Recent Developments in Bankruptcy

JUDGE LEE MORRIS
U.S. Bankruptcy Court, Northern District of Texas

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Topic	Case Citation	Court	Resource Obtained From	Brief Description
Attorneys' Fees	*Wright v. Csabi (In re Wright)*, 13-10472, 2017 WL 6001685 (Bankr. S.D. Tex. Dec. 1, 2017)	Bankr. S.D. Texas	Recent Developments in Consumer Bankruptcy 2018	Receipt/retention of fees be debtor's special counsel under undisclosed fee-sharing agreement can constitute violation of automatic stay in addition to violations of §§ 327 and 329.
Attorneys' Fees	*Stewart v. Sikes*, CV 16-1187, 2017 WL 6567989 (W.D. La. Dec. 22, 2017)	W.D. Louisiana	Recent Developments in Consumer Bankruptcy 2018	Failure to timely obtain approval of contingency fee agreement may result in fees under engagement being limited to consideration under § 330.
Automatic Stay	*Ritzen Group, Inc. v. Jackson Masonry, LLC (In re Jackson Masonry, LLC)*, Nos. 18-5157 and 18-5161, 2018 US App. LEXIS 29009 (6th Cir. Oct. 16, 2018)	6th Circuit	Business Bankruptcy Case Developments - 2018	A motion for relief from the automatic stay commences a discrete proceeding and once the motion is granted or denied, there are no more rights and obligations at issue. Therefore, an order denying stay relief is a final order for purposes of appeal.
Automatic Stay	*Hunsaker v. United States*, 902 F.3d 963 (9th Cir. 2018)	9th Circuit	Recent Developments in Chapter 13: Selected Cases	Waiver of sovereign immunity under § 106(a) broad enough to permit award of emotional distress damages under § 362(k) for IRS' violation of automatic stay.
Automatic Stay	*In re Bloomfield Nursing Operations, LLC*, 17-42769 (Bankr. N.D. Tex. May 1, 2018)	Bankr. N.D. Texas	Business Bankruptcy Case Developments – 2018	Based upon application of "pecuniary purpose" and "public policy" tests, determining that New Mexico Attorney General's assertion that pre-petition litigation commenced against debtors was not stayed because of policy/regulatory power exception under § 362(b)(4) was not supported by the evidence under the totality of the circumstances involved.
Avoidance Actions	*Whitlock v. Lowe*, SA-16-CV-00049-RCL, 2018 WL 1528236	W.D. Texas	Recent Developments in Consumer Bankruptcy 2018	Judgment under § 550 against transferee for amount of funds

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	(W.D. Tex. Mar. 28, 2018)			fraudulently transferred to transferee could be recovered even though funds were later effectively spent for the benefit of the debtor.
Claims	*Creutz v. U.S. Bank Nat'l Ass'n (In re Creutz)*, 17-1110, 2018 WL 2733942 (Bankr. D. Mass. Jun. 5, 2018)	Bankr. D. Massachusetts	Recent Developments in Chapter 13: Selected Cases	Assignee of mortgage claim is not liable for misconduct of its assignor, but debtor's objection to the claim based upon the misconduct of the assignor survives as a recoupment defense to assignee's claim.
Claims	*In re Barbour-Freeman*, 590 B.R. 147 (Bankr. E.D. Mich. 2018)	Bankr. E.D. Michigan	Recent Developments in Chapter 13: Selected Cases	If mortgagee fails to timely file proof of claim, FRBP 3004 allows debtor to file proof of claim on behalf of mortgagee, but only up to 30 days after bar date has passed. Where debtor's counsel waited too long, trustee distributed funds to unsecured and debtor had to extend term of plan to make up mortgage arrearages.
Claims	*In re Tajeda*, 17-51561-CAG, 2018 WL 2433196 (Bankr. W.D. Tex. May 3, 2018)	Bankr. W.D. Texas	Recent Developments in Consumer Bankruptcy 2018	Entity with lien against property of the estate has "claim" in bankruptcy case even though there is no direct privity of contact between lienholder and debtor as to indebtedness owed to lienholder [debtor had separately entered into assumption agreement with lienholder's counter-party].
Claims	*Pate v. Tow*, 4:15-CV-01804, 2018 WL 2426662 (S.D. Tex. May 29, 2018)	S.D. Texas	Recent Developments in Consumer Bankruptcy 2018	Child support claimants who filed late POCs not entitled to priority treatment under § 726(a)(1) where state agency authorized to file POCs on their behalf received timely notice of bar date.
Confirmation	*21st Mortgage Corp. v. Glenn (In re Glenn)*, 900 F.3d 187 (5th Cir. 2018)	5th Circuit	Recent Developments in Consumer Bankruptcy 2018;	Valuation of mobile home for purposes of plan confirmation would not include delivery and set-up costs. Consideration of replacement value

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			Recent Developments in Chapter 13: Selected Cases	under § 506(a)(2) should take into consideration the property's proposed disposition or use.
Confirmation	*Houston Sportsnet Fin., LLC v. Houston Astros, LLC (In re Houston Regional Sports Network, LP)*, 886 F.3d 523 (5th Cir. 2018)	5th Circuit	Business Bankruptcy Case Developments – 2018	While bankruptcy court properly determined the value of a television agreement with Comcast as of the petition date, the bankruptcy court improperly valued the agreement for confirmation cramdown purposes under § 506(a) and *Rash* by failing to consider the intended post-petition use or disposition of the collateral.
Confirmation	*Keystone Gas Gathering, LLC v. Ad Hoc Committee of Unsecured Creditors of Ultra Res., Inc. (In re Ultra Petroleum Corp.)*, 913 F.3d 533 (2019)	5th Circuit		Construing make-whole premium as a provision to compensate lender for lost interest, finding such interest to be disallowable under § 502(b)(2) as unmatured interest. A plan does not impair a class of unsecured claims by failing to provide for the payment of unmatured interest that the Code, itself, disallows. Moreover, if the plan doesn't otherwise impair the class, then the best interest of creditors test (which invokes the Chapter 7 waterfall – including payment of interest "on" claims where a surplus exists) does not ordinarily apply. However, given the uniqueness of the case as a solvent case, remanded to bankruptcy court for consideration of: (a) whether the pre-Code "solvent-debtor" exception survived enactment of § 502(b)(2), and if so, whether/to what extent that entitles the lenders to recovery of the make-whole premium as interest "as part of the claims," and (b) whether there is a basis under 28 USC § 1961(a)

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				or in equity for the payment of interest "on" the claims (given the inapplicability of the best interest of creditors test).
Confirmation	*In re Pioneer Carriers, LLC*, 581 B.R. 809 (Bankr. S.D. Tex. 2018)	Bankr. S.D. Texas	Business Bankruptcy Case Developments – 2018	Lender holding originally undersecured claim timely made § 1111(b)(2) election, thereby entitling the claim to treatment as an allowed secured claim in the full amount of the claim. As such, