). The right to cure pursuant to § 1322 (c)(1) does not extend through the redemption period under state law.

Federal Land Bank v. Glenn (In re Glenn), 760 F.2d 1428 (6th Cir. 1985). At any time prior to a foreclosure sale, a chapter 13 debtor may cure the mortgage default and reinstate the original payment schedules under § 1322(b). However, the right to cure a default terminates upon completion of the sale.

SEVENTH CIRCUIT

Modification

In re Witkowski, 16 F.3d 739 (7th Cir. 1994). A bankruptcy court can properly exercise its discretion to modify a chapter 13 plan under § 1329 even in the absence of changed circumstances. Debtor had proposed to pay his creditors 10% of their claims. When more creditors filed claims, the bankruptcy court properly granted the trustee's motion to increase Debtor's payments into the plan.

Cure

Colon v. Option One Mtg. Corp., 319 F.3d 912 (7th Cir. 2003). After a foreclosure sale, any right to cure a mortgage default under § 1322(c)(1) can only be found under state law. Because Illinois law did not give a right to redeem after a foreclosure sale, Debtor was precluded from exercising cure rights under § 1322(c)(1) even though judicial confirmation of the foreclosure sale had not yet occurred.

EIGHTH CIRCUIT

Modification

Johnson v. Fink (In re Johnson), 458 B.R. 745 (B.A.P. 8th Cir. 2011). A husband and wife filed a joint chapter 13 petition and the bankruptcy court confirmed their 60-month plan. Under the plan, Debtors voluntarily contributed all of their disposable income, including Social Security income, toward their plan payment, even though Debtors could have objected to such inclusion. About a year after confirmation, the husband lost his second job (the income from which had been factored into the required plan payments). Debtors filed a post-confirmation amended plan that proposed to significantly reduce their monthly plan payments and no longer to include their Social Security income. The chapter 13 trustee objected because Debtors did not propose to dedicate their disposable monthly income towards plan payments. The bankruptcy court denied Debtors' proposed modification and ultimately modified the plan with its own amount. The issue on appeal was the extent to which Debtors could modify their plan payments.

The Eighth Circuit BAP ruled that when a confirmed chapter 13 plan is modified to reduce payments under § 1329(a) due to a substantial change in financial circumstances, the modification must correlate to the change in circumstances. Under § 1327(a), a plan is binding on the debtor once it is confirmed. If modification of the plan did not correlate to the change in the financial circumstances, the binding effect of the plan would be undermined. Although Debtors could have objected to inclusion of their Social Security income in the original plan payments, they did not do so. Here, Debtors' proposed reduction in their plan payments did not reflect the loss in income.

NINTH CIRCUIT

Modification

Home Funds Direct v. Monroy (In re Monroy), 650 F.3d 1300 (9th Cir. 2011). Section 1322(b)(2)'s prohibition on the modification of mortgage creditors' rights does not preclude the imposition of enhanced reporting duties. The Court rejected the mortgage creditors' argument that changing their annual reporting requirements to quarterly or monthly modified their rights under the instrument, because the rights protected by § 1322(b)(2) "all deal with the terms of payment of, the security for, and the ability to enforce the mortgage loan contracts." The Court adopted the reasoning in *In re Herrara*, 422 B.R. 698 (B.A.P. 9th Cir. 2010), one of the cases consolidated into this appeal.

Zimmer v PSB Lending Corp. (In re Zimmer), 313 F.3d 1220 (9th Cir. 2002). The Court held that a chapter 13 debtor can strip off a wholly unsecured lien on his or her principal residence. A creditor whose claim is wholly unsecured is not entitled to the protection of § 1322(b)(2). Debtor's residence was encumbered by two deeds of trust and the debt secured by the first lien exceeded the value of the home. Thus, the debt secured by the second lien was wholly unsecured pursuant to § 506(a), and so was not subject to the anti-modification protection of § 1322(b)(2).

Mattson v. Howe (In re Mattson), 468 B.R. 361 (B.A.P. 9th Cir. 2012). Chapter 13 Debtors, who were deemed above-median, confirmed a plan that would pay $150 per month for 60 months to their attorney and to unsecured creditors. About three months after confirmation, Debtors filed amended schedules and moved to amend their plan because their income had increased while their expenses decreased. The amended plan proposed monthly payments of $900 for one month and then $1,000 per month for the remaining term of the plan, but the plan term would be reduced to 36 months. The chapter 13 trustee objected to reduction in the plan term, arguing that Debtors should be required to pay the increased monthly payment for the original commitment period of 60 months, as required for above-median debtors under § 1325. Debtors asserted that they should be able to modify their plan under § 1329 as long as the amended plan was proposed in good faith. The bankruptcy court decided that Debtors' proposed modification to shorten the term of their plan did not correlate with their change in circumstances—their increased income—and denied Debtors' motion to amend the plan and shorten the plan term. Debtors appealed.

The Ninth Circuit BAP held that a debtor's circumstances must justify any reduction in the length of the chapter 13 plan. Section 1329(a) provides that at any time after confirmation of a chapter 13 plan but before the completion of payments, the plan may be modified, upon request of the debtor to (among other things): (1) increase the amount of payments on claims of a particular class provided for by the plan; and (2) extend or reduce the time for such payments. The bankruptcy court must consider a change in circumstances in the exercise of its discretion based on a good faith analysis under § 1325(a)(3). That subsection includes consideration of the substantiality of proposed plan payments, whether the debtor has misrepresented facts in the plan, whether the debtor has unfairly manipulated the Bankruptcy Code, and whether the plan is proposed in an equitable manner. The burden of establishing that a plan is submitted in good faith is on the debtor, but the bankruptcy court has an independent duty to determine whether a chapter 13 plan is proposed in good faith. Here, the Court concluded that Debtors advanced no legitimate reason for shortening the term of their plan, and Debtors' contribution of a portion of their increased income to their plan for a 3-year period did not amount to good faith *per se*. Debtors were not retiring, leaving the employment market, changing jobs, or claiming health issues; thus, they failed to show how their changed circumstances warranted shortening the plan term.

Benafel v. OneWest Bank (In re Benafel), 461 B.R. 581 (B.A.P. 9th Cir. 2011) *appeal docketed*, No. 12-60030 (9th Cir. Apr. 23, 2012). The court held that the relevant date for determining whether a claim is secured by a chapter 13 debtor's "principal residence" for purposes of § 1322(b)(2)'s anti-modification provision is the date of the petition. The panel followed its ruling on the parallel chapter 11 provision, § 1123(b)(5), in *BAC Home Loans Serv., LP v. Abdelgadir (In re Abdelgadir)*, 455 B.R. 896, 898 (B.A.P. 9th Cir. 2011).

Sunahara v. Burchard (In re Sunahara), 326 B.R. 768 (B.A.P. 9th Cir. 2005). The disposable income test of § 1325(b) does not apply to the modification of a confirmed chapter 13 plan under § 1329. A proposal to modify a plan to complete payments in less than 36 months, without making full payment on allowed claims, should be considered in determining whether the plan modification was proposed in good faith.

Cure

Downey Savings & Loan Assoc. v. Metz (In re Metz), 820 F.2d 1495 (9th Cir. 1987). A chapter 13 debtor may use the plan to cure a default on a debt for which he has no personal liability because it was discharged in an earlier bankruptcy case.

Frazer v. Drummond (In re Frazer), 377 B.R. 621 (B.A.P. 9th Cir. 2007). Section 1322(b) trumps § 108(b) for determining the time within which a chapter 13 debtor may cure a default on a land sale contract. The panel rejected the creditor's argument that § 108(b) requires debtors to cure the default within 60 days. In a chapter 13 case, § 1322(b)'s "reasonable time" for curing a default applies, rather than the 60-day limit set out in § 108(b). Therefore, Debtors were able to propose a plan to cure the default and to maintain payments on the debt. The panel also held that, in order for § 1322(c)(1) to apply—which is the Code provision allowing for cure "at least through completion of a foreclosure sale"—foreclosure must be a remedy available to the creditor under applicable nonbankruptcy law. Section 1322(c)(1) did not apply in this case because the debt was on a contract for a deed rather than a mortgage and, under Montana law, "there is no foreclosure sale (or a functional equivalent) where the security device is a contract for a deed."

Labib-Kiyarash v. McDonald (In re Labib-Kiyarash), 271 B.R. 189 (B.A.P. 9th Cir. 2001). A student loan debt that matures after Debtor completes the chapter 13 plan may be classified as long-term debt under § 1322(b)(5). Accordingly, Debtor may maintain payments at the contract rate while curing any arrearage through the chapter 13 plan provided that the plan does not unfairly discriminate against other unsecured creditors.

ELEVENTH CIRCUIT

Modification

Universal American Mortgage Co. v. Bateman (In re Bateman), 331 F.3d 821 (11th Cir. 2003). Because § 1322(b)(2) prohibits modification of a claim secured only by a security interest in real property that is the debtor's principal residence, the home lender's claim for the full amount of its arrearage survives confirmation of the Chapter 13 plan that did not provide for payment of the arrearage in full because the lender's claim was not allowed in the full amount of the arrearage. The plan is binding on the lender during its term.

American General Finance, Inc. v. Paschen (In re Paschen), 296 F.3d 1203 (11th Cir. 2002). Under § 1322(c)(2), a chapter 13 plan may modify a claim secured only by a security interest in real property that is the debtor's principal residence, notwithstanding the general prohibition on modification of such a claim in § 1322(b)(2), when the last payment on the secured claim is due prior to the due date for the final payment under the plan. The Court rejected the contrary ruling in *In re Witt,* 113 F.3d 508 (4th Cir. 1997), holding that § 1322(c)(2) is ambiguous and permits modification only of the amount of the payment, not the claim itself.

Cure

Commercial Federal Mortgage Corp. v. Smith (In re Smith), 85 F.3d 1555 (11th Cir. 1996). Once a foreclosure sale has occurred under Alabama law, a chapter 13 plan cannot provide for cure and reinstatement of the mortgage. The debtor after foreclosure retains a statutory one-year right to redeem the property under Alabama law, but the requirement of a lump sum payment cannot be modified.

Jim Walter Homes, Inc. v. Saylors (In re Saylors), 869 F.2d 1434 (11th Cir. 1989). Debtor may propose a chapter 13 plan to cure arrearages on a mortgage debt that was discharged in a prior chapter 7 case.

Green Tree Acceptance, Inc. v. Hoggle (In re Hoggle), 12 F.3d 1008 (11th Cir. 1994). Debtor may modify her plan after confirmation pursuant to § 1329 to provide for cure of post-petition defaults under a mortgage for which the plan provided cure and maintenance payments under § 1322(b)(5).

D. GOOD FAITH AS A FILING REQUIREMENT

THIRD CIRCUIT

In re Myers, 491 F.3d 120 (3d Cir. 2007). The Court affirmed the bankruptcy court's determination that Debtor's Chapter 13 petition was filed in bad faith as a tactic to avoid an adverse state court decision. Bad faith analysis requires consideration of the "nature of the debt" and "how the debt arose." In this case, most of Debtors' debt consisted of a state fraudulent conveyance claim. The bankruptcy court's decision to dismiss a chapter 13 case as a bad faith filing is reviewed for abuse of discretion, and the bankruptcy court's factual findings will not be set aside unless they are clearly erroneous. A chapter 13 case filed in bad faith may be dismissed for cause under § 1307(c), even though that provision lacks an explicit good faith requirement. To determine bad faith, the court looks to the totality of the circumstances and may consider a wide range of factors, including the nature of the debt, the timing of the petition, how the debt arose, the debtor's motive in filing the petition, how the debtor's actions affected creditors, the debtor's treatment of creditors both before and after filing the petition, and whether the debtor has been forthcoming with the bankruptcy court and creditors.

In re Lilley, 91 F.3d 491 (3d Cir. 1996). Addressing a question of first impression, the Court concluded that there is a good faith filing requirement in chapter 13. The court acknowledged that there was no explicit requirement of good faith in § 1307(c), but agreed with three other circuit courts that a lack of good faith qualified as "cause" for dismissal or conversion. The court adopted the Seventh Circuit's totality of the circumstances test in *In re Love*, 957 F.2d 1350, 1357 (7th Cir. 1992), identifying the following relevant factors: the "nature of the debt . . .; the timing of the petition; how the debt arose; the debtor's motive in filing the petition; how the debtor's actions affected creditors; the debtor's treatment of creditors both before and after the petition was filed; and whether the debtor has been forthcoming with the bankruptcy court and the creditors." The Court expressly rejected one factor: "the question of whether the debt would be nondischargeable in a Chapter 7 proceeding." 91 F.3d at 496 n.2.

Note that the 2005 amendments added an express requirement that the chapter 13 case be filed in good faith, by requiring the court to deny confirmation of the plan if the case was not, § 1325(a)(7).

SEVENTH CIRCUIT

In re Smith, 286 F.3d 461 (7th Cir. 2002). In deciding whether a plan is filed in good faith, the Seventh Circuit looks to the totality of the circumstances including factors such as whether the plan accurately reflects the debtor's financial condition, whether there are inaccuracies in the debtor's disclosure indicating an intent to mislead, and whether the plan indicates a "fundamental fairness" toward creditors. Taking advantage of the broader discharge in chapter 13 or proposing a low percentage dividend to creditors are factors that do not alone mean a plan is filed in bad faith. S*ee also In re Schaitz*, 913 F.2d 452 (7th Cir. 1990) (containing similar language on the broader chapter 13 discharge and its relationship to good faith); *In re Love*, 957 F.2d 1350 (7th Cir. 1990) (holding that lack of good faith in filing a chapter 13 petition is grounds for dismissal of the case for cause under § 1307(c)); *In re Smith*, 848 F.2d 813 (7th Cir. 1988) (same).

Since the time of these cases, § 1325(a)(7) has added the debtor's good faith in filing the petition as a confirmation requirement. Simply availing oneself of the more liberal provisions in chapter 13 is not bad faith. *In re Smith*, 286 F.3d 461 (7th Cir. 2002).

NINTH CIRCUIT

Leavitt v. Soto (In re Leavitt), 171 F.3d 1219 (9th Cir. 1999). Bad faith, as cause for the dismissal of a chapter 13 petition, is determined under the totality of the circumstances. In determining whether a case was filed in bad faith, the court should consider: (1) whether the debtor misrepresented facts in his or her petition, unfairly manipulated the Bankruptcy Code, or otherwise filed the chapter 13 plan in an inequitable manner; (2) the debtor's history of filings and dismissals; (3) whether the debtor intended only to defeat state court litigation; and (4) whether the debtor behaved egregiously. These same factors apply in determining whether a chapter 13 plan has been filed in good faith. *See, e.g., In re Welsh*, 465 B.R. 843 (B.A.P. 9th Cir. 2012) *appeal docketed*, No. 12-60009 (9th Cir. Feb. 24, 2012).

E. *CONFIRMATION REQUIREMENTS*

1. Good faith

FIRST CIRCUIT

Berliner v. Pappalardo (In re Puffer), 674 F.3d 78 (1st Cir. 2012). Chapter 13 Debtor filed a plan that proposed to pay in aggregate approximately 2% of unsecured claims. The plan also proposed to pay $2,900 to Debtor's counsel and $400 to the chapter 13 trustee. The bankruptcy court denied confirmation of this "fee-only" plan and found that Debtor's petition and plan were both filed in bad faith. Debtor elected to convert his case to chapter 7. Debtor's counsel then sought $2,872 in fees and expenses incurred during Debtor's chapter 13 case. Based on its findings of *per se* bad faith, the bankruptcy court awarded Debtor's counsel only $299 (the fee for converting Debtor's case) and ordered counsel to disgorge the balance of the $500 retainer Debtor had paid counsel prepetition.

The First Circuit ruled that a chapter 13 petition and a "fee-only" plan are not *per se* bad-faith filings. A fee-only plan is one under which a debtor proposes to pay essentially only the debtor's counsel and the chapter 13 trustee. The Court held that the bankruptcy court should assess the "totality of the circumstances" in order to determine the good faith in chapter 13 plans, which is the applicable test for assessing whether a debtor seeking to convert a case from chapter 7 to chapter 13 is abusing the bankruptcy process. See *Marrama v. Citizens Bank of Mass.* (*In re Marrama*) (*Marrama I*), 430 F.3d 474, 482 (1st Cir. 2005), *aff'd, Marrama v. Citizens Bank of Mass.* (*Marrama II*), 549 U.S. 365 (2007). The Court also noted that proponents of a fee-only plan have the "heavy burden of demonstrating special circumstances that justify its submission," 674 F.3d at 83, and the bankruptcy court is in the best position to assess all relevant facts and circumstances to guard against potential bankruptcy abuse. Here, the bankruptcy court found *per se* bad faith and thus did not assess the "totality of the circumstances" and the existence of "special circumstances" justifying Debtor's fee-only plan.

THIRD CIRCUIT

In re Richmond, 338 F. App'x 197 (3d Cir. 2009). The Court affirmed the bankruptcy ruling that Debtor had not filed his chapter 13 plan in bad faith even though he had previously transferred his interest in the marital home to his wife for $1. The wife borrowed $200,000 from her family trust and used the money to pay the husband's gambling debts and other obligations. Debtor disclosed the transaction even though it occurred more than two years prepetition. The court found no evidence that Debtor sought to defraud his creditors or to avoid his debt.

FOURTH CIRCUIT

Branigan v. Bateman (In re Bateman), 515 F.3d 272 (4th Cir. 2008). Even though a debtor is ineligible for discharge under § 1328(f), the filing of a chapter 13 petition is not necessarily in bad faith. The availability of discharge is only one factor to consider in assessing good faith under § 1325(a)(7). Aside from discharge, a debtor may file a chapter 13 case to cure a mortgage, deal with other secured debts, or seek shelter from creditors under the automatic stay. Because Debtor's plan would pay all allowed claims in full, the bankruptcy and district courts did not err in concluding that Debtor's petition was filed in good faith.

Neufeld v. Freeman, 794 F.2d 149 (4th Cir. 1986). A debtor's good faith under § 1325(a)(3) is determined by the totality of the circumstances. Bankruptcy courts consider a number of factors in determining whether the debtor's proposed plan constitutes an abuse of the provisions, purpose, or spirit of chapter 13. These factors include the debtor's prepetition conduct and the nondischargeability of the objecting creditor's claim in chapter 7, as well as "the percentage of proposed repayment, the debtor's financial situation, the period of time payment will be made, the debtor's employment history and prospects, the nature and amount of unsecured claims, the debtor's past bankruptcy filings, the debtor's honesty in representing facts, and any unusual or exceptional problems facing the particular debtor." *Id.* at 152.

Romar Elevators, Inc. v. Tomer (In re Tomer), 2009 U.S. Dist. LEXIS 60261 (W.D. Va. July 14, 2009). Good faith analysis under § 1325(a)(7) is broader in scope and has a different focus than good faith analysis under § 1325(a)(3). Subsection (a)(7)—dealing with the debtor's good faith in filing the petition—requires consideration of the totality of circumstances surrounding the bankruptcy petition, including the debtor's intent. It is similar to the analysis regarding dismissal of a case for lack of good faith under § 1307(c). The analysis under subsection (a)(3)—which requires good faith in proposing the plan—considers, *inter alia*, the technical sufficiency of the plan and the debtor's honesty in stating facts. Sections 1325(a)(3) and (a)(7) are distinct requirements, and satisfaction of one does not establish satisfaction of the other.

FIFTH CIRCUIT

In re Stanley, 224 F. App'x 343 (5th Cir. 2007). To determine whether a chapter 13 plan was filed in good faith, the Fifth Circuit applies a "totality of the circumstances test." Under this test, the courts must 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.

In applying this test, the bankruptcy court "exacts an examination of all of the facts in order to determine the bona fides of the debtor." If the bankruptcy court determines that a chapter 13 plan has not been filed in good faith, it may deny confirmation. Furthermore, at the request of an interested party, the court may convert a chapter 13 case not filed in good faith to one under chapter 7 or dismiss the case in its entirety, "whichever is in the best interests of creditors and the estate."

SIXTH CIRCUIT

Society Nat'l Bank v. Barrett* (*In re Barrett*)*, 964 F. 2d 588 (6th Cir. 1992). Good faith is judged by the totality of the circumstances.

Hardin v. Caldwell (In re Caldwell), 895 F.2d 1123 (6th Cir. 1990). The burden of proving that a plan was filed in good faith rests with the debtor.

State of Ohio, Student Loan Comm'n v. Doersam (In re Doersam), 849 F.2d 237 (6th Cir. 1988). The Court cited its previous holding in *In re Okoreeh-Baah* and the 12-part test for determining whether a debtor proposed his or her plan in good faith. Both pre- and post-petition conduct of the debtor may be considered.

Metro Emp. Credit Union v. Okoreeh-Baah (In re Okoreeh-Baah), 836 F.2d 1030 (6th Cir. 1988). The Court, citing with approval *Kitchens v. Georgia R.R. Bank & Trust Co. (In re Kitchens),* 702 F.2d 885 (11th Cir. 1983), held that bankruptcy courts must conduct a subjective analysis of the totality of the debtor's circumstances, including:

(a) Amount of income of debtor/debtor's spouse from all sources;
(b) Regular and recurring living expenses for debtor and dependents;
(c) Amount of attorney's fees to be awarded in the case and paid by debtor;
(d) Probable or expected duration of the chapter 13 plan;
(e) Motivations of debtor and sincerity in seeking relief in chapter 13;
(f) Ability of debtor to earn and likelihood of future increase or diminution of earnings;
(g) Special situations such as inordinate medical expenses, or unusual care required for a member of debtor's family;
(h) Frequency with which debtor has sought relief under the Bankruptcy Code;

(i) Circumstances under which debtor contracted his or her debts and the demonstrated bona fides, or lack of same, in dealing with creditors;
(j) Whether the amount or percentage of payment offered would operate as a mockery of honest, hard-working, well-intended debtors who pay a higher percentage of their claims consistent with the purpose and spirit of chapter 13;
(k) Burden that administration of the plan would place on the trustee; and
(l) The salutary rehabilitative provisions of the Code, which are to be construed liberally in favor of the debtor.

EIGHTH CIRCUIT

In re LeMaire, 898 F.2d 1346 (8th Cir. 1990). The Court of Appeals used the totality of the circumstances analysis in the good faith inquiry from *Estus*, but also recognized that each factor should be evaluated on a "case-by-case basis in light of the structure and general purpose of Chapter 13."

Education Assistance Corp. v. Zellner, 827 F.2d 1222 (8th Cir. 1987). After the decision in *Estus*, the Code was amended to include § 1325(b), which added an "ability to pay" criterion. This section "subsumes most of the *Estus* factors and allows the court to confirm a plan in which the debtor uses all of his disposable income for three years to make payments to his creditors." The section thus narrows the focus of the good faith inquiry.

In re Estus, 695 F.2d 311 (8th Cir. 1982). In this decision, the Court of Appeals applied a totality of the circumstances analysis to the good faith requirement of § 1325(a)(3). The Court of Appeals stated, "If, after weighing all the facts and circumstances, the plan is determined to constitute an abuse of the provisions, purpose or spirit of Chapter 13, confirmation must be denied." The following factors should be considered in a good faith analysis:

1) the percentage of repayment to unsecured creditors;
2) the amount of the proposed payments and the amount of the debtor's surplus;
3) the debtor's employment history, ability to earn and likelihood of future increases in income;
4) the probable or expected duration of the plan;
5) the accuracy of the plan's statements of debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court;
6) the extent of preferential treatment between classes of creditors;

7) the extent to which secured claims are modified;
8) the type of debt sought to be discharged and whether any such debt is nondischargeable in chapter 7;
9) the existence of special circumstances such as inordinate medical expenses;
10) the frequency with which the debtor has sought bankruptcy relief;
11) the motivation and sincerity of the debtor in seeking chapter 13 relief; and
12) the burden that the plan's administration would place upon the trustee.

NINTH CIRCUIT

Drummond v. Welsh (In re Welsh), 711 F.3d 1120 (9th Cir. 2013). The chapter 13 trustee objected to confirmation of Debtors' plan on the grounds that it was not proposed in good faith. Specifically, the trustee pointed to the facts that Debtors were making "miniscule" payments to unsecured creditors while living in a $400,000 home, paying for various luxury and unnecessary items, and not committing 100% of their disposable income to the plan. The Court affirmed the bankruptcy court's conclusion that Debtors' deduction, in calculating projected disposable income, of payments on secured debts for unnecessary items does not by itself constitute bad faith. Likewise, exclusion of Social Security income in calculating projected disposable income does not constitute bad faith. Both the deduction and the exclusion are expressly allowed under the Code.

Downey Savings & Loan Assoc. (In re Metz), 820 F.2d 1495 (9th Cir. 1987). When a chapter 13 filing follows a chapter 7, both cases should be considered in determining good faith.

Goeb v. Heid (In re Goeb), 675 F.2d 1386 (9th Cir. 1982). The good faith requirement of § 1325(a) does not contain an implied requirement that a chapter 13 debtor make a substantial repayment to unsecured creditors. Instead, whether a plan has been proposed in good faith is a question of whether the debtor "acted equitably," as demonstrated by the totality of the circumstances. Factors to be considered are "whether the debtor has misrepresented facts in his plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed his chapter 13 plan in an inequitable manner. Though it may consider the substantiality of the proposed repayment, the court must make its good-faith determination in light of all militating factors."

Meyer v. Lepe (In re Lepe), 470 B.R. 851 (B.A.P. 9th Cir. 2012). Applying the rule articulated in *Platinum Capital, Inc. v. Sylmar*

Plaza, L.P (In re Sylmar Plaza, L.P.), 314 F.3d 1070 (9th Cir. 2002), a chapter 11 case, the BAP held that a chapter 13 debtor's insolvency is relevant to, but not required for, a finding of good faith. The fact that a debtor proposes to strip a wholly unsecured second mortgage while paying unsecured creditors a small dividend similarly does not, without more, show a lack of good faith. No single fact will serve to produce a finding of bad faith *per se*. Rather, the bankruptcy court must examine the totality of the circumstances to determine whether the debtor proposed the plan in good faith.

TENTH CIRCUIT

In re Gier, 986 F.2d 1326 (10th Cir. 1993). On appeal of a bankruptcy court's finding of bad faith under § 1325(a)(3), appellee must establish that the ruling of was clearly erroneous and the record must be such as to leave the appellate court with a definite and firm conviction that a mistake has been made.

Flygare v. Boulden (In re Flygare), 709 F.2d 1344 (10th Cir. 1983). In confirming a Chapter 13 plan, the bankruptcy court should utilize its fact-finding expertise and judge each case on its own unique circumstances as to whether the plan constitutes an abuse of the provisions, purpose or spirit of chapter 13. The Tenth Circuit listed eleven factors as guidance: (1) the amount of proposed payments and the amount of Debtor's surplus; (2) Debtor's employment history and ability to earn, and the likelihood of future increases in income; (3) the probable or expected duration of the plan; (4) the accuracy of the plan's statement of debts and expenses, the percentage repayment of unsecured debt, and whether any inaccuracies were an attempt to mislead the court; (5) the extent of preferential treatment between classes of creditors; (6) the extent to which secured claims are modified; (7) the type of debt sought to be discharged and whether any such debt would be nondischargeable in chapter 7; (8) the existence of special circumstances such as inordinate medical expenses; (9) the frequency with which Debtor has sought bankruptcy relief; (10) Debtor's motivation and sincerity in seeking chapter 13 relief; and (11) the burden that the plan's administration would place upon the trustee.

Post-BAPCPA, *Flygare* continues to set the good-faith standard in the Tenth Circuit.

ELEVENTH CIRCUIT

Jim Walter Homes, Inc. v. Saylors (In re Saylors), 869 F.2d 1434 (11th Cir. 1989). The bankruptcy court's determination of whether a chapter 13 plan is proposed in good faith is a finding of fact reviewable under the clearly erroneous standard.

Shell Oil Co. v. Waldron (In re Waldron), 785 F.2d 936 (11th Cir. 1986). Chapter 13 plan filed by a financially secure husband and wife for the sole purpose of rejecting an option contract for the sale of real estate that they thought was not as profitable as it could be was not filed in good faith. Congress intended the good faith requirement of § 1325(a)(3) to provide the bankruptcy court with a discretionary process for its intended purpose and to deny confirmation upon discovery of "unmistakable manifestations of bad faith." Such manifestations "need not be based upon a finding of actual fraud, requiring proof of malice, scienter or an intent to defraud." *Id.* at 940.

Kitchens v. Georgia Railroad Bank & Trust Co. (In re Kitchens), 702 F.2d 885 (11th Cir. 1983). The good faith requirement in § 1325(a)(3) for confirmation of a chapter 13 plan does not impose a "best efforts" test requiring the debtor to propose meaningful or substantial payments to unsecured creditors. Rather, it is one factor for the bankruptcy court to consider in determining whether, under the circumstances of the case, the plan is an abuse of the provisions, purpose, or spirit of chapter 13. A non-exhaustive list of factors that the bankruptcy court should consider are:

(1) the amount of the debtor's income from all sources;

(2) the living expenses of the debtor and his dependents;

(3) the amount of attorney's fees;

(4) the probable or expected duration of the debtor's chapter 13 plan;

(5) the motivations of the debtor and his sincerity in seeking relief under the provisions of chapter 13;

(6) the debtor's degree of effort;

(7) the debtor's ability to earn and the likelihood of fluctuation in his earnings;

(8) special circumstances such as inordinate medical expense;

(9) the frequency with which the debtor has sought relief under the Bankruptcy Code and its predecessors;

(10) the circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealings with his creditors, including the extent to which claims are modified and the extent of preferential treatment among class of creditors; and

(11) the burden that the plan's administration would place on the trustee.

Id. at 888-889. Other factors include the types of debts to be discharged and whether a debt would be nondischargeable under chapter 7, the accuracy of the debtor's statements of debts and expenses, and whether any inaccuracies are an attempt to mislead the court.

2. Feasibility

FIFTH CIRCUIT

Matter of Foster, 670 F.2d 478 (5th Cir. 1982). The Fifth Circuit interprets § 1325(a)(6)—which states that "the debtor will be able to make all payments under the plan and to comply with the plan"—as a feasibility requirement necessary for approval of the chapter 13 plan. This also applies to any payments a debtor wishes to make outside the plan. To establish feasibility, the debtor must submit an additional plan that specifies all secured claims that are to be handled outside of the plan.

EIGHTH CIRCUIT

In re Wagner, 259 B.R. 694 (B.A.P. 8th Cir. 2001). The issue in this case was whether Debtors' chapter 13 plan was feasible. In the plan, Debtors proposed to amortize a bank's debt, secured by Debtors' cattle, over seven years, with a balloon payment at the end of the plan's three-year term. The bank argued that the plan was not feasible because of this balloon payment. According to § 1325(a)(6), "the court shall confirm a plan if the debtor will be able to make all payments under the plan and to comply with the plan." The debtor has the burden of proving the feasibility of the plan and that he or she is able to comply with all provisions of the plan. In this case, the BAP determined that Debtors met their burden because Debtor-husband's father would help in making the balloon payment, thereby protecting the bank's security interest. Therefore, the plan was feasible.

NINTH CIRCUIT

In re Hua, 411 B.R. 671 (Bankr. S.D. Cal. 2009). Debtors' demonstrated ability to stay current on their plan payments was evidence that the feasibility requirement was satisfied.

3. Best Interest

FOURTH CIRCUIT

In re Delbrugge, 347 B.R. 536, 539 (Bankr. N.D.W. Va. 2006). The hypothetical costs of sale should be deducted when applying the best interest of creditors test of § 1325(a)(4), even though Debtor will retain the property in question. The test focuses on the amount that the unsecured creditor would receive if the property were liquidated.

FIFTH CIRCUIT

Matter of Maddox, 15 F.3d 1347 (5th Cir. 1994). A debtor must cross a "best interests of the creditor" threshold to have a confirmable plan in chapter 13. The plan generally must provide that secured creditors receive at least as much value as they would have received in a chapter 7 liquidation, and that secured creditors receive the present value of their collateral.

SEVENTH CIRCUIT

In re Rimgale, 669 F.2d 426 (7th Cir. 1982). The best interest test in chapter 13 does not require full payment for a debt that would not be discharged in chapter 7 but is discharged under the broader chapter 13 discharge.

EIGHTH CIRCUIT

Education Assistance Corp. v. Zellner, 827 F.2d 1222 (1987). In this decision, the Court of Appeals applied the "best interests of creditors" test of chapter 13 to determine whether the creditor would have received more in a chapter 7 liquidation than under the proposed chapter 13 plan. Under the "best interests of creditors" test, a plan should not be confirmed "if the property to be distributed under the plan is less than the amount each allowed unsecured creditor would be paid if the debtor's estate were liquidated under Chapter 7." The Court must determine the value of the estate property and, if any creditor would receive more in a chapter 7 liquidation, the plan may not be confirmed.

NINTH CIRCUIT

Drummond v. Urban (In re Urban), 375 B.R. 882 (B.A.P. 9th Cir. 2007). Exemptions are significant in chapter 13 because they are used to calculate what unsecured creditors would receive in a hypothetical chapter 7 liquidation.

Beguelin v. Volcano Vision (In re Beguelin), 220 B.R. 94 (B.A.P. 9th Cir. 1998). A creditor must receive at least as favorable treatment as it would receive in chapter 7. In the case of a solvent debtor, this requires payment of interest that, "[p]ursuant to §§ 1325(a)(4) and 726(a)(5), . . . clearly accrues from the date of the petition through and beyond the effective date of the plan."

AMFAC Distribution Corp. v. Wolff (In re Wolff), 22 B.R. 510 (B.A.P. 9th Cir. 1982), *superseded by statute on other grounds as recognized by In re Renteria*, 456 B.R. 444, 448 (Bankr. E.D. Cal. 2011), *aff'd,* 470 B.R. 383 (B.A.P. 9th Cir. 2012). The debtor carries the burden of demonstrating that a plan is in the best interest of creditors.

4. Projected Disposable Income

UNITED STATES SUPREME COURT

Ransom v. FIA Card Servs., N.A., 131 S. Ct. 716 (2011). Chapter 13 Debtor owned a car free and clear of any loan or lease obligation and thus did not have to make any actual loan or lease payments in order to retain the car. Debtor nonetheless claimed ownership costs with respect to the car when calculating his disposable monthly income and resulting repayment plan amounts.

The Supreme Court ruled that a chapter 13 debtor who does not have to make loan or lease payments is not entitled to deduct any ownership costs with respect to the car for the purpose of calculating disposable monthly income. The Court explained that a debtor may apply deductions listed in the IRS's National and Local Standards to the extent that they apply to the debtor. But a debtor may only deduct actual expenses that he or she incurs. The Bankruptcy Code requires a chapter 13 debtor to devote his or her "disposable income" to plan payments. Under § 1325(b), "disposable income" is "current monthly income" minus "amounts reasonably necessary to be expended" for "maintenance and support." Because chapter 13 debtors are required to devote all of their disposable income to meet their plan obligations, only actually incurred expenses may be deducted. Thus Debtor was not entitled to a car ownership cost deduction.

Hamilton v. Lanning, 130 S. Ct. 2464 (2010). Chapter 13 Debtor received a buy-out payment from her former employer about six months before she filed her bankruptcy petition. This additional income inflated Debtor's "current monthly income" substantially in comparison to income from her new job. Debtor filed a plan that would not fully repay all of her creditors, and proposed to calculate her "projected disposable income" based on her actual income and expenses, rather than based on her "current monthly income" that took her buy-out payment into consideration. The chapter 13 trustee objected to plan confirmation.

The Supreme Court ruled that "projected disposable income" under § 1325(b), for purposes of determining a debtor's chapter 13 plan payments, should be calculated based on a forward-looking approach rather than a strictly historical approach. Under § 1325(b)(1), a chapter 13 plan that does not provide for the full payment of unsecured claims cannot be confirmed unless it provides that a debtor's projected disposable income will be applied in full to pay creditors as of the plan's effective date. "Projected disposable income" is defined in § 1325(b)(2) as "current monthly income" minus certain charitable contributions, business expenses and amounts reasonably necessary to be expended for maintenance or support of the debtor and his or her dependents. "Amount reasonably necessary for support" is calculated just like actual expenses, unless a debtor's current monthly income is above the means test. "Projected," which is not defined in the Bankruptcy Code, should be given its ordinary meaning, so a court should consider future expected earnings that will be available to pay creditors. A debtor's prepetition income creates a rebuttable presumption of the debtor's future income, but a court should take into account post-petition changes in a debtor's circumstances that are known or virtually certain at the time of plan confirmation. The Court reasoned that prior to the enactment of BAPCPA, a bankruptcy court had discretion to consider known or virtually certain changes in a debtor's income when determining plan repayment obligations, and Congress did not indicted any intention to depart from this established case law. Thus, in this case Debtor's plan properly used a lower projected disposable income amount (based on her current circumstances) rather than the historical calculation of her prepetition income (which factored in the one-time buyout payment from her former employer).

FIRST CIRCUIT

Coffin v. eCast Settlement Corp. (In re Coffin), 435 B.R. 780 (B.A.P. 1st Cir. 2010). Debtor appealed a bankruptcy court order denying confirmation of his chapter 13 plan because it included a deduction for an ownership expense on a vehicle that was neither leased nor encumbered. The bankruptcy court said that under § 707(b)(2)(A)(ii)(I), the vehicle ownership expense deduction is not applicable to above-median debtors who have no loan or lease payments. Thus, Debtor failed to apply all of his disposable income to make payments to unsecured creditors as required by § 1325(b)(1)(B). In reversing the bankruptcy court's decision, the BAP stated that "the mandatory language of § 707(b)(2)(A)(ii)(I), read in the context of its statutory scheme, purposes, and policies, provides that above-median debtors 'shall' enter the Internal Revenue Service Local Standards (rather than their actual expenses) onto their Form B22C in determining their projected net disposable income."

SECOND CIRCUIT

In re Joest, 450 B.R. 381 (Bankr. N.D.N.Y. 2011). The court held that the single, above-median income Debtor residing in a household of one person was allowed to deduct ownership costs associated with her second vehicle as an amount "reasonably necessary" for her maintenance and support under § 1325(b)(2) because she was actually incurring this expense when she filed for bankruptcy.

FOURTH CIRCUIT

Morris v. Quiqley (In re Quigley), 673 F.3d 269 (4th Cir. 2012). An above-median debtor's projected disposable income must take into account the debtor's intention to surrender vehicles on which she had been making secured debt payments. The Supreme Court's decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010), applies to known changes in expenses as well as income. Therefore, because Debtor would not be making payments on surrendered vehicles under the chapter 13 plan, those payments were not properly deducted in calculating Debtor's projected disposable income.

Johnson v. Zimmer, 686 F.3d 224 (4th Cir. 2012). Debtor filed her chapter 13 petition and proposed a plan. Debtor and her ex-husband were jointly liable on two of Debtor's unsecured loans. Her ex-husband objected to confirmation on the ground that she had overstated the size of her household, resulting in an incorrect calculation of her disposable monthly income. Debtor had two children from her marriage with her ex-husband who lived with her 204 days per year. Debtor's current husband had three children who lived in Debtor's home 180 days per year. Debtor counted all of the children in calculating her household size as totaling 7 members. Debtor's ex-husband argued that Debtor incorrectly calculated her household size (given that the five children did not live with her full time) and that an approximation of the actual economic impact of the children would result in lower monthly expenses and higher disposable monthly income.

The Fourth Circuit ruled that the calculation of household size for purposes of the chapter 13 means test should be based on "economic units" to more accurately reflect a debtor's actual ability to pay creditors, which is the ultimate goal of BAPCPA. Using the "economic unit" approach, the bankruptcy court would first determine how many people's income and expenses are intermingled with the debtor, and then calculate how much time any part-time residents are members of the debtor's household ("fractional children"). In this case, each of Debtor's two children constituted 0.56 members of Debtor's household based on time spent in Debtor's home, and each of Debtor's three stepchildren constituted 0.49 members of her household. That gave a total of 2.59 children, which was then rounded up to 3 children, for a total household size of 5 rather than 7. The Court found that alternative methods of calculating household size are less preferable: the "heads on beds" approach, which includes anyone who occupies a debtor's home is over-inclusive; and the "income tax dependent" approach, which includes anyone who could be deemed a "dependent" in tax returns, is under-inclusive.

FIFTH CIRCUIT

In re Nowlin, 576 F.3d 258 (5th Cir. 2009). Joining the Eighth and Tenth Circuits, the Fifth Circuit in this case adopted a forward-looking interpretation of "projected disposable income" in § 1325(b)(1). The word "projected" allows for the calculation of future income and expenses based on present data, including evidence extrinsic to that used in the calculation of "disposable income" under § 1325(b)(2). Thus, any party can present such evidence of changed circumstances, and the bankruptcy court can adjust projections accordingly. In short, the debtor's "disposable income" calculated under § 1325(b)(2) and multiplied by the applicable commitment period is presumptively the debtor's "projected disposable income" under § 1325(b)(1)(B), but any party may rebut this presumption by presenting evidence of present or reasonably certain future events that substantially change the debtor's financial situation.

SIXTH CIRCUIT

Seafort v. Burden (In re Seafort), 669 F.3d 662 (6th Cir. 2012). Chapter 13 Debtors in two unrelated cases were both eligible to participate in their employers' 401(k) retirement plans. At the time that Debtors filed their respective bankruptcy petitions, they were not making any contributions to their 401(k) plans and were instead repaying 401(k) loans. Each of their plans provided for a 5-year commitment period. Debtors proposed to repay their 401(k) loans in full before completion of their plans, and then to use the extra income to resume making voluntary contributions to their 401(k) plans. The chapter 13 trustee objected to confirmation of the plans on the grounds that because Debtors had not been making 401(k) contributions at the time of filing, they could not exclude post-petition contributions from estate property and projected disposable income; thus, post-petition income no longer required for repayment of the 401(k) loans had to be used towards the payment of Debtors' unsecured creditors.

The Sixth Circuit held that under § 1325(b)(1)(B) post-petition income available after repayment of a 401(k) loan is disposable income available for distribution to unsecured creditors, pursuant to § 1325(b)(1)(B), and may not be used to fund non-mandatory contributions to a 401(k) plan. In dicta, the Court indicated that no voluntary post-petition 401(k) contributions can be excluded from disposable income even if similar contributions were being made by the debtor at the time of filing.

Baud v. Carroll (In re Baud), 634 F.3d 327 (6th Cir. 2011). Chapter 13 Debtors filed schedules showing that Debtors had above-median current monthly income and negative monthly disposable income, after subtraction of all deductions and expenses (including Social Security benefits and mortgage payments). Debtors proposed a 36-month plan that would pay only a portion of their unsecured claims. The chapter 13 trustee objected to confirmation on the ground that 60 months is the applicable commitment period for above-median income debtors under § 1325(b).

The Sixth Circuit ruled that under § 1325(b), if a chapter 13 plan does not propose to pay unsecured creditors in full and an objection to confirmation by an allowed claim holder or the trustee is filed, a debtor with positive projected disposable income must propose a plan that extends for the applicable commitment period. The Court also ruled that calculation of a debtor's projected disposable income, which occurs as of the confirmation date, cannot include non-disposable income and income that is excepted from the definition of current monthly income (such as Social Security benefits). The calculation also must deduct expenses that above-median-income debtors are permitted to deduct under the Bankruptcy Code (such as payments on secured debts). Finally, the Court ruled that there is no exception to the temporal requirement set forth in § 1325(b) for debtors with zero or negative projected disposable income. Thus Debtors' plan had to extend the full 60 months.

Darrohn v. Hildebrand* (*In re Darrohn*)*, 615 F.3d 470 (6th Cir. 2010). Changes in income or expenses that are known or virtually certain may be considered in a calculation of disposable income. This includes, for example, salary from a current job rather than unemployment for the six months prior to filing. Payments for real estate that is to be surrendered under the plan may not be deducted.

Schultz v. United States, 529 F.3d 343 (6th Cir. 2008). The 2005 BAPCPA amendments do not violate the uniformity provisions of Article 1, § 8, Clause 4, of the Constitution by establishing a means test that allows certain income exclusions.

Harshbarger v. Pees* (*In re Harshbarger*)*, 66 F.3d 775 (6th Cir. 1995). Notwithstanding the exclusion of ERISA account funds from property of the estate, Debtor could not deduct her expected future income repayments to be made on a loan from her ERISA plan.

Note: Certain lower courts in Ohio state that *Harshbarger* was decided pre-BAPCPA and has been superseded by §1322(f), which specifically excludes from § 1325(b)'s definition of "disposable income" amounts required to repay retirement account loans.

SEVENTH CIRCUIT

In re Johnson, 382 F. App'x 503 (7th Cir. 2010). Applying *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010), the Seventh Circuit held that the bankruptcy court was within its discretion to exclude from the "projected disposable income," required to be paid under § 1325(b)(1)(B), the workers' compensation payments a debtor had received in the six months prebankruptcy but that had ceased before the bankruptcy was filed.

The Seventh Circuit reached a similar result in a pre-*Hamilton* decision on expenses, ruling that a mortgage payment that was certain to disappear should not be counted as an expense in arriving at "projected disposable income." *In re Turner*, 574 F.3d 349 (7th Cir. 2009).

EIGHTH CIRCUIT

In re Frederickson, 545 F.3d 652 (2008). The Court of Appeals held that projected disposable income varies depending on whether the debtor is below- or above-median. If the debtor is below-median, projected disposable income is calculated by the debtor's disposable income from Schedules I and J, multiplied by the number of months in the plan. If the debtor is above-median, the disposable income calculation on Form 22C is a starting point; but changes in the debtor's financial circumstances and actual income and expenses on Schedules I and J will be considered in the final calculation.

NINTH CIRCUIT

Danielson v. Flores (In re Flores), 2013 U.S. App. LEXIS 18413 (9th Cir. Aug. 29, 2013) (*en banc*). A divided Ninth Circuit panel ruled that the Supreme Court's ruling in *Hamilton v. Lanning*, 103 S. Ct. 2464 (2010), did not disturb the holding in *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868 (9th Cir. 2008), to the effect that § 1325(b)(1)(B) does not impose a minimum duration for a chapter 13 plan if the debtor has no projected disposable income; thus, in such circumstances, the 60-month "applicable commitment period" does not apply to above-median income debtors. 692 F.3d 1021 (9th Cir. 2012). On rehearing *en banc*, the Ninth Circuit overruled that aspect of *Kagenveama* and held that the statute permits confirmation only if the length of the proposed plan is at least equal to the applicable commitment period under § 1325(b)(4). The Court held, first, that the statute defines a temporal, rather than monetary, requirement for confirmation under § 1325(b)(1)(B). Second, the Court found that temporal requirement applicable without regard to the debtor's projected disposable income. The Ninth Circuit found support for its decision in *Lanning*: "The [Supreme] Court favored a 'forward-looking' approach that takes into account known or nearly certain information about changes in a debtor's earning power during the plan period. [130 S. Ct.] at 2475. The policy justification for looking to future earnings is that a failure to do so 'would deny creditors payments that the debtor could easily make.' *Id.* at 2476. In other words, the statute is meant to allow creditors to receive increased payments from debtors whose earnings happen to increase. *Lanning* involved *pre*-confirmation adjustments to plan payments, 'to account for known or virtually certain changes' in a debtor's income. *Id.* at 2475. But the same logic persuades us that Congress intended § 1325(b)(1)(B) to ensure a plan duration that gives meaning to § 1329's modification procedure as a mechanism for *post*-confirmation adjustments for unforeseen increases in a debtor's income. That mechanism will achieve its purpose most effectively if the Chapter 13 plan has a minimum duration within which modification is possible. Accordingly, the policy that underlies *Lanning* also supports our reading of § 1325(b)(1)(B)." 2013 U.S. App. LEXIS 18413 at *21.

Drummond v. Welsh (In re Welsh), 711 F.3d 1120 (9th Cir. 2013). The trustee objected to Debtors' chapter 13 plan on the grounds of lack of good faith because, *inter alia*, that Debtors proposed to make payments on secured claims for luxury items. The Ninth Circuit agreed with the bankruptcy court and the BAP that payments to secured claims are authorized in the means test. Section 707(b)(2)(A)(iii) allows payments on secured debt to be deducted from CMI, unless payment on the outstanding amount of the secured claim is unnecessary because the debtor will be surrendering the property or avoiding the lien securing the claim. If payment on the outstanding amount is necessary, the debtor may deduct the average payment amount from his or her CMI, regardless of whether the collateral is necessary to the debtor. In BAPCPA, "Congress chose to remove from the bankruptcy court's discretion the determination of what is or is not "reasonably necessary." It substituted a calculation that allows debtors to deduct payments on secured debts in determining disposable income. That policy choice may seem unpalatable either to some judges or to unsecured creditors. Nevertheless, that is the explicit choice that Congress has made. We are not at liberty to overrule that choice." *Id.* at 1134 (footnote omitted).

Meyer v. U.S. Trustee (In re Scholz), 699 F.3d 1167 (9th Cir. 2012). The Court held that income from an annuity received under the Railroad Retirement Act of 1974 (RRA) must be included in calculating projected disposable income. Unlike benefits received under the Social Security Act, RRA annuity payments are not expressly excluded from the calculation of current monthly income, which is used to determine disposable income. The "anti-anticipation clause" in the RRA does not prohibit use of RRA annuities in calculating projected disposable income; it merely prohibits premature disbursement of payments.

American Express Bank, FSB v. Smith (In re Smith), 418 B.R. 359 (B.A.P. 9th Cir. 2009). Payments on secured debts attributable to property as to which Debtors indicated an intent to surrender are not reasonably necessary expenses. Therefore, the payments may not be included in the calculation of Debtors' disposable income.

Drummond v. Wiegand (In re Wiegand), 386 B.R. 238 (B.A.P. 9th Cir. 2008). A debtor engaged in business may not deduct ordinary and necessary business expenses from gross receipts for purposes of calculating current monthly income. Under § 1325(b)(2), those expenses are subtracted from current monthly income when calculating disposable income.

McDonald v. Burgie (In re Burgie), 239 B.R. 406 (B.A.P. 9th Cir. 1999). The sale of Debtors' homestead constituted a sale of a capital asset and, therefore, proceeds of the sale were not disposable income that could be required to be paid into the plan. The test is whether the sum is intended to be income or an income substitute, not whether the amount is received as a stream of payments versus a lump sum.

Smith v. Spurgeon (In re Smith), 207 B.R. 888 (B.A.P. 9th Cir. 1996). Life insurance premiums may be a necessary expense for purposes of determining disposable income. This determination should be made on a case-by-case basis, taking into consideration whether the policy is intended as a retirement contribution or instead is to protect the debtor's dependents from destitution if the debtor were to die.

TENTH CIRCUIT

Anderson v. Cranmer (In re Cranmer), 697 F.3d 1314 (10th Cir. 2012). A chapter 13 repayment plan that excludes Social Security Income ("SSI") from the calculation of projected disposable income is permissible and, therefore, exclusion of SSI from repayment plan payments, "exactly as the Bankruptcy Code and Social Security Act allow," cannot provide a basis for a finding of lack of good faith. Under §§ 101(10A)(B) and 1325(b)(2), "disposable income" expressly excludes SSI and § 1325(b)(1)'s requirement that payments for a repayment plan be made from "*projected* disposable income" does not alter the exclusion of SSI from the general definition of "disposable income."

Midkiff v. Stewart (In re Midkiff), 342 F.3d 1194 (10th Cir. 2003). Debtors' chapter 13 plan provided for the contribution of all tax refunds received within 36 months of the plan. In the 34th month, and before receiving their last tax refund, Debtors obtained approval for an early pay-off of their chapter 13 case. After the trustee filed the final report, she learned that Debtors were entitled to a $5,000 tax refund that fell within the three-year period of the plan. The bankruptcy court granted the trustee's motion to reopen the case to distribute the $5,000 to creditors. The Tenth Circuit held that a bankruptcy case can be reopened based on mistake, especially when the debtors contributed to the mistake by not disclosing to the trustee their anticipated tax refund. The Court refused to encourage a practice whereby debtors could conceal income from a chapter 13 trustee through excessive tax withholdings. Finally, under the provisions of Debtors' plan, the tax refund was "disposable income" under § 1325(b) that had to be contributed to the plan.

5. Discharge by Declaration

UNITED STATES SUPREME COURT

United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367 (2010). Debtor obtained confirmation of a chapter 13 plan under which he would pay the principal of his student loan debt, but discharge accrued interest. He did not initiate an adversary proceeding or obtain a determination of undue hardship under § 523(a)(8). The creditor received notice of the plan, but did not object. Several years after Debtor's discharge, the creditor sought to collect the interest and Debtor sought to enforce the discharge order. The bankruptcy court rejected the creditor's argument that discharge of the interest on Debtor's student loan was inconsistent with the Code. The district court reversed, but was reversed in turn by the Ninth Circuit.

The Supreme Court held that the debt to a creditor who receives actual notice of bankruptcy filing and of contents of a debtor's chapter 13 plan, but fails to object, is discharged even if it erroneously discharges debt subject to § 523(a)(8)'s discharge exception. The plan is a final and enforceable judgment. A creditor may not later rely seek to set that judgment aside as void; the bankruptcy court's failure to make findings of undue hardship was legal error, but it did not make the order confirming Debtor's plan void. Because § 523(a)(8) is self-executing, however, bankruptcy courts have an independent obligation to ensure that plans meet confirmation requirements. Thus, if a plan proposes to discharge student loan debt, the court must make an independent determination of undue hardship, regardless of whether a creditor objects or even appears at the proceeding. The Court also admonished debtors' counsel against bad faith tactics.

THIRD CIRCUIT

SLW Capital, LLC v. Mansaray-Ruffin (In re Mansaray-Ruffin), 530 F.3d 230 (3d Cir. 2008). Debtor asserted TILA violations against the original mortgagee, and filed a proof of claim on behalf of the mortgagee, designating the claim as unsecured and capped at $1,000. Debtor's amended chapter 13 plan proposed to fix the mortgagee's claim at $1,000, payable as an unsecured claim. Debtor's plan was confirmed without objection. The mortgagee later filed an adversary complaint to determine its secured status. The court held that the validity, extent and priority of a lien can only be challenged under the Bankruptcy Rules by the filing of an adversary complaint, and that the mandatory nature of the Rule "trumped" any finality afforded by the confirmation of Debtor's plan. Due process concerns required a heightened level of procedural protections.

Note that the Supreme Court in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010), rejected a challenge to the confirmation of a plan that discharged the interest component of a student loan obligation without the filing of the adversary proceeding required under Bankruptcy Rules. The Court concluded that legal error was committed in confirming the plan, but that the confirmation order remained enforceable and binding because the creditor had notice and failed to timely object or appeal. It is unclear how the Supreme Court would view the due process issues raised in *Mansaray-Ruffin* in the context of invalidating a lien.

F. *MISCELLANEOUS*

THIRD CIRCUIT

In re Michael, 699 F.3d 305 (3d Cir. 2012). Debtor proposed to cure mortgage arrears in his confirmed chapter 13 plan and agreed to continue regular mortgage payments outside of the plan. Debtor had a wage garnishment to ensure that payments were made to the chapter 13 trustee. When Debtor defaulted on his regular mortgage payments, the mortgagee received relief from the automatic stay and foreclosed on Debtor's property. The mortgagee refused to accept further payments from the trustee, and monies accumulated in the trustee's account. After Debtor converted his case to chapter 7, he sought the turnover of the accumulated funds. The Court concluded that undistributed plan payments held by the trustee at the time of conversion become Debtor's property pursuant to § 348(f), absent bad faith.

Branchburg Plaza Assocs., L.P. v. Fesq (In re Fesq), 153 F.3d 113 (3d Cir. 1998). Fraud is the only ground available for revocation of a chapter 13 confirmation order.

SIXTH CIRCUIT

Post-confirmation Tax Refund

Harchar v. United States (In re Harchar), 694 F.3d 639 (6th Cir. 2012). The IRS's manual processing of Debtor's post-confirmation tax refund did not violate the confirmed chapter 13 plan, Debtor's right to due process or the automatic stay because the tax refund in question did not arise from the same tax period as the tax claim resolved by the chapter 13 plan.

SEVENTH CIRCUIT

Dismissal

In re Dempsey, 247 F. App'x 21 (7th Cir. 2007). Among other grounds, dismissal of a chapter 13 case is allowed for unreasonable delay that is prejudicial to creditors, and one "well-recognized instance of prejudice" is the debtor's inability to propose a confirmable plan. Thus, the bankruptcy court did not abuse its discretion in dismissing a chapter 13 case after a two-year period in which Debtor was unable to propose a confirmable plan.

NINTH CIRCUIT

Issue preclusion

Enewally v. Washington. Mut. Bank (In re Enewally), 368 F.3d 1165 (9th Cir. 2004), *cert. denied,* 543 U.S. 1012 (2004). Although a confirmed plan is *res judicata* as to issues addressed by the plan, it has no preclusive effect on issues that must be determined in adversary proceedings or are "not sufficiently evidenced in a plan to provide adequate notice."

XVI. AVOIDING POWERS

A. *PREFERENCES*

1. Basic requirements

FIRST CIRCUIT

Riley v. Nat'l Lumber Co. (In re Reale), 584 F.3d 27 (1st Cir. 2009). The Court held that Debtor's $20,000 payment to the creditor, made from his mother's bank account, was a preferential transfer. At issue was whether Debtor had a sufficient interest in the transferred property. The Court found that the determinative question was the extent of Debtor's exercise of control over the funds. The Court held that the "transfer of an interest of the debtor" test of § 547 was met.

Ford v. Skorich (In re Skorich), 482 F.3d 21 (1st Cir. 2007). The chapter 7 trustee sought to recover Debtor's former interest in funds held in escrow from the sale of real estate transferred to Debtor's former spouse after Debtor's chapter 7 filing. The First Circuit affirmed the bankruptcy court's findings that the former spouse did not hold a "claim" and the transfer was not to satisfy an "antecedent debt." Thus, there was no preferential transfer under § 547.

THIRD CIRCUIT

Norwest Bank Minn., N.A. v. Andrews (In re Andrews), 262 B.R. 299 (Bankr. M.D. Pa. 2001). A foreclosure sale can be avoided under § 547 if the creditor received more from the sale than it would have received in a chapter 7 case because the secured debt is substantially less than the value of the property received by the creditor. *Contra Chase Manhattan Bank v. Pulcini (In re Pulcini)*, 261 B.R. 836 (Bankr. W.D. Pa. 2001).

FIFTH CIRCUIT

In re SGSM Acquisition Co., LLC, 439 F.3d 233 (5th Cir. 2006). Any payment made by the debtor on account of antecedent debt, within ninety days before bankruptcy, qualifies as a preference. Many defenses exist for specific kinds of payments, however.

Matter of Southmark Corp., 62 F.3d 104 (5th Cir. 1995). The date of transfer of a check occurs on the date of honor, not the date of delivery, as long as the check is presented to the drawee bank within a reasonable time. There are no appellate level decisions in the Fifth Circuit for other types of transfers.

SIXTH CIRCUIT

MBNA America Bank, N.A. v. Meoli (In re Wells), 561 F.3d 633 (6th Cir. 2009). Debtor's prepetition payments to one credit card company using convenience checks received from another credit card company constituted avoidable preferential transfers, and chapter 7 trustee was not prohibited from avoiding the transfer under the earmarking doctrine. Debtor's degree of control exercised over the property transferred was the principal determinant of Debtor's interest in the property sufficient for avoidance purposes. The Court cited *McLemore v. Third Nat'l Bank (In re Montgomery)*, 983 F.2d 1389 (6th Cir. 1993), and *Yoppolo v. MBNA America Bank (In re Dilworth)*, 450 F.3d 562 (6th Cir. 2009).

Yoppolo v. MBNA America Bank, N.A. (In re Dilworth), 560 F.3d 562 (6th Cir. 2009). Debtor's bank-to-bank transfer of her credit card balance within 90 days prepetition constituted the transfer of an interest of Debtor in property as an element of an avoidable preference, and the earmarking doctrine did not preclude the trustee's avoidance action.

Morehead v. State Farm Mut. Auto. Ins. Co. (In re Morehead), 249 F.3d 445 (6th Cir. 2001). Wages earned during the preference period that are subjected to a garnishment order stemming from a pre-petition judgment are "transferred" for purposes of § 547(b)(4)(A) and the transfer may be avoided.

First Tennessee Bank, N.A. v. Stevenson (In re Cannon), 237 F.3d 716 (6th Cir. 2001). The bank acquired a security interest in checks deposited by Debtor, and the security interest remained in effect pending satisfaction by the account holder's deposit of additional funds. The Court held that satisfaction of the security interest in Debtor's deposited checks through charge-back made upon return of the checks for insufficient funds did not constitute a preferential transfer under the Bankruptcy Code, even though the funds used to cover the charge backs did not originate from the account on which the deposited funds were drawn. The transfer was not an avoidable preference under § 547(b).

SEVENTH CIRCUIT

In re Wey, 854 F.2d 196 (7th Cir. 1988). Debtor's forfeiture of a 10% down payment under a real estate contract did not constitute a "transfer" within the meaning of the avoiding powers and was not recoverable either as a preference or as a fraudulent transfer.

In re Coppie, 728 F.2d 951 (7th Cir. 1984). Under Indiana law, the date of transfer of a wage garnishment is upon service of the summons. The Seventh Circuit held, therefore, that the trustee could not recover a wage garnishment that occurred during the preference period but was based on a writ of garnishment served more than 90 days prepetition.

Lower courts in Illinois and Wisconsin have not applied *Coppie*, reasoning that state law in those states requires a different result. *See, e.g.*, *Richardson v. Ford Motor Credit Co. (In re Casias)*, 332 B.R. 357 (Bankr. C.D. Ill. 2005); *Deardorff v. Ford Motor Credit Co. (In re Deardorff)*, 195 B.R. 904 (Bankr. W.D. Wis. 1996); *Nealis v. Ford Motor Credit Co. (In re Nealis)*, 52 B.R. 329 (Bankr. N.D. Ill. 1985).

EIGHTH CIRCUIT

Kaler v. Overboe (In re Arzt), 252 B.R. 138 (B.A.P. 8th Cir. 2000). Creditors appealed from the bankruptcy court's judgment voiding mortgages on Debtors' homestead property under § 547(b) and preserving the equity for the benefit of the estate under § 551.

Debtors voluntarily granted mortgages to creditors in order to secure antecedent debts. Four days later, Debtors filed chapter 7 bankruptcy. The bankruptcy court held in favor of trustee, voiding the mortgages as preferential transfers under § 547(b), and preserving Debtors' equity in the homestead for the benefit of the bankruptcy estate, pursuant to § 551. The creditors appealed and, upon review, the BAP affirmed the judgment of the bankruptcy court. Debtors' voluntary mortgage transfers to creditors were preferential because Debtors executed and recorded the mortgages within four days of filing bankruptcy. The trustee's recovery of the transfers was proper and preserved the voluntarily transferred equity for the benefit of the estate.

NINTH CIRCUIT

USAA Federal Savings Bank v. Thacker (In re Taylor), 599 F.3d 880 (9th Cir. 2010). Debtors bought a car within 90 days of filing a chapter 7 petition. The lender obtained a security interest in the car and timely perfected it 21 days after the purchase. Debtors made the required loan payments. Post-petition, the bankruptcy court granted the trustee's motion to avoid the security interest as a preference. The court did not award the estate the security interest; instead, the court awarded the "value" of the security interest, which it determined was the full value of the initial loan. In exchange, the bankruptcy court granted the lender a non-priority unsecured claim in for the additional loan amount.

The Ninth Circuit ruled that when a bankruptcy court avoids a preferential transfer, it may award the bankrupt estate either the actual transferred property or the value of the transferred property. The purpose of § 550(a) is to restore the estate to the financial condition it would have enjoyed if the transfer had not occurred. The bankruptcy court ordinarily determines the value of the property as of the time of the transfer, but the court has discretion on how to value the property so as to put the estate in its pre-transfer position. Here, the bankruptcy court correctly held that awarding the estate the value of the security interest would more closely restore the estate to its pre-transfer position than simply avoiding the transfer of the security interest in Debtor's car and the prepetition loan payments. But, the bankruptcy court abused its discretion by determining the value of the security interest without sufficient factual support. When the value of property cannot be easily or readily determined from the record—as was the case here—the correct remedy is to return the property, not award an estimate of the value of the property. Thus, the Ninth Circuit found that the bankruptcy court should have voided the lien and ordered the return of the prepetition loan payments. Accordingly, the Court remanded with instructions for the bankruptcy court to declare the lender's security interest void, grant the lender an unsecured claim against the estate for the value of the loan, and determine whether the lender must return the payments it received from Debtors, and if so, to whom.

MBNA America v. Locke (In re Greene), 223 F.3d 1064 (9th Cir. 2000). Rule 9006(a) does not apply to extend the 90-day period provided under § 547(b). Therefore, a transfer that was made on a Friday (the 91st day prior to the bankruptcy filing) was not avoidable when the 90th day fell on a Saturday.

Hall-Mark Electronics Corp. v. Sims (In re Lee), 108 F.3d 239 (9th Cir. 1997). What constitutes a transfer under one subsection of § 547 does not necessarily constitute a transfer under a different subsection. In general, a transfer accomplished by means of an ordinary check takes place not on the day the check is delivered, but on the day it is honored by the payee bank. A different rule applies, however, under the "new value" exception of § 547(c)(4); the transfer occurs for purposes of § 547(c)(4) on the date when an ordinary check is delivered, not when the check is subsequently honored, *as long as the check is honored within ten days from execution*. If the check is not honored within ten days, then the transfer is made when the check is honored. In addition, the transfer of a cashier's check occurs upon delivery of the check.

Fitzgerald v. First Security Bank of Idaho (In re Walker), 77 F.3d 322 (9th Cir. 1996). In bankruptcy, what constitutes a transfer and when it is complete is a matter of federal law. Thus, the Bankruptcy Code's rule as to transfers and the relation-back of delayed perfection trumps state law. The state's relation-back provision cannot save a lien when the bank's lien was not perfected within the time prescribed under § 547(e). *See also Long v. Joe Romania Chevrolet, Inc. (In re Loken)*, 175 B.R. 56 (B.A.P. 9th Cir. 1994) (holding state law grace periods inapplicable under § 547(e)).

Hurst Concrete Products, Inc. v. Lane (In re Lane), 980 F.2d 601 (9th Cir. 1992). Under California law, the recording of a valid *lis pendens* is a transfer within the meaning of the Bankruptcy Code. Therefore, the transfer occurred at the time of recording of the *lis pendens* (outside the preference period), rather than at the time of recording of abstracts of judgment entered in the same action (within the preference period).

Grover v. Gulino (In re Gulino), 779 F.2d 546 (9th Cir. 1985). Establishing the date on which a transfer is made under § 547 requires a preliminary determination of when the transfer was perfected. Determining what is necessary to perfect a transfer of an interest in real property depends entirely on state law. Here, the transferees perfected their interest in the property by taking immediate possession of the property as their residence, which gave constructive notice of their interest to third parties. Therefore, the transfer of the property occurred at the time of purchase and possession, rather than at the time the grant deed was recorded—approximately 16 months after the sale and during the 90-day preference period.

2. Earmarking

FIRST CIRCUIT

Collins v. Greater Atlantic Mortgage Corp. (In re Lazarus), 478 F.3d 12 (1st Cir. 2007). The issue in this case was whether there was a preferential transfer under § 547(b) and, if so, whether the standard for an exception under § 547(c) was met. The mortgagee delayed in perfecting its mortgage, and thus the debt incurred by Debtor was antecedent to the "transfer" of the mortgage. The mortgagee challenged the assertion that its delay in recording its mortgage constituted a preferential transfer and relied on the "earmarking doctrine" to claim that the transfer of the mortgage ought to be viewed in substance as a transfer from the prior mortgagee, and not from Debtor. Thus, under this view, the transfer did not meet the "transfer of property of the debtor" prong of the preference test under § 547(b). The bankruptcy court refused to set aside the mortgage, reasoning that delay did not mislead any creditor because a prior mortgage remained on the books, so the property did not appear to be unencumbered. The district court affirmed, but the First Circuit disagreed. The Court observed that the classic earmarking case involves a guarantor who gives the debtor funds to pay off its creditor and the debtor does so but then files for bankruptcy shortly thereafter. In such cases, courts have viewed the funds as transferred by the guarantor to the creditor through, but not *by*, the debtor. Because the estate is no worse off than it would have been if the guarantor had advanced nothing to the debtor but paid off the debt directly, courts have not found such transfers to be preferential. The First Circuit noted that in contrast, the debtor in this case made a *new* mortgage in favor of the mortgagee. When the mortgagee paid off the prior mortgagee's loan, the prior mortgagee *released* its mortgage. This release did not transfer the old mortgage to the new mortgagee; rather, the new mortgagee's mortgage was now first in line rather than subordinate. Debtor did not act merely as a bailee, with the mortgage passing through her hands from the old mortgagee to the new mortgagee. Thus, the Court held, the earmarking doctrine did not provide the mortgagee an escape from the plain language of § 547(b). Moreover, the transfer did not qualify for the "contemporaneous exchange" exception because the transfer was accomplished outside of the 10-day limitation found in § 547(e)(2)(B).

3. Refinancings

FIFTH CIRCUIT

In re Brown, 375 B.R. 348 (Bankr. E.D. Tex. 2007). Citing *In re Ramba, Inc.*, 437 F.3d 457 (5th Cir. 2006), the court held that the refinancing of a loan will not meet the elements of a preferential transfer under § 547(b) of the Bankruptcy Code if it does not result in a diminution of the estate. If the assets of the estate are depleted and no other safe harbor is satisfied, however, the refinancing can become a preferential payment.

SIXTH CIRCUIT

Chase Manhattan Mort. Corp. v. Shapiro (In re Lee), 530 F.3d 458 (6th Cir. 2008). Six months pre-petition, Debtor refinanced the lien on his residence with the original creditor. The lien was recorded 77 days pre-petition and 72 days after the refinanced funds were used to pay the original mortgage. The chapter 7 trustee successfully avoided the transaction as a preferential transfer. The transfer was of Debtor's interest in property made on account of an antecedent debt, and the lapsed perfection of the original mortgage and late perfection of the refinanced mortgage diminished Debtor's estate. The earmarking doctrine did not protect the creditor from preference liability.

ELEVENTH CIRCUIT

Gordon v. Novastar Mortgage, Inc. (In re Hedrick), 524 F.3d 1175 (11th Cir. 2008). A lender who refinances Debtors' first mortgage outside of the 90-day preference period, but records its security interest within that 90 days, is entitled to rely on the doctrine of equitable subrogation to place perfection of its security interest outside the 90-day preference period when the original mortgages remain uncancelled.

4. Safe harbors

THIRD CIRCUIT

In re Spada, 903 F.2d 971 (3d Cir. 1990)**.** The bankruptcy court properly determined that the bank's reduction of the interest rate and agreement to forgo all but interest payments for one year were valuable considerations in a refinancing that constituted new value to the debtor in exchange for the granting of a mortgage to secure a previously unsecured debt. After reaching this conclusion, however, the court failed to establish the value of the new consideration and to compare it with the value of the security interest conveyed. Apparently the bankruptcy court concluded that once the creditor demonstrates that new value of any amount was conveyed to the debtor, the entire transfer falls within the exception under § 547(c)(1). This implicit conclusion is contrary to both the language of the statute and the policy behind the preferential transfer rule. The plain language of § 547(c)(1) expressly states that a trustee is unable to avoid a transfer "*to the extent* that such transfer was intended . . . to be a contemporaneous exchange for new value given to the debtor."

FIFTH CIRCUIT

Matter of Hailes, 77 F.3d 873 (5th Cir. 1996). Applying § 547(c)(8), the Court held that small transfers of less than $600, though made during the preferential period, are allowed. This $600 limit, however, encompasses all transfers to each individual creditor, and not just a single transaction.

SEVENTH CIRCUIT

Kleven v. Household Bank, 334 F.3d 638 (7th Cir. 2003). The chapter 7 trustee argued that lenders taking an income tax refund in payment of a refund anticipation loan were preferential transfers when the loans were made within 90 days of bankruptcy. The Seventh Circuit held that the payments were received in the ordinary course of business between Debtors and the lenders, and hence the lenders had a defense to preference liability.

NINTH CIRCUIT

Futoran v. Rush (In re Futoran), 76 F.3d 265 (9th Cir. 1996). A lump-sum payment to Debtor's ex-wife in exchange for cancellation of their marital termination agreement was a recoverable preference. Although unmatured, the husband's future spousal support obligations were antecedent debt. The court did not conduct an analysis under § 547(c)(7), as Debtor's bankruptcy case was filed prior to the addition of that subsection.

Western States Glass Corp. of Northern Cal. v. Barris (In re Bay Area Glass, Inc.), 454 B.R. 86 (B.A.P. 9th Cir. 2011). The $600 amount in § 547(c)(8) is a threshold, distinguishing transfers that may be avoided from those that may not. The recovery of a preference is not limited only to the portion of the transfer that is in excess of that threshold. (Although this case involved § 547(c)(9), the court applied cases interpreting § 547(c)(8), which had "identical" language "in all relevant respects.")

Keller v. Keller (In re Keller), 185 B.R. 796 (B.A.P. 9th Cir. 1995). The BAP reversed the bankruptcy court's conclusion that the transfer of certain proceeds from the sale of a family residence, pursuant to post-dissolution orders of the state court issued within 90 days of Debtor's bankruptcy, constituted an avoidable preference. Debtor's ultimate right to receive the initially designated one-half of net proceeds was dependent upon orders that would be issued by the state court. The estate was subject to those rights, and the bankruptcy filing could not enlarge them. Because Debtor never possessed a vested right to one-half of the net sale proceeds, adjustments made by the state court order (in part to remedy Debtor's failure to make support payments) prior to the distribution were not a transfer of "an interest of the debtor in property." The court did not conduct an analysis under § 547(c)(7), as Debtor's bankruptcy case was filed prior to the addition of that section.

ELEVENTH CIRCUIT

Miller v. Hirn (In re Raymond), 2009 Bankr. LEXIS 2053 (Bankr. N.D. Ga. June 16, 2009). The Court observed, in a footnote, that § 547(c)(8) provides a defense to a preference claim for a transfer less than $600 if the debtor is an individual with primarily consumer debts.

B. *FRAUDULENT TRANSFERS*

1. Generally

THIRD CIRCUIT

Butler v. Lomas & Nettleton Co., 862 F.2d 1015 (3d Cir. 1988). For purposes of § 548, the date of the transfer in a Pennsylvania sheriff's sale is the date of the sheriff's auction. The purchaser at a Pennsylvania sheriff's sale obtains vested equitable ownership of the property at the fall of the auctioneer's hammer. Constructive notice of this equitable interest arose through the record of the Lomas mortgage. Anyone attempting after the sale to purchase any type of rights in Debtors' property would take subject to the prior equitable interest.

FIFTH CIRCUIT

De La Pena Stettner v. Smith (In re IFS Fin. Corp.), 669 F.3d 255 (5th Cir. 2012). While the bank accounts from which transfers were made were not in Debtor's name, Debtor had the ultimate power to transfer the funds and de facto ownership of the accounts.

EIGHTH CIRCUIT

Myers v. Raynor (In re Raynor), 617 F.3d 1065 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 945 (2011). An individual chapter 11 Debtor filed for bankruptcy and a chapter 11 trustee was appointed. The trustee sued Debtor's wife to recover allegedly fraudulent prepetition transfers that Debtor had made to her. The trustee filed the complaint on the second anniversary of Debtor's petition date (the date of the order for relief). Debtor and his wife moved to dismiss the trustee's fraudulent transfer complaint on the ground that it was not timely. Both motions were denied.

The Eighth Circuit ruled that a complaint to avoid a fraudulent transfer is timely under both § 546(a) and Rule 9006(a) as long as it is not filed later than two years after a debtor's petition date—that is, the date of the order for relief). Section 546(a) provides that a fraudulent transfer action may not be commenced after two years after the entry of the order for relief (the petition date). Rule 9006(a) provides that in computing a time period specified in any statute that does not itself specify a method of computing time, the day of the event should be excluded and the last day of the period should be included. Thus, the limitations period starts to run the day after the petition date. The Court also explained that a time-computation rule like Rule 9006(a) applies only when a statute of limitations is not jurisdictional, and § 546 is not. In this case, the triggering event under Rule 9006(a) was Debtor's petition, so excluding that day and adding two years, the limitations would expire on the petition's second anniversary, and the trustee would not be able to file the action after that date. The trustee's complaint, filed on that date, was still timely.

Kaler v. Able Debt Settlement, Inc. (In re Kendall), 440 B.R. 526 (B.A.P. 8th Cir. 2010). Prepetition, Debtors contracted with a company promising debt settlement services, in exchange for a fee, so that they could avoid filing for bankruptcy. Their financial circumstances continued to deteriorate and Debtors eventually filed a chapter 7 petition. The trustee filed a complaint against the company, seeking to avoid the fee that Debtors had paid, alleging that it was a constructively fraudulent transfer and that the company's contract with Debtors was illegal under state law. The company asserted that Debtors nevertheless received reasonably equivalent value in the form of debt relief services. The bankruptcy court found that Debtors had received reasonably equivalent value.

The Eighth Circuit BAP ruled that the mere fact that a contract is void, unenforceable, or illegal does not require a finding that a debtor did not receive reasonably equivalent value for purposes of § 548(a)(1)(B), and does not preclude a finding of reasonably equivalent value. Thus, the bankruptcy court did not err when it determined that Debtors had received reasonably equivalent value from the company in the form of debt relief services, notwithstanding the contract's alleged illegality under state law.

Phongsisattanak v. Blue Heron, Inc. (In re Phongsisattanak), 353 B.R. 594 (B.A.P. 8th Cir. 2006). Individual Chapter 11 debtors filed an adversary proceeding against defendants—a company, its owner, and another person—seeking to avoid a real estate transaction involving themselves and the company. The bankruptcy court determined that the transaction was not a fraudulent conveyance under Minnesota law and Debtors appealed.

The debtors owned four parcels of property. They signed an agreement selling the properties to the company in exchange for a cash payment and a contract for deed. The company later assigned the contract for deed to a third party. The third party and Debtors then entered into their own written agreement pertaining to the properties. Debtors thereafter filed the adversary proceeding, seeking to avoid the original transaction with the company. The district court held that the transaction was not a fraudulent conveyance under Minnesota law because Debtors were not insolvent at the time of the transaction and they were not made insolvent as a result of the transaction.

The BAP held that the district court's solvency finding was not clearly erroneous. Under Minnesota law, there cannot be a fraudulent conveyance unless the debtors were insolvent at the time of the transaction or were made insolvent by the transaction. Neither condition existed in Debtors' case. The evidence showed that, Even though Debtors were less well off after the transaction, the evidence showed that they had a positive equity position both before and after the challenged transaction. The BAP affirmed the bankruptcy court's decision.

Stalnaker v. DLC, Ltd. (In re DLC, Ltd.), 295 B.R. 593 (B.A.P. 8th Cir. 2003). Appellant chapter 7 debtor and a non-debtor trust challenged an order of the bankruptcy court allowing the appellee trustee to avoid certain fraudulent transfers and to recover a portion of transferred property.

A previous lien foreclosure action involving Debtor and the non-debtor trust did not preclude the trustee from bringing the § 544(b) action because the trustee was neither a party to that litigation nor in privity with any pre-petition party thereto. Moreover, the trustee was allowed to use the creditor that brought that litigation as an eligible unsecured creditor because a settlement with Debtor was not the same as a fraudulent transfer avoidance action against the non-debtor trust. The fact that the claims of eligible unsecured creditors had either been satisfied or withdrawn at the time of trial did not affect the trustee's case because their existence was established at the time of trial. Thus, the trustee took over their rights. The trustee was allowed to recover the entire fraudulent transfer under § 550(a). The orders were affirmed.

Halverson v. Funaro (In re Funaro), 263 B.R. 892 (B.A.P. 8th Cir. 2001). The chapter 7 trustee appealed from the bankruptcy court's judgment in favor of defendant, who was the president of Debtor Subchapter S corporation, in a fraudulent conveyance action. Defendant, an insurance agent and owner of the corporation, had assigned his commissions to the corporation. After filing chapter 13, he reassigned the commissions to him. Then, the corporation filed chapter 7. The chapter 7 trustee sought to avoid only the transfer of the right to receive renewal commissions paid pre-petition. The BAP found that if the corporation held the right to those commissions, transfer of that right could constitute a fraudulent conveyance. But the trustee failed to prove what portion of the commissions earned and assigned by contract to the corporation were earned during the period in question. The BAP affirmed the decision of the bankruptcy court.

Williams v. Marlar (In re Marlar), 252 B.R. 743 (B.A.P. 8th Cir. 2000). Debtor deeded farm property to his son for a consideration of ten dollars with love and admiration. The deed was not recorded until nine years later, during Debtor's contested divorce. Following the divorce, Debtor's former spouse sued in state court to set aside the transfer of farm property. The state court ruled against her, finding that the property was transferred while Debtor was a single person, that the consideration was sufficient, that the deed had been delivered, and that there was no evidence the transfer was intended to defraud Debtor's creditors. An involuntary chapter 7 petition was then filed against Debtor with his former spouse as a petitioning creditor. The chapter 7 trustee brought an adversary proceeding alleging a pre-petition fraudulent transfer in violation of § 544 and the Arkansas Fraudulent Transfer Act, Ark. Code Ann. § 4-59-204(a)(1), 204(a)(2). The bankruptcy court granted summary judgment to the trustee and ordered Debtor's transferee to turn over certain farm property to the trustee. The BAP affirmed, holding that the consideration given for the farm property did not constitute reasonably equivalent value under the Arkansas Fraudulent Transfer Act.

LaBarge v. Benda (In re Merrifield), 214 B.R. 362 (B.A.P. 8th Cir. 1999). After Debtor filed her chapter 13 case, she filed a complaint against a third party, alleging that her pre-petition transfer of a condominium unit to him was for less than reasonably equivalent value under § 548(a)(2). The trustee joined the proceeding as a plaintiff. At trial, the bankruptcy court found that the transfer was for reasonably equivalent value and entered judgment for the defendant-transferee. The debtor appealed but the trustee did not. The BAP determined that the statutory language of § 548 expressly confers avoidance powers exclusively on the trustee, not the debtor. Thus, Debtor lacked standing to bring the avoidance action and to appeal the bankruptcy court's decision.

2. Mortgage Foreclosures

UNITED STATES SUPREME COURT

BFP v. Resolution Trust Corp., 511 U.S. 531 (1994). Three individuals formed BFP, a partnership, for the purpose of buying a home. BFP took title subject to a deed of trust in favor of Imperial Savings, which repossessed upon BFP's default. The home was sold at a properly-conducted foreclosure sale for $433,000. Shortly thereafter, BFP filed chapter 11 and, acting as debtor-in-possession, sought to set aside the sale as a fraudulent transfer on the grounds that the home was sold for less than reasonably equivalent value because it was then worth over $725,000. The bankruptcy court granted summary judgment to Imperial. The BAP affirmed, as did the Ninth Circuit.

The Supreme Court held that "reasonably equivalent value" for real property is the price received at a regularly-conducted—*i.e.*, non-collusive, non-fraudulent—foreclosure sale. "Fair market value" is not the appropriate measure because it presumes market conditions that, by definition, do not obtain in the context of a forced sale. To specify a federal minimum sale price above what state foreclosure law requires would disturb the peaceful coexistence that fraudulent transfer law and foreclosure law have enjoyed for over 400 years.

THIRD CIRCUIT

Knapper v. Bankers Trust Co. (In re Knapper), 407 F.3d 573, 583 (3d Cir. 2005). The Court held that a sheriff's sale pursuant to an order of court on a mortgage debt cannot constitute a fraudulent transfer in violation of § 544(b). The Court did not explain its conclusion, but presumably it was an extension of the holding of *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994).

SIXTH CIRCUIT

In re Winshall Settlor's Trust, 758 F.2d. 1136 (6th Cir. 1985). Appellant trust, which operated a garage, obtained a mortgage loan from a bank to pay off other mortgages and to renovate the structure. The trust contracted for sale of the garage and, after the vendee defaulted, the trust defaulted in turn on the mortgage payments. Following the bank's foreclosure, the trust filed chapter 11 allegedly for the sole purpose of setting aside the foreclosure as a voidable transfer under § 548(a)(2)(A). The Sixth Circuit ruled that the consideration received at a non-collusive, regularly-conducted real estate foreclosure sale equates to reasonably equivalent value under § 548(a)(2)(A). The Sixth Circuit held that the trust qualified as a debtor under § 109(b). Chapter 11 was not intended to be available to entities without assets or business operations to protect.

SEVENTH CIRCUIT

Smith v. SIPI, LLC, 614 F.3d 654 (7th Cir. 2010). Under Illinois law, a tax purchaser's interest in a tax deed is not perfected against a bona fide purchaser for value until it is recorded. Because the recordation in this case occurred in the two-year look-back for a fraudulent transfer, Debtors properly pleaded the time element of their claim.

EIGHTH CIRCUIT

Sullivan v. Welsh (In re Lumbar), 457 B.R. 748 (B.A.P. 8th Cir. 2011). The bankruptcy trustee brought an adversary proceeding against transferees of real property from a debtor, seeking to avoid the transfer as constructively fraudulent under § 548. The bankruptcy court granted summary judgment in favor of the transferees, finding that the debtor's exempt homestead property was not capable of being fraudulently transferred under state law, and that the same rationale precluded the transfer from being fraudulent under bankruptcy law. On the trustee's appeal, the BAP held that state law determines the nature of a debtor's interest in property, but it does not determine whether a transfer of that interest is fraudulent under § 548. Thus, the bankruptcy court erred by failing to analyze the transfer of Debtor's property under the elements of § 548.

The court directed that, if the trustee recovered the property on fraudulent transfer grounds, Debtor could not claim the homestead exemption since Debtor voluntarily transferred the property; nor could the transferees claim the exemption, which was personal to the debtor. Thus, the order granting summary judgment in favor of the transferees was reversed, and the case was remanded for further findings.

Montgomery v. Dennis Joslin Co. II, LLC (In re Montgomery), 262 B.R. 772 (B.A.P. 8th Cir. 2001). Creditor held an interest in Debtor's homestead under a deed of trust to secure repayment of a debt. After Debtor defaulted, the creditor commenced foreclosure proceedings under state law. The creditor's bid-in for the outstanding amount of the debt was accepted and a deed was executed in the creditor's favor. Less than two hours later, Debtor filed a petition for relief under chapter 13. The creditor objected to confirmation of the plan and moved for relief from the automatic stay, asserting that it was the owner of the property pursuant to the trustee's sale. Debtor appealed from the order granting relief from the stay, arguing she was not allowed to present a fraudulent transfer theory as a defense to the creditor's motion for relief from the stay. The court found that the relief from stay hearing was not intended for a full airing of Debtor's fraudulent transfer argument. Debtor could commence an action in state court or possibly stand in the trustee's shoes in an adversary proceeding. The BAP affirmed the judgment of the bankruptcy court.

NINTH CIRCUIT

Lindsay v. Beneficial Reinsurance Company (In re Lindsay), 59 F.3d 942 (9th Cir. 1995), *cert. denied*, 516 U.S. 1074 (1996). Gross inadequacy of price is a ground for setting aside a foreclosure sale under *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994), if applicable state law so provides, but it is not a federal standard independent of state law enabling a bankruptcy court to set aside a foreclosure sale. Likewise, commercial reasonableness is a ground only if it is a state ground.

Washington Mutual v. Fritz (In re Fritz), 225 B.R. 218 (E.D. Wash. 1998). A debtor attacking a foreclosure sale as a fraudulent conveyance under § 548 bears the burden of persuasion as to whether the foreclosing party complied with state law foreclosure requirements.

3. Safe Harbor for Charitable Contributions

FIFTH CIRCUIT

American Cancer Soc. v. Cook, 675 F.3d 524 (5th Cir. 2012). A charitable organization does not have to disgorge received funds if the donations were not given as a part of any fraudulent scheme. If the entity giving money to a charitable organization obtained that money through a fraudulent scheme, however, the organization may be required to return the funds.

NINTH CIRCUIT

Drummond v. Cavanagh (In re Cavanagh), 250 B.R. 107 (B.A.P. 9th Cir. 2000). A charitable contribution in an amended plan was reasonably necessary for the maintenance and support of Debtors and their dependents under § 1325(b)(2)(A), even though Debtors had not made charitable contributions pre-petition. The Religious Liberty and Charitable Donation Protection Act of 1998 unequivocally established the priority of charitable contributions. The interests of creditors are subordinate to the interests of charitable organizations.

The court also discussed, *inter alia*, § 548's specific exclusion of charitable contributions as fraudulent transfers, when the sum of the transfers does not exceed 15% of the debtor's gross annual income, or if the sum exceeds fifteen percent, whether the transfers are consistent with past practices.

Wolkowitz v. Breath of Life Seventh Day Adventist Church (In re Lewis), 401 B.R. 431 (Bankr. C.D. Cal. 2009). When a debtor has a sole proprietorship business, the "gross annual income" of the debtor, for purposes of charitable contributions in § 548(a)(2), is the business' gross receipts, without subtracting the cost of goods or operating expenses.

TENTH CIRCUIT

Wadsworth v. Word of Life Christian Center (In re McGough), 467 B.R. 220 (B.A.P. 10th Cir. 2012). Debtors' chapter 7 trustee initiated an adversary proceeding seeking to avoid as fraudulent transfers all charitable donations Debtors had made to a certain church within two years of Debtors' petition date. The church admitted its receipt of the donations, but asserted a safe harbor defense under § 548(a)(2). The trustee argued that, because the contributions exceeded 15% of Debtors' gross annual income in each year, the total amount of the contributions made to the church were avoidable and should be recovered for the benefit of the estate. The church argued that none of the contributions could be avoided because no individual contribution exceeded the 15% maximum or, alternatively, if contributions must be viewed in the aggregate on an annual basis, then only that portion of the total contributions that exceeded 15% of the Debtors' gross annual income could be avoided. The bankruptcy court determined that the portion of Debtors' annual contribution, viewed in the aggregate, that exceeded 15% of Debtors' gross annual income was avoidable.

The Tenth Circuit BAP ruled that § 548(a)(2)(A) protects charitable donations up to 15% of a debtor's gross annual income and allows a trustee to avoid only that portion of the debtor's charitable contributions that exceeded the 15% threshold in the relevant year. Importantly, § 548 does not allow a trustee to avoid all charitable donations if the total of the donations exceeded the threshold. The court concluded that inclusion of the phrase "up to" in the statute should be read to mean that a debtor's contributions are protected from avoidance up to the threshold amount, and not that all protection disappears once the threshold is crossed,. The court also acknowledged that as a matter of statutory construction, § 548(a)(2)(A) is susceptible to different interpretations, and looked to its legislative history for clarification. The court thought it doubtful that Congress would protect debtors' right to donate 15% of their gross annual income to a charitable organization, but allow a trustee to avoid all donations if one cent over the 15% threshold were donated. Accordingly, the BAP affirmed that bankruptcy court's ruling allowing for avoidance by the trustee of only the amount of Debtors' donations in excess of the 15% statutory cap.

4. Miscellaneous

SEVENTH CIRCUIT

Issue Preclusion

In re Jones, 226 F.3d 917 (7th Cir. 2000). Because a chapter 7 trustee is not a party to a prebankruptcy foreclosure action, issue preclusion does not prevent the trustee from successfully relitigating the validity of a mortgage in a preference action seeking to recover the proceeds from a foreclosure sale.

NINTH CIRCUIT

Marriage Property Settlement Agreements

Batlan v. Bledsoe (In re Bledsoe), 569 F.3d 1106 (9th Cir. 2009). A state court's dissolution judgment, following a regularly conducted contested proceeding, conclusively establishes "reasonably equivalent value" for the purpose of § 548, in the absence of actual fraud. The Court distinguished this situation from cases involving a marital settlement agreement rather than a judgment following a contested proceeding.

Wolkowitz v. Beverly (In re Beverly), 374 B.R. 221 (B.A.P. 9th Cir. 2007), *aff'd in part, adopting BAP opinion*, *Beverly v. Wolkowitz (In re Beverly),* 551 F.3d 1092 (9th Cir. 2008). Debtor's transfer through a marital settlement agreement of an interest in $1 million in non-exempt cash and other assets, in exchange for the community property interest worth $1.1 million in an exempt pension plan, was avoidable as an actually fraudulent transfer under California's Uniform Fraudulent Transfer Act ("UFTA"), as incorporated by § 544(b). Under California law, a transfer accomplished through a marital settlement agreement can be avoided as a fraudulent transfer pursuant to UFTA.

Sigurdson v. Ray (In re Roosevelt), 220 F.3d 1032 (9th Cir. 2000). Although Debtor's ex-wife was a good faith transferee under § 548(c), Debtor's transfer to her through a marital settlement agreement was avoidable as a fraudulent transfer if she gave no value in exchange.

C. *STRONG ARM*

THIRD CIRCUIT

Midlantic Nat'l Bank v. Bridge (In re Bridge), 18 F.3d 195 (3d Cir. 1994). When a bank satisfies a prior mortgage during a refinancing transaction and does not record a new mortgage, the trustee's power as a hypothetical bona fide purchaser for value overcomes any equitable lien or subrogation rights that the bank might have, because under New Jersey state law a bona fide purchaser prevails over such rights.

Graffen v. Philadelphia, 984 F.2d 91, 93 (3d Cir. 1992). When Debtors filed their chapter 13 petition the City's lien was on file in a book in Room 262 labeled "Water/Sewer In Rem Judgment Index" and a sign in Room 268, where the judgment index is kept, referred searchers to that index for water liens. These changes remedied the problem in *McLean*, *supra* and the liens could not be avoided. Nothing in Pennsylvania law requires the Prothonotary to integrate the various indices comprising the judgment index. The lien was not a judicial lien. Even if the docketing was required for the lien to be enforced, that was a condition for creation of the lien and not a judicial proceeding.

McLean v. Philadelphia, Water Revenue Bureau, 891 F.2d 474 (3d Cir. 1989). When city water liens were not recorded in either the judgment index or the locality index maintained by the Prothonotary, they were not indexed "in the judgment index" as required by state law and could be avoided under § 544(a)(3). Recording the liens in separate water lien books did not satisfy this requirement because recording the liens in that fashion would not defeat the rights of a bona fide purchaser under Pennsylvania law.

FOURTH CIRCUIT

SunTrust Bank, N.A. v. Macky (In re McCormick), 669 F.3d 177 (4th Cir. 2012). Prepetition, Debtors owned adjoining tracts of land for which deeds were properly recorded in the official recording index using a parcel identifier number (PIN) for each property. Debtors then obtained a loan from a lender and secured it with a deed of trust to both tracts. The deed of trust that was submitted for recordation, however, only contained the PIN to Tract II and, accordingly, was only recorded in the official index against Tract II, but the deed was recorded against both tracts in the unofficial grantor/grantee index. Debtors later obtained another loan and secured it with a deed of trust to Tract I, which was properly recorded in the official index. Thereafter, an involuntary chapter 7 petition was filed against Debtors and a trustee was appointed. The trustee sought to avoid the lender's lien on Tract I because it had not been properly recorded in the official index.

The Fourth Circuit ruled that under § 544, a trustee is imputed only with the knowledge imputable to a bona fide purchaser, without regard to any knowledge the trustee has in his capacity as the debtor's bankruptcy trustee. Here, a bona fide purchaser of Tract I would have found that no lien was recorded against Tract I in the official index, and would have had no reason to examine the title to Tract II. The trustee, like a bona fide purchaser, may rely exclusively on the official index to discover recorded liens. Accordingly, the trustee may avoid any liens that are not properly recorded in the official index of the relevant county, regardless of any other independent knowledge.

Schlossberg v. Barney, 380 F.3d 174 (4th Cir. 2004). Chapter 7 trustee objected to Debtor's exemption of entireties property owned with his non-debtor spouse. The trustee attempted to use the Internal Revenue Service's ability to attach liens to entireties property for taxes owed by an individual spouse in the Supreme Court case of *United States v. Craft*, 535 U.S. 274 (2002), as a basis and ability to object to exemptions through § 544. The trustee argued that because the IRS could reach the entireties property as it did in *Craft*, he could, as a hypothetical creditor standing in the shoes of the IRS on the petition date, similarly reach the entireties property. Every other court examining the applicability of *Craft* to a bankruptcy trustee had rejected this argument in various contexts. The Fourth Circuit similarly rejected the argument on the basis that the IRS is not a "creditor who extends credit" in whose shoes the trustee can stand for purposes of the strong-arm clause. First, tax liabilities are not debts for a good or service the government entrusts to a taxpayer pending repayment. Second, the Bankruptcy Code distinguishes the IRS as an involuntary creditor, apart from other voluntary creditors of the debtor. Finally, such a reading of the role of the IRS, and the subsequent ability of a trustee to stand in its shoes and avoid liens or object to exemptions, would allow a bankruptcy trustee to "wield extraordinary collection powers" reserved for the federal government.

NINTH CIRCUIT

Chase Manhattan Bank, USA, N.A. v. Taxel (In re Deuel), 594 F.3d 1073 (9th Cir.), *cert. denied*, 131 S. Ct. 85 (2010). Prepetition, Debtor refinanced her home three times, the last two with the same lender. The last deed of trust was not properly recorded, but the previous two deeds were, along with the discharge of the second lien. Thus, a review of county records would have shown that the mortgage was paid off. When Debtor filed her chapter 7 petition, the lender filed a complaint to quiet title to its lien on the grounds that Debtor's schedules provided constructive notice to the chapter 7 trustee of its unrecorded lien or, alternatively, that the lender was subrogated to its own previously recorded lien that was paid off by the third loan.

The Ninth Circuit ruled that a bankruptcy trustee may avoid an unrecorded lien. A trustee has the power to avoid any transfer that a hypothetical bona fide purchaser for value could have avoided under applicable state law as of the petition date. A debtor's schedules filed with the petition do not give the trustee any notice and thus do not hinder the strong arm powers, which exist without regard to any knowledge of the trustee. State law controls whether the trustee's status as a bona fide purchaser for value without notice defeats the rights of the person against whom the trustee seeks to assert the avoidance powers. Here, California law provides that recording a conveyance provides constructive notice and, because the lender failed to record its lien, the lien was void as to the trustee, who took the property on the petition date without notice as a subsequent good-faith purchaser for value. The lender's lien was thus avoidable. The Court did, however, note in *dicta* that an involuntary petition giving notice of an interest may provide the requisite notice to the trustee; thus, such an interest may not be avoidable. With respect to equitable subrogation, the Court ruled that a junior lienor who pays off a senior lien may be subrogated to the senior lienor's position against other creditors. Here, however, equitable subordination did not help the lender. A creditor whose debt the lender paid off itself has no lien, having discharged it by a recorded deed of reconveyance, and a lien may not be revived if revival would prejudice senior or equal equities. Here, the trustee's rights would be prejudiced. Moreover, California law gives priority to a bona fide purchaser (the trustee) over one with an inchoate lien claiming equitable subrogation (the lender).

ELEVENTH CIRCUIT

Old West Annuity & Life Ins. Co. v Apollo Group, 605 F.3d 856 (11th Cir. 2010). The IRS could not use the trustee's "strong arm" power to prime a lienholder's interest in the proceeds of property of the bankruptcy estate because the lienholder's interest was granted post-petition; § 544 applies only to interests granted pre-petition.

Gordon v Terrace Mortg. Co. (In re Hong Ju Kim), 571 F.3d 1342, (11th Cir. 2009). The bankruptcy trustee could not avoid a lien under § 544(a), even though the security deed may have been defective under Georgia law due to the lack of a notary seal, because an affidavit accompanying the deed substantially complied with the remedial provisions of O.C.G.A. § 44-2-18.

Kapila v Atlantic Mortg. & Inv. Corp. (In re Halabi), 184 F.3d 1335 (11th Cir. 1999). Chapter 7 Debtor mortgaged his real property prepetition and the mortgage and note were subsequently assigned multiple times. The trustee sought to avoid a post-petition assignment of the note and mortgage. The Court held, however, that an assignment of a mortgage that had already been assigned and perfected prepetition does not involve a transfer of the debtor's interest in real property. Therefore, because there was no transfer of property of estate, there could be no avoidance under § 544.

Henry Lee Co. v Tolz, 157 F.3d 1290 (11th Cir. 1998). The chapter 7 trustee was entitled to recover funds that had been in Debtor's bank account but were garnished by a judgment creditor within ninety days prior to Debtor's filing bankruptcy because the judgment creditor had not taken possession of the money as was required by Florida law to perfect its security interest. In the absence of perfection, the trustee's interest pursuant to § 544 was superior.

In re Davis, 785 F.2d 926 (11th Cir. 1986). The district court dismissed a chapter 7 trustee's strong-arm action against the Farmer's Home Administration, which the trustee had brought on the basis that Debtor had defrauded the FHA in obtaining a loan by giving false collateral. The Eleventh Circuit reversed, holding that the trustee is not imputed with Debtor's fraud under § 544 and instead may pursue the estate's claims for the benefit of creditors.

Wells Fargo Bank. N.A. v. Gordon, 2013 Ga. LEXIS 158 (Feb 18, 2013). Answering a certified question from the Eleventh Circuit Court of Appeals, the Supreme Court of Georgia held that a defective security deed that lacks an unofficial witness is not "duly filed, recorded, and indexed" when the security deed incorporates the covenants, terms, and provisions of a rider containing the requisite attestations. Therefore, a hypothetical bona fide purchaser would not be on constructive notice of the security deed. The hypothetical bona fide purchaser would also not be on inquiry notice of the security deed.

U.S. Bank Nat'l Ass'n v. Gordon, 289 Ga. 12 (2011). Answering a certified question from the District Court for the Northern District of Georgia, the Supreme Court of Georgia held that when the face of a security deed shows it not to be in recordable form, the security deed is not "duly filed, recorded, and indexed" such that it provides constructive notice to a hypothetical bona fide purchaser.

D. *RECOVERY UNDER § 550*

TENTH CIRCUIT

Rodriguez v. Drive Financial Servs., LP (In re Trout), 609 F.3d 1106 (10th Cir. 2010). Prepetition, Debtors in two separate bankruptcy cases each purchased a vehicle with borrowed funds and each lender perfected its lien on the vehicle within the preference period. Post-petition, each trustee filed an adversary proceeding to avoid the lien under § 547, recover the value of the lien under § 550(a), preserve the lien for the value of the estate under § 551, and recover prepetition loan payments under § 547. The trustees and lenders settled the claims for prepetition payments, after which the bankruptcy court and the BAP both concluded that the trustees could avoid each lien and preserve it for the benefit of the estate, but they were not entitled to recover the value of the lien.

Under § 550(a), a trustee who successfully avoids a transfer may recover "the property, or if the court so orders, the value of the property transferred." The default rule, therefore, is that a trustee may recover the property itself, whereas a monetary recovery for the value of the transferred property is a more unusual remedy to be used only in the court's discretion. Bankruptcy courts have consistently held that § 550 is designed to restore the estate to the financial condition that would have existed had the transfer never occurred. The fact that an asset is depreciating does not entitle the trustee to a monetary recovery for the original value of the lien on that asset because the Bankruptcy Code does not guarantee that recovered assets will be worth what they were at any relevant valuation date; rather, the Code only ensures that the estate will be put back in the same place as if the transfer had not occurred. The Court explained that the collateral may have devalued over time, but that would have happened even if the debtor had never transferred the security interest to the creditor. Here, the trustees avoided the liens and thereby preserved them for the estate. Lien avoidance was sufficient to put the bankruptcy estate back in its pre-transfer position: because the lien was transferred, the estate had a depreciating asset and an obligation to an unsecured creditor; after the lien was avoided, the estate again had a depreciating asset and an obligation to an unsecured creditor. The Court found that the trustees gave no compelling reason to deviate from the default rule of returning the transferred property itself.

In re Bremer, 408 B.R. 355 (B.A.P. 10th Cir. 2009). When the chapter 7 trustee's avoidance of the creditors' untimely perfected liens on debtors' motor vehicles as preferences automatically preserved the liens for the benefit of the estates, the bankruptcy court did not abuse its discretion in determining that the trustee's preservation and recovery of the liens sufficed to place the estates in their pre-transfer positions and that the trustee was not also entitled to recover money judgments against the creditors for the value of the avoided liens. §§ 550(a), 551. If a bankruptcy court grants the trustee relief under § 550(a), the court may either allow recovery of the transferred property or, "if the court so orders," its value. While preservation and recovery of avoided transfers are distinct remedies covered in two different sections of the Bankruptcy Code, they serve the same purpose of placing the estate in the position it would have been in had the avoided transfer not been made. §§ 546(a), 550(f). When avoidance and preservation of a transfer are sufficient to place the estate in its pre-transfer position, a bankruptcy trustee may not seek, and a bankruptcy court may not grant, recovery of the property transferred.

In re Hansen, 332 B.R. (B.A.P. 10th Cir. 2005). Chapter 13 Debtors brought a strong-arm proceeding to avoid the lien on their mobile home, asserting that the lien was not properly perfected on the petition date. The bankruptcy court refused to avoid the lien, holding that a chapter 13 debtor lacks standing to exercise the trustee's strong arm powers under § 544. The court noted that the question of chapter 13 debtors' standing under § 544(a) has not been squarely addressed by the Tenth Circuit and that courts in other jurisdictions are split, with most holding that the debtor cannot use the trustee's avoiding powers. Relying upon the clear and express language in the statutory avoiding powers and limiting their enforcement to trustees, many courts have followed the Supreme Court's analysis in *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 230 U.S. 1 (2000) In *Hartford Underwriters*, a creditor that had provided insurance to the debtor-in-possession sought under § 506(c) to surcharge a secured creditor's collateral to cover unpaid premiums. Section § 506(c) refers to "the trustee," and the Supreme Court determined that only the trustee could surcharge under § 506(c)'s express terms. Section 544(a), like § 506(c), also refers to "the trustee."

ELEVENTH CIRCUIT

Martinez v. Hutton (In re Harwell), 628 F.3d 1312 (11th Cir. 2010). Prepetition, a plaintiff obtained a state court judgment against Debtor and sought to domesticate the judgment in another state where Debtor owned interests in two businesses. Debtor engaged counsel to represent him in the domestication dispute. Separately, Debtor negotiated settlements with the two businesses in exchange for his interests. Debtor and counsel arranged to have the settlement amounts deposited into counsel's trust account. Before Debtor filed his chapter 7 petition, counsel distributed Debtor's funds from the trust account to Debtor, Debtor's family members, and certain select creditors of Debtor. During Debtor's bankruptcy case, the chapter 7 trustee filed an adversary proceeding against Debtor's counsel, seeking to avoid and recover as fraudulent transfers, pursuant to §§ 548 and 550, the funds that counsel transferred from his trust fund on Debtor's behalf. Counsel argued that he was not an "initial transferee" within the meaning of § 550(a)(1) because he never had dominion and control over the money he kept in his trust account for Debtor. The bankruptcy court agreed and the trustee appealed.

The Eleventh Circuit ruled that initial recipients of a debtor's fraudulently transferred funds who seek to take advantage of equitable exceptions to § 550(a)(1) must establish both that they did not have control over the assets received because they were mere conduits for assets that were under the actual control of the debtor-transferor, and that they acted in good faith and as an innocent participant in the fraudulent transfer. Under § 548, a trustee may avoid any transfer of a debtor's interest in property, made within two years of the filing, with actual intent to hinder, delay, or defraud the debtor's creditors. To the extent that a transfer is avoided under § 548, § 550(a)(1) allows the trustee to recover the property transferred or, if the court so orders, the value of the property from, among others, the initial transferee of such transfer. Under a literal or rigid interpretation of § 550(a), the "initial transferee" is the first recipient of the debtor's fraudulently transferred funds. The Court, however, had previously carved out an equitable exception for initial recipients who are "mere conduits" with no control over the fraudulently transferred funds. Equitable considerations play a major role in the Court's "mere conduit or control test"—it would be inequitable to hold an initial recipient of the debtor's fraudulently transferred funds liable when that recipient cannot ascertain the transferor-debtor's solvency, lacked any control over the funds, or lacked knowledge of the source of the funds. This exception, therefore, allows a court to temper the literal application of § 550(a)(1) by examining all the facts and circumstances surrounding a transaction to prevent recovery from a transferee who is innocent of wrongdoing and deserving of protection. The Court emphasized, however, that good faith is a requirement for application of the" mere conduit or control" test. Parties seeking protection under this equitable exception bears the burden of proof and must establish that (1) they did not have control over the assets received, and (2) they acted in good faith and as an innocent participant to the fraudulent transfer. The Court concluded here, based upon the bankruptcy court's assumption that Debtor's counsel had masterminded Debtor's fraudulent transfer scheme, that counsel had not acted in good faith was not protected by the equitable exception to the "initial transferee" definition under § 550(a)(1).

E. *MISCELLANEOUS*

THIRD CIRCUIT

Post-petition transfers

In re Ward, 837 F.2d 124, 127 (3d Cir. 1988). A creditor that purchased Debtor's property at a post-petition foreclosure sale did not fall within the exception for good faith purchaser under § 549(c). Under the applicable law of New Jersey, a deed to real estate is void and of no effect against subsequent purchasers until duly recorded in the county in which the property is situated. Therefore, the creditor did not meet the requirement in § 549(c) that the transfer be perfected so that a bona fide purchaser could not acquire superior title. The Court also held that the sale was void because it violated the automatic stay.

Lee v. Schweiker, 739 F.2d 870 (3d Cir. 1984) The right of the Social Security Administration (SSA) to recover prepetition debts should be subject to the limitations on setoff, just as it is limited by the provisions for exemption and discharge, rather than treated as part of a "contract" between the government and the debtor. Accordingly, the SSA may not recoup previous overpayments from benefits payable after a bankruptcy petition is filed. All of the monthly benefits that came due before the filing of the petition should be considered obligations of the SSA to the beneficiary 90 days before the petition was filed, for purposes of applying the "improvement in position" test, even though they were not yet payable. If all of these benefits are considered, there has not been an improvement in position. Accordingly, the SSA did not have to return amounts recouped from Debtor's benefits prepetition.

Setoff

Dollar Bank, FSB v. Tarbuck (In re Tarbuck), 318 B.R. 78 (Bankr. W.D. Pa. 2004). A debtor's right to exemption of funds in his bank account is superior to the bank's right to setoff under § 553.

SIXTH CIRCUIT

Standing

Dickson v. Countrywide Home Loans (In re Dickson), 655 F.3d 585 (6th Cir. 2011). Debtor in a chapter 13 case has standing to bring an action to avoid as preferential an involuntary transfer resulting from a state court default judgment entered within the 90-day preference period.

EIGHTH CIRCUIT

Terry v. Standard Insurance Co. (In re Terry), 443 B.R. 816 (B.A.P. 8th Cir. 2011). Prepetition, Debtor began receiving monthly disability benefits from an insurer based on his long-term disability policy. Two years later, Debtor was awarded Social Security disability benefits and a retroactive payment in the amount of $45,316.54. The disability policy provided that Debtor's insurance benefits would be reduced by any Social Security payments he received and that the insurer would be entitled to reimbursement from Debtor's future benefits for prior "overpayments." After the insurer determined that it had a right to Debtor's retroactive payment, Debtor paid the total amount, and then filed his chapter 7 petition. The insurer did not file a proof of claim in Debtor's case. After Debtor received a discharge, the chapter 7 trustee sent a preference demand to the insurer for the full amount of the retroactive payment. The insurer turned over the payment to the trustee and then reinstated Debtor's obligations for the overpayment by deducting it from Debtor's post-petition benefits. Debtor filed an adversary complaint for declaration of the parties' respective rights with respect to the disability payments. The bankruptcy court held, under § 502(h), that the insurer was not entitled to recoupment.

The Eighth Circuit BAP ruled that a creditor's equitable defense of recoupment survives even if its claim was not allowed and was discharged. Recoupment entitles a creditor to defend against demands by a debtor on account of a transaction with the creditor. But, in order for recoupment to be permitted in bankruptcy cases, both debts must arise out of a single integrated transaction so that it would be inequitable for the debtor to enjoy the benefits of that transaction without also meeting its obligations. Here, because the insurer had not filed any claims in Debtor's case, it was not entitled to a distribution and whatever claim it had was discharged. Thus, the insurer had no right to assert any affirmative actions against Debtor to collect the overpayment. Nevertheless, the insurer could use recoupment to withhold payments due to Debtor under the policy as a means to reimburse itself for the overpayment to Debtor, given that the insurer's obligations and its right to reimbursement both arose out of the same policy with Debtor. The Court noted, however, that the right of recoupment is not absolute; because it is an equitable defense, the equities must be weighed and recoupment should be narrowly construed in bankruptcy. Contrary to Debtor's assertions,

§ 502(h) did not limit the insurer to a claim against the estate or eliminate the insurer's rights against Debtor. This provision just assumes the existence of a prepetition claim and instructs the court on how the claim is to be allowed in the case; it does not create claims, confer priority, or limit a creditor's rights to recovery and its defenses.

Janssen v. United States (In re Janssen), 213 B.R. 558 (B.A.P. 8th Cir. 1999). The IRS appealed from a bankruptcy court judgment in favor of Debtors, permitting avoidance of an IRS tax lien pursuant to § 545(2). The BAP reversed.

Years prior to the bankruptcy, Debtors transferred their interest in several pieces of property to a corporation in exchange for stock in the corporation. In 1987, the IRS filed a notice of federal tax lien against Debtors in the amount of $245,725.38. In 1993, Debtors filed an individual chapter 11 bankruptcy and sought to avoid liens the IRS claimed on certain securities owned by the Debtors.

Section 545(2) grants the bankruptcy trustee the power to "avoid the fixing of a statutory lien on property of the debtor to the extent that such lien . . . is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such purchaser exists." In addition, Internal Revenue Code § 6323(b)(1)(A) provides that, "even though notice of a lien has been filed, such lien shall not be valid . . . with respect to a security . . . as against a purchaser of such security who at the time of the purchase did not have actual notice or knowledge of the existence of such lien." Thus, a "purchaser is empowered under Internal Revenue Code § 6323 to avoid the fixing of a lien on securities."

ELEVENTH CIRCUIT

Post-petition Transfers

Pugh v Brook (In re Pugh)**,** 158 F.3d 530 (11th Cir. 1998). The Eleventh Circuit held that the time limitation period set forth in § 549(d) (as well as in § 546(a)) is not jurisdictional, but rather only a statute of limitations. Thus, the time limitation can be waived by parties.

Kapila v Atlantic Mortg. & Inv. Corp. (In re Halabi), 184 F.3d 1335 (11th Cir. 1999). Chapter 7 debtor mortgaged his real property prepetition, and the mortgage and note were subsequently assigned multiple times. The trustee sought to avoid a post-petition assignment of the note and mortgage. The Court held, however, that an assignment of a mortgage that was perfected prepetition does not involve the transfer of the debtor's interest in real property. Because there was no transfer of property of estate, there could be no avoidance under § 549.

In re McDonald, 210 B.R. 648 (Bankr. S.D. Fla. 1997). The bankruptcy court extended the Supreme Court's rationale in *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994)—that a foreclosure sale held in accordance with state law results in a purchase price that is "reasonably equivalent value"—to the context of § 549. Thus, the bankruptcy court concluded that a purchaser at a post-petition foreclosure sale satisfied the "present equivalent value" standard of § 549.

In re Ford, 296 B.R. 537 (Bankr. N.D. Ga. 2003). The bankruptcy court concluded that the standards in §§ 548 and 549 ("fair equivalent value" versus "present equivalent value") are different and, as a result, that the purchase price at a regularly conducted foreclosure does not necessarily satisfy the "present equivalent value" standard of § 549.

XVII. EXECUTORY CONTRACTS AND UNEXPIRED LEASES

A. *ASSUMPTION OF RESIDENTIAL REAL PROPERTY LEASES*

FOURTH CIRCUIT

RCI Technology Corp. v. Sunterra Corp. (In re Sunterra Corp.), 361 F.3d 257 (4th Cir. 2004). Fourth Circuit applies the Countryman definition of executory contract.

In re Lucash, 370 B.R. 664 (Bankr. E.D. Va. 2007). Debtor transferred property to a land trust to avoid a foreclosure, and Debtor became a tenant of the land trust. After Debtor filed a chapter 13 petition, the land trust moved for relief from the automatic stay and a determination that the lease had been rejected. While the court determined that the rental agreement should have been viewed as a mortgage rather than a true lease and, thus, did not grant relief from the stay, the court made the following observations on the law regarding assumption and rejection of residential real property leases.

In a chapter 13 case, an unexpired lease of residential property may be assumed or rejected by the trustee at any time prior to confirmation of a plan and by the debtor in the plan itself. Assumption is permitted even if the lease is in default, provided that the default is cured, the landlord is compensated for any loss related to the breach, and adequate assurance of future performance is given. The "deemed rejected" language, for failure to assume a lease of residential real property within 60 days of the petition date, in

§ 365(d)(1) applies only to chapter 7 cases and is not included in § 365(d)(2), which applies to chapter 13 cases. In most instances, the debtor's failure in a chapter 13 plan to assume an unexpired residential lease would constitute cause for termination of the automatic stay, at least if the lease were in default. Rejection of a lease, although it constitutes a breach of the lease, does not terminate the lease; rather, it gives rise to a prepetition claim for damages.

In re Thompson-Mendez, 321 B.R. 814 (Bankr. D. Md. 2005). The question before the court was whether a creditor is required to obtain relief from stay before instituting an ejectment action based solely on a *pro se* chapter 7 debtor's post-petition rent default occurring after a lease was deemed rejected under § 365(d)(1). Debtor was the tenant under a residential lease for an apartment. The court found that although a lease is deemed rejected, rejection does not cause the lease to be extinguished or abandoned. Rather, rejection is treated as a pre-petition breach of the lease. Because the lease was not abandoned, it remained property of the estate and the creditor was required to obtain relief from the automatic stay before it could commence an ejectment action.

In re Park, 275 B.R. 253 (Bankr. E.D. Va. 2002). This case involved a lease of non-residential real property that was not assumed by the chapter 7 trustee within 60 (now 120) days of the petition date as required by § 365(d)(4), and presented the unusual situation in which the individual debtor continued to make the lease payments. The landlord moved for relief from stay. As the stay was terminated by Debtor's discharge, however, the question before the court was whether rejection of the lease terminated Debtor's rights under the lease. Even though § 365(d)(4) requires a trustee to surrender leased non-residential real property when the lease is rejected, the court held that because Debtor was an individual, the lease property did not need to be surrendered and that rejection of the lease, although it constituted a breach of the lease, did not terminate the lease. If the debtor is otherwise current on all obligations as a tenant, a merely technical breach arising from a rejection does not constitute a material default that allows the landlord to terminate the tenancy. While this case involved a non-residential real property lease, its rationale is particularly applicable to residential real property leases because, as opposed to § 365(d)(4), there is no requirement for surrender in § 365(d)(1) that addresses rejection of residential real property leases.

In re Bane, 228 B.R. 835 (Bankr. W.D. Va. 1998). This case concerned a relief from stay motion brought by a landlord based on an asserted rejection of a lease for non-residential real property. The case was originally filed as a chapter 7 case and then converted to chapter 13. The lease was not assumed within 60 (now 120) days of the chapter 7 petition date as required by § 365(d)(4).. The lease was not listed in Debtor's schedules. The court held that the lease was deemed rejected because it was not timely assumed before the case was converted and that no new rejection period resulted from conversion of the case to chapter 7. Once the lease was deemed rejected, the court did not have authority to extend the rejection period. Additionally, acceptance by the landlord of payments for over a year did not estop the landlord from asserting that the lease was deemed rejected.

Although this case dealt with non-residential real property, the effect would be same for residential real property.

SEVENTH CIRCUIT

In re Williams, 144 F.3d 544 (7th Cir. 1998). Although this case presented stay relief issues, the Seventh Circuit's decision is relevant to the assumption of residential real property leases under litigation in state court but prior to entry of a judgment of possession.

Robinson v. Chicago Hous. Auth., 54 F.3d 316 (7th Cir. 1995). When a state court issues a prebankruptcy judgment of possession against the debtor-lessee of residential real property, the debtor or chapter 13 trustee cannot assume the lease. The Seventh Circuit rejected the argument that § 365(a) intends a difference between unexpired and terminated leases. Furthermore, Debtor's status as a resident of public housing did not change the result.

NINTH CIRCUIT

Sticka v. Casserino (In re Casserino), 379 F.3d 1069 (9th Cir. 2004). Section 365 does not apply to a residential lease qualifying as an exempted homestead. By definition, exempted property is property that is removed from the bankruptcy estate. Therefore, an exempted homestead is not subject to assumption or rejection by the trustee. Debtor's residential lease continued in effect even though it was not assumed within the 60-day period.

ELEVENTH CIRCUIT

In re Moore, 290 B.R. 851 (Bankr. N.D. Ala. 2003). The issue before the court was whether Debtors held unexpired leases at the filing of their bankruptcy petitions sufficient to become property of the estate and to be subject to assumption under § 365. The court held that the leases of both Debtors were terminated by their terms prepetition. Under Alabama law, that stripped both Debtors of any leasehold interest to be acquired by the estate at the bankruptcy filing. The court's conclusion dictated that the leases were not assumable under the Bankruptcy Code.

In re Atkins, 237 B.R. 816 (Bankr. M.D. Fla. 1999). Debtors fell behind on their residential lease with the Winter Park Housing Authority. After several cure agreements between the parties failed, Winter Park obtained a judgment for possession and a monetary judgment for outstanding arrears. A Writ of Possession was never issued because Debtors filed a chapter 13 petition. Debtors then moved to assume the lease. Relying on *Ross v. Metropolitan Dade County*, 142 B.R. 1013 (S.D. Fla. 1992), the bankruptcy court held that the lease was not terminated prepetition because of Florida's anti-forfeiture doctrine and noted that a Writ of Execution was never entered. Based upon that conclusion, the court held that Debtors were entitled to assume the lease if they met the requirements of § 365(b)(1), including curing the outstanding rental arrearages plus interest.

In re Scott, 209 B.R. 777 (Bankr. S.D. Ga. 1997). Creditors of a chapter 13 Debtor filed an administrative claim for post-petition rent and Debtor objected. The creditors' claim arose out of a prepetition lease of real property between the parties that contained an option to purchase. Although the written lease expired prior to the filing of the petition, the court found that the parties created a tenancy at will during the intervening year and, by virtue of § 365(m), that § 365's provisions applied to that tenancy. The court then concluded that the lease had not been assumed because assumption requires an express order from the court and, therefore, the creditors' claims could not be given administrative expense status.

In re Morgan, 181 B.R. 579 (Bankr. N.D. Ala. 1994). Chapter 13 Debtor in this case leased an apartment unit from Property Managers, prepetition. After Debtor filed bankruptcy, Property Managers moved to have the automatic stay lifted so that it could bring an unlawful detainer action against Debtor in state court. Under Alabama state law, the lease had been terminated. Debtor proposed to pay the back rent and to assume the lease pursuant to § 365 through his chapter 13 plan. The issue was whether, under Alabama law, the lease was unexpired. Property Managers argued that because the lease was terminated under state law, it was not an unexpired lease and could not be assumed. The bankruptcy court held that "terminated" and "expired" are not synonymous and that a lease "which has been terminated under nonbankruptcy law may . . . be an unexpired lease . . . which may be assumed." According to the court, a lease is not expired until all of the state law requirements to remove the tenant from possession have been satisfied, including the exhaustion of any pending appeal.

In re Rodall, 165 B.R. 506 (Bankr. M.D. Fla. 1994). Chapter 7 Debtor moved to assume a prepetition lease for a subsidized housing apartment. The apartment was damaged by fire and the lessor sent Debtor a letter, prepetition, stating that the lease would terminate if Debtor did not pay for the repairs within 30 days. Debtor did not pay and the lessor terminated the tenancy, in writing, giving Debtor 30 days to vacate. The lessor demanded $2,500 for the cost of repairs not covered by insurance. Debtor filed for chapter 7 protection. She listed the debt for damages in her schedules and listed the lease as an executory contract in Schedule G. During the pendency of her case, the bankruptcy court ordered the lessor to allow Debtor to resume occupancy of the apartment, and considered the merits of Debtor's motion to assume. The court held that Debtor lacked standing to assume the lease in her chapter 7 case, in contrast to debtors under the reorganization chapters of the Bankruptcy Code; instead, in this case the trustee alone possessed that power. Debtor's trustee took no action with regard to the lease and it was rejected as a matter of law pursuant to § 365(d)(1) upon the passage of 60 days from the filing.

Ross v. Metropolitan Dade County, 142 B.R. 1013 (S.D. Fla. 1992), *aff'd*, 987 F.2d 774 (11th Cir. 1993). Debtor's chapter 13 plan proposed to assume a lease of a public housing unit from Dade County. The County obtained a prepetition judgment for possession of the unit for failure to pay rent. The judgment stated that a Writ of Possession would issue on a designated date. Three days before that date, Debtor filed for chapter 13 protection. The bankruptcy court confirmed Debtor's plan and the County appealed, arguing that Debtor could not assume the lease because, by virtue of the judgment and writ of possession, the lease had expired. The district court held that under Florida law Debtor's lease had not expired; the process for terminating the lease had not been completed and, even if it had, it could be reversed under Florida's anti-forfeiture statute. Thus, Debtor could assume the unexpired lease pursuant to § 365 through his chapter 13 plan because the plan terms satisfied the requirements of the Florida anti-forfeiture doctrine.

B. *REJECTION OF RESIDENTIAL LEASES IN CHAPTER 7*

THIRD CIRCUIT

Westgate Village Apts. v. Sims (In re Sims), 213 B.R. 641 (Bankr. W.D. Pa. 1997). Neither the rejection of an individual debtor's residential lease in an earlier chapter 7 case nor an order granting relief from the stay in that case terminated the lease. Therefore, the lease could be assumed in a subsequent chapter 13 case.

In re Szymecki, 87 B.R. 14 (Bankr. W.D. Pa. 1988). Under § 365(d)(1), if a residential lease is not assumed or rejected within 60 days after the order for relief, it is deemed rejected. In the case at bench, the lease was therefore deemed rejected. But that only amounts to an abandonment of the lease rights to the debtor.

In re Adams, 65 B.R. 646 (Bankr. E.D. Pa. 1986). An order granting relief from the automatic stay, as well as a state court judgment for possession, must precede any eviction of any individual tenant, irrespective of § 365(d)(4), and must precede as well any action by the landlord that adversely affect the tenant's leasehold interest, such as termination of utility service.

NINTH CIRCUIT

Carrico v. Tompkins (In re Tompkins), 95 B.R. 722 (B.A.P. 9th Cir. 1989). When a case is converted from chapter 11 to chapter 7, the 60-day period under § 365(d)(1) starts at the date of conversion. Once the 60-day period expires without any action taken by the trustee, the lease is deemed rejected and the court has no authority to revive it. The decision to assume or reject a lease in a chapter 7 setting is solely the trustee's, and only the trustee has standing to bring a motion for extension of the 60-day period.

ELEVENTH CIRCUIT

In re Waldron, 785 F.2d 936 (11th Cir. 1986). Chapter 13 Debtors filed a joint petition listing one creditor, Shell Oil, and detailing no debts. The purpose of the filing was to reject, by virtue of § 365(a), an option contract in favor of Shell on a piece of real property owned by Debtors. Other than the contract, Debtors were financially sound. The bankruptcy court initially questioned Debtors' motive, but ultimately allowed Debtors to proceed, concluding that the bankruptcy laws were intended to be widely available. The district court affirmed and an appeal to the Eleventh Circuit followed. The Court of Appeals reversed, holding that Debtors' plan was not filed in good faith. The Court stated that "[r]ejection of an executory contract under section 365 must . . . only be permitted to serve some useful purpose such as providing a troubled debtor with a 'fresh start.'" Debtors' financial security in this case precluded effectuation of that policy by allowing Debtors to use the Bankruptcy Code as a sword instead of shield. Although this was a chapter 13 case, the Court implied that chapter 7 and chapter 11 cases should be viewed similarly if they are filed solely to reject an executory contract.

In re Meadows, 428 B.R. 894 (Bankr. N.D. Ga. 2010). After filing a chapter 7 petition, Debtor did not move to assume his unexpired residential lease and it was rejected as a matter of law pursuant to

§ 365(d)(1). Debtor received a discharge in June of 2005. Debtor remained in the property and continued to pay rent to the landlord until the end of the lease term in 2006. The landlord applied post-petition payments to the prepetition arrearages first, so Debtor never caught up and was always paying late fees. At the end of the lease, Debtor owed the landlord $3,920 in unpaid rent and fees. The landlord attempted to collect that amount from Debtor by filing suit in state court and obtaining a judgment. When the landlord initiated a garnishment, Debtor filed this adversary proceeding asserting a willful violation of the discharge injunction. In response, the landlord argued that the judgment pertained to post-petition rather than prepetition rents. The court disagreed and found that the landlord was seeking to enforce Debtor's liability on the prepetition lease because the lease was not terminated by Debtor's rejection. Rather, rejection constituted a breach of the lease under § 365(g). The landlord did not terminate the lease due to the breach; instead, he continued to accept rent and applied that rent to prepetition arrears from the prepetition lease. Thus, the court found that the prepetition debt from the lease had been discharged and that the landlord, who had notice of the bankruptcy filing, violated the discharge injunction by obtaining the judgment, which was void under § 524.

In re Chira, 343 B.R. 361 (Bankr. S.D. Fla. 2006), *aff'd*, 367 B.R. 888 (S.D. Fla. 2007), *aff'd*, 567 F.3d 1307 (11th Cir. 2009). The chapter 7 trustee moved to assume an agreement for the sale of a hotel co-owned by Debtor and his former wife. Debtor and his wife divorced prepetition. The divorce court initially ordered the former spouses to continue to operate the hotel together, but, after that proved untenable, the court appointed a receiver to run the hotel. The receiver marketed the hotel for sale and, with the divorce court's approval, entered into a sales agreement with a purchaser. Debtor was forced into chapter 7 bankruptcy through an involuntary petition before completion of the sale. With regard to the trustee's motion to approve the sales agreement, the bankruptcy court first determined that the agreement was an executory contract because "there were material obligations yet to be performed on both sides before the closing," *i.e.*, the purchaser had to pay and the seller had to deliver title. The bankruptcy court also considered whether it was in the best interest of the estate for Debtor to assume the contract. The court determined that the trustee's motion to assume should be granted because the specter of damages from rejecting the sales agreement outweighed any benefit the estate might garner.

In re Rodall, 165 B.R. 506 (Bankr. M.D. Fla. 1994). Chapter 7 Debtor moved to assume a prepetition lease in a subsidized housing apartment. The chapter 7 trustee took no action with regard to the lease within 60 days and it was automatically rejected pursuant to § 365(d)(1). The court held that Debtor lacked standing to assume the lease as a chapter 7 debtor. The effect of the rejection was that the lease was no longer property of the estate. The bankruptcy court noted that it no longer retained jurisdiction over the lease, leaving Debtor with only the rights and remedies provided under nonbankruptcy law. Essentially, automatic rejection amounted to an abandonment of the lease by the trustee. *Accord In re Hobbs*, 221 B.R. 892, 894 (Bankr. M.D. Fla. 1997) (noting that a majority of courts find that automatic rejection of a lease pursuant to § 365(d)(1) results in abandonment of the lease to the debtor).

C. *MISCELLANEOUS*

SIXTH CIRCUIT

Ford Motor Credit Co. v. Parmenter (In re Parmenter), 527 F.3d 606 (6th Cir. 2008). The Court denied an automobile lessor's motion for administrative expense allowance in a chapter 13 case as *res judicata* based upon the terms of the confirmed plan that did not obligate the bankruptcy estate to make the vehicle lease payments. Debtors assumed the prepetition motor vehicle lease and remitted payments outside the plan, but defaulted post-confirmation.

SEVENTH CIRCUIT

In re Williams, 144 F.3d 544 (7th Cir. 1998). The Seventh Circuit held that for purposes of the automatic stay and executory contract analysis, a residential lease does not terminate until a judgment of possession has been entered, but that prior to the entry of judgment a bankruptcy court can properly exercise its discretion to lift the stay and allow a forcible entry action to proceed in state court to determine if the debtor has any valid defenses.

In re Powers, 983 F.2d 88 (7th Cir. 1993). On the terms of the leases before it, the Seventh Circuit held that a consumer's rent-to-own relationship was a true lease and not a security interest. The consumers had could return the leased property anytime with no further obligation to make future payments.

TENTH CIRCUIT

In re Baird, 567 F.3d 1207 (10th Cir. 2009). The Tenth Circuit explicitly adopted the Countryman definition of an executory contract over the functional test. The bankruptcy court erred in finding that a malpractice liability policy was not an asset that the trustee could administer in the chapter 7 case as an executory contract.

ELEVENTH CIRCUIT

In re Kirsch, 242 B.R. 77 (Bankr. M.D. Fla. 1999). Debtors entered into a 60-month lease for nonresidential real property prior to filing their chapter 13 bankruptcy petition. At the time of filing, Debtors were not present in the leased premises or gainfully operating a business there. The court determined that the lease was unexpired on the petition date. Debtors did not move to assume the lease within 60 days of filing their petition and it was automatically rejected pursuant to § 365(d)(4). The lessors filed an application for administrative expenses for unpaid post-petition rent. Section 365(d)(3) requires chapter 13 debtors to perform all obligations under any unexpired lease of nonresidential real property until the lease is assumed or rejected, including paying rent. The bankruptcy court held that all unpaid post-petition rent of the nonresidential property due to the lessor qualified as an administrative expense. Because the lease was rejected 60 days after the filing of the petition, however, the court restricted the amount of unpaid post-petition rent that qualified as an administrative expense to that which had accrued during the 60 day period. The court noted that, if Debtors had breached and terminated the lease prepetition, the lessor would have only been entitled to an unsecured claim.

In re Williams, 171 B.R. 420 (Bankr. S.D. Ga. 1994). Chapter 13 Debtor was the prepetition lessor of nonresidential real estate located in Savannah, Georgia where he operated an upholstery business. The lease was unexpired at the filing of Debtor's petition, but Debtor had made no payments post-petition and neither he nor the chapter 13 trustee took steps to assume or reject the lease during the 60 days after filing. The lessor filed a motion for surrender of the property pursuant to § 365(d)(4), which gives a debtor or trustee 60 days from the petition date to assume or reject an unexpired lease on nonresidential real property before the lease is deemed rejected. The court held that the lease had been rejected. The court explained that its ruling did not empower it to order the surrender of the property; instead, either an adversary proceeding akin to that detailed in Rule 7001(1) or a state court action was necessary to dispossess Debtor from the leased property.

But see In re Deli Den, LLC, 425 B.R. 725 (Bankr. S.D. Fla. 2010) (holding lessor of nonresidential real property entitled to immediate possession after expiration of the 60-day period in chapter 11 case).

I. DISCHARGE

A. *DISCHARGE INJUNCTION—§ 524*

UNITED STATES SUPREME COURT

United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367 (2010). The debt to a creditor who receives actual notice of bankruptcy filing and of contents of a debtor's chapter 13 plan, but fails to object, is discharged even if it erroneously discharges debt subject to § 523(a)(8)'s discharge exception. The plan is a final and enforceable judgment. A creditor may not later rely seek to set that judgment aside as void; the bankruptcy court's failure to make findings of undue hardship was legal error, but it did not make the order confirming Debtor's plan void.

Johnson v. Home State Bank, 501 U.S. 78 (1991). This case discussed whether a debtor can include a mortgage lien in a chapter 13 plan even after the debtor's personal liability on the debt secured by the property has been discharged in a chapter 7 liquidation. The court addressed the scope of a bankruptcy discharge against a debtor for actions *in personam* and actions *in rem* and ultimately held that a mortgage lien survives the discharge of a debtor's personal liability in a chapter 7 liquidation. Therefore, the lien was a claim subject to inclusion in the subsequent chapter 13 plan.

FIRST CIRCUIT

Parker v. Handy (In re Handy), 624 F.3d 19 (1st Cir. 2010). Prepetition, Debtor was sued in state court under the state's Uniform Fraudulent Transfer Act. The plaintiff had sought both money damages and imposition of a constructive trust. The state court entered judgment for Debtor, but the plaintiff's appeal was stayed by Debtor's chapter 7 bankruptcy petition. The plaintiff moved for relief from stay, arguing that his request in the state court litigation for a constructive trust gave him an *in rem* claim against Debtor. The bankruptcy court denied relief and granted Debtor a discharge.

The First Circuit ruled that § 524(a)(2) precludes a plaintiff from continuing to pursue a state court proceeding against a discharged debtor, if at the time of the debtor's discharge, the plaintiff had obtained neither a judgment nor a lien, attachment or other provisional remedy against the debtor. A plaintiff cannot transform his prepetition request for a constructive trust, which is deemed a remedy and not a cause of action, into a cause of action *in rem*. Thus, the plaintiff here held only a contingent, unliquidated, and disputed unsecured claim against Debtor. Because § 524(a)(2) enjoins all personal liability claims against a debtor upon discharge, the plaintiff was enjoined from continuing to pursue its cause of action against Debtor.

Pratt v. GMAC (In re Pratt), 462 F.3d 14 (1st Cir. 2006). Pursuant to § 521(a)(2), Debtors filed timely notice of their intention to surrender their encumbered vehicle, and they did nothing to prevent the creditor from repossessing it. Following the grant of Debtors' discharge, the value and condition of the vehicle was such that it had to be towed to a junkyard. When the junkyard refused to accept the car until creditor released its lien, Debtors reopened their bankruptcy case and asked the court for relief. The First Circuit held that the creditor's refusal to release its valueless lien so that the vehicle could be junked— though presumably not made in bad faith—was "coercive" in its effect, and thus constituted a willful violation of the discharge injunction.

United States v. Torres (In re Torres), 432 F.3d 20 (1st Cir. 2005). The bankruptcy court held the IRS in contempt for violating § 524 by attempting collection activities after Debtors obtained a discharge injunction. The court awarded expenses, costs, attorney fees, and emotional distress damages under § 105(a). The First Circuit reversed and remanded the bankruptcy court's award of emotional distress damages, finding that § 106 does not waive sovereign immunity for emotional distress damages. The Court declined to rule on the question whether emotional distress damages are available under § 105(a).

SECOND CIRCUIT

In re Nicholas, 457 B.R. 202 (Bankr. E.D.N.Y. 2011). When, following completion of Debtor's chapter 13 plan, a creditor commenced a state court action asserting a variety of claims against Debtor as to matters that had already been decided by the bankruptcy court, the court relied upon §§ 105 and 524 and held the creditor in contempt. The court imposed civil sanctions, including actual and punitive damages, for willfully and knowingly violating the discharge in bad faith and with "a clear disregard and disrespect of the bankruptcy laws." *Id.* at 227.

THIRD CIRCUIT

In re Joubert, 411 F.3d 452 (3d Cir. 2005). The Court addressed whether § 524 implies a private right of action, either alone or through § 105(a), for violations of bankruptcy stays. The court ultimately held that § 105(a) does not afford debtors a private cause of action to remedy violations of bankruptcy stays, and therefore, the debtor's sole remedy is a contempt proceeding in bankruptcy court.

Judd v. Wolfe, 78 F.3d 110 (3d Cir. 1996). This case has a good discussion of the scope of a bankruptcy discharge. The Court addressed whether a debt is discharged pursuant to §§ 727(b) and 523(a)(3) when the debtor in a no-asset, no-bar-date chapter 7 proceeding fails to list a claim on the schedule of creditors and the bankruptcy case is closed, or whether the debtor must move the bankruptcy court, pursuant to § 350(b), for an order reopening the proceeding to add the omitted creditor for purposes of discharging the claim. Having concluded that the debt was not based on an intentional tort (which is a debt that is not dischargeable if not listed), the court held that the reopening of the case was not necessary to discharge the debt. The Court remanded the case to the bankruptcy court, however, for a determination of whether a debtor may reopen a case for the limited purpose of correcting the list of creditors for administrative purposes.

First Fid. Bank v. McAteer, 985 F.2d 114 (3d Cir. 1993). This is a good § 524(e) case addressing a creditor's right to collect a debt from non-debtor third parties. The Court held that discharge of a debtor in bankruptcy will not preclude creditors from collecting the full amount of the debt from co-debtors or other liable parties. A creditor remains free to collect the full amount of the original obligation from any non-debtor party, such as a guarantor or insurer.

Lugo v. Paulsen, 886 F.2d 602 (3d Cir. 1989). Debtor sought to enjoin the state's effort to collect an insurance surcharge imposed on his because of his prepetition conviction for operating a motor vehicle while legally intoxicated. The Court first addressed whether the surcharge was a "debt" and next considered whether the obligation to pay the surcharge arose pre-petition. Relying on the broad definition of a "debt," the Court held that the surcharge on individuals convicted of driving under the influence of liquor is in fact a debt and that the obligation to pay the surcharge arose on the date of Debtor's conviction. Because that was prior to his filing for bankruptcy, the obligation was dischargeable.

Matter of Davis, 691 F.2d 176 (3d Cir. 1982). This case addressed a federal court's power to enjoin state court proceedings and, more specifically, a bankruptcy court's ability to issue an injunction to prevent a state criminal prosecution. Debtors, who had purchased goods with checks that were dishonored, filed bankruptcy the day after one of the payees initiated criminal proceedings. Those proceedings were voluntarily stayed until after Debtors' discharge, at which point Debtors sought an injunction against the prosecution on the grounds that any ordered restitution would subvert the discharge of those debts. The bankruptcy court denied the requested injunction and the district court affirmed. The Third Circuit affirmed in turn, citing *Younger v. Harris*, 401 U.S. 37 (1971). Although the Court noted that in proper circumstances a bankruptcy court may issue an injunction to prevent a state prosecution, the Court in this matter found no irreparable injury to warrant the issuance of an injunction. Therefore, the request for the injunction was denied.

In re Ciccimaro, 364 B.R. 184 (Bankr. E.D. Pa. 2007). This case contemplates the bankruptcy court's power to determine the scope of a discharge injunction while simultaneously being careful not to render any advisory opinions. The court held that there must be sufficient evidence that a creditor has violated, or is about to, violate the discharge injunction under § 524(a) before the violation becomes a justiciable issue that the bankruptcy court has power to address.

FOURTH CIRCUIT

Birney v. Smith, 200 F.3d 225 (4th Cir. 1999). The Court held that a creditor is not able to obtain a lien on tenants-by-the-entireties realty after discharge of the creditor's debt under § 727 even though the non–debtor spouse died within 6 months of the filing of the case and the realty was exempted on the basis of the tenancy ownership. The Fourth Circuit held that termination of an exemption post-petition and post-discharge does not, by itself, bring the property into the bankruptcy estate; rather, there must be an applicable statutory mechanism by which the estate captures the post-petition property. Finding that § 541 was the only such mechanism and that it did not capture property not obtained by bequest, devise or inheritance, the Court held that the creditor had no right to obtain a lien post-petition.

SIXTH CIRCUIT

Hamilton v. Herr (In re Hamilton), 540 F.3d 367 (6th Cir. 2008). Debtor received his discharge in bankruptcy and was then brought into a state court action in which the Debtor, *pro se*, failed to plead his bankruptcy discharge as an affirmative defense. The Court reviewed whether § 524(a) makes a state court judgment void *ab intio* when entered against a debtor with dischargeable debts who has been discharged, or whether the *Rooker-Feldman* doctrine compels federal courts to respect the state court judgment. The court held that state court judgments modifying a discharge order are void *ab initio* pursuant to § 524(a). If a debt is not discharged pursuant to the bankruptcy court's discharge order, then the state court judgment is not a modification of the discharge order and the *Rooker-Feldman* doctrine bars federal court jurisdiction.

SEVENTH CIRCUIT

In re Kuehn, 563 F.3d 289 (7th Cir. 2009). A university's withholding of college transcripts until Debtor paid her prepetition obligations violated the automatic stay during the pendency of the bankruptcy case and the bankruptcy discharge after the case was closed.

EIGHTH CIRCUIT

Dubois v. Ford Motor Credit Co., 276 F.3d 1019 (8th Cir. 2002). Chapter 7 Debtors brought an action against Ford Motor Credit alleging that Ford violated the discharge injunction by sending payment reminders following Debtors' discharge and by requiring them to roll into a new lease excess usage charges from the vehicle they leased during their bankruptcy case. The Court held that "after a debtor receives a discharge, a creditor cannot seek to recover a discharged debt from the debtor. Further, any post-petition agreement, 'the consideration for which, in whole or in part, is based on a debt that is dischargeable,' is enforceable only if the agreement complies with the strict requirements of [§ 524(c)]." *Id.* at 1022. The Eighth Circuit affirmed the district court and found that Ford did not violate the discharge injunction because Ford's conduct was not coercive; Debtors voluntarily agreed to roll excess usage charges incurred during use of the first leased vehicle into the second lease.

NINTH CIRCUIT

Barrientos v. Wells Fargo Bank, N.A., 633 F.3d 1186 (9th Cir. 2011). Chapter 7 Debtor filed a petition and obtained a discharge of his debts under § 524. Sometime thereafter, Debtor commenced an adversary proceeding in the bankruptcy court against a lender that had allegedly reported to certain credit reporting agencies that Debtor still owed the lender a debt that had been discharged. Debtor asserted a single cause of action for contempt for violation of § 524, and sought an injunction, a coercive fine, declaratory relief, and attorneys' fees. The bankruptcy court granted lender's motion to dismiss the complaint on the ground that § 105 creates no private right of action to sue for a discharge violation under § 524.

The Ninth Circuit ruled that a proceeding for contempt for violation of a discharge injunction under § 524 must be brought via motion in the bankruptcy case, not via an adversary proceeding. Rule 9020 provides that Rule 9014 governs contempt proceedings in bankruptcy. Such proceedings are not listed under Rule 7001; thus, they are contested matters not qualifying as adversary proceedings and they must be brought by the trustee or a party in interest by motion in the bankruptcy case under Rule 9014. The Court reasoned that Congress did not intend for enforcement of a discharge order to be left to any judge than the bankruptcy judge who issued the order, which would be a possible result if an adversary proceeding were available to pursue contempt for violation of a discharge order. Here, the only remedy for a violation of the discharge injunction was for Debtor to commence proper contempt proceedings in the bankruptcy court. Accordingly, Debtor's complaint was properly dismissed.

Zilog, Inc. v. Corning (In re Zilog, Inc.), 450 F.3d 996 (9th Cir. 2006). In demonstrating a violation of the discharge injunction, the movant must prove that the creditor knew the injunction was applicable and, if the actions are disputed, prove that intent in an evidentiary hearing.

McGhan v. Rutz (In re McGhan), 288 F.3d 1172 (9th Cir. 2002). The Ninth Circuit relied on *Gruntz v. County of Los Angeles (In re Gruntz)*, 202 F.3d 1074 (9th Cir. 2000) (*en banc*), to conclude that state courts lack authority to modify or extinguish bankruptcy court orders including, but not limited to, orders regarding discharge, a permanent injunction, or the automatic stay. A state court lacks such authority even if the state court believed that the creditor had valid grounds to object to orders on the basis that the creditor was a minor at time of bankruptcy and his mother, as guardian, received notice of bankruptcy. The Court clarified that state courts still retain power to assess the applicability of a discharge order to the state action before it.

Walls v. Wells Fargo Bank, N.A., 276 F.3d 502 (9th Cir. 2002). A debtor's sole remedy for violation of the discharge injunction under § 524 is an action for civil contempt under § 105(a). A private right of action, such as Debtor-plaintiff's claim under the Fair Debt Collection Practices Act, is not available. The court examined the language of § 524(c) and considered Congress' intent to provide a private right of action. Absent explicit language, the court was unwilling to imply a private right of action because allowing a debtor to sue under the FDCPA would "circumvent the Bankruptcy Code's remedial scheme" and "undercut the 'complex, detailed, and comprehensive provisions of the lengthy Bankruptcy Code.'" *Id.* at 509, *quoting MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 914 (9th Cir. 1996).

Rein v. Providian Fin. Corp., 270 F.3d 895 (9th Cir. 2001). When a bankruptcy court does not enter an order approving a reaffirmation agreement, there has been no final judgment on the merits. A subsequent challenge to the validity of such agreement will not be barred by claim preclusion.

Goldberg v. Ellett (In re Ellett), 254 F.3d 1135 (9th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002). Debtor notified the Franchise Tax Board of California (FTB) of his chapter 13 bankruptcy case, but the FTB did not file a proof of claim, otherwise participate in the case, or receive a distribution. After discharge, the FTB sent demand letters claiming that Debtor's income tax obligations had not been discharged. Applying the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), the Court allowed Debtor's adversary proceeding, seeking prospective injunctive and declaratory relief against the executive director of the FTB over the FTB's defense of sovereign immunity.

Hong Kong & Shanghai Banking Corp. v. Simon (In re Simon), 153 F.3d 991 (9th Cir. 1998). A foreign creditor participated in a bankruptcy by filing a proof of claim in Debtor's domestic chapter 7 bankruptcy case, seeking to collect all or a portion of the debt. The bankruptcy discharge injunction prevented the foreign creditor from engaging in foreign collection of the discharged debt against estate property. The order did not involve an improper extraterritorial application of U.S. laws because all of a debtor's property, "wherever located and by whomever held," is part of the bankruptcy estate.

Hedges v. Resolution Trust Corp., 32 F.3d 1360 (9th Cir. 1994). The discharge injunction does not prevent a purchaser of property at a trustee's sale from evicting Debtor and collecting post-petition rents when the debts were incurred post-petition.

Siragusa v. Siragusa (In re Siragusa), 27 F.3d 406 (9th Cir. 1994). The state court's modification of Debtor's alimony obligation based on the spouse's inability to collect a property settlement did not violate the discharge injunction. The state court could consider the discharge as a "changed circumstance."

Am. Hardwoods, Inc. v. Deutsche Credit Corp. (In re Am. Hardwoods, Inc.), 885 F.2d 621 (9th Cir. 1989). The Ninth Circuit concluded that although a discharge and a permanent injunction are distinguishable remedies, "a discharge is in effect a special type of permanent injunction."

NLRB v. Better Bldg. Supply Corp., 837 F.2d 377 (9th Cir. 1988). Partnerships and corporations may not discharge their debts in a chapter 7 liquidation proceeding. Under § 727(a)(1), discharge is available only for individual debtors.

TENTH CIRCUIT

In re Beaumont, 586 F.3d 776 (10th Cir. 2009). It did not violate the discharge injunction for the Veterans Affairs Department to withhold payment of disability benefits after Debtor's discharge in chapter 7. The withholding was for recoupment of benefits that were overpaid after the veteran-debtor received a substantial inheritance. Recoupment is an equitable doctrine for the settlement of payments in the same transaction; it is not a claim or debt.

In re Troff, 488 F.3d 1237 (10th Cir. 2007). The Court held that restitution ordered for an arson conviction did not violate the discharge injunction. *See also In re Williams*, 438 B.R. 679 (B.A.P. 10th Cir. 2010) (holding that restitution imposed for securities fraud conviction did not violate discharge injunction).

ELEVENTH CIRCUIT

Florida Dep't of Rev. v. Diaz (In re Diaz), 647 F.3d 1073 (11th Cir. 2011). During Debtor's chapter 13, the Virginia Department of Social Services and the Florida Department of Revenue violated the automatic stay by threatening monetary and other penalties against Debtor if he did not pay his past due child support obligations. Debtor provided for the past due support in his chapter 13 plan, which he timely completed. Due to the state's failure to prove interest due on the arrearages, however, the bankruptcy court had only allowed the principle child support obligation to proceed and had denied the claims for interest. As a result, following Debtor's discharge, he was still noted by the state as being nearly $20,000 in arrears.

Debtor subsequently filed a motion against the state agencies for contempt and sanctions for their alleged violations of the automatic stay and the discharge injunction. The bankruptcy court awarded Debtor actual and punitive damages, and the district court affirmed the judgment. The Eleventh Circuit subsequently reversed on the grounds, *inter alia*, that the agencies did not violate the discharge injunction because domestic support obligations are not dischargeable in a chapter 13 bankruptcy.

Ghee v. Retailers Nat'l Bank, 271 F. App'x 858 (11th Cir. 2008). Debtor, acting *pro se*, filed a motion to proceed *in forma pauperis* in his appeal of various bankruptcy court rulings. The district court denied the motion on grounds that Debtor's appeals were frivolous. The Eleventh Circuit concluded that Debtor's claims were, in fact, frivolous, and agreed that the motion to proceed *in forma pauperis* should be denied.

Georgia Dep't of Rev. v. Burke (In re Burke), 146 F.3d 1313 (11th Cir. 1998). Various Debtors accused the Georgia Department of Revenue of violating the automatic stay and discharge injunction by pursuing continued tax collection efforts against them. The state argued that it was free to continue its collections efforts because Eleventh Amendment sovereign immunity prevented the federal court from applying the automatic stay and discharge injunctions against the state. The Court of Appeals held that the state had waived its Eleventh Amendment immunity by filing claims in the cases and, therefore, was subject to the bankruptcy court's enforcement of the automatic stay and discharge injunctions.

Clay County Bank v. Culton (In re Culton), 111 F.3d 92 (11th Cir. 1997). Several months after receiving a chapter 7 discharge, Debtors' home was burglarized, and several coins and pieces of jewelry were stolen. This prompted Debtors to file an insurance claim for the stolen goods. A discharged creditor got word of the claim and filed an adversary proceeding seeking to reopen the bankruptcy case.

The creditor claimed that Debtors owned the assets prior to receiving their discharge and failed to disclose them to the court.

Debtors filed a motion to dismiss based on a statute of limitations argument and the bankruptcy court granted the motion. On appeal, the district court reversed as to the statute of limitations, relying on equitable tolling grounds, and remanded the decision to the bankruptcy court for further consistent findings. Both parties sought appeal to the Court of Appeals for a final determination of the issue. That Court ruled, however, that a final decision had not been rendered by the district court in order to satisfy the jurisdictional requirements of 28 U.S.C. § 158(d). Moreover, although the district court's opinion may have arguably modified the discharge injunction, Debtors failed to satisfy the test set forth in *Carson v. American Brands, Inc*., 450 U.S. 79, 83-84 (1981), requiring that an order have a "serious, perhaps irreparable consequence" and that the order can be "effectively challenged" only by immediate appeal. As such, Debtors were not entitled to an appeal from the interlocutory order of the district court under 28 U.S.C. § 1292(a)(1).

Hardy v. United States (In re Hardy), 97 F.3d 1384 (11th Cir. 1996). The IRS pursued Debtor for debts that had been provided for in Debtor's chapter 13 plan and subsequently discharged. The court found that the government had waived sovereign immunity and may be liable for damages arising from its violation of the discharge injunction of § 524(a). The court also held that the government may be liable for monetary sanctions that are coercive, but that the court could not impose punitive damages.

Wrenn v. Amer. Cast Iron Co. (In re Wrenn), 40 F.3d 1162 (11th Cir. 1994). Despite the underlying judgment being discharged, Debtors were not entitled to discharge a prepetition judgment lien recorded by a judgment creditor against Debtor's homestead. Section 522(f) only permitted Debtors to assert an exemption up to the amount provided by statute ($5,000 in this case) and did not permit the total strip off and discharge of the lien.

B. *DISCRIMINATION—§ 525*

THIRD CIRCUIT

Employment

Rea v. Federated Investors, 627 F.3d 937 (3d Cir. 2010), *cert. denied*, 132 S. Ct. 116 (2011). Approximately seven years after closing his bankruptcy case, Debtor applied for a job as project manager. The prospective employer obtained a third-party background check and informed Debtor that he would not be hired because of his prior bankruptcy case. Debtor sued the prospective employer for discrimination.

The Third Circuit ruled that § 525(b) does not prohibit a private employer from refusing to hire a person based on the person's past bankruptcy. Section 525(a) does not permit a government employer to "deny employment to, terminate the employment of, or discriminate with respect to employment against" a person solely because of a prior bankruptcy. Section 525(b) does not permit a private employer to "terminate the employment of, or discriminate with respect to employment against" a debtor solely because of the debtor's current bankruptcy. Although the Court acknowledged that the phrase "discriminate with respect to employment against" in § 525(b) could be read broadly enough to prohibit denial of employment based on bankruptcy, omission of the specific prohibition against denying employment, which is explicit in § 525(a), means that Congress did not intend that prohibition to apply to private employers. Therefore, the prospective employer's refusal to hire Debtor based on his prior bankruptcy did not violate § 525.

Government

Brown v. Pennsylvania State Employees Credit Union, 851 F.2d 81 (3d Cir. 1988). This case considered whether a credit union's policy, denying future services to members when any portion of a debt is discharged in bankruptcy unless the debt is reaffirmed with court approval, violated the statute prohibiting discrimination on account of a bankruptcy filing, even though the chapter 7 Debtor had not yet been granted a discharge. The court held that the credit union's policy did not violate the law because a credit union cannot be ordered to provide services to a debtor. The court also held that § 525, which bars discrimination by the government or its agencies, did not apply. Although the credit union was comprised of present and former government employees (and their families), that fact was insufficient to transform the credit union into a governmental body.

Watts v. Pennsylvania Hous. Fin. Co., 876 F.2d 1090 (3d Cir. 1989). This case was a class-action suit by several bankruptcy debtors against the Pennsylvania Homeowner's Emergency Mortgage Assistance Program (the "Program") for termination of their benefits upon the filing of bankruptcy petitions. The Court examined whether § 525(a), which prohibits discrimination by a governmental unit on account of bankruptcy, required the Program to continue paying the mortgages of debtors in bankruptcy. The Court ultimately held that it did not. The Court also addressed whether the suspension of benefits under the Program violated the automatic stay, and held the stay not violated because the commitment to provide mortgage assistance constituted an unassumable executory contract to which the stay was inapplicable.

Student Loans

Johnson v. Edinboro State Coll., 728 F.2d 163 (3d Cir. 1984). The college in this case had a policy of withholding transcripts from students who had made no payments on their educational loans, had not approached the college to arrange a more flexible repayment schedule, and had not had their debts discharged. Following that policy, the college refused to provide a transcript to Debtor, whose education loans were not dischargeable in his chapter 7 proceeding. The question was whether the college had discriminated against Debtor on the basis of his bankruptcy filing. The Court held that the withholding of Debtor's transcript did not constitute a violation of the Code's "fresh start" policy and that the college could retain the transcript.

FOURTH CIRCUIT

Government

Ayes v. United States Dep't of Veteran Affairs, 473 F.3d 104 (4th Cir. 2006). Military veterans who had previously filed bankruptcy and received discharges brought an action against the Department of Veterans Affairs alleging that it violated § 525(a)'s prohibition on discrimination by governmental units against bankruptcy debtors by refusing to restore home-loan guaranty benefits to them because of their prior bankruptcies. The Court of Appeals held that the program does not fall within the meaning of a "license, permit, charter, franchise, or other similar grant" and hence the denial was not discriminatory.

FIFTH CIRCUIT

Employment

Burnett v. Stewart Title, Inc. (In re Burnett), 635 F.3d 169 (5th Cir. 2011). Debtor sued a prospective private employer in district court for unlawful discrimination because she was denied employment when the employer discovered through a background check that Debtor had filed a chapter 13 petition within the past year. Debtor asserted that § 525(b) bars such discrimination.

The Fifth Circuit ruled that § 525(b) does not prohibit private employers from denying employment to prospective employees based on their bankruptcy status. Although § 525(a) expressly prohibits governmental units from denying employment to applicants on the basis of their bankruptcy status, § 525(b), which applies to private employers, contains no explicit prohibition against denial of employment on the basis of a prospective employee's bankruptcy status. Had Congress intended to prohibit such discrimination in the private sector as well, it would have so stated.

SIXTH CIRCUIT

Government

Toth v. Michigan State Hous. Dev. Auth., 136 F.3d 477 (6th Cir. 1998). Plaintiff's loan application was denied under the agency's policy imposing a three-year limitation after a bankruptcy discharge before a loan application can be processed. Plaintiff asserted that this policy discriminated against her in violation of § 525(a), which led to a further cause of action under 42 U.S.C. § 1983. The Sixth Circuit held that the plaintiff failed to prove discrimination pursuant to § 525(a) because that subsection does not refer to the extension of credit by home loan programs.

SEVENTH CIRCUIT

Government

Robinson v. Chicago Hous. Auth., 54 F.3d 316 (7th Cir. 1995). For a governmental unit to discriminate against a debtor based on his or her bankruptcy status, it must have been aware of that status.

Wilson v. Harris Trust & Sav. Bank, 777 F.2d 1246 (7th Cir. 1985). The Seventh Circuit held that § 525(a) is specifically worded to apply to governmental units, and therefore, does not apply to private entities.

EIGHTH CIRCUIT

Government

Mangan v. Cullen, 870 F.2d 1396 (8th Cir. 1989). Debtor, who worked as a court reporter, charged excessive transcript fees to Waseca County. The County filed a civil suit against Debtor. Prior to resolution of the suit, Debtor received a discharge of her debt to Waseca County in her bankruptcy. Debtor sued her employer, the district administrator for Minnesota's third judicial district, for failing to give her salary increases because she had previously overcharged the County for transcripts. The Court held that § 525(a) "prohibits discrimination for failure to pay a discharged debt where the discrimination is based 'solely' on the failure to pay." In this case, the employer had a basis other than Debtor's failure to pay the discharged debt for treating Debtor differently from the other court reporters. Because the employer could reasonably have believed that his actions complied with § 525, the Eighth Circuit concluded that he was entitled to qualified immunity respecting Debtor's claim under § 525.

NINTH CIRCUIT

Employment

Leonard v. St. Rose Dominican Hosp. (In re Majewski), 310 F.3d 653 (9th Cir. 2002). After Debtor-employee incurred large medical expenses, he informed his employer of his intent to file a bankruptcy petition. The employer fired him before he could do so, and Debtor-employee brought a claim under § 525(b). The Ninth Circuit held that the antidiscrimination provision of § 525 forbids an employer from firing an employee solely because that person "is or has been" a debtor; it protects only persons who have actually filed a bankruptcy petition.

Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264 (9th Cir. 1990). Debtor applied for a sales representative position with a prospective employer. The employer orally offered the position subject to certain contingencies, but not a credit check report, and the employer did not inform Debtor that the findings of the report could affect his employment status. Although the credit report indicated a poor credit history, it did not reveal Debtor's pending chapter 13 bankruptcy. The employer refused to hire Debtor on the basis of his past credit history. The Ninth Circuit affirmed the holding of the district court that Debtor's bankruptcy status was not the sole reason for denial of employment; thus, the employer did not violate § 525(b).

ELEVENTH CIRCUIT

Employment

Myers v. Toojay's Management Corp., 640 F.3d 1278 (11th Cir. 2011). After chapter 7 Debtor received a discharge, he moved and sought employment as manager at a restaurant. The prospective employer required a paid 2-day on-the-job-evaluation and informed Debtor that his employment offer was conditioned on a clean credit history. After the prospective employer ran a background credit check, Debtor was informed that he would not be hired because of his past bankruptcy filing. Debtor sued the prospective employer for discrimination in violation of § 525(b). The district court found in favor of the prospective employer and Debtor appealed.

The Eleventh Circuit ruled that § 525(b) does not prevent private employers from refusing to hire prospective employees on the basis of their bankruptcy filings. Section 525(a) expressly prohibits a government from denying employment to, terminating the employment of, or discriminating with respect to employment against, someone based on a bankruptcy filing. Section 525(b) prevents a private employer from terminating the employment of, or discriminating with respect to employment against, an individual on that same ground. The conspicuous difference between the two subsections is that § 525(a) explicitly forbids government employers from denying employment because of a bankruptcy, but § 525(b) does not do so with respect to private employers. When Congress includes particular language in one section of a statute but omits it elsewhere, it is generally presumed that Congress acted intentionally and purposely in the disparate inclusion or exclusion. The phrase "discriminate with respect to employment" in § 525(a) must mean something other than discrimination in hiring; because it must mean the same thing in § 525(b) as in § 525(a), § 525(b) cannot be read to prevent discrimination in hiring, but rather refers to other aspects of employment, such as promotions, demotions, hours, and pay. Because the difference between § 525(a) and § 525(b) was dispositive, the Court held that the prospective employer did not violate § 525(b) by denying Debtor employment because of his bankruptcy status.

Davis v. Crumbley Backhoe Serv. (In re Davis), 380 F. App'x 843 (11th Cir. 2010). Section 525(b), which generally bars discriminatory employment treatment based on a bankruptcy filing does not apply when the adverse employment action occurred prior to Debtor's bankruptcy filing.

Patterson v. B.F. Goodrich Employees Fed. Credit Union, 967 F.2d 505 (11th Cir. 1992). A company-affiliated credit union froze Debtor's checking accounts immediately following Debtor's bankruptcy petition. The circuit court held that the freeze amounted to a setoff; and that the setoff was an untimely and improper violation of the automatic stay. Additionally, the court held that the credit union violated the anti-discrimination provision of § 525(b). Because the credit union was tightly affiliated with Debtor's employer, the court found that the freezing of the account amounted to discrimination by a private employer against Debtor solely because Debtor had filed bankruptcy.

Everett v. Lake Martin Area United Way, 46 F. Supp. 2d 1233 (M.D. Ala. 1999). Debtor was fired from her position with a non-profit organization after filing bankruptcy. In determining that summary judgment was not warranted, the district court clarified that in order for § 525(b) to apply, Debtor's bankruptcy filing had to have been the sole reason for her adverse employment treatment; the prohibition on discrimination would not be applicable if Debtor were fired for another viable reason.

Government

Curry v. Metro. Dade County (In re Curry), 148 B.R. 966 (S.D. Fla. 1992). A local public housing authority sought relief from the automatic stay in order to evict Debtors from public housing for nonpayment of prepetition rent. The district court held that the Bankruptcy Code prevented the county from pursuing an eviction based solely on unpaid prepetition rents. Because the rents were dischargeable, a post-petition effort to evict the tenants would be impermissible discrimination under § 525(a).

Student Loans

Taylor v. U.S. Dep't of Educ., 263 B.R. 139 (N.D. Ala. 2001). Prepetition, Debtor took out a PLUS student loan for her dependent son. Following her bankruptcy filing, the lender cancelled the second disbursement of the loan. The bankruptcy court held that the lender's actions constituted impermissible discrimination under § 525, but the district court reversed. The district court concluded that the lender had a right under § 365(e)(2) to revoke its contract following the bankruptcy filing. Moreover, the lender's revocation policy did not violate § 525's prohibition on discrimination against bankruptcy filers because that policy was not limited to bankruptcy filers, extending instead to everyone with an "adverse credit history," and the policy provided a means for overcoming the presumed denial. The court reasoned that if the lender were required to ignore Debtor's adverse credit history because of the bankruptcy filing, Debtor would actually receive favorable treatment over similar applicants with poor credit history. Additionally, the court held that § 525 does not create a private right of action for monetary damages.

C. *DENIAL OF DISCHARGE—§ 727*

FIRST CIRCUIT

Gagne v. Fessenden (In re Gagne), 394 B.R. 219 (B.A.P. 1st Cir. 2008). Debtors filed a joint chapter 13 petition in which they disclosed several prior cases they had filed individually. The trustee argued that Debtors were not entitled to a discharge in the pending case based upon the dates they received discharges in their earlier cases. The trustee emphasized the phrase "received a discharge" in § 1328(f). The BAP reversed the findings of the bankruptcy court and found in favor of Debtors. The BAP observed that Debtors' interpretation of § 1328(f)—that the look-back period runs backwards from the date of the filing of the current case to the date of filing of the prior chapter 13 case, rather than from the date of filing of the current case back to the entry of discharge in the prior case—is consistent with the majority of decisions, which follow the statute's plain reading. Thus, the look-back period is from the date of the filing of the earlier case. The rule of the last antecedent should be followed.

SECOND CIRCUIT

Pisculli v. T.S. Haulers, Inc. (In re Pisculli), 408 F. App'x 477 (2d Cir. 2011). The Second Circuit affirmed the bankruptcy court's denial of discharge under § 727(a)(2)(b) when Debtor disbursed the proceeds from sale of a truck with the intent to defraud. Among other things, Debtor used those proceeds to satisfy the creditors of one of his wholly owned businesses and to pay personal expenses.

O'Connor v. Leone (In re Leone), 463 B.R. 229 (Bankr. N.D.N.Y. 2011). The U.S. Trustee objected to chapter 7 Debtors' (husband and wife) claim of an annuity exemption and sought denial of discharge under §§ 727(a)(2)(A), (a)(2)(B), (a)(3), (a)(4), (a)(5), and (a)(6) because of their alleged failure to disclose the purchase of the annuity. The court refused to deny discharge because there was no proof that the purchase was intended to hinder, delay or defraud creditors. Rather, the evidence showed that Debtors reasonably and in good faith relied upon their counsel's advice to put money into the annuity to "protect it from bankruptcy," and Debtors disclosed the purchase through an amendment to their schedules.

THIRD CIRCUIT

In re Bryen, 449 F. App'x 165 (3d Cir. 2011). This is an example of cases denying discharge to a dishonest debtor whom the court determined, on the basis of the totality of the circumstances, willfully (*i.e.*, voluntarily, consciously and intentionally) attempted to evade his taxes.

In re DiLoreto, 266 F. App'x 140 (3d Cir. 2008). In this matter, Debtor's failure to disclose his assets and beneficial interests in various corporations and offshore entities, as well as his false testimony that the records he submitted were complete, was sufficient to support denial of discharge under § 727(a)(4). The Court collected authorities regarding the governing standards under § 727(a).

Rosen v. Bezner, 996 F.2d 1527 (3d Cir. 1993). The Court discussed denial of discharge on the grounds of Debtor's concealment of assets pursuant to the "continuous concealment doctrine. That doctrine consists of two components: an act (*i.e.*, a transfer or a concealment of property) and an improper intent (*i.e.*, a subjective intent to hinder, delay, or defraud a creditor). The matter was remanded back to the bankruptcy court to determine (1) whether Debtor actually retained a secret interest in property that he had transferred to his wife and concealed from creditors during the year preceding his bankruptcy filing, and (2) whether such concealment was accompanied by his actual intent to hinder or defraud creditors.

Meridian Bank v. Alten, 958 F.2d 1226 (3d Cir. 1992). This case addressed the denial of a discharge as a result of the inadequacy of Debtor's financial records. The court stated that while a debtor may justify the failure to keep records in some cases, discharge may be granted only if the debtor presents an accurate and complete account of his or her financial affairs. Notably, the court held that fear of liens by creditors did not, by itself, provide adequate justification for the failure to keep adequate records.

FOURTH CIRCUIT

Smith v. Jordan, 521 F.3d 430 (4th Cir. 2008). Revocation or denial of discharge under § 727(a)(6)(A), based upon noncompliance with a court order, requires a "refusal," which is willful and intentional, and not simple "failure" to obey, which involves no willfulness. When the order prohibited "selling, transferring, removing, destroying, mutilating or concealing" property, Debtor did not willfully and intentionally refuse to obey the order by "refinancing" the property.

Branigan v. Bateman (In re Bateman), 515 F.3d 272 (4th Cir. 2008). Under the plain language of § 1328(f)(2), a chapter 13 discharge is barred if Debtor received a discharge in a prior chapter 13 case *filed* within two years of the filing of the current case. Although most chapter 13 plans extend for three or five years, the filing-date-to-filing-date interpretation does not render the provision meaningless since some plans are completed in one or two years. Moreover, even assuming that the filing-date-to-filing-date interpretation will make the discharge bar rarely applicable, that outcome is consistent with congressional policy favoring chapter 13 over chapter 7.

Mercantile Peninsula Bank v. French, 499 F.3d 345 (4th Cir. 2007). The bankruptcy court denied Debtor his discharge under § 727(a)(3) for failure to keep adequate records and under § 727(a)(4) for a false oath on a motion for summary judgment filed by the creditor. The district court affirmed. On appeal, the Court of Appeals vacated the judgment and remanded the case for trial. The Court reasoned that both sections require the trial court to judge the credibility of witnesses, which it cannot properly do on a grant of summary judgment.

Tidewater Fin. Co. v. Williams, 498 F.3d 249 (4th Cir. 2007). Section 728(a)(8) does not permit tolling of the waiting period between bankruptcy discharges. The bankruptcy court has power—pursuant to §§ 105(a), 109(g)(2), 349(a) and 362—to "screen out bad-faith petitioners . . . ." *Id.* at 259. In this case, Debtor filed two chapter 7 petitions more than six years apart. In between these two cases Debtor filed three chapter 13 cases, all of which were dismissed. After Debtor's second chapter 7 petition, a judgment creditor filed an adversary proceeding objecting to discharge. The creditor argued that the six year period required by § 727(a)(8) was a statute of limitations and that Debtor's chapter 13 cases had tolled the six year waiting period, thus precluding a second chapter 7 discharge. The Fourth Circuit held that §728(a)(8) is not a statute of limitations; rather, it "defines a condition" that a debtor must satisfy so as to qualify for a discharge. The statute "conditions the ability of a debtor . . . to obtain a Chapter 7 discharge by requiring" a wait of six years after the debtor initiated the earlier proceeding. *Id.* at 254.

Note that § 728(a)(8) was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) to extend the six year period between chapter 7 discharges to eight years.

SIXTH CIRCUIT

Keeney v. Smith (In re Keeney), 227 F.3d 679 (6th Cir. 2000). Debtor was denied a discharge under § 727(a)(2)(A) for concealing his interest in two properties, and under § 727 (a)(4)(A) for making a false oath. On appeal, Debtor was found to have a beneficial interest in the ownership of the properties transferred to his parents' names. The continuing concealment doctrine was correctly applied when Debtor had a beneficial interest in the properties under dispute, and an intent to defraud. Debtor omitted his beneficial interest in filing for bankruptcy and, therefore, made a false oath pursuant to §727(a)(4)(A). The Sixth Circuit held the bankruptcy court did not err in inferring from the circumstances that Debtor knowingly or with reckless disregard omitted his interest in the property in order to defraud.

Barclays/American Bus. Credit v. Adams (In re Adams), 31 F.3d 389 (6th Cir. 1994). The Sixth Circuit held that Debtors intended to hinder or delay creditors, resulting in denial of discharge under § 727(a)(2)(A-B). Prior to this case, the Sixth Circuit had not opined whether the burden of proof for a creditor under § 727 was the preponderance of the evidence standard. The Sixth Circuit joined sister circuits (the Fourth, Fifth, and Tenth) and applied *Grogan v. Garner*, 498 U.S. 279, 291 (1991), in which the Supreme Court held that exceptions to discharge under § 523, including the exception for fraud, require proof by a preponderance of the evidence.

SEVENTH CIRCUIT

The Seventh Circuit requires the elements of a denial of discharge under section 727 to be proved by a preponderance of the evidence. *Peterson v. Scott (In re Scott)*, 172 F.3d 959 (7th Cir. 1999). Among other grounds, the Seventh Circuit has upheld denials of discharge for (1) concealment of assets (including business interests) and misreporting of income, *Stamat v. Neary*, 635 F.3d 974 (7th Cir. 2011); *Village of San Jose v. McWilliams*, 284 F.3d 785 (7th Cir. 2002); (2) concealment of assets combined with the failure to keep adequate books and records, *Peterson v. Scott (In re Scott)*, 172 F.3d 959 (7th Cir. 1999); (3) failure to keep business records, *Union Planters Bank v. Connors*, 283 F.3d 896 (7th Cir. 2002; (4) transfer of nonexempt assets into exempt assets even when the transfers were ultimately unavailing to increase exemptions because the debtor acted with intent to hinder, delay, or defraud creditors, *Smiley v. First Nat'l Bank (In re Smiley)*, 864 F.2d 562 (7th Cir. 1989).

The Seventh Circuit has issued a few important holdings on the procedural requirements under § 727. First, the court ruled that the time limits in Rule 4004 are not jurisdictional and, thus, are subject to equitable defenses. *In re Kontrick*, 295 F.3d 724 (7th Cir. 2002). The Seventh Circuit also has ruled that the grounds for revocation of a discharge in § 727(d) are not exclusive such that a bankruptcy court can revoke a discharge under Fed. R. Civ. P. 60 as incorporated by Rule 9024 as long as the revocation occurs within one year of the discharge order. *Disch v. Rasmussen*, 417 F.3d 769 (7th Cir. 2005). Third, the Seventh Circuit held that a previous fraudulent transfer judgment for actual fraud can have preclusive effects in a later proceeding under § 727 to deny the discharge on the grounds of pre-bankruptcy transfers, although the court also commented it was deciding the case on issue preclusion grounds because the parties did not raise other doctrines that might apply such as law of the case. *Cohen v. Bucci*, 905 F.2d (7th Cir. 1990).

Interpreting Indiana law, the Seventh Circuit has held prepetition interspousal transfers of entireties property is not prejudicial to creditors when state law does not allow separate creditors to reach entireties property. Therefore, such transfers may not be grounds for denial of discharge under § 727. *Lee Supply Corp. v. Agnew (In re Agnew)*, 818 F.2d 1284 (7th Cir. 1987).

EIGHTH CIRCUIT

Korte v. Internal Revenue Serv. (In re Korte), 262 B.R. 464 (B.A.P. 8th Cir. 2001). The IRS argued that Debtor's discharge should be denied under § 727(a)(2)(A), because Debtor transferred or concealed assets within one year of the petition date with an intent to defraud his creditors, and under § 727(a)(4)(A) for having falsely filled out his schedules. The BAP held that § 727 is included to prevent a debtor's abuse of the Bankruptcy Code, and that denying the debtor a discharge is a harsh and drastic penalty. "Accordingly, the denial of discharge provisions of section 727 are strictly construed in favor of the debtor." *Id*. at 471. The BAP upheld the bankruptcy court's denial of Debtor's discharge on the facts in the case.

NINTH CIRCUIT

§ 727(a)(2)

Retz v. Samson (In re Retz), 606 F.3d 1189 (9th Cir. 2010). Debtor made a false oath when he signed his schedules and statement of financial affairs in blank without reading them. There were significant omissions and errors, the monetary value of the omitted transfers was significant, the omissions detrimentally affected administration of the estate, and Debtor had not amended his papers in three years since the petition date and trial.

"Badges of fraud" that support a finding of fraudulent intent, include the facts that: (1) the transferor and transferee had a close relationship; (2) the transfer was in anticipation of a pending suit; (3) the transferor-debtor was insolvent or in poor financial condition at the time; (4) all or substantially all of the debtor's property was transferred; (5) the transfer so completely depleted the debtor's assets that the creditor had been hindered or delayed in recovering any part of the judgment; and (6) the debtor received inadequate consideration for the transfer.

Debtor's sale of real property to his brother for 27% less than the appraised value and within one year prior to filing was made with the intent to hinder, delay, or defraud a creditor. A debtor who acts in reliance on his counsel's advice generally lacks the requisite intent, but that reliance must be in good faith. "[A]dvice of counsel is not a defense when the erroneous information should have been evident to the debtor." *Id.* at 1199. A debtor's intent need not be fraudulent to deny discharge for concealment of assets; mere intent to delay or hinder a creditor is sufficient. *Id.* at 1200.

Bernard v. Sheaffer (In re Bernard), 96 F.3d 1279 (9th Cir. 1996). Within one year before filing for bankruptcy, Debtors withdrew over $64,000 from their bank accounts while a creditor was trying to levy a writ of attachment. The Ninth Circuit relied on the broad meaning of "transfer" pursuant to § 101(54) to determine that Debtors' withdrawal constituted a "disposing of" or "parting with" property warranting denial of discharge under § 727(a)(2)(A).

Finalco, Inc. v. Roosevelt (In re Roosevelt), 87 F.3d 311 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1691, *overruled on other grounds by*

In re Bammer, 131 F.3d 788 (9th Cir. 1997). Transfer with intent to defraud under § 727(a)(2) occurs at the time the transfer is valid and made effective between the parties of the transfer, whether or not it is valid against bona fide purchasers.

Hughes v. Lawson (In re Lawson), 122 F.3d 1237 (9th Cir. 1987). Although Debtor's transfers of real property to her mother occurred more than one year before the petition date, Debtor was denied a discharge under § 727(a)(2)(A) based on her continuing concealment of assets.

Adeeb v. First Beverly Bank (In re Adeeb), 787 F.2d 1339 (9th Cir. 1986). "A debtor who transfers property within one year of bankruptcy with the intent penalized by § 727(a)(2)(A) may not be denied discharge of his debts if he reveals the transfers to his creditors, recovers substantially all of the property before he files his bankruptcy petition, and is otherwise qualified for a discharge." *Id.* at 1345. The court concluded that "transferred" in § 727(a)(2)(A) means "transferred and remained transferred," but noted that "concealment may be undone simply by disclosing the existence of the property." *Id.*

Devers v. Bank of Sheridan (In re Devers), 759 F.2d 751 (9th Cir. 1985). Although constructive fraudulent intent cannot be the basis for denial of a discharge, fraudulent intent "may be established by circumstantial evidence, or by inferences drawn from a course of conduct," such as violation of the court's order that "evidences a fraudulent intent." *Id.* at 753-54.

§ 727(a)(3)

Caneva v. Sun Cmtys. Operating L.P. (In re Caneva), 550 F.3d 755 (9th Cir. 2008). Debtor owned or controlled approximately 15 business entities, recreational vehicle and mobile home parks, and an airplane. Debtor admitted that he had no records for his business entities and lacked any documentation evidencing an alleged transfer of $500,000 to a broker. Either admission was sufficient to establish a prima facie violation of § 727(a)(3) because a total absence of records meant inadequate records and impossibility of discerning debtor's financial situation. Section 727(a)(3) placed an affirmative duty on Debtor to create books and records accurately documenting his business affairs.

Lansdowne v. Cox (In re Cox), 41 F.3d 1294 (9th Cir. 1994). To state a prima facie case under § 727(a)(3), a creditor must demonstrate (1) that the debtor failed to maintain and preserve adequate records, and (2) that such failure makes it impossible to ascertain the debtor's financial condition and material business transactions. *Id.* at 1296. Once the prima facie case is established, the burden shifts to the debtor to justify his failure to keep or preserve records. Debtor's reliance on her husband to maintain adequate books and records was deemed "objectively reasonable" under the totality of the circumstances, warranting Debtor's discharge.

Rhodes v. Wikle, 453 F.2d 51 (9th Cir. 1971). While § 727(a)(3) does not require absolute completeness in making or keeping records, the debtor must "present sufficient written evidence which will enable his creditors reasonably to ascertain his present financial condition and to follow his business transactions for a reasonable period in the past." *Id.* at 53.

§ 727(a)(4)(A)

Weiner v. Perry, Settles & Lawson, 161 F.3d 1216 (9th Cir. 1998). The bankruptcy court abused its discretion by denying Debtor's discharge for undervaluing jewelry and knowingly making a false oath when a pending trustee-ordered appraisal, known to the court, later indicated that the jewelry was actually worth less than the $2,500 value Debtor listed on his schedules.

Khalil v. Developers Sur. & Indem. Co. (In re Khalil), 379 B.R. 163, 177 (B.A.P. 9th Cir. 2007), *aff'd,* 578 F.3d 1167 (9th Cir. 2009). While evidence of recklessness does not alone satisfy the intent requirement of § 727(a)(4), evidence of recklessness may be combined with other circumstantial evidence to prove fraudulent intent. Debtor's numerous omissions, coupled with his conscious exclusion of information, even at the time of trial, and failure to make any attempt to correct inaccuracies, was sufficient to support an inference of his fraudulent intent to deceive.

Searles v. Riley (In re Searles), 317 B.R. 368 (B.A.P. 9th Cir. 2004). Denial of discharge under § 727(a)(4)(A) requires proof, by a preponderance of evidence, that "(1) there was a false statement under oath or penalty of perjury; (2) made knowingly and fraudulently and (3) regarding a material fact." *Id.* at 377. Debtor's failure promptly to amend the schedules supported the court's inference of intent. The court emphasized a debtor's ongoing duty to amend schedules to assure the accurate and complete disclosure of financial affairs. *Id.* at 378.

Fogal Legware of Switzerland, Inc. v. Wills (In re Wills), 243 B.R. 58 (B.A.P. 9th Cir. 1999). An omission relating to an asset that is of little value or would not be property of the estate can be material if it detrimentally affects administration of the estate. Value is not an absolute prerequisite either to materiality or to a denial of discharge under §§ 727(a)(2) and (a)(4). *Id.* at 61.

§ 727(d)

White v. Nielsen (In re Nielsen), 383 F.3d 922 (9th Cir. 2004). The Ninth Circuit reaffirmed its holding in *In re Beezley*, 994 F.2d 1433 (9th Cir. 1993), and found that Debtors' failure to list a creditor in their no-asset, no-bar-date chapter 7 proceeding was not grounds for revocation of their discharge for fraud under § 727(d)(1). "Fraud of the debtor" in § 727(d)(1) requires that the discharge be "obtained through" fraud; "fraud in the air will not suffice." *Id.* at 925.

Surcharge for Discharge Denial

Latman v. Burdette, 366 F.3d 774 (9th Cir. 2004). Debtors were denied discharge under §§ 727(a)(2), (a)(3), (a)(4), and (a)(5). The trustee sought, in addition, to surcharge Debtors' "wild card" exemption to make up for $7,000 in unaccounted-for proceeds from the sale of a car and boat and approximately $8,000 in cash from a non-disclosed bank account. The bankruptcy court held that it had equitable authority to surcharge Debtors' statutory exemptions because doing so was reasonably necessary to protect the integrity of the bankruptcy process and to ensure that Debtors exempted no more than what is permitted under the Code. *Id.* at 786.

TENTH CIRCUIT

Standiferd v. U.S. Trustee (In re Standiferd), 641 F.3d 1209 (10th Cir. 2011). Chapter 13 Debtors confirmed a plan that proposed to pay 100% of allowed unsecured claims from Debtors' post-petition income and other sources. The plan and confirmation order required Debtors to file monthly operating reports if Debtors were to engage in business, and required Debtors to timely file all tax returns due during the life of the plan and send a copy to the trustee. Debtors failed to file monthly operating reports, however, even though they engaged in business, and they failed to send copies of their tax returns to the trustee. After the trustee moved to dismiss Debtors' case for the second time (the trustee's first motion was denied), Debtors voluntarily converted their case to chapter 7. At the time of conversion, Debtors had not completed the payments required by the plan; and instead of paying 100% of the allowed unsecured claims as the plan proposed, Debtors' unsecured debt had nearly tripled while they were proceeding under chapter 13. The trustee filed a complaint seeking to deny Debtors a discharge of their debts. The bankruptcy court issued an order denying Debtors a discharge under both §§ 727(a)(2)(B) and (a)(6)(A).

The Tenth Circuit ruled that the bankruptcy court's confirmation order was a "lawful order of the court" for purposes of § 727(a)(6)(A), and that Debtors' willful non-compliance with that order permitted denial of discharge. Although the Bankruptcy Code does not define what constitutes a "lawful order of the court" for purposes of

§ 727(a)(6)(A), the Court easily concluded that a confirmation order qualified. The fact that the Bankruptcy Code permits a chapter 13 debtor, under §§ 1307(a) and (b), to stop complying with the provisions of a confirmation order and either convert the case to chapter 7 or dismiss the bankruptcy case altogether does not reflect a clear legislative intent to make confirmation orders nugatory. Instead, §§ 1307(a) and (b) simply embody the Code's policy that a chapter 13 debtor cannot, in most circumstances, be forced to continue proceeding under chapter 13, but as long as the debtor remains under chapter 13, he or she must comply with the terms of the bankruptcy court's confirmation order. Here, Debtors' willful violations of the confirmation order—by failing to provide the trustee with monthly operating reports and copies of tax returns—permitted the bankruptcy court to deny Debtors a discharge.

The Court also ruled that a debtor's pre-conversion conduct may support denial of discharge under § 727(a)(6)(A). Specifically, when a debtor converts the bankruptcy case from chapter 13 to chapter 7, discharge may be denied under § 727(a)(6)(A) based on the debtor's refusal to obey a lawful order of the court while the case was proceeding under chapter 13. Because conversion does not commence a new case, a debtor's conduct during chapter 13 may be considered after the debtor's case has been converted to chapter 7, as long as the motion to deny discharge under § 727(a)(6)(A) is filed while the debtor is in chapter 7. The Code is not designed to allow a chapter 13 debtor to avail him- or herself of its protections, willfully disobey the bankruptcy court's confirmation order and, once the misconduct is discovered, convert the case to chapter 7 in order to obtain a guaranteed discharge. Here, Debtors violated the bankruptcy court's confirmation order while they were in chapter 13, but once their case was converted to chapter 7, the trustee could seek denial of discharge under § 727 based on Debtors' chapter 13 conduct.

ELEVENTH CIRCUIT

In re Phillips, 476 F. App'x 813 (11th Cir. 2012). The Eleventh Circuit held the bankruptcy court applied the correct standard requiring actual intent to defraud under § 727(a)(4)(A). Citing *Chalik*, the Court clarified that that an omission is material for the purposes of § 727(a)(4)(A) if it bears a relationship to the debtor's business transactions or estate, or concerns the discovery of assets, business dealings or the existence and disposition of property.

In re Coady, 588 F.3d 1312 (11th Cir. 2009). After a failed real estate venture, Debtor lived in his wife's house, drove a car leased in her name, and served as an "uncompensated independent contractor" for business entities held in her name. The Eleventh Circuit agreed with the creditor's argument that these actions were in violation of § 727(a)(2) because Debtor was the actual owner and operator of the businesses. The bankruptcy estate broadly includes all legal or equitable interests of the debtor pursuant to § 541(a)(1). Finally, the court held that the doctrine of continuing concealment would be robbed of all its force if knowledge of the concealment before the look-back period could be used as a defense.

In re Chalik, 748 F.2d 616 (11th Cir. 1984). The bankruptcy court denied Debtor a discharge due to Debtor's failure to disclose certain worthless assets. The Eleventh Circuit upheld the decision by concluding that the value of the assets is irrelevant. An omission need only be known or fraudulent for a debtor to be denied discharge.

D. *EXCEPTIONS TO DISCHARGE*

1. Taxes

UNITED STATES SUPREME COURT

Hall v. United States, 132 S. Ct. 1882 (2012). Chapter 12 Debtors sold their farm and related farm assets in bankruptcy. Debtors proposed a plan that treated the federal capital gains tax arising out of the sale of their assets as an unsecured claim. To the extent that the tax could not be paid in full from plan funds, its balance would be discharged under the plan. The IRS objected to the dischargeability of the capital gains tax.

The Supreme Court ruled that the federal capital gains tax arising from the post-petition sale of farmland or farm assets are not "incurred by the estate" under § 503(b) of the Bankruptcy Code, and cannot be discharged pursuant to a chapter 12 plan; farmers who sell such assets during a bankruptcy reorganization remain liable for the full amount of the capital gains tax resulting from the sale. The Court explained that, read together, IRC §§ 1398 and 1399 make it clear that the filing of chapter 12 petition does not create a separate taxable entity. For this reason, a chapter 12 estate does not and cannot incur any post-petition taxes; the petitioning debtor continues to incur taxes. Thus, any such post-petition tax liability is not incurred by the debtor's estate under § 503(b), and those taxes cannot be collected from the estate or discharged by the estate under a chapter 12 plan. The Court also noted that a similar result has been found in the chapter 13 context, so chapter 13 case law may be relied upon as authority when construing similar chapter 12 provisions.

THIRD CIRCUIT

In re Bryen, 449 F. App'x 165 (3d Cir. 2011). The Court denied discharge to a dishonest debtor whom the Court determined, based upon the totality of the circumstances, willfully (i.e. voluntarily, consciously and intentionally) attempted to evade his taxes.

FOURTH CIRCUIT

Maryland v. Ciotti (In re Ciotti), 638 F.3d 276 (4th Cir. 2011). Prepetition, the state comptroller assessed Debtor with more than \$500,000 in past due taxes, penalties, and interest based on IRS determinations about Debtor's federal adjusted income for tax years 1992 through 1996. The IRS had notified Debtor about these adjusted amounts, but Debtor had not reported them to the state. Debtor then filed her chapter 7 petition and received a discharge, after which her case was closed. When the state comptroller attempted to collect the assessed past due taxes, penalties, and interest from Debtor, she moved to reopen her case and obtain a declaration from the bankruptcy court that her state tax liabilities has been discharged. The state comptroller argued that § 523(a)(1)(B) excepted Debtor's state tax liabilities from discharge.

The Fourth Circuit ruled that Debtor's state tax liabilities were excepted from discharge pursuant to § 523(a)(1)(B). This provision prevents the discharge of a tax liability if the debtor did not provide the respective taxing authority with a return or equivalent report or notice. Because Debtor was required to report the changes in her federal adjusted income to the state and failed to do so, her state tax liability was not discharged. The fact that the state found out about Debtor's income adjustments from the IRS anyway is not relevant to this analysis. In light of the BAPCPA amendments, "[i]t is apparent from the changes that Congress determined that the same policy reasons that justify precluding the discharge of tax debt when the debtor failed to file a return also justify precluding the discharge of the tax debt when the debtor failed to file or give a required report or notice corresponding to that debt." *Id*. at 279-80.

FIFTH CIRCUIT

McCoy v. Mississippi State Tax Comm'n (In re McCoy), 666 F.3d 924 (5th Cir. 2012), *cert. denied,* 133 S. Ct. 192 (2012). Debtor filed a post-discharge adversary proceeding against the state tax commission seeking a declaratory judgment that two years of her prepetition state income tax debts were subject to discharge. The Fifth Circuit held that, unless it is filed under a "safe harbor" provision similar to 26 U.S.C. § 6020(a), a state income tax return that is filed late under applicable nonbankruptcy state law is not a "return" for bankruptcy discharge purposes under § 523(a).

Colvin v. Comm'n of Internal Revenue, 460 F. App'x 349 (5th Cir. 2012). The Tax Court concluded that Debtor's unpaid taxes were still due and owing. On appeal, the Fifth Circuit concluded that the Tax Court had interpreted § 523(a)(1)(A) correctly. Thus, Debtor's tax debt was not discharged in his bankruptcy proceeding.

SIXTH CIRCUIT

United States v. Storey, 640 F.3d 739 (6th Cir. 2011). Debtor filed income tax returns in 1994, 1995, 1996, 1997, 2000, 2001, 2002, 2003, 2004 and 2005, each showing that she had taxable income, but she never paid any income tax for those years. In 2002, Debtor filed her chapter 7 petition. Neither Debtor nor the IRS filed an adversary complaint seeking a determination regarding the dischargeability of her federal income tax liabilities. The bankruptcy court entered a discharge order in 2002 and Debtor's case was closed in 2004. In 2007, the IRS filed a complaint against Debtor to reduce her tax debt to judgment and to foreclose on its tax lien on Debtor's real property.

The Sixth Circuit ruled that non-payment of taxes alone is insufficient evidence of a willful attempt by a debtor to evade or defeat a tax debt so as to warrant the nondischarge of the debtor's tax debt. Section 523(a)(1)(C) renders any tax nondischargeable if the debtor willfully attempted to evade or defeat the tax, upon proof of two elements—conduct and mental state. The conduct element requires showing that the debtor avoided or evaded payment or collection of taxes through acts of omission, such as failure to file returns and failure to pay taxes, or through acts of commission, such as affirmative acts of evasion. The mental element requires a showing of willfulness—that the debtor voluntarily, consciously, and intentionally evaded her tax liability. Here, the Court found that the IRS did not present sufficient evidence to establish either element. There was no proof of a lavish lifestyle or extravagant purchases that might demonstrate a voluntary and intentional evasion by Debtor of her tax obligations. The Court explained that § 523 limits the discharge of tax debts to the honest but unfortunate debtor. Without a finding of willful evasion by a preponderance of the evidence, the IRS failed to overcome the presumption that Debtor's tax obligations were discharged in her bankruptcy case.

Palmer v. United States (In re Palmer), 219 F.3d 580 (6th Cir. 2000). Income tax debts arising from tax returns due more than three years pre-petition are dischargeable in chapter 7. Also, bankruptcy court may invoke equitable powers under § 105(a) to toll the three-year look-back period for the discharge of income tax debts, but cannot automatically toll the period.

Meyers v. Internal Revenue Service (In re Meyers), 196 F.3d 622 (6th Cir. 1999). Notwithstanding Debtor's voluntary efforts to cooperate in settling the issue of income tax obligations, those obligations are nondischargeable when the debtor willfully attempted to evade or defeat the tax.

SEVENTH CIRCUIT

In re Payne, 431 F.3d 1055 (7th Cir. 2005). For purposes of determining when a tax return is filed (for purposes of the running of the three-year period of § 523(a)(1)), the Seventh Circuit adopted the conventional test that the document must (1) purport to be a "return," (2) be signed under penalty of perjury, (3) contain enough information to enable the taxpayer's tax liability to be calculated, and (4) evince an honest and genuine endeavor to satisfy the law.

In re Birkenstock, 87 F.3d 947 (7th Cir. 1996). For evasion under § 523(a)(1)(C), the Seventh Circuit requires more than nonpayment. Rather, the nonpayment must be willful. Thus, the Court found that a wife who signed a tax return without knowledge of the return's contents and who generally did not have knowledge of the family's finances did not "evade" the payment of taxes for purposes of § 523(a)(1)(C).

United States v. Frontone, 383 F.3d 656 (7th Cir. 2004). The Seventh Circuit ruled that the government's recovery of an erroneous tax refund can be a nondischargeable debt. If the erroneous refund resulted in a debtor's underpayment, the government is prosecuting a tax claim when it pursues a refund, and hence the claim is nondischargeable. The Court suggested the nature of the government's claim would have been different if the refund had gone to someone who owed no tax; in such a case, the debt might have been dischargeable in bankruptcy.

EIGHTH CIRCUIT

May v. Missouri Dep't of Rev. (In re May), 251 B.R. 714 (B.A.P. 8th Cir. 2000). Debtor brought an adversary proceeding to determine the dischargeability of his federal and state income tax debts. Debtor had consistently failed to file his income tax returns and was incarcerated for willful failure to do so. He was ordered to file his federal income tax returns no later than 180 days after his release and he did file, but after 180 days had passed. Section 523(a)(1)(C) provides that a discharge in bankruptcy does not discharge an individual debtor from any debt with respect to which the debtor "willfully attempted in any manner to evade or defeat such tax." As the court stated, "[i]f a debtor is aware of the duty to pay his taxes, has the wherewithal to pay taxes and takes steps to avoid paying them, there is a willful attempt to evade or defeat the tax." The BAP affirmed the bankruptcy court's conclusion that Debtor willfully attempted to evade or defeat his taxes.

NINTH CIRCUIT

California Franchise Tax Board v. Kendall (In re Jones), 657 F.3d 921 (9th Cir. 2011). Debtor and her husband filed a chapter 13 petition and confirmed a plan; in the same year, they received an extension for payment of their income taxes. A few years later, the bankruptcy court dismissed the bankruptcy case. More than a year later, Debtor file her own chapter 7 petition and received a discharge. Section 507(a)(8)(A) was inapplicable because Debtor's tax return was due more than three years before Debtor's chapter 7 petition. Thus, the tax debt would be discharged unless the statutory suspension provision (an unnumbered provision at the end of § 507(a)(8)) or equitable tolling applied to extend the look-back period pursuant to § 507(a)(8)(A). After Debtor's case was closed, the state franchise tax board successfully moved to reopen Debtor's case to obtain a declaration from the bankruptcy court that Debtor's tax debt had been excepted from discharge.

The Ninth Circuit ruled that under § 1327(b) property of the estate re-vested in Debtor upon confirmation of her chapter 13 plan, since Debtor did not elect otherwise in the plan. Thus, Debtor once again became the owner of her property upon confirmation, except as to the amount specifically dedicated to fulfillment of the plan. As a result, the taxing authority was not precluded from collecting post-petition taxes from property that re-vested in Debtor. Since the tax debt arose after confirmation, the government could have collected on the debt during the three-year look-back period and, as a result, the limitations period was not statutorily suspended. Furthermore, given that the taxing authority could have collected on the debt at any time after the tax came due, the Court distinguished *Young v. United States*, 535 U.S. 43, 46-47 (2002) (tolling the look-back period when the IRS was prevented from collecting its claim during pendency of a chapter 13 proceeding), and refused to equitably toll the look-back period. Thus, the debt was discharged.

Severo v. Comm'r of Internal Revenue, 586 F.3d 1213 (9th Cir. 2009). The Ninth Circuit allowed collection efforts on a 1990 tax return based on a 2005 notice of intent to make a levy, and notice of a federal tax lien on the debtors' assets. The court followed *Young v. United States*, 535 U.S. 43, 46 (2002), and § 523(a)(1)(A).

Miller v. United States, 363 F.3d 999 (9th Cir. 2004). The Ninth Circuit joined the Eleventh Circuit in concluding that the interplay between §§ 1141(d)(2), 523(a)(1)(A) and 507(a)(8) renders an IRS claim for unpaid withholding taxes nondischargeable by a confirmed chapter 11 bankruptcy plan, whether that claim is secured or not.

United States IRS v. Palmer (In re Palmer), 207 F.3d 566 (9th Cir. 2000). A tax court granted summary judgment in favor of the IRS based on uncontroverted assertions deemed admitted. The BAP and the Ninth Circuit held that the default judgment had no preclusive effect in Debtor's later nondischargeability proceeding because the issue of fraud was not "actually litigated" in the tax court. Although Debtor initiated the tax court proceeding, his lack of response amounted to "a classic default." *Id.* at 568.

Ward v. Board of Equalization of California (In re Artisan Woodworkers), 204 F.3d 888 (9th Cir. 2000). Relying on *Bruning v. United States*, 376 U.S. 358 (1964), the Ninth Circuit held that post-petition interest is an integral part of nondischargeable tax debt under § 523(a)(1)(A); thus, it is also nondischargeable and recoverable despite the full payment of prepetition taxes and interest under Debtors' confirmed plan.

Franchise Tax Board, State of Cal. v Bracey (In re Bracey), 77 F.3d 294 (9th Cir. 1996) (*per curiam*). The California Franchise Tax Board sent Debtor a notice of proposed income taxes for the 1984 tax year. Debtor sent a letter of protest to the FTB on April 21, 1988. On June 16, 1989, Debtor filed a voluntary chapter 7 petition and later received a discharge. The FTB later notified Debtor of its intent to collect the taxes. Debtor sought an order of contempt for violation of the discharge order. The Ninth Circuit held that because the 1984 tax assessment was not yet made when Debtor filed for bankruptcy, the assessment was excepted from discharge under the provisions of §§ 523(a)(1)(A) and 507(a)(7).

In re West, 5 F.3d 423 (9th Cir. 1993), *cert denied* 511 U.S. 1081 (1994). The Ninth Circuit adopted the majority view on tolling as first addressed in *Brickley v. United States (In re Brickley),* 70 B.R. 113 (B.A.P. 9th Cir. 1986), by incorporating Internal Revenue Code § 6503 into § 507(a)(8)(A)(i). IRC § 6503 tolls the three-year look-back period for nondischargeability during the pendency of the bankruptcy case and for six months thereafter. After examining congressional intent behind § 108(c), § 507(a)(8)(A)(i), and IRC § 6503, the Court concluded that allowing the statute of limitations to run while the debtor's assets were protected by the automatic stay would render § 108(c) meaningless and "would open the door to schemes of tax avoidance by debtors who could simply dismiss and refile their case after the expiration of the three-year period of nondischargeability." *Brickley,* 70 B.R. at 115.

TENTH CIRCUIT

In re Tuttle, 291 F.3d 1238 (10th Cir. 2002). The "gap interest" that accrued on the individual chapter 11 Debtor's taxes between the chapter 11 petition and plan confirmation were nondischargeable taxes under § 1141(d)(2).

Dalton v. I.R.S. 77 F.3d 1297 (10th Cir. 1996). Concealment of assets to avoid taxes is a willful evasion within § 523(a)(1)(C). The Court refused to construe a concealment of assets as limited to denial of discharge under § 727(a)(2). The failure to pay taxes is not determinative of concealment, however. It is only evidence to be used with the totality of circumstances.

ELEVENTH CIRCUIT

United States v. Mitchell (In re Mitchell), 633 F.3d 1319 (11th Cir. 2011). Debtor was a successful real estate agent who simply stopped filing tax returns and stopped paying his federal income taxes in 1998. By 2006, the IRS commenced collection and issued levies on Debtor's assets, at which point Debtor proposed an installment plan to pay all past due taxes. Debtor filed for bankruptcy shortly thereafter and initiated an adversary proceeding to determine the dischargeability of this tax debt. The IRS objected to the discharge of the tax debt pursuant to § 523(a)(1)(C). The bankruptcy court found that Debtor's failure to pay taxes was not "willful" and therefore determined that the debt was dischargeable. The IRS appealed.

The Eleventh Circuit ruled that under § 523(a)(1)(C), a tax debt is excepted from discharge if the debtor made a fraudulent tax return or willfully attempted to evade or defeat a tax liability. The test for determining whether a tax debt is dischargeable has two prongs, and the government bears the burden of proving both: (1) the debtor engaged in evasive conduct with (2) a mental state consistent with willfulness. The government satisfies the conduct requirement when it proves that the debtor engaged in affirmative acts to avoid payment or collection of taxes, either through commission or culpable omission. While mere non-payment of taxes is insufficient to satisfy the conduct requirement, non-payment is deemed to constitute evasive conduct if it ocurs in conjunction with a failure to file tax returns. The government satisfies the mental state by showing that the debtor (1) had a duty under the law, (2) knew he had that duty, and (3) voluntarily and intentionally violated the duty. Accordingly, a debtor's tax debts are nondischargeable if the debtor acted knowingly and deliberately in his efforts to evade his tax liabilities. Here, the Court found that there was sufficient evidence—based on Debtor's own testimony—before the bankruptcy court to establish that Debtor willfully evaded his tax liability by, among other things, intentionally not filing his returns because he knew he would have to pay past due taxes, interest and penalties, buying a home in his wife's name to avoid tax levy on it, and transferring his assets to his wife to avoid levies. The Court concluded, therefore, that Debtor's tax debt was not dischargeable.

Zimmerman v. I.R.S. (In re Zimmerman), 262 F. App'x 943 (11th Cir. 2008). The Court held Debtor's tax debt nondischargeable under § 523(a)(1)(C) because Debtor failed to file returns for the years in question, engaged in several evasive practices, and filed previous bankruptcies in an attempt to hinder collection efforts.

Console v. Comm'r of Internal Rev., 291 F. App'x 234 (11th Cir. 2008). The IRS was not required to appear in the bankruptcy court to object to discharge of its tax debt when the tax court had previously determined that Debtor's returns had been filed fraudulently. The IRS was only required to appear in court to assert the § 523(a)(1)(C) discharge exception if or when Debtor attempted to assert the discharge injunction defense.

U.S. v. Jacobs (In re Jacobs), 490 F.3d 913 (11th Cir. 2007). The Court of Appeals found that Debtor engaged in willful conduct to evade his taxes by transferring all of his interest in the family home to his wife despite remaining on the mortgage. Accordingly, Debtor was denied a discharge of the tax debt pursuant to § 523(a)(1)(C).

U.S. v. Fretz (In re Fretz), 244 F.3d 1323 (11th Cir. 2001). Chapter 7 Debtor had not filed a tax return in more than a decade prior to filing bankruptcy. Despite acknowledging Debtor's long bout with alcoholism, the Courth of Appeals held that Debtor's failure to file returns satisfied the willful conduct requirement for a finding of nondischargeability of the tax debt under § 523(a).

Griffith v. U.S (In re Griffith), 206 F.3d 1389 (11th Cir. 2000). Prior to filing bankruptcy, chapter 7 Debtor transferred various assets to his wife and to a corporation she owned. As a result, the estate did not have sufficient assets to pay a federal tax assessment. The Eleventh Circuit held that although Debtor did not willfully falsify his tax returns, he did willfully transfer most of his assets in order to evade payment of the tax debt through the bankruptcy. Accordingly, Debtor's tax liability was not dischargeable pursuant to § 523(a)(1)(C).

Gust v. U.S. (In re Gust), 197 F.3d 1112 (11th Cir. 1999). Debtor challenged the nondischargeability of tax debt when the IRS had filed a secured claim. Debtor argued that § 507(a)(8) limits the nondischargeability of tax debts under § 523(a)(1) to unsecured tax debts. The Court of Appeals held that tax debt of any kind *specified* in § 507(a)(8), as opposed to debt evidenced by a *claim* under § 507(a)(8), is nondischargeable. As a result, neither secured nor unsecured tax debts can be discharged if otherwise covered by § 523(a)(1).

U.S. v. Ryan (In re Ryan), 64 F.3d 1516 (11th Cir. 1995). Chapter 7 debtors sought to have a previous federal tax overpayment allocated to a nondischargeable tax debt. Debtors had overpaid their taxes in 1990 and had requested that the IRS apply the overpayment to their 1989 tax liability. Instead, the IRS applied the overpayment to earlier liability arising from Debtors' 1986 tax deficiency. Debtors wished to have the amount credited to the later return because the 1986 debt was dischargeable under § 523(a)(1). Because Debtor's payment was an overpayment instead of a voluntary partial payment, however, the IRS had discretion to apply the overpayment to any remaining tax liability under 28 U.S.C. § 6401(b)(1).

Burns v. U.S. (In re Burns), 887 F.2d 1541 (11th Cir. 1989). Debtor sought to discharge interest and tax fraud penalties through her chapter 13 plan. The Eleventh Circuit held that all pre- and post-petition interest that attaches to nondischargeable tax debt is likewise not dischargeable. Because the fraud penalties arose from tax debt that was more than three years old at the time of the petition, however, those penalties could not attach to a nondischargeable principal tax debt and could be discharged.

Wood v. U.S. (In re Wood), 866 F.2d 1367 (11th Cir. 1989). Debtor brought a constitutional equal protection challenge against §§ 523(a)(1) and 507(a)(7)(a), arguing that a debtor who has not received a valid extension to file a tax return may be able to discharge certain federal tax debt, whereas a debtor who has received a valid extension would not. The scenario results from language in § 507(a)(7)(A) tolling the nondischargeability period for tax debtors who have received valid extensions until three years from the extension deadline date. Without an extension, the debt is dischargeable three years after the original deadline. The Court of Appeals held that those Code sections do not violate equal protection guarantees because the government has a legitimate interest in encouraging tax collectors to quickly pursue delinquent tax debtors. In addition, tolling of the nondischargeabilitiy period for filers with valid extensions is rationally related to encouraging the prompt prosecution of those who did not receive a valid extension.

Western Surety Co. v. Waite (In re Waite), 698 F.2d 1177 (11th Cir. 1983). Debtor retained a surety to ensure that taxes would be paid on alcoholic beverage sales in Debtor's restaurant. When Debtor's restaurant failed, he defaulted on the alcoholic beverage taxes and the surety paid the tax bill. The Court of Appeals held that the surety's indemnity claim against Debtor was subrogated to the rights of the taxing entity and was nondischargeable under § 523(a)(1).

2. Fraud

SECOND CIRCUIT

Esposito v. Hartley (In re Hartley), 458 B.R. 145 (Bankr. S.D.N.Y. 2011). The creditor obtained a judgment for $300,000 against Debtors' corporation. While the case was on appeal, Debtors dissolved the business, but they did not give either the creditor or the court notice of that dissolution. Debtors filed a chapter 13 petition and did not list the creditor or the lawsuit on their schedules. The case was converted to chapter 7 and the creditor sought to except her judgment from discharge. The court held that because Debtors had dissolved their corporation during the pendency of their appeal, without giving the creditor adequate notice and an opportunity to enforce her judgment, Debtors were jointly and severally liable on the judgment under state law, and the debt was nondischargeable as "property obtained by false pretenses" under § 523(a)(2)(A).

THIRD CIRCUIT

In re Cohn, 54 F.3d 1108 (3d Cir. 1995). This case provides a good discussion of the requirements to except false financial statements from discharge under § 523(a)(2)(B). More specifically, a creditor must prove that a debtor used a statement in writing: (1) that was materially false, (2) respecting his financial condition, (3) upon which the creditor reasonably relied, and (4) with the intent to deceive the creditor. The Court ultimately remanded the case to the bankruptcy court in order to determine whether the creditor reasonably relied on Debtor's statement, since reasonable reliance is a required component of the exception to discharge.

FIFTH CIRCUIT

Bandi v. Becnel (In re Bandi), 683 F.3d 671 (5th Cir. 2012). The principal question in this case was the proper construction of the phrase "respecting the debtor's . . . financial condition" as it appears in §§ 523(a)(2)(A) and (a)(2)(B). Section 523(a)(2)(A) provides that certain debts obtained by false pretenses, a false representation, or actual fraud are nondischargeable, but it does not cover "a statement respecting the debtor's . . . financial condition." Section 523(a)(2)(B) provides that certain debts obtained by a false "statement in writing . . . respecting the debtor's financial condition" are nondischargeable. The term "financial condition" has a readily understood meaning—namely, the general overall financial condition of an entity or individual, or the overall value of property and income as compared to debt and liabilities. False statements and misrepresentations are not statements respecting financial condition for purposes of this exception to nondischargeability.

Kapetanakis v. First Nat'l Ins. Co. of Am. (In re Kapetanakis), 478 F. App's 217 (5th Cir. 2012). Debtor claimed that the creditor released its nondischargeable fraud claim when it entered into a consent judgment. Because the creditor established both the reliance and intent prongs of § 523(a)(2)(A), however, the debt was not dischargeable in bankruptcy.

SIXTH CIRCUIT

Wolf v. Campbell (In re Campbell), 159 F.3d 963 (6th Cir. 1998). Debtor's use of false financial statements to obtain the creditor's forbearance in collecting a debt that otherwise would be dischargeable renders the debt nondischargeable.

Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert), 141 F.3d 277 (6th Cir. 1998). Because Debtor had the subjective intent to repay her debts when she obtained credit card cash advances to finance gambling, the debts are dischargeable notwithstanding Debtor's inability to repay her obligations.

Investors Credit Corp. v. Batie (In re Batie), 995 F.2d 85 (6th Cir. 1993). Reckless submission of false financial statements satisfies "intent to deceive" element.

Bank One, Lexington, N.A. v. Woolum (In re Woolum), 979 F.2d 71 (6th Cir. 1992). A question of the creditor's "reasonable reliance" on the debtor's false financial statement is a factual determination, reviewable under the "clearly erroneous" standard.

BancBoston Mort. Corp. v. Ledford (In re Ledford), 970 F.2d 1556 (6th Cir. 1992). The fraud of one partner may be imputed to a second general partner who is without actual knowledge of the fraud, if the "innocent" party benefitted from the deception.

3. Fiduciary Obligations

UNITED STATES SUPREME COURT

Bullock v. BankChampaign, N.A., 133 S. Ct. 1754 (2013). Debtor became the nonprofessional trustee of a family trust with one asset—a life insurance policy on his father's life. Debtor borrowed funds from the trust for purposes inconsistent with the trust instrument and, although the sums were repaid with interest, his siblings brought suit in state court for breach of fiduciary duty. The court found that Debtor had engaged in self-dealing. The court found no malicious motive, but nevertheless imposed judgment in the amount by which it found Debtor to have benefited—$250,000—plus costs and attorney's fees. The court also imposed a constructive trust on certain of Debtor's property interests, with BankChampaign as trustee. When Debtor was unable to make payments, he filed bankruptcy. The Bank objected to discharge of the obligations the Dwed to the trust, relying on § 523(a)(4) and arguing that a trustee should not be able to take actions that violate express limitations on his or her authority under the terms of the trust instrument and then obtain a discharge in bankruptcy for any resulting damages. The The bankruptcy court held in the Bank's favor; the district court and Eleventh Circuit affirmed.

The Supreme Court granted certiorari in order to resolve the long-standing disagreement among the lower courts regarding the meaning of "defalcation" under § 523(a)(4). Although finding no resolution of the question in dictionary definitions of the term, the Court concluded that defalcation "includes a culpable state of mind . . . akin to that which accompanies application of the other terms in the same statutory phrase. We describe that state of mind as one involving knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior." *Id*. at 1757.

This "heightened standard" may mandate the most rigorous test for "defalcation" of those previously set out by the circuit courts—specifically, the "extreme recklessness" standard previous adopted in the First and Second Circuits. *See Denton v. Hyman (In re Hyman)*, 502 F.3d 61 (2d Cir. 2007); *Rutanen v. Baylis (In re Baylis)*, 313 F.3d 9 (1st Cir. 2002).

FOURTH CIRCUIT

Republic of Rwanda v. Uwimana, 274 F.3d 806 (4th Cir. 2001). The Rwandan government was not barred, on theory of unclean hands, from seeking a determination that an ambassador's debt for government funds he had spent in procuring asylum for himself and his family, was non-dischargeable on grounds of the ambassador's fiduciary defalcation, Debtor, in his capacity as ambassador for the Republic of Rwanda, qualified as a "fiduciary."

FIFTH CIRCUIT

Shcolnik v. Rapid Settlements Ltd. (In re Shcolnik), 670 F.3d 624 (5th Cir. 2012). After Debtor engaged in a course of conduct that required his company to file a claim against him, the company was awarded attorneys' fees. The debt at issue was for fees and not for fraud or defalcation while acting in a fiduciary capacity, so § 523(a)(4) was not a bar to Debtor's discharge.

FNFS, Ltd. v. Harwood (In re Harwood), 637 F.3d 615 (5th Cir. 2011). Debtor was an officer of a corporate general partner of a limited partnership. Debtor made loans to himself for his personal use, secured by deeds of trust that he failed to record. After the board of the corporate general partner discovered the loans and their unperfected status, it terminated Debtor's employment and sued Debtor along with the limited partnership. Thereafter, Debtor filed his chapter 7 petition. The general partner and limited partnership initiated an adversary proceeding to challenge Debtor's discharge under § 727(a) or, alternatively, the dischargeability of certain of Debtor's debts under § 523.

The Fifth Circuit ruled that an officer of a corporate general partner who is entrusted with the management of a limited partnership and who exercises sufficient control over that limited partnership owes a fiduciary to the partnership within the meaning of § 523(a)(4). Thus, any debt incurred by such a person for fraud or defalcation is nondischargeable. The Court concluded that a fiduciary relationship existed based on the control that the officer actually exerted over the partnership, as well as the confidence and trust placed in the hands of the controlling officer. Here, Debtor was entrusted by the board to manage the partnership's affairs and investments and had almost complete control. Debtor had a duty to protect the partnership from financial harm, and willfully neglected that duty when he failed to file and perfect the deeds of trust securing his personal loans.

SEVENTH CIRCUIT

Follett Higher Education Group, Inc. v. Berman (In re Berman), 629 F.3d 761 (7th Cir. 2011). Chapter 7 Debtor had served as the president, director, and sole shareholder of an advertising brokerage firm. Prepetition, the firm received payments from a client for advertisements the firm would place with third party media outlets. The firm would use the funds to pay the full advertising costs and retain the rest as a fee for its services. Shortly before Debtor's bankruptcy filing, however, the firm failed to pay the invoices of certain media outlets, which the client then had to pay. The now-former client filed an adversary complaint in Debtor's bankruptcy case, alleging that its claim was not dischargeable under § 523(a)(4) because Debtor, as an officer of an insolvent corporation, owed a fiduciary duty to its creditors.

The Seventh Circuit ruled that to establish non-dischargeability under § 523(a)(4), a creditor must show (1) that the debtor acted as a fiduciary to the creditor at the time the debt was created, and (2) that the debt was caused by fraud or defalcation. Not all persons treated as fiduciaries under state law are considered to "act in a fiduciary capacity" for purposes of federal bankruptcy law, however. The existence of a fiduciary relationship under § 523(a)(4) is a matter of federal law, so it is insufficient to show merely that the debtor was a fiduciary under applicable state law. Thus, an officer or director of an insolvent corporation may be deemed a fiduciary for creditors under state law, but that individual may not be deemed a fiduciary under § 523(a)(4) on that basis alone. The requisite fiduciary obligation may be found through the presence of either an express trust or an implied fiduciary status arising from a contractual relationship. The fiduciary duty, however, must exist prior to the debt. Here, no fiduciary relationship existed between Debtor and the client for purposes of § 523(a)(4).

EIGHTH CIRCUIT

Arvest Mortgage Co. v. Nail (In re Nail), 680 F.3d 1036 (8th Cir. 2012). Debtor filed her chapter 13 petition to stay judicial foreclosure proceedings that her lender had commenced in state court. The lender obtained relief from stay and Debtor's property sold for substantially less than the lender's secured claim. The lender obtained a deficiency judgment and sought a declaration from the bankruptcy court that a portion of its judgment was not dischargeable under §§ 523(a)(2) and (a)(4). The lender asserted that Debtor was obligated under the mortgage to remit to the lender all "miscellaneous proceeds" from any settlements by third parties for damage to Debtor's property. Prepetition, Debtor had settled her claims for constructive fraud, breach of warranty, and breach of contract against the builders of the property for $65,000. The lender argued that Debtor was obligated to hold this settlement amount in trust for the lender under applicable state law, which provided that an assignor shall be a trustee of any sums held for an assignee (and here the lender argued it was the assignee of the settlement proceeds). Because Debtor spent the proceeds instead, the lender claimed that Debtor's actions constituted a defalcation while acting in a fiduciary capacity, within the meaning of § 523(a)(4).

Section 523(a)(4) bars discharge of an obligation a debtor incurs through fraud or defalcation while acting in a fiduciary capacity. The Eighth Circuit ruled that whether a relationship is a "fiduciary" one within the meaning of § 523(a)(4) is a question of federal law. It is the substance of a transaction, rather than the labels assigned by the parties, that determines whether there is a fiduciary relationship for bankruptcy purposes. Most secured lending agreements, such as mortgages, impose duties on the borrower in dealing with the creditor's collateral, but those duties seldom create a § 523(a)(4) fiduciary relationship. A state statute may create the fiduciary relationship required by § 523(a)(4), but a statute cannot magically transform ordinary agents, contractors, or sellers into fiduciaries by simply using the terms "trust" or "fiduciary." To fall within § 523(a)(4), a statutory trust must (1) include a definable res and (2) impose "trust-like" duties. Here, the Court found that the statute did not create a fiduciary relationship within the meaning of § 523(a)(4) because it imposed no trust-like duties such as segregation of funds in an interest-bearing account. Thus, Debtor was not deemed to hold the settlement proceeds in a fiduciary capacity for the lender, and Debtor's obligation to the lender could not be excepted from discharge under § 523(a)(4).

4. Marital obligations

THIRD CIRCUIT

In re Gianakas, 917 F.2d 759 (3d Cir.1990). The Court provided a good discussion of whether an obligation pursuant to a divorce settlement qualifies as support and therefore is excepted from discharge by § 523(a)(5). The Court found that Debtor's obligation for a second mortgage on his former marital residence, pursuant to a settlement agreement incorporated into a divorce decree, was in the nature of alimony, maintenance or support so as to be nondischargeable.

EIGHTH CIRCUIT

Burnett v. Burnett (In re Burnett), 646 F.3d 575 (8th Cir. 2011). Prepetition, chapter 13 Debtor was in arrears on spousal and child support payments. Debtor confirmed a plan that provided for monthly support payments of $300 to cure the arrearage over the life of the plan and after the plan terminated, until the debt was satisfied in full. The plan incorporated an agreed order in which Debtor's ex-wife reserved the right to litigate any accrued interest on the support arrearage. After Debtor completed his plan, the Bureau of Child Support Enforcement ("BCSE") sued Debtor on behalf of the ex-wife for the interest owed. Debtor reopened his bankruptcy case and moved for a contempt order against the BCSE and his ex-wife. After multiple appeals, the remaining issue was whether Debtor's confirmed plan prevented his ex-wife from collecting more than $300 per month on any obligation Debtor owed to her.

The Eighth Circuit ruled that, post-confirmation, § 1327(a) affords a confirmed plan res judicata effect, binding debtors and creditors, and bars a creditor's attempts in a collateral state-court proceeding to expand her entitlement to relief to include interest on any prepetition domestic support obligations. This is true even if the confirmed plan violates the Bankruptcy Code when, for instance, it does not provide for the full payment of accrued interest on child and spousal support in accordance with § 101(14A), which defines "domestic support obligations" to include interest that has accrued on that debt. Any claim for interest on post-petition support payments, however, is beyond the purview of the plan and the bankruptcy court's jurisdiction. Thus, Debtor's ex-wife could seek interest on post-petition domestic support payments.

Phegley v. Phegley (In re Phegley), 443 B.R. 154 (B.A.P. 8th Cir. 2011). Debtor filed a chapter 13 petition shortly after a marital dissolution decree awarded his wife monthly maintenance payments for four years and attorneys' fees. Debtor's wife filed a complaint alleging that the monthly maintenance payments were not dischargeable pursuant to § 523(a)(5). Debtor argued that these payments did not constitute "domestic support obligations" because they represented the division of marital property.

The Eighth Circuit BAP ruled that whether a debt should be characterized as a "domestic support obligation," nondischargeable under § 523(a)(5), or a dischargeable property settlement depends on the function the award was intended to serve. This is a question of federal bankruptcy law, not state law. A divorce decree's characterization of an award as maintenance or alimony does not bind the bankruptcy court but is a starting point for determination of the award's intended function. The burden of proof under is on the party asserting that the debt is nondischargeable. Courts consider the following factors in making this determination: (1) the language and substance of the agreement in the context of surrounding circumstances, using extrinsic evidence if necessary; (2) the relative financial conditions of the parties at the time of the divorce; (3) the respective employment histories and prospects for financial support; (4) the fact that one party or another receives the marital property; the periodic nature of the payments; and (5) whether it would be difficult for the former spouse and children to subsist without the payments. The Court noted, however, that exceptions from discharge for spousal and child support deserve a liberal construction, and the policy underlying § 523 favors the enforcement of familial obligations over a fresh start for the debtor, even if the support obligation is owed directly to a third party. Here, the BAP found that the bankruptcy court did not err when it determined that the maintenance payments and attorneys' fees awarded in the decree were in the nature of support.

Moeder v. Moeder (In re Moeder), 220 B.R. 52 (B.A.P. 8th Cir. 1998). Debtor's former wife commenced an adversary proceeding seeking a determination that Debtor's obligations under their divorce decree were nondischargeable pursuant to §§ 523(a)(5) and (a)(15). Section 523(a)(5) exempts from discharge debts that are "actually in the nature of alimony, maintenance or support of a spouse, former spouse, or child of the debtor," and § 525(a)(15) excepts from discharge those debts arising out of marital dissolution proceedings that do not fall under § 523(a)(5). Two exceptions to § 523(a)(15) were then in effect—when the debtor does not have the ability to pay the debt from disposable income and when discharging such a debt would result in a benefit to the debtor that outweighs the detrimental consequences to the non-debtor spouse. The BAP affirmed the bankruptcy court's holding that Debtor's obligation to pay alimony, medical expenses and a psychologist's bill were nondischargeable under § 523(a)(5) because these debts were intended to serve the function of "alimony, maintenance or support." The BAP remanded the bankruptcy court's holding that Debtor's property settlement to his ex-wife was nondischargeable because the bankruptcy court found that Debtor did not have the ability to pay his obligations to his former spouse. (Note that the exceptions to § 523(a)(15) have since been repealed.)

NINTH CIRCUIT

Foster v. Bradbury (In re Foster), 319 F.3d 495 (9th Cir. 2003). Post-petition interest on Debtor's child support obligation is nondischargeable, even after the claim was paid in full and Debtor received his discharge. Neither the county's failure to oppose the plan nor failure to request post-petition interest on child support debt constituted a waiver of right to collect such interest.

Beaupied v. Chang (In re Chang), 163 F.3d 1138 (9th Cir. 1998). Although the § 523(a)(5) exception to dischargeability applies on its face to debts owed "to" a child or former spouse, the Ninth Circuit recognized a less-literal application. Costs incurred by a guardian *ad litem* and out-of-wedlock parent were for support within the meaning of § 523(a)(5); "the identity of the payee is less important than the nature of the debt." *Id.* at 1141.

Freidkin v. Sternberg (In re Sternberg), 85 F.3d 1400 (9th Cir. 1996), *rev'd on other grounds*, *In re Bammer*, 131 F.3d 788 (9th Cir. 1997) (*en banc*). "[I]n determining whether a debtor's obligation is in the nature of support, the intent of the parties at the time the settlement agreement is executed is dispositive." 85 F.3d at 1405.

Shaver v. Shaver, 736 F.2d 1314 (9th Cir. 1984). The Court held that Debtor-husband's obligation in a settlement agreement, though referred to as "property rights" in the initial divorce decree and "marital and dower rights" in the amended decree, was in the nature of alimony, maintenance, or support and, therefore, was not dischargeable. In determining whether an obligation is intended for spousal support, the Ninth Circuit looked beyond the language of the decree to the substance of the obligation and the parties' intent. Some factors indicating that support is necessary include: (1) whether the recipient spouse needed spousal support at the time of the divorce, such as the presence of minor children; (2) imbalance of relative income of the parties; (3) whether the obligation terminates on death or remarriage of the recipient spouse; and (4) whether the payments were "made directly to the recipient spouse and paid in installments over a substantial period of time."

Stout v. Prussel, 691 F.3d 859 (9th Cir. 1982) (*per curiam*). The Ninth Circuit reversed the district court judgment in favor of the debtor and held that Debtor's obligation to hold his ex-wife harmless on an SBA loan was in the nature of a property settlement, not in the nature of spousal support, and was thus dischargeable. A dischargeability determination is in the sound discretion of the bankruptcy court. The Court emphasized that it would not disturb the bankruptcy court's ruling except for "gross abuse of discretion." *Id*. at 861. *See also In re Cox*, 904 F.2d 1399, 1401 (9th Cir. 1990) (concluding that the bankruptcy court's decision should not be overturned unless factual findings are clearly erroneous or it fails to apply correct law).

In re Combs, 101 B.R. 609 (B.A.P. 9th Cir. 1989). In order to determine whether a debtor's obligation is in the nature of alimony, maintenance, or support, "the court must ascertain the intention of the parties at the time they entered into their stipulation agreement and not the current circumstances of the parties." *Id.* at 615. Extrinsic evidence is admissible to clarify the parties' intent.

In re Comer, 27 B.R. 1018 (B.A.P. 9th Cir. 1982). The BAP rejected Debtor's proposition that the trial court had a duty to balance Debtor's financial health with that of his former spouse in determining dischargeability under § 523(a)(5). The absence of an express hardship exception, such as in § 523(a)(8), evidenced Congress's intent that a balancing of hardships by the bankruptcy court is not appropriate in determining the dischargeablity of § 523(a)(5) claims. Instead, "such balancing is within the province of the state family law courts." *Id.* at 1020-21.

TENTH CIRCUIT

In re Sampson, 997 F.2d 717 (10th Cir. 1993). The question of whether an obligation is spousal support rather than a property settlement, for purposes of dischargeability, is a federal question. The clear statement of the settlement agreement and the financial circumstances of the husband and wife, at the time of the decree, support the conclusion in this case that payments tied to tax consequences were intended as support.

ELEVENTH CIRCUIT

State of Florida Dep't of Revenue v. Diaz (In re Diaz), 647 F.3d 1073 (11th Cir. 2011). Prepetition, Debtor defaulted on his court-ordered child support obligations, despite a judgment for support arrearages and multiple new court orders. When Debtor filed his chapter 13 petition, he listed his child support obligations as a priority unsecured claim. On behalf of Debtor's wife, the state Department of Social Services ("DSS") enlisted the help of the state Department of Revenue ("DOR") and filed a proof of claim that included the arrearage and accrued prepetition interest. Debtor objected to the inclusion of interest and, hearing no response from the DOR, the bankruptcy court reduced the claim to disallow interest. Debtor confirmed a plan that provided for full payment of the allowed claim and, upon completion of the plan payments, received a discharge. While Debtor was still making payments, he received two notices from the DOR demanding full payment of the overdue support obligations, but these notices stopped after Debtor informed the DOR of his ongoing bankruptcy case. After Debtor's case was closed, the DOR and DSS, on behalf of Debtor's wife, began collection efforts on both the previously disallowed prepetition interest and on accrued post-petition interest. Debtor moved to hold both the DOR and the DSS in contempt for violating the automatic stay and the discharge injunction. Both the DOR and the DSS argued that sovereign immunity shielded them from Debtor's claims.

The Eleventh Circuit ruled that neither DOR nor DSS waived sovereign immunity with respect to Debtor's claim against them for violation of the automatic stay, but they did waive sovereign immunity with respect to Debtor's claim for violation of the discharge injunction. Generally, the doctrine of state sovereign immunity precludes a federal court from entertaining a private person's suit against a state unless a "litigation waiver" or "consent by ratification" can be established. The "litigation waiver" theory provides that a state waives its sovereign immunity to the extent it voluntarily invokes the jurisdiction of the bankruptcy court by invoking its aid in the claims adjudication and allowance process upon the filing of a proof of claim. The filing of a proof of claim, however, does not subject a state to any and all lawsuits relating to the bankruptcy; an action against the state must bear a direct relationship to adjudication of the claim. Here, the Court found that Debtor's claim for violation of the stay did not bear a direct relationship to the DOR's proof of claim, which by then had already been adjudicated. (The Court did not address whether the "litigation waiver" theory would provide a basis for hearing Debtor's claim for violation of the discharge injunction.) Under the "consent by ratification" theory, the states' decision to join the Union and ratify the Bankruptcy Clause in the Constitution empowers Congress to establish, among other things, uniform laws on the subject of bankruptcies throughout the United States. Whether "consent by ratification" applies depends on whether the proceedings against the state are necessary to effectuate the *in rem* jurisdiction of the bankruptcy court. Because the automatic stay is a fundamental procedural mechanism that allows the bankruptcy court to administer the estate, an action arising out of a creditor's stay violation assists the court in carrying out its *in rem* functions, and is therefore generally necessary. Here, the Court found that although the DOR and DSS had allegedly violated the automatic stay, Debtor did not bring his contempt motion until years later—after confirmation and discharge, and after the stay had already accomplished its purpose of preserving estate assets. Thus, this claim was no longer "necessary." On the other hand, motions seeking contempt and sanctions for alleged violations of the discharge injunction are "necessary to effectuate" the bankruptcy court's *in rem* functions, such that the DOR and the DSS waived sovereign immunity as to this claim, pursuant to the "consent by ratification" theory. The Court also ruled, on the merits of the discharge injunction claim, that the DOR and DSS did not violate the discharge junction. Under § 524, a discharge under chapter 13 prohibits collection of only discharged debts and does not apply to nondischargeable debts. Under §§ 1328 and 523(a)(5), a debt for child support is excepted from discharge. Here, although Debtor's debt on the prepetition interest was disallowed, disallowance of a claim and nondischargeability are separate issues: a disallowed claim may not be paid by the bankruptcy estate, but that does not eliminate the debtor's personal liability outside of bankruptcy. Thus, the DOR and DSS did not violate the discharge injunction by seeking to collect nondischargeable child support debts from Debtor.

Benson v. Benson (In re Benson), 441 F. App'x 650 (11th Cir. 2011). Debtor's former wife waived the right to receive alimony in return for Debtor's commitment to make mortgage payments on a home. Debtor filed chapter 13 and sought to discharge the obligation. In affirming the lower courts, the Eleventh Circuit ruled that because the wife had effectively swapped her right to alimony for the mortgage debt, the debt was a nondischargeable support obligation.

Cummings v. Cummings, 244 F.3d 1263 (11th Cir. 2001). An equitable distribution in the amount of $6.3 million, in favor of Debtor's former wife, was a nondischargeable support obligation under § 523(a)(5).

Strickland v. Shannon (In re Strickland), 90 F.3d 444 (11th Cir. 1996). Prior to filing bankruptcy, Debtor initiated a child custody dispute in state court against his former wife. In that action, Debtor sought to eliminate his child support obligations, gain custody of his child, and compel the wife to pay child support. The state court ruled in favor of the former wife and awarded her attorney's fees. After filing chapter 7 Debtor sought to discharge the judgment for attorney's fees, arguing that it did not represent a nondischargeable debt under § 523(a)(5). The Court of Appeals held that the judgment debt was not dischargeable pursuant to § 523(a)(5) because the fee award constituted a support obligation owed to a former spouse.

Harrell v. Sharp (In re Harrell), 754 F.2d 902 (11th Cir. 1985). Chapter 7 Debtor sought to discharge alimony, post-majority child support, and educational expense obligations owed pursuant to a separation agreement. Debtor argued that the post-majority child support and educational expenses were not provided for by state law and did not qualify as nondischargeable under § 523(a)(5). The Eleventh Circuit concluded that § 523(a)(5) does not require a domestic support obligation to be within the minimal requirements of state law. If an obligation is owed to a former spouse or child of the debtor, and the obligation is created by a domestic settlement agreement, the obligation is nondischargeable.

5. Willful and Malicious Injuries

UNITED STATES SUPREME COURT

Kawaauhau v. Geiger, 523 U.S. 57 (1998). Debtor was a doctor who carried no malpractice insurance. His negligent treatment of creditor's foot injury resulted in the amputation of her leg. A jury found him liable for $355,000 in damages, including loss of consortium and emotional distress. He filed bankruptcy and the bankruptcy court concluded that his obligations to the creditors were nondischargeable under § 523(a)(6). The district court affirmed, but the Eighth Circuit, *en banc*, reversed.

On appeal, the Supreme Court stated the issue as follows: "Does § 523(a)(6)'s compass cover acts, done intentionally, that cause injury (as the [creditors] urge), or only acts done with the actual intent to cause injury (as the Eighth Circuit ruled)?" *Id*. at 61 (footnote omitted). The Court held "that debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." *Id*. at 64. Rather, that exception covers only acts done with the actual intent to cause injury.

FIRST CIRCUIT

B.B. v. Bradley (In re Bradley), 466 B.R. 582 (B.A.P. 1st Cir. 2012). Prepetition, Debtor's ex-wife obtained a favorable state court judgment against Debtor for intentional infliction of emotional distress, having alleged that Debtor caused her physical and emotional harm. After Debtor filed his chapter 7 petition, his ex-wife commenced an adversary proceeding seeking a determination that her judgment was excepted from discharge under § 523(a)(6), and that Debtor was collaterally estopped from relitigating the issues of fraud and malice, as applicable to § 523(a)(6).

The First Circuit BAP ruled that for a debt to be excepted from discharge under § 523(a)(6), a creditor must establish that the debtor intended to cause the injury or that there was a substantial certainty that the injury would occur. Here, the BAP found a lack of identity between the elements of the state law claims against Debtor and the elements of a § 523(a)(6) discharge exception. Specifically, the BAP held that the claim for intentional infliction of emotional distress under applicable state law requires proof of "extreme and outrageous conduct by the defendant with the intention of causing or reckless disregard of the probability of causing, emotional distress," but a majority of courts have concluded that a state court judgment that can be based on "reckless disregard" is not the equivalent of "substantial certainty" as required by § 523(a)(6). Thus, Debtor was not collaterally estopped from disputing the required "willfulness" element of his ex-wife's § 523(a)(6) claim.

SECOND CIRCUIT

Basile v. Spagnola (In re Spagnola), 473 B.R. 518 (Bankr. S.D.N.Y. 2012). In the creditor suit against Debtor for sexual harassment, the jury returned a verdict in the creditor's favor and awarded her $150,000 in compensatory damages and $50,000 in punitive damages. The court held that the judgment was nondischargeable under § 523(a)(6) because the acts giving rise to the judgment were willful and malicious.

SEVENTH CIRCUIT

Jendusa-Nicolai v. Larsen, 677 F.3d 320 (7th Cir. 2012). Prepetition, Debtor attempted to murder his ex-wife by brutally attacking her with a baseball bat, sealing her in a garbage can filled with snow, and leaving the can in an unheated storage facility. He was sentenced to life in prison. Debtor's ex-wife then sued Debtor in state court. She was awarded a $3.4 million judgment for battery, false imprisonment, and intentional infliction of emotional distress; her present husband and daughters received $300,000 for loss of consortium. Debtor thereafter filed a chapter 7 petition and sought to discharge these judgment debts. The bankruptcy court ruled that his debts were nondischargeable because the findings underlying the state court judgment (which Debtor was collaterally estopped from challenging) established that the debts were "for willful and malicious injury" within the meaning of § 523(a)(6).

The Seventh Circuit ruled that a "willful and malicious injury," precluding discharge in bankruptcy of the debt created by the injury, is one that the injurer inflicted knowing he had no legal justification and with a desire to inflict the injury or with knowledge that it was highly likely to result from his act. To allow a debtor to shirk liability by discharging his judgment debt in those circumstances would undermine the deterrent efficacy of tort law without serving any policy that might be thought to inform bankruptcy law, which is designed to, among other things, grant a fresh start to the honest but unfortunate debtor. Here, the Court held that the bankruptcy court correctly denied Debtor a discharge of the debt arising from his brutal attack on his ex-wife. The Court noted that despite semantic variations in the definition of "willful and malicious injury" used by other circuit courts, the outcome would likely be same in other jurisdictions.

6. Student Loans

UNITED STATES SUPREME COURT

United Student Aid Funds Inc. v. Espinosa, 130 S. Ct. 1367 (2010). Chapter 13 Debtor proposed a plan that discharged the interest with respect to his student loan obligations. Debtor did not initiate an adversary proceeding for a determination by the bankruptcy court of undue hardship warranting that discharge. The student loan creditor received notice of the proposed plan but did not object to its confirmation. The bankruptcy court confirmed the plan but made no findings of undue hardship in the confirmation order. The creditor did not appeal the confirmation order. After Debtor had made all required payments under the plan, the creditor sought relief from the confirmation order under FRCP 60(b)(4) on the basis that the order was void because the bankruptcy court confirmed a plan discharging Debtor's student loan obligations without the requisite finding of undue hardship.

The Supreme Court ruled that a student loan creditor that does not timely object to the confirmation of a chapter 13 plan (or appeal from the confirmation order) providing for the discharge of student loan obligations without a showing of undue hardship is bound by the plan. The Court explained that undue hardship warranting the discharge of student loan obligations is generally determined in an adversary proceeding to ensure that the lender's due process rights to notice and an opportunity to be heard are respected. Here, the Court found that the lender had actual notice of the plan and failed to object to or appeal from the confirmation order, and that Debtor's failure to follow Bankruptcy Rule 7001(6) did not violate the lender's due process rights. Under *Travelers Indemnity Co. v. Bailey*, 129 S. Ct. 2195 (2009), a confirmed plan is binding on creditors who had notice. The Court acknowledged that the bankruptcy court committed legal error by confirming a plan discharging Debtor's student loan obligations without a finding of undue hardship, as required by § 523(a)(8). That error did not render the confirmation order void, however. Thus, the confirmation order was enforceable and binding on the lender, the lender could not collaterally attack the order, and Debtor's outstanding student loan obligation remained discharged.

FIRST CIRCUIT

Nash v. Connecticut Student Loan Foundation (In re Nash), 446 F.3d 188 (1st Cir. 2006). Section 523(a)(8) requires that to discharge student loans guaranteed by a governmental unit, a debtor must prove that due to a disability, repayment of the student loans causes the debtor "undue hardship." The bankruptcy court found that this burden was not met by the "level two bipolar disorder" diagnosis because Debtor did not prove that her disability would prevent her from working in the future. Finding no clear error, the Court of Appeals declined to choose between the "tripartite test" and the "totality of the circumstances test" for identifying "undue hardship," and affirmed the decision of the bankruptcy court.

Bronsdon v. Educ. Credit Mgmt. Corp. (In re Bronsdon), 435 B.R. 791 (B.A.P. 1st Cir. 2010). Under § 523(a)(8), debtors are not permitted to discharge student loans unless the non-discharged loans would impose an undue hardship. In determining what constitutes "undue hardship," the BAP declined to adopt the *Brunner* test, and adopted the "totality of the circumstances test." A debtor's eligibility to participate in the income contingent repayment plan (ICRP) can be considered under the totality of the circumstances test, but it is not determinative. On remand, the bankruptcy court stated that Debtor's ability to repay the debt was unrealistic in light of her age, her apparent inability to pass the Massachusetts bar examination, the difficulty of finding employment, and other burdens. These circumstances were amply supported by the record and were appropriate factors to be considered under the test.

Educ. Res. Inst. Inc. v. Taratuska (In re Taratuska), 2008 U.S. Dist. LEXIS 93206 (D. Mass. 2008). The bankruptcy court found that a student loan issued by a for-profit bank but guaranteed by a non-profit entity did not qualify for an exception to discharge under § 523(a)(8). The district court disagreed, noting that "the language of § 523(a)(8) focuses on loan programs, not individual loans." Debtor's loan was funded "through a program . . . which was funded by a nonprofit institution." The district court also found that the non-profit guarantor "actually did 'fund' money when [Debtor] defaulted on her obligation to repay the loan." In thus finding that the guarantor did play a meaningful part in the funding of the loan, the court held that loan non-dischargeable pursuant to § 523(a)(8).

SECOND CIRCUIT

Traversa v. Educ. Credit Mgmt. Corp. (In re Traversa), 444 F. App'x 472 (2d Cir. 2011). Debtor sought discharge of his student loans on the basis that he was unemployed, his only income consisted of $1577 in monthly Social Security benefits, and he suffered from several conditions—depression, sleeping disorders, ADHD, and bipolar disorder—that affected his ability to gain and maintain employment. The court denied discharge of the student loans, finding insufficient evidence that these conditions were likely to persist for a significant portion of the repayment period; Debtor had suffered from these conditions while working for seven years prior to law school and his medication was sufficiently effective.

Bene v. Educ. Credit Mgmt. Corp. (In re Bene), 474 B.R. 56 (Bankr. W.D.N.Y. 2012). The court held that Debtor satisfied the "undue hardship" standard of § 523(a)(8) and that Debtor's student loans must be discharged. In so ruling, the court attempted to reconcile the William D. Ford Program's options for loan repayment, stating that the Ford Program "ought not to be viewed as an implied repeal of 11 U.S.C. § 523(a)(8)," *id.* at 76, but that a court should "decide how much personal sacrifice society expects from individuals who accepted the benefits of guaranteed student loans but who have not obtained the financial rewards they had hoped to receive as a result of their educational expenditures." *Id.*

THIRD CIRCUIT

In re Coco, 335 F. App'x 224 (3d Cir. 2009). This case assessed whether Debtor faced undue hardship in repaying student loan debt, pursuant to § 523(a)(8), using the three-pronged test set forth in *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987) (the "*Brunner* undue hardship test"). The court remanded the case back to the bankruptcy court to determine whether Debtor made a good-faith effort to repay her student loans in light of her chronic medical condition and other life circumstances.

In re Udell, 454 F.3d 180 (3d Cir. 2006). Debtor, who had been enrolled in the United States Air Force Academy, brought an adversary proceeding for determination of the dischargeability of his student loan obligation after he was discharged due to alleged misconduct prior to graduating and without commencing the required years of service in the United States Air Force. The Third Circuit held that under § 523(a)(8) the obligation to pay educational costs is not dischargeable in bankruptcy except upon a showing of undue hardship.

In re Faish, 72 F.3d 298 (3d Cir. 1995). This case discusses the *Brunner* undue hardship test and how the test must be applied by bankruptcy courts within the Third Circuit to determine whether student loan debt is dischargeable. The Court also discussed the other two prominent tests used by other circuits—namely, the *Johnson* test and the *Bryant* test. The court held that Debtor failed to show, based on her current income and expenses, that she could not maintain her minimal standard of living if she were forced to repay her loans, as required under first prong of the *Brunner* test. As a result, Debtor's student loan debt did not fall within the discharge exception for student loans.

In re Pelkowski, 990 F.2d 737 (3d Cir. 1993). This Court addressed the scope of the statutory exception to discharge for educational loans, and whether the exception precludes discharge not only of the student borrower, but also of the non-student co-obligor(s) as well. These co-obligors sought but failed to distinguish between signatories to the loan who receive the educational benefits and those who do not, and the Court held that the statutory exception to discharge for educational loans applies both to debts of student borrowers and to obligations incurred by their non-student co-obligors.

FOURTH CIRCUIT

Spence v. Educ. Credit Mgmt. Corp., 541 F.3d 538 (4th Cir. 2008). The Fourth Circuit denied a hardship discharge of $161,000 in student loan debt incurred by a single Debtor in her late 60's who had a low-paying job, but who had a master's degree along with some completed Ph.D. course work. She suffered from diabetes and high blood pressure, but neither affected her ability to work full-time. She had difficulty obtaining a higher paying position, but she had not actively sought other employment recently. "We have said that '[h]aving a low-paying job . . . does not in itself provide undue hardship, especially where the debtor is satisfied with the job, has not actively sought higher-paying employment, and has earned a larger income in previous jobs'. We are not unsympathetic to the disadvantages of her current circumstances, but the facts point to no 'additional circumstances,' outside of the normal hardships faced by bankruptcy petitioners, that would render her situation hopeless." *Id.*

at 544, *quoting Educational Credit Mgmt. Corp. v. Frushour (In re Frushour),* 433 F.3d 393, 401 (4th Cir. 2005).

Educ. Credit Mgmt. Corp. v. Mosko, 515 F.3d 319 (4th Cir. 2008). Applying the *Brunner* test, as adopted by the Fourth Circuit in *Educational Credit Mgmt. Corp. v. Frushour (In re Frushour),* 433 F.3d 393 (4th Cir. 2005), the Court of Appeals reversed the district court, which had affirmed the bankruptcy court, and denied husband and wife Debtors any discharge of their joint student debts of $120,000 in their chapter 7 case based on undue hardship. Their joint income had been about $75,000 for the past three years. Although the husband suffered from a disabling medical condition, and the wife worked only part time in order to spend time with her minor children, the Court concluded that Debtors had not satisfied the "good-faith effort" requirement with respect to their prior efforts to repay their student loans. In determining this, the Court focused on Debtors' efforts to obtain employment, maximize income, minimize expenses, and their loan consolidation options.

Frushour v. Educ. Credit Mgmt. Corp., 433 F.3d 393 (4th Cir. 2005). In this case, involving a complaint seeking a discharge of student loan debt as an undue hardship in a chapter 7 case, the Fourth Circuit adopted the test set out in *Brunner v. New York State Higher Educ. Servs.,* 831 F.2d 395 (2d Cir.1987). The discharge of student loan debt was denied because Debtor failed to meet the third prong of the test, which requires a showing of a good faith effort to repay the loans.

United States Dep't of Education v. Lokey, 98 F. App'x 938 (4th Cir. 2004). In reversing the bankruptcy court's complete denial of student loan debt discharge for undue hardship, which was affirmed by the district court, the Fourth Circuit remanded the case to the bankruptcy court to determine what portion of Debtor's student loan debt would be discharged. The Court concluded that the bankruptcy court had erroneously found that Debtor failed the third prong of the *Brunner* test because she had not pursued loan consolidation.

U.S. Dept. of Health & Human Servs. v. Smitley, 347 F.3d 109 (4th Cir. 2003). The Fourth Circuit held that the trial court had to apply different legal standards in determining whether to permit the discharge of regular student loans versus the discharge of health education student loans. The latter are governed by 42 U.S.C. § 292f(g) and are dischargeable only upon a finding that non-discharge of such a debt would be "unconscionable." The Fourth Circuit held that the "unconscionability" standard is more stringent than the "undue hardship" standard under § 523(a)(8).

Ekenasi v. Educ. Resources Inst., 325 F.3d 541 (4th Cir. 2003). Chapter 13 Debtors do not have to wait until completion of chapter 13 plan payments to file a complaint for a determination of discharge of student loan debt based upon undue hardship. Such a complaint may be filed at any time during the case

Floyd v. Educ. Credit Mgmt. Corp., 54 F. App'x 124 (4th Cir. 2002). The Fourth Circuit reversed the district court and affirmed the bankruptcy court, granting Debtor a partial undue hardship discharge of his student loan debts. The bankruptcy court had found that Debtor could make monthly student loan debt payments of $100 and had discharged all but a portion of the $27,000 in student loan debt. The court found that only about $5,000 of the student loan debt, which could be repaid by the $100 per month payments, would not be discharged. The Fourth Circuit affirmed the bankruptcy court's partial discharge of $22,000 of the student loan debt for undue hardship.

Kielisch v. Educ. Credit Mgmt. Corp., 258 F.3d 315 (4th Cir. 2001). Relying on § 502(b)(2), Debtors argued that payments under their confirmed chapter 13 plan could not be applied by the student loan creditor to interest that accrued during the pendency of the plan. Both the bankruptcy and the district courts agreed with Debtors. The Fourth Circuit reversed, holding that the provisions of § 502 regarding unmatured interest only apply to proofs of claim and that § 528(a)(8) clearly provides that student loan debt can only be discharged upon a showing of undue hardship. Accordingly, student loan creditors can apply chapter 13 payments to interest that accrues post-petition.

Educ. Credit Mgmt. Corp. v. Gouge, 320 B.R. 582 (W.D.N.C. 2005). Although the Fourth Circuit has not yet addressed the issue, the district court held that "bankruptcy courts may exercise their equitable authority under § 105(a) to partially discharge student loans." Partial discharge may be granted to the extent that it would be an undue hardship for the debtor to have to pay that portion of the loan that is to be discharged.

United States Dep't of Education v. Blair, 301 B.R. 181 (D. Md. 2003). After dismissal without prejudice of a complaint seeking discharge of student loan debt based upon undue hardship, the bankruptcy court issued a moratorium on collection or accrual of interest on the debt based upon its equitable powers under § 105 and its finding that Debtor might be able to obtain an undue hardship discharge of the debt in the future. Finding the moratorium to be in effect a partial discharge of student loan debt without a finding of undue hardship, the district court reversed. "Because Appellee failed to prove undue hardship within § 523(a)(8), as the bankruptcy court itself concluded, that court exceeded its equitable authority under § 105(a) in ordering the moratorium." *Id*. at 186.

In re Kapinos, 243 B.R. 271 (W.D. Va. 2000). "The court recognizes the breadth and diversity of remedies available to a bankruptcy court under § 105 to ensure that the dual policies of § 523(a)(8)—ensuring the solvency of student loan programs while providing relief to debtors, in appropriate cases, from oppressive financial circumstances—are accomplished. The court therefore concludes that § 523(a)(8), understood in combination with § 105, authorizes partial discharge of student loans. If the bankruptcy court finds that the *Brunner* standard has been met, it may, in exercise of its equitable power, discharge all of [Debtors'] loans or only a portion of them. Likewise, the bankruptcy court may exercise its equitable power under § 105 to discharge a portion of [Debtors'] student loans even if it finds that the *Brunner* standard has not been satisfied." *Id*. at 277.

FIFTH CIRCUIT

Ostrom v. Educ. Credit Mangt. Corp., 283 F. App'x 283 (5th Cir. 2008). Chapter 7 Debtor sought discharge of student loan debt under § 523(a)(8) on account of undue hardship stemming from a sleep condition disability that preventing him from gaining employment. The Court affirmed the rulings of the district and bankruptcy courts denying Debtor's petition against the creditor. Debtor did not meet all three elements of the *Brunner* test adopted by the Fifth Circuit to show undue hardship. The elements required to demonstrate undue hardship are: (1) based on current income and expenses, the debtor cannot sustain for himself and his dependents a minimal standard of living if he is forced to repay; (2) there are additional circumstances that indicate this state of affairs will likely continue for a significant portion of the loan repayment period; and (3) the debtor has made good-faith attempts to pay back the loan. In light of the record as a whole, the Court found that the bankruptcy court could plausibly conclude that Debtor failed to show that his financial circumstances would continue for a significant portion of the repayment period. This unpublished opinion has limited precedential effect under Fifth Circuit Rule 47.5.

SIXTH CIRCUIT

In re Cassim, 594 F.3d 432 (6th Cir. 2010). Chapter 13 Debtor filed an adversary proceeding to determine the dischargeability of student loan debt based upon the undue hardship provisions of § 523(a)(8). The Sixth Circuit found that the question whether the student loan was dischargeable was constitutionally ripe for review, despite the fact that Debtor had yet to receive a discharge under § 1328, because the dispute involved a specifically-defined debt and a statutorily-based claim for relief that Debtor was entitled to pursue.

Notably, the Court reiterated that the creditor's challenge was only as to constitutional ripeness, which is more limited in scope than prudential ripeness, and the Court refused to address prudential ripeness *sua sponte*.

SEVENTH CIRCUIT

Krieger v. Educational Credit Mgmt. Corp., 713 F.3d 882 (7th Cir. 2013). To determine undue hardship, the Seventh Circuit follows the *Brunner* test. Under this test, the debtor must demonstrate that: (1) he or she cannot maintain, based on current income and expenses, a minimal standard of living for him- or herself and dependents if forced to repay the loans; (2) additional circumstances exist indicating that the state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) he or she has made good faith efforts to repay the loans. *In re Roberson,* 999 F.2d 1132, 1135 (7th Cir. 1993) (adopting test from *Brunner v. New York State Higher Educ. Servs. Corp.,* 831 F.2d 395, 396 (2d Cir. 1987)). The *Krieger* Court emphasized the fact-bound nature of the "undue hardship" inquiry and stated that the bankruptcy court's conclusion is to be given deferential appellate review. Consequently, the Court reversed a district court that, on appeal, had inappropriate interfered with the fact-finding of the bankruptcy court.

Busson-Sokolik v. Milwaukee School of Engineering (In re Busson-Sokolik), 635 F.3d 261 (7th Cir.), *cert. denied*, 131 S. Ct. 3039 (2011). Chapter 7 Debtor defaulted on a $3,000 student loan made by a school, which sued and obtained a default judgment for $5,909.63. Debtor then filed a chapter 13 petition, but the proceeding was later converted to a chapter 7 case. Debtor initiated an adversary proceeding to determine the dischargeability of his student loan. The bankruptcy court found that the debt was not dischargeable and that Debtor owed the school $16,248.78 (which included costs and attorneys' fees). On appeal, the district court affirmed and also imposed sanctions for a frivolous appeal under Rule 8020, for which Debtor and his counsel were jointly liable.

The Seventh Circuit ruled that under § 523(a)(8)(A), an education loan that is made, insured, or guaranteed by a governmental unit or nonprofit institution is not dischargeable in bankruptcy unless excepting the debt from discharge would impose undue hardship on the debtor or the debtor's dependents. Adopting the approach of the Fifth Circuit in *In re Murphy,* 282 F.3d 868 (5th Cir. 2002), the Seventh Circuit held that a court should look to the purpose of the loan when determining whether a loan qualifies as an "educational loans" that is properly excepted from discharge; the actual use of the loan is irrelevant. Thus, an unpaid student account balance did not qualify as an "educational debt" absent an agreement evincing an intent to create a lending relationship.

Although the Court found that the district court properly imposed sanctions under Rule 8020, the Court nevertheless reduced the sanctions amount by half to fulfill the deterrent purposes of the rule without subjecting Debtor to financial ruin.

In re Chambers, 348 F.3d 650 (7th Cir. 2003). To determine what constitutes "debt" excepted from discharge as student loan, the Seventh Circuit adopted the approach of the Second Circuit's decision in *Cazenovia College v. Renshaw (In re Renshaw)*, 222 F.3d 82 (2d Cir. 2000), and the Third Circuit's decision in *Boston University v. Mehta (In re Mehta)*, 310 F.3d 308 (3d Cir. 2002), holding an unpaid student account balance did not qualify as "educational debt" absent an agreement evincing an intent to create a lending relationship.

EIGHTH CIRCUIT

Walker v. Sallie Mae Servicing Corp. (In re Walker), 650 F.3d 1227 (8th Cir. 2011). Chapter 7 Debtor incurred substantial student loan debts that she sought to discharge under § 523(a)(8) retroactively (through a FRCP 60(b) motion) after her discharge had already been granted. She had five children, two of whom had special needs, and, as a result, her family had to subsist on a single income. In addition, she had a sizable debt and her financial circumstances that had not improved post-discharge. The bankruptcy court granted Debtor's request for discharge. The student loan lender appealed on the ground that the bankruptcy court should not have considered Debtor's post-discharge circumstances in assessing whether the requirements for undue hardship were met; instead, the court should have considered Debtor's circumstances at the time of the initial discharge in the case.

The Eighth Circuit ruled that § 523(a)(8) allows the discharge of educational loans if nondischarge will impose an undue hardship on the debtor and the debtor's dependents. A debtor has the burden of establishing undue hardship by a preponderance of the evidence. A court considers the totality of the circumstances to assess whether this burden has been met, including: (1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the reasonable living expenses of the debtor and her dependents; and (3) any other relevant facts and circumstances surrounding the particular bankruptcy case. The Court held that a bankruptcy court can make its determination in light of the debtor's actual circumstances at the relevant time—that is, at the time of the undue hardship determination. Here, the bankruptcy court did not err by considering Debtor's post-discharge circumstances in its determination of undue hardship.

Long v. Educ. Credit Mgmt. Corp. (In re Long), 322 F.3d 549 (8th Cir. 2003). Debtor attempted to discharge her student loans after she began to experience extreme fatigue, depression, and diminution of her mental faculties. An income contingent repayment plan was available to her. The Eighth Circuit remanded the case to the BAP but reaffirmed that the test for undue hardship in the Eighth Circuit is the "totality of the circumstances." In evaluating the totality of the circumstance, courts should consider: "(1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and her dependent's reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case." *Id.* at 554.

NINTH CIRCUIT

Craig v. Educ. Credit Mgmt. Corp (In re Craig), 579 F.3d 1040 (9th Cir. 2009). The Ninth Circuit remanded the bankruptcy court's order requiring Debtor's monthly 401(k) contributions to be applied toward repayment of her student loan debt. Debtor earned $10 an hour working as a part-time customer service representative. She suffered from various serious medical problems including heart problems, asthma, diabetes, and chronic bronchitis. Although Debtor owed $81,575 on several consolidated loans, she never made a payment because of deferments and forbearances. At the petition date, Debtor's annual income was $16,815 and her monthly expenses were $1,873. The bankruptcy court mandated Debtor to pay her student loans to the extent of her monthly 401(k) contribution, as well as future mortgage payments. The district court affirmed Debtor's obligation with respect to her 401(k) contributions, but reversed the contribution of her future mortgage payments. By remanding, the Ninth Circuit required reanalysis and clarification of the bankruptcy court's insistence that Debtor contribute her retirement payment to the student loans, despite her monthly shortfall. Additionally, the Ninth Circuit rejected a *per se* rule as to whether a 401(k) contribution is a "necessary" expense, and held that the bankruptcy court should "consider a number of factors, including, but not limited to: the debtor's age, income, overall budget, expected date of retirement, existing retirement savings, and amount of contributions." *Id.* at 1045.

Educational Credit Mgmt. Corp. v. Coleman (In re Coleman), 560 F.3d 1000 (9th Cir. 2009). An undue hardship determination on student loan debt was ripe for adjudication less than a year after confirmation of Debtor's five-year chapter 13 plan, based upon considerations of both "constitutional" ripeness and "prudential" ripeness.

McKay v. Ingleson, 558 F.3d 888 (9th Cir. 2009). The issue on appeal was whether a student account and deferment agreement constituted a "loan" under § 523(a)(8). The Ninth Circuit applied dictionary definitions of the term and joined the Eighth Circuit BAP's reasoning in *Johnson v. Missouri Baptist College*, 218 B.R. 449 (B.A.P. 8th Cir. 1998), to conclude that Debtor's agreement with the school was a loan.

Lewis v. U.S. Dept. of Educ. (In re Lewis), 506 F.3d 927 (9th Cir. 2007). The Court held that the 1998 amendment, repealing the provision that student loans in repayment for seven years are eligible for discharge, applies retroactively. Congress has the power to impair contractual obligations, even retroactively, and to enforce retroactive application of the amendment without violating a debtor's due process rights.

Educational Credit Mgmt. Corp. v. Mason (In re Mason), 464 F.3d 878 (9th Cir. 2006). The Ninth Circuit reversed and remanded the BAP's decision to grant Debtor a partial undue hardship discharge. The Court of Appeals concluded that while Debtor suffered from a learning disability that impaired his ability to earn a sufficient income, he failed to make a "good faith effort" to repay his student loan debt when he did not explore a second job, did not retake bar exams, and did not make efforts to renegotiate his debt under an Income Contingent Repayment Plan.

Educational Credit Mgmt. Corp. v. Nys (In re Nys), 446 F.3d 938 (9th Cir. 2006). The Ninth Circuit clarified its holding in *In re Pena,* 155 F.3d 1108 (9th Cir. 1998), and held that undue hardship "does not require exceptional circumstances beyond inability to pay for a substantial portion of loan's repayment period." 446 F.3d at 941. The standard does not require "that additional circumstance be 'exceptional' in the sense that the debtor must prove 'serious illness, psychiatric problems, disability of a dependent, or something which makes the debtor's circumstances more compelling than that of an ordinary person in debt.'" *Id.* at 946. The bankruptcy court erred in requiring a showing of exceptional circumstances beyond the inability to pay in the present and likely inability to pay in the future.

Saxman v. Educ. Credit Mgmt. Corp. (In re Saxman), 325 F.3d 1168 (9th Cir. 2003). The Ninth Circuit rejected the BAP's "all-or-nothing" approach to dischargeability of student loan debt set out in *United States Aid Funds Inc. v. Taylor (In re Taylor)*, 223 B.R. 747 (B.A.P. 9th Cir. 1998), and agreed with the Sixth Circuit's conclusion in *Tennessee Student Assistance Corp. v. Hornsby (In re Hornsby),* 144 F.3d 433 (6th Cir. 1998), that a bankruptcy court has equitable authority under § 105(a) to order partial discharge. Unlike in *Hornsby*, however, the Ninth Circuit held that a partial discharge of student loan debt is only appropriate after a debtor has proven undue hardship under § 523(a)(8).

Rifino v. United States (In re Rifino), 245 F.3d 1083 (9th Cir. 2001). The Ninth Circuit concluded that while Debtor's standard of living would fall below a minimal level if she were required to repay her student loan debt, the bankruptcy court erred in concluding that Debtor's circumstances were likely to persist for a significant portion of the repayment period. The Ninth Circuit held that the lower court's factual finding was not supported by the evidence.

United Student Aid Funds, Inc. v. Pena (In re Pena), 155 F.3d 1108 (9th Cir. 1998). The Ninth Circuit adopted the three-part *Brunner* test to determine whether excepting all or part of a student loan debt will impose an undue hardship under § 523(a)(8). Debtor must prove:

(1) inability to maintain, based on current income and expenses, a "minimal" standard of living if forced to repay the student loans;
(2) existence of additional circumstances demonstrating debtor's state of affairs is likely to persist for a significant portion of the repayment period; and
(3) prior good faith efforts to repay the loans.

Id. at 1111, citing *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987).

Pa. Higher Educ. Assistance Agency v. Birrane (In re Birrane), 287 B.R. 490 (B.A.P. 9th Cir. 2002). The BAP reversed the discharge of Debtor's student loan debt because there was no evidence demonstrating that Debtor's current inability to repay would likely continue for a significant part of the repayment period and that Debtor did not make good faith efforts to repay the loan. "[G]ood faith is measured by the debtor's efforts to obtain employment, maximize income, and minimize expenses." *Id.* at 499. Debtor's effort in trying to negotiate repayment was an important indicator of good faith, but Debtor's failure to seek a second job to maximize income or to renegotiate a repayment schedule under the Income Contingent Repayment Plan—factors not beyond Debtor's reasonable control—could not support a finding of good faith. *Id.* at 500.

TENTH CIRCUIT

Woody v. U.S. Dep't of Justice (In re Woody), 494 F.3d 939 (10th Cir. 2007). HEAL loans are subject to an "unconscionability" standard, which is more stringent than "undue hardship."

Educational Credit Mgmt Corp. v. Polleys, 356 F.3d 1302 (10th Cir. 2004). The Court adopted the three-part test of *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.3d 395 (2nd Cir. 1987), for the Tenth Circuit. *See also Alderete v. Educational Credit Mgmt. Corp. (In re Alderete)*, 412 F.3d 1200 (10th Cir. 2005).

ELEVENTH CIRCUIT

Wieckiewicz v. Educ. Credit Mgmt. Corp., 443 F. App'x 449 (11th Cir. 2011). The Eleventh Circuit found no abuse of discretion when the bankruptcy court ordered Debtor to apply for a federal direct consolidation loan, which would potentially consolidate and reduce Debtor's student loan payments. The Court held that the availability of a consolidation program such as the Ford program, and the debtor's eligibility for it, are important factors under the *Brunner* test.

In re Mosley, 494 F.3d 1320 (11th Cir. 2007). Debtor was granted a discharge of student loan debt incurred while pursuing a college degree. Debtor did not complete the degree due to an injury sustained in an Army ROTC program. The injury also made him unable to perform heavy lifting or engage in strenuous labor. At the times relevant to his *pro se* case, Debtor's income never exceeded $7,700 annually and was as low as $1,287. Moreover, Debtor was homeless and diagnosed by Veteran's Affairs as suffering from hypertension, depression, anxiety, and lower back pain.

The creditor argued that the bankruptcy court improperly relaxed the evidentiary requirements by accepting, *inter alia*, a letter from a professor explaining Debtor's medical condition. Rejecting these arguments, the Eleventh Circuit agreed with the holding in *Barrett v. Educational Credit Management Corp.*, 487 F.3d 353, 356 (6th Cir. 2007), that medical conditions preventing a debtor from working can be shown by an array of evidence including the debtor's own testimony. Moreover, the Court found that Debtor's failure to enroll in or attempt to negotiate a repayment plan was not a *per se* bar to a showing of good faith.

Hemar Ins. Corp. of Amer. v. Cox (In re Cox), 338 F.3d 1238 (11th Cir. 2003). The Eleventh Circuit adopted the test set out in *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987), for determining "undue hardship" under § 523(a)(8) for purposes of evaluating the dischargeability of student loans. The Court also held that, although partial discharge of student loan debt is an available option for judges, an undue hardship determination is required for any discharge, whether partial or complete. Finally, the Court held that bankruptcy courts may not grant a discharge pursuant to § 105, as such an act would directly contravene the plain language of § 523(a)(8).

Burks v. La. State Bd. of Regents (In re Burks), 244 F.3d 1245 (11th Cir. 2001). Under the terms of Debtor's graduate educational grant, the indebtedness would be forgiven if the recipient, upon graduation, taught at an "other race" school. In Debtor's case this meant teaching at a predominately minority school. Debtor did not fulfill the "other race" requirement and the grant became repayable. Debtor sought to discharge the grant, arguing that it was not an educational loan contemplated by § 523(a)(8). The Court of Appeals affirmed the decisions of the lower courts holding that an education grant whose forgiveness is conditioned on an event is an educational loan for purposes of determining its nondischargeability.

7. Additional Exceptions

UNITED STATES SUPREME COURT

Criminal Fines

Pennsylvania Dep't of Public Welfare v. Davenport, 495 U.S. 552 (1990). This Supreme Court case discusses restitution obligations imposed as conditions of probation in state criminal actions. More specifically, the Court addressed whether restitution obligations constitute "debts" for bankruptcy purposes and, if so, whether such obligations are accordingly dischargeable. The Court ultimately held that the restitution obligation at issue was in fact a debt dischargeable under the Code. The decision, however, was in part superseded by subsequent statutory changes under § 1328(a), expressly withdrawing the bankruptcy court's power to discharge restitution orders.

Debts Incurred by Fraud

Cohen v. de la Cruz, 523 U.S. 213 (1998). This Supreme Court case considered § 523 and its scope relative to the discharge exception for any debt for money, property, services, or credit to the extent obtained by false pretenses, false representation, or actual fraud. The Supreme Court held that this discharge exception prevents the discharge of all liability arising from the debtor's fraud, including treble damages assessed on account of fraud under state law as well as an award of attorneys' fees and costs. The Supreme Court also analyzed the phrase "to the extent obtained by" and whether that phrase imposes any limitations on the extent to which any debt arising from fraud is excepted from discharge.

FIRST CIRCUIT

Attorney Disciplinary Fines

Richmond v. New Hampshire Supreme Court Committee on Professional Conduct, 542 F.3d 913 (1st Cir. 2008). Costs incurred from attorney disciplinary proceedings that Committee on Professional Conduct orders the disbarred debtor-lawyer to pay are non-dischargeable as a "fine, penalty, or forfeiture" under § 523(a)(7).

THIRD CIRCUIT

Forfeited Bail Bond

In re Gi Nam, 273 F.3d 281 (3d Cir. 2001). The City of Philadelphia brought an adversary proceeding for determination that the chapter 7 Debtor's obligation as surety on a bail bond for his son was excepted from discharge under § 523(a)(7) because it was in the nature of a "fine, penalty or forfeiture" payable to and for the benefit of a governmental unit. The Third Circuit held that the bail bond forfeiture judgment entered against the family surety for failure to produce the defendant for trial was nondischargeable under § 523(a)(7).

FOURTH CIRCUIT

Forfeited Bail Bond

Virginia v. Collins, 173 F.3d 924 (4th Cir. 1999), *cert. denied*, 528 U.S. 1073 (2000). The Fourth Circuit held that a debt due to the Commonwealth of Virginia for a forfeited bail bond was not a debt penalty that could be excepted from discharge because such a debt is more akin to triggering liquidated damages for breach of contract than triggering a penal sanction. The Court also held that the Eleventh Amendment did not deprive the bankruptcy court of jurisdiction to resolve this issue involving a debtor's discharge.

SEVENTH CIRCUIT

Civil Restitution

In re Towers, 162 F.3d 952 (7th Cir. 1998). Civil restitution payable to a governmental unit but not for the benefit of the governmental unit—because the funds were to be distributed to the victims of a fraud—is not excepted from discharge under § 523(a)(7).

NINTH CIRCUIT

Securities-Related Wrongdoing

Sherman v. Sec. Exchange Comm'n (In re Sherman), 658 F.3d 1009 (9th Cir. 2011). The Ninth Circuit held that § 523(a)(19) prevents the discharge of debts for securities-related wrongdoing *only* when the debtor is responsible for that wrongdoing. Debtors who may have received funds derived from a securities violation remain entitled to a complete discharge of any resulting disgorgement order. The Ninth Circuit held that Debtor-attorney's obligation to disgorge funds did not fall within the scope of the dischargeability exception, which applies to any debt for violation of federal securities laws. Although § 523(a)(4) only prohibits the discharge of debts "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny"—without any mention that the misconduct must have been by the debtor—this Circuit has strongly suggested that it applies only in cases in which the debtor is responsible for the misconduct.

TENTH CIRCUIT

Criminal Restitution

Oklahoma Dept. of Securities v. Wilcox, 691 F.3d 1171 (10th Cir. 2012). The Court held that Debtors, who were early investors in a Ponzi scheme for which the originator was convicted, were unjustly enriched and were not subject to § 523(a)(19) when they were not convicted of securities violation. A strong dissent argued that the majority's narrow reading misinterpreted the statute when applied to the extensive state and bankruptcy proceedings in this case, which revealed that Debtors were not innocents in the carrying out of the Ponzi scheme.

In re Sandoval, 541 F.3d 997 (10th Cir. 2008). Forfeiture of a bail bond for non-appearance is not excepted from discharge as a fine, penalty, or forfeiture. Even though the bondsman paid the bond to the state, the debtor's obligation to the bondsman was not an obligation to the state.

Colorado Judicial Dept. v. Sweeney (In re Sweeney), 492 F.3d 1189 (10th Cir. 2007). A restitution order against a juvenile arising from arson is not the equivalent of criminal restitution for purposes of § 1328(a)(3). Therefore, such a debt may be discharged in chapter 13.

In re Troff, 488 F.3d 1237 (10th Cir. 2007). Restitution for arson, paid over to the victim by the state, is not dischargeable. *See also In re Williams* 438 B.R. 679 (10th Cir. 2008) (holding that restitution ordered upon conviction for securities fraud is not barred by discharge of the debt). *But see In re Sweeney*, 492 F.3d 1189 (10th Cir. 200) (holding that arson by a 12-year-old with restitution imposed by state juvenile court was not conviction of a crime so discharge ten years later in chapter 13 case was permissible).

Williams v. Meyer (In re Williams), 438 B.R. 679 (B.A.P. 10th Cir. 2010). In 1997, Debtor borrowed $6,000 from the creditors and provided them a promissory note payable in six months. Debtor failed to pay and filed a chapter 7 petition. The creditors did not seek a discharge exception for their claim. Debtor received a discharge of his debts, which included his debt on the note. The following year, the creditors filed a criminal complaint against Debtor for securities fraud under applicable state law, alleging Debtor's fraud in the offer and sale of securities to them between 1990 and 1997, and that the promissory note had been part of a continuing fraud. Debtor was convicted by a jury and was sentenced to 16 years in prison. He was also ordered to pay restitution to the creditors in the amount of $83,032 (which included the $6,000 loan). In 2009, while Debtor was still serving his sentence, he filed a complaint against the creditors in the bankruptcy court, seeking a declaration that the debt on the promissory note had been discharged, that the restitution order was null and void, and that the creditors willfully violated the discharge injunction. Debtor also sought a judgment against the creditors in the amount they had already collected from him under the restitution order, with interest, as well as fines, imprisonment and damages for willful contempt of the discharge injunction. The creditors moved to dismiss Debtor's complaint for failure to state a claim.

The Tenth Circuit BAP ruled that § 523(a)(7) excepts from discharge a restitution obligation entered after a criminal conviction. The relevant portion of § 523(a)(7) provides that a discharge does not discharge any debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." Because § 523(a)(7) is self-executing, it does not require any party to obtain a judgment declaring that the post-petition restitution order is excepted from discharge; upon imposition, a restitution order is automatically excepted from discharge under § 523(a)(7). For purposes of determining whether restitution is dischargeable, it does not matter whether a prepetition crime is discovered and prosecuted before or after the criminal defendant files for bankruptcy. Thus, neither entry of the post-discharge restitution order nor the creditors' acceptance of restitution payments was violative of Debtor's discharge injunction. The Court also ruled that the creditors did not violate the discharge injunction by filing a criminal complaint against Debtor. Generally, the act of reporting a crime does not violate the discharge injunction unless the report is unsubstantiated and frivolous and designed to coerce payment of a discharged debt. A debtor's bankruptcy discharge does not insulate the debtor from the consequences of criminal conduct; public policy favors the identification of criminal conduct and the imposition of sanctions to punish and rehabilitate the perpetrator, and to deter future crime, and does not support subjecting an adjudicated crime victim to a discharge violation lawsuit by the debtor. Here, the fact that Debtor was actually convicted of the crime—a conviction that had not been overturned—established "beyond a reasonable doubt" that the crime the creditors reported was not an attempt to coerce payment by assertion of an unsubstantiated or frivolous charge; instead, it established that the charges were valid and the prosecution justified. Accordingly, Debtor failed to state a claim and his complaint was dismissed.

8. Award of Costs—§ 523(d)

FIRST CIRCUIT

FIA Card Servs., N.A. v. Conant, 476 B.R. 675 (B.A.P. 1st Cir. 2012). The bankruptcy court awarded attorney's fees and costs to Debtor pursuant to § 523(d). Creditor contended that a portion of Debtor's debt was non-dischargable in bankruptcy because it was fraudulently incurred credit card debt pursuant § 523(a)(2)(A). On a motion for summary judgment, the bankruptcy court found in favor of Debtor, awarding her attorney's fees and costs pursuant to § 523(d). In examining the contours of "substantial justification" under § 523(d), the BAP applied a "totality of the circumstances" test that considered whether there was: "(1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) reasonable support in the facts alleged for the legal theory advanced." *Id.* at 683. Although not dispositive, failures to fully investigate a claim, to conduct an examination under the Bankruptcy Rules, or to attend the § 341 meeting of creditors are significant factors in determining whether a creditor had substantial justification to file a § 523(a)(2)(A) complaint. The BAP affirmed the order of the bankruptcy court.

E. *COLLATERAL ESTOPPEL*

SIXTH CIRCUIT

In re Pitner, 686 F.2d 447 (6th Cir. 1982). The Court held that the doctrine of collateral estoppel precluded relitigation of issues determined against Debtor in a wrongful death suit brought by the decedent's widow when issues of willfulness and malice were determined in a state court proceeding and were necessary to the state court's decision.

TENTH CIRCUIT

Clark v. Zwanziger (In re Zwanziger), 467 B.R. 475 (B.A.P. 10th Cir. 2012). Prepetition, Debtor was sued by plaintiffs in the district court for fraudulent misrepresentation and violation of the state's wage act. A jury found against Debtor on both claims and the court awarded damages. Debtor appealed and the Tenth Circuit affirmed the lower court's holding that Debtor committed fraud; the Court, however, reversed awards of actual and punitive damage on the fraud claim, holding that the plaintiffs had waived any claim for emotional distress damages. The Court remanded to the district court for a new trial on the amount of damages resulting from fraud that did not stem from plaintiff's alleged emotional distress. Before the new trial commenced in the district court, Debtor filed for bankruptcy. The plaintiffs initiated an adversary proceeding seeking a determination that the claim against Debtor was nondischargeable under § 523(a)(2)(A). The plaintiffs moved for summary judgment on the issue of fraud and emotional distress damages on collateral estoppel grounds based on the prior litigation. The bankruptcy court found that collateral estoppel did not apply and allowed the plaintiffs to retry their emotional distress damage claims. Debtor appealed.

The Tenth Circuit BAP ruled that while claim preclusion (res judicata) does not apply to a claim for nondischargeability, it does apply to preclude a claim that challenges the extent and validity of the underlying debt, whenever another court has already made that determination. The court explained that a dischargeability action involves two separate claims: a cause of action on the debt and a cause of action on the dischargeability of that debt. The former is subject to claim preclusion, whereas the latter is a cause of action that arises solely by virtue of the Bankruptcy Code and its discharge provisions and is therefore not subject to claim preclusion. The Court ruled that issue preclusion (collateral estoppel) is more broadly applied, allowing the bankruptcy court to properly give collateral estoppel effect to those elements of the claim that are identical to the elements required for discharge and were actually litigated and determined in the prior action, thereby preventing relitigation of an issue that the party litigated and lost in a prior action. The bankruptcy court may apply both doctrines to preclude relitigation of the amount of damages and extent of damages, if that issue was fully and finally litigated in a prior proceeding; whether a court chooses claim or issue preclusion depends on whether the amount of damages is characterized as a "claim" or an "issue." Only the portions of a judgment that have not been reversed are entitled to preclusive effect. Even when a decision is remanded, if the appellate decision was definite rather than tentative, or would be the law of the case in the other proceeding, that holding is sufficiently "final" to have preclusive effect in a subsequent suit brought against the same party. Also, in the case of a penalty default by entry of a default judgment, it is appropriate to deem the "actual litigation" requirement to be satisfied because the losing party was afforded a reasonable opportunity to defend himself on the merits but chose not to do so. Here, the Court concluded that the issue of emotional distress damages had been actually litigated on appeal, when the court decided that the plaintiffs had waived this claim. Accordingly, the plaintiffs were collaterally estopped from relitigating this issue before the bankruptcy court in the dischargeability proceeding.

F. *MISCELLANEOUS*

FIRST CIRCUIT

In re Barry, 451 B.R. 654 (B.A.P. 1st Cir. 2011). A judgment creditor filed an adversary proceeding against jointly petitioning debtors seeking to preclude both Debtors from discharging her claim in their chapter 7 cases. The BAP held that when a judgment creditor's claim lies against only one debtor, a bankruptcy court may not deny the other, jointly petitioning debtor a discharge under § 727(a)(2)(A), regardless of whether the second debtor acted with actual intent to hinder, delay or defraud the creditor.

As to the debtor against whom the judgment creditor held a claim, the BAP also held that denial of discharge under § 727(a)(2)(A) is appropriate even when the debtor's actions were intended to, and may have in fact, benefited some creditors.

FOURTH CIRCUIT

Discharge of Tax Liens

Deutchman v. Internal Revenue Serv., 192 F.3d 457 (4th Cir. 1999). A chapter 13 plan did not effectively discharge the tax lien of the IRS on Debtor's home because Debtor did not take sufficient affirmative steps to modify or extinguish the IRS's liens; he sought no pre-confirmation adversary hearing, did not object to the proof of claim filed by the IRS, sought no valuation hearing pursuant to § 506, nor otherwise attempt to modify the lien in any affirmative way. "[E]ven where confirmed without objection, a plan will not eliminate a lien simply by failing or refusing to acknowledge it or by calling the creditor unsecured." *Id*. at 461, quoting *In re Beard*, 112 B.R. 951, 954 (Bankr. N.D. Ind. 1990).

SIXTH CIRCUIT

Zirnhelt v. Madaj (In re Madaj), 149 F.3d 467 (6th Cir. 1998). Regardless of a chapter 7 debtor's intent in failing to schedule a claim, all claims are discharged in no-asset cases when no claims bar date is established, so long as the claimant does not have grounds for nondischargeability under §§ 523(a)(2), (a)(4), or (a)(6).

EIGHTH CIRCUIT

Jurisdiction to Liquidate Debts

Islamov v. Ungar (In re Ungar), 429 B.R. 668 (B.A.P. 8th Cir. 2010). Prepetition, Debtor represented to a creditor that she was a successful day trader. The creditor gave Debtor money to invest on his behalf, and the parties were to split the profits. Debtor provided the creditor with favorable but false reports of her trading activities, inducing the creditor to invest more money. Once the creditor stopped advancing funds, Debtor filed a chapter 7 petition. The creditor filed a nondischargeability action against Debtor for his claim, alleging fraud. The bankruptcy court entered a judgment in favor of the creditor in the amount of $228,791. Debtor appealed and asserted, among other things, that the bankruptcy court exceeded its jurisdiction when it awarded a money judgment to the creditor.

The Eighth Circuit BAP ruled that bankruptcy courts have jurisdiction to liquidate debt and enter money judgments against debtors in dischargeability actions. Thus, the bankruptcy court here acted within its bounds when it entered the money judgment against Debtor.

ELEVENTH CIRCUIT

Hardship Discharge in Chapter 13

In re Edwards, 207 B.R. 728 (Bankr. N.D. Fla. 1997). Chapter 13 Debtor was entitled to a hardship discharge under § 1328(b) when Debtor had failed to complete plan payments due to several unforeseeable events. These events included the bank's failure to approve the sale of Debtor's business, the subsequent demise of Debtor's marriage, and Debtor's inability to secure employment following the closing of his business.

In re Bacon, 2003 Bankr. LEXIS 2386 (Bankr. S.D. Ga. Aug. 19, 2003). When joint Debtors' plan was originally confirmed, one was on disability and the other was working a low wage job. One experienced additional health issues post-petition, prompting Debtors to seek a hardship discharge under § 1328(b). The bankruptcy court denied the hardship discharge, noting that Debtors had not evidenced any change of income since the plan was confirmed and had not demonstrated why a modification of the plan would not work.

In re Schlottman, 319 B.R. 23 (Bankr. M.D. Fla. 2004). Debtor's husband, a joint debtor, died following confirmation of Debtors' joint chapter 13 plan. As a result, Debtor-wife moved for a hardship discharge. In denying the discharge, the court held that she had not demonstrated that the substantial sum received from the husband's life insurance policy was reasonably necessary for the support of herself and any dependents.

XIX. MISCELLANEOUS

FIRST CIRCUIT

Section 108

Shamus Holdings, LLC v. LBM Fin. LLC (In re Shamus Holdings, LLC), 642 F.3d 263 (1st Cir. 2011). The First Circuit held that § 108 tolls the Massachusetts Obsolete Mortgages Statute's five-year time period for enforcing a delinquent mortgage. Tolling allows the mortgage holder, barred from filing a judicial foreclosure action until the automatic stay is lifted, to file the action thereafter.

Turnover—§ 542
exception for DIP

Braunstein v. McCabe, 571 F.3d 108 (1st Cir. 2009). After a lawyer filed for bankruptcy, he and his spouse were living on a houseboat that was subsequently damaged by a towing company. Debtors settled with an insurance company and, without notification or court approval, arranged to have the houseboat repair work done. The trustee filed a turnover complaint to obtain the money Debtors had received from the insurance company. The First Circuit determined that the district court had properly denied Debtors' demand for a jury trial; the statutory turnover action was authorized by § 542 since the turnover issue was whether the debtor-in-possession had properly spent down the proceeds from the insurance company in the ordinary course of business, turnover powers are inherently equitable in nature, and the remedy was equitable. The Court found that the costs of towing and repairing the boat were not in the ordinary course of business because they were not expenditures within the boat owners' day-to-day operations.

Note: This was a consumer chapter 11, consolidated with affiliated entity business filings.

Rule 9011(b)(3)

Ameriquest Mortgage Co. v. Nosek (In re Nosek), 609 F.3d 6 (1st Cir. 2010). The lender represented that it was the holder of Debtor's mortgage and note, when in fact it was a servicer rather than the holder. The bankruptcy court imposed sanctions of $250,000 on the lender under Rule 9011(b)(3). The First Circuit found this sanction amount excessive considering that the representation was not made in bad faith. The Court reduced the sanctions to $5,000.

Section 105

Ameriquest Mortgage Co. v. Nosek (In re Nosek), 544 F.3d 34 (1st Cir. 2008). In an adversary proceeding, the bankruptcy court relied on § 105(a) to find that the creditor's use of 'suspense accounts' to hold Debtor's plan payments violated § 1322(b). The bankruptcy court awarded debtor $250,000 in emotional distress damages and $500,000 in punitive damages. The First Circuit vacated the bankruptcy's court's decision and remanded the case, finding that § 105(a) was misused; the creditor's accounting practices did not violate the Bankruptcy Code or any court order. The Court observed that § 1322(b) "does not impose any specific duties on a lender," the chapter 13 plan did not specify how payments were to be accounted for by the creditor, and there was no basis to conclude that the creditor's accounting practices violated Debtor's cure rights under § 1322(b).

Note: Debtor's case was filed before BAPCPA went into effect and thus the newly added § 524(i) did not apply.

Standard for Appeal

United States v. Paolo (In re Paolo), 619 F.3d 100 (1st Cir. 2010). Debtor challenged the decision of the district court to abstain from deciding his tax dispute as an adjunct to his personal bankruptcy proceeding. Debtor argued that Congress intended for bankruptcy courts to be forums to determine a debtor's tax liability even when the estate has no assets whose administration the tax issues would affect. The district court framed the government's position as requesting abstention pursuant to 28 U.S.C. § 1334(c)(1), and Debtor did not claim otherwise. The Court of Appeals observed that the language of 28 U.S.C. § 1334 (d) states that such abstention is not reviewable by appeal or otherwise, and thus held that the district court's decision was not reviewable.

Elkin v. Metropolitan Property & Casualty Insurance Co. (In re Shkolnikov), 470 F.3d 22 (1st Cir. 2006). Debtor-tortfeasor filed for bankruptcy, and the tort claimants filed an adversary proceeding seeking assignment of Debtor's rights with respect to insurance coverage. After some litigation, a tentative agreement between the trustee and the creditors was reached whereby the trustee would sell the rights in question to the creditors. The bankruptcy court denied the sale. On appeal, the BAP found that the creditors lacked standing to appeal the court's decision, thereby giving a victory to the insurance company. The insurance company, however, was not satisfied with certain language in the BAP's judgment and appealed to the First Circuit. That Court dismissed the appeal. "[S]ince courts of appeals sit to review final decisions, orders, and judgments of lower courts, such as the BAP, not to review passages in lower court opinions, a party may not appeal a favorable decision, order, or judgment for the purpose of securing appellate review of statements or findings therein." *Id*. at 24, citing *California* v. *Rooney*, 483 U.S. 307, 311 (1987).

Allowance for Direct Appeal—28 U.S.C. § 158(d)(2)(A)

Weaver v. Harmon Law Offices, P.C., (In re Weaver), 542 F.3d 257 (1st Cir. 2008). Debtors attempted to utilize 28 U.S.C. § 158(d)(2)(A), which permits direct appeals from a bankruptcy court to the court of appeals, under certain circumstances. The First Circuit issued a show cause order asking why the appeal should not be dismissed because, (i) no timely notice of appeal was filed, and (ii) no authorization of the direct appeal was obtained from the appellate court as required by § 158(d)(2)(A). Debtors requested that the appeal be allowed despite the procedural problems, and the question arose whether the requirements under § 158(d)(2)(A) are jurisdictional or merely "claims-processing rules." Without deciding the jurisdictional question, the First Circuit exercised its discretion under § 158(d)(2)(A) to deny the leave to appeal. The Court found that the existence of a serious jurisdictional question meant that allowing the appeal to go forward would not serve the purposes of § 158(d)(2)(A)—specifically, a rapid and definitive resolution of the underlying legal question by the court.

THIRD CIRCUIT

Appeals

In re Caterbone, 640 F.3d 108 (3d Cir. 2011). Debtor's bankruptcy petition was dismissed by the bankruptcy court. Debtor filed his notice of appeal three days after the deadline to do so had passed, as provided by Rule 8002. Debtor also failed to timely file his designation of items to be included in the record on appeal and a statement of the issues to be presented, as required by Rule 8006.

The Third Circuit ruled that it lacks jurisdiction to consider an appeal when the appellant has failed to file a timely notice of appeal. The Court explained that ordinarily, a time period specified in a Bankruptcy Rule is not jurisdictional. When a statute requires the appeal to be filed within a specified time period (one that is incorporated by reference from a Bankruptcy Rule), however, compliance with the time period is a condition to the appellate court's jurisdiction. Under 28 U.S.C. § 158(c)(2), appeals must be made within the time provided by Rule 8002. Rule 8002(a) requires that a notice of appeal from the bankruptcy court judgment be filed within 14 days after entry of the judgment. The combination of § 158(c)(2) and Rule 8002 makes the time limit for filing an appeal jurisdictional. Thus, because Debtor filed an untimely notice of appeal, the Court lacked jurisdiction to hear it.

Judicial Estoppel

In re Kane, 628 F.3d 631 (3d Cir. 2010). Chapter 13 Debtor, in New Jersey, filed a motion to expunge with prejudice a proof of claim filed by his estranged wife because the proof of claim was premised on claims that she failed to include in her own chapter 7 petition, in New York. The parties were then engaged in a contentious divorce, The Third Circuit held that the district court did not err in finding that judicial estoppel did not apply to the entirety of the estranged wife's proof of claim but that it applied to those claims she had not referenced in her own chapter 7 petition. The Third Circuit also found that the estranged wife's equitable distribution claim was abandoned to her when the bankruptcy court in New York in her chapter 7 proceedings granted a discharge. Because the bankruptcy court in New York is not subject to the Third Circuit's appellate review, the Court found that the wife had standing to pursue equitable distribution as a basis for her proof of claim against Debtor, according to the terms set forth in the bankruptcy court's order.

FIFTH CIRCUIT

Judicial Estoppel

Love v. Tyson Foods, Inc., 677 F.3d 258 (5th Cir. 2012). Debtor was fired from his job. By the time he filed a discrimination claim against his former employer with the Equal Employment Opportunity Commission ("EEOC"), he had already filed his chapter 13 petition. After filing his EEOC claim, however, Debtor did not amend his bankruptcy schedules to include the claim. Debtor's plan, providing no recovery to unsecured creditors, was confirmed. Thereafter, Debtor obtained permission from the EEOC to sue his former employer. The employer moved for summary judgment on the ground that Debtor was judicially estopped from pursuing the claim because he had not disclosed his EEOC claim in his bankruptcy schedules. Although Debtor then moved to amend his schedules, the district court granted the employer's motion.

The Fifth Circuit ruled that a debtor who has failed to disclose a claim in existence at the time of plan confirmation is judicially estopped from pursuing that claim post-confirmation. The Court explained that judicial estoppel is applicable when (1) the party against whom it is sought has asserted a legal position that is plainly inconsistent with a prior position, (2) a court accepted the prior position, and (3) the party did not act inadvertently. In the bankruptcy context, judicial estoppel is appropriate when a debtor has not disclosed an asset and then seeks to pursue a claim based on that undisclosed asset. Failure to disclose a claim is inadvertent only when the debtor lacks knowledge of the claim and has no motive to conceal the claim. Debtors have a motive to conceal a claim when they stand to reap a windfall.

Lowe v. Am. Eurocopter, L.L.C., 471 F. App'x 257 (5th Cir. 2012). The district court granted summary judgment against Debtor, based upon judicial estoppel, for failing to include the claims on her bankruptcy schedules. She failed to respond to the motion for summary judgment or otherwise challenge it in the district court. For that reason, the Fifth Circuit held that she did not preserve any error for purposes of appeal.

Reed v. City of Arlington, 650 F.3d 571 (5th Cir. 2011). Prepetition, Debtor won a judgment against the city under the Family Medical Leave Act ("FMLA"). While the city's appeal was pending, Debtor and his wife filed a chapter 7 petition, but failed to disclose the FMLA judgment as an asset. The chapter 7 trustee deemed the case a no-asset case, Debtors received a discharged, and their bankruptcy case was closed. The Fifth Circuit then affirmed the FMLA verdict against the city and remanded for recalculation of damages. The city then offered Debtor a FRCP 68 judgment for $580,000. Debtor informed his counsel of his closed bankruptcy case, and counsel then informed the chapter 7 trustee of the FMLA judgment. Debtor's case was reopened and his discharge was revoked. The trustee substituted as the real party in interest in the FMLA case and attempted to accept and collect the city's Rule 68 offer. The city argued that Debtor's failure to disclose the judgment operated to judicially estop Debtor and the trustee from collecting the judgment. The city requested a take-nothing judgment against Debtor.

The Fifth Circuit ruled that, absent unusual circumstances, an innocent trustee can pursue for the benefit of a debtor's creditors a judgment or cause of action that the debtor failed to disclose in bankruptcy, and that judicial estoppel, based on the debtor's failure to disclose assets in bankruptcy cannot be applied against an innocent trustee who succeeds to the debtor's estate. Judicial estoppel arises when a party intentionally takes a position in later litigation that is inconsistent with a position the court accepted in earlier litigation. Thus, judicial estoppel would bar Debtor from collecting the judgment or benefiting from it because he failed to disclose it in his bankruptcy schedules. Upon the commencement of a chapter 7 case, a debtor's property becomes property of the estate and the chapter 7 trustee becomes the real party in interest, entitled to maintain and collect property of the estate. A trustee takes a debtor's assets as they exist as of the commencement of the debtor's bankruptcy case, subject to any applicable prepetition defenses that may exist at the time. Here, however, the conduct upon which the city based its defense of judicial estoppel occurred post-petition, when Debtor failed to disclose the judgment in his schedules. Thus, when the trustee took rights under the judgment, upon Debtor's chapter 7 filing, this conduct had not yet occurred; the trustee took the judgment free of the city's defense of judicial estoppel. Applying judicial estoppel against the trustee would be inequitable because it would grant a windfall to the city based on Debtor's misconduct and would deprive Debtor's creditors of an asset to which they would clearly be entitled in the absence of that misconduct. Thus, the trustee could collect the judgment, only to the extent necessary to pay estate claims, including administrative expenses, but any surplus could not be returned to Debtor, whose failure to fully and honestly disclose all his assets undermined the integrity of the bankruptcy system. Such misconduct may not encouraged or rewarded.

SIXTH CIRCUIT

Jurisdiction

United States v. Carroll, 667 F.3d 742 (6th Cir. 2012). The United States lacked standing to seek relief against all chapter 13 trustees for the Eastern District of Michigan in a complaint arguing that federal tax refund-redirection orders violated the U.S.'s sovereign immunity.

The U.S. government sought a declaratory judgment against all of the chapter 13 trustees for the Eastern District of Michigan, preventing them from enforcing existing federal tax refund-redirection orders on the grounds that the orders violated the government's sovereign immunity. The government also sought a writ of mandamus prohibiting the bankruptcy court from including these provisions in future chapter 13 plans. The Court concluded that the government lacked standing and that the court lacked jurisdiction because the chapter 13 trustees were the wrong defendants; the harm suffered flowed from the bankruptcy court's orders, not the trustees' actions. The more appropriate action would be an appeal of the tax refund-redirection orders.

Petition preparers

In re Wicker, 702 F.3d 874 (6th Cir. 2012). The appellate court affirmed the bankruptcy court's award to the US Trustee of civil penalties totaling $11,500 against a bankruptcy petition preparer. The bankruptcy court had found that the preparer had instructed Debtor to conceal the fact that he had paid $400 to the preparer for the services and had received assistance. In addition to awarding penalties under the specific statute relating to petition preparers, bankruptcy courts may also assess civil penalties under § 526 against a person for assisting a debtor in making a statement in a document filed with the court that is untrue or misleading.

SEVENTH CIRCUIT

Reopening of Cases

Redmond v. Fifth Third Bank, 624 F.3d 793 (7th Cir. 2010). Prepetition, Debtor defaulted on his home mortgage and then filed his chapter 13 petition to stave off foreclosure. The bankruptcy court entered an agreed order that reduced the arrearage, stayed the foreclosure proceedings, and required Debtor to make monthly payments on the mortgage in addition to a final balloon payment. Debtor failed to make the final balloon payment and the lender sued to foreclose. Debtor thereafter received a discharge and his case was closed. After years of litigation, the second foreclosure proceedings were finally slated for trial, at which time Debtor twice moved to reopen his bankruptcy case, arguing that the state court action implicated the bankruptcy court's agreed order. Both motions were denied on the grounds that the motions were untimely, any remaining issues could be resolved in the state court proceedings, and Debtor's bankruptcy arguments were facially meritless.

The Seventh Circuit ruled that a bankruptcy court has broad discretion when deciding a motion to reopen a case and may consider the following non-exclusive factors: (1) the length of time that the case has been closed, (2) whether the debtor would be entitled to relief if the case were reopened, and (3) the availability of non-bankruptcy courts, such as state courts, to entertain the claims. The passage of time weighs heavily against reopening; the longer a party waits to file a motion to reopen a closed bankruptcy case, the more compelling the reason to reopen must be. A bankruptcy proceeding should not be reopened when it appears that to do so would be futile and a waste of judicial resources. Here, the Court found that the bankruptcy court had not abused its discretion when it denied Debtor's motions to reopen.

Individual Chapter 11 Cases—Absolute Priority

In re Wabash Valley Power Ass'n, 72 F.3d 1305 (7th Cir. 1995). The Seventh Circuit allowed members of a rural electricity cooperative to remain in control of the cooperative despite the lack of full payment to creditors in a chapter 11 plan.

The Seventh Circuit suggested in *In re Castleton Plaza, L.P.*, 707 F.3d 821 (7th Cir. 2013), that the reasoning in *Wabash Valley* may not have survived the Supreme Court's decisions in *Bank of America v. 203 N. LaSalle St. P'ship*, 526 U.S. 434 (1999), and *RadLAX Gateway Hotel LLC v. Amalgamated Bank*, 132 S. Ct. 2065 (2012). In addition, the 2005 addition of § 1115 also may undermine the precedential force of *Wabash Valley*.

Individual Chapter 11 Cases—Property of the Estate

The Seventh Circuit discussions about estate property in an individual chapter 11 predate the 2005 adoption of § 1115. *See e.g.*, *In re Prince*, 85 F.3d 314 (7th Cir. 1996). These case are likely to have been superseded by that statutory enactment.

Issues Arising Under Chapter 12

In re Fortney, 36 F.3d 701 (7th Cir. 1994). Chapter 12 Debtors sought to repay a secured county tax debt over three years instead of the twenty-year amortization schedule for their mortgage. The trustee objected on the grounds that Debtors should be compelled to extend the repayment of the tax obligation beyond the three-year duration of their plan because, if it were paid more slowly, more income would be available to pay the claims of unsecured creditors. The bankruptcy court held that Debtors should satisfy their tax obligation within three years. The district court affirmed, as did the Court of Appeals. Generally, all payments under chapter 12 plans should be made within three years, in accordance with § 1222(c), but § 1222(b)(9) gives a bankruptcy court discretion to extend the repayment period when appropriate. Here, the bankruptcy court gave valid reasons for extending the repayment of the mortgage but not the taxes. Nothing in chapter 12 requires the amortization of all secured debts on the same schedule.

In re Armstrong, 812 F.2d 1024 (7th Cir. 1987). The Seventh Circuit ruled that cash rent "paid in full and up front" is not income from farm operations. The court also ruled that proceeds from sales of farm equipment are income from farm operations.

Although the *Armstrong* court was deciding whether a debtor was a "farmer" and hence ineligible for an involuntary bankruptcy petition, lower courts have found *Armstrong* binding precedent on the question of what constitutes income from farming operations for purposes of the "family farmer" definition and eligibility for chapter 12. *See In re Swanson*, 289 B.R. 372 (Bankr. C.D. Ill. 2003); *In re Maschkoff*, 89 B.R. 768 (Bankr. S.D. Ill. 1988).

TENTH CIRCUIT

Standing

Smith v. Rockett (In re Smith), 522 F.3d 1080 (10th Cir. 2008). During her chapter 13 case, Debtor filed a complaint alleging violations of the FDCPA, but the district court dismissed the complaint reasoning that only the trustee, and not the debtor, has standing to prosecute the cause of action. The Tenth Circuit held that, unlike a chapter 7 case in which all assets are deemed transferred to the trustee, a chapter 13 debtor retains possession of property of the estate. Compare § 1302(b) with § 704(a)). Therefore, the chapter 13 Debtor had standing to pursue the federal cause of action.

ELEVENTH CIRCUIT

Sovereign Immunity

State of Florida Dep't of Revenue v. Diaz (In re Diaz), 647 F.3d 1073 (11th Cir. 2011). Prepetition, Debtor defaulted on his court-ordered child support obligations, despite a judgment for support arrearages and multiple new court orders. When Debtor filed his chapter 13 petition, he listed his child support obligations as a priority unsecured claim. On behalf of Debtor's wife, the state Department of Social Services ("DSS") enlisted the help of the state Department of Revenue ("DOR") filed a proof of claim that included the arrearage and accrued prepetition interest. Debtor objected to the inclusion of interest, and hearing no response from the DOR, the Bankruptcy Court reduced the claim to disallow the interest. Debtor confirmed a plan that provided for the full payment of the allowed claim, and upon completion of the plan payments, received a discharge. While Debtor was still making plan payments, Debtor received two notices from the DOR demanding full payment of the overdue support obligations, but these notices stopped after Debtor informed the DOR of his ongoing bankruptcy case. After Debtor's case was closed, the DOR and the DSS, on behalf of Debtor's wife, began collection efforts on both the previously disallowed prepetition interest and on accrued post-petition interest. Debtor moved to hold both the DOR and the DSS in contempt for violating the automatic stay and the discharge injunction. Both the DOR and the DSS argued that sovereign immunity shielded them from Debtor's claims.

The Eleventh Circuit ruled that neither DOR nor DSS waived sovereign immunity with respect to Debtor's claim against them for violation of the automatic stay, but they did waive sovereign immunity with respect to Debtor's claim for violation of the discharge injunction. Generally, the doctrine of state sovereign immunity precludes a federal court from entertaining a private person's suit against a state unless a "litigation waiver" or "consent by ratification" can be established. The "litigation waiver" theory provides that a state waives its sovereign immunity to the extent it voluntarily invokes the jurisdiction of the bankruptcy court by invoking its aid in the claims adjudication and allowance process upon the filing of a proof of claim. The filing of a proof of claim, however, does not subject a state to any and all lawsuits relating to the bankruptcy; an action against the state must bear a direct relationship to adjudication of the claim. Here, the Court found that Debtor's claim for violation of the stay did not bear a direct relationship to the DOR's proof of claim, which by then had already been adjudicated. (The Court did not address whether the "litigation waiver" theory would provide a basis for hearing Debtor's claim for violation of the discharge injunction.) Under the "consent by ratification" theory, the states' decision to join the Union and ratify the Bankruptcy Clause in the Constitution empowers Congress to establish, among other things, uniform laws on the subject of bankruptcies throughout the United States. Whether "consent by ratification" applies depends on whether the proceedings against the state are necessary to effectuate the *in rem* jurisdiction of the bankruptcy court. Because the automatic stay is a fundamental procedural mechanism that allows the bankruptcy court to administer the estate, an action arising out of a creditor's stay violation assists the court in carrying out its *in rem* functions, and is therefore generally necessary. Here, the Court found that although the DOR and DSS had allegedly violated the automatic stay, Debtor did not bring his contempt motion until years later—after confirmation and discharge, and after the stay had already accomplished its purpose of preserving estate assets. Thus, this claim was no longer "necessary." On the other hand, motions seeking contempt and sanctions for alleged violations of the discharge injunction are "necessary to effectuate" the bankruptcy court's *in rem* functions, such that the DOR and the DSS waived sovereign immunity as to this claim, pursuant to the "consent by ratification" theory. The Court also ruled, on the merits of the discharge injunction claim, that the DOR and DSS did not violate the discharge junction. Under § 524, a discharge under chapter 13 prohibits collection of only discharged debts and does not apply to nondischargeable debts. Under §§ 1328 and 523(a)(5), a debt for child support is excepted from discharge. Here, although Debtor's debt on the prepetition interest was disallowed, disallowance of a claim and nondischargeability are separate issues: a disallowed claim may not be paid by the bankruptcy estate, but that does not eliminate the debtor's personal liability outside of bankruptcy. Thus, the DOR and

DSS did not violate the discharge injunction by seeking to collect nondischargeable child support debts from Debtor.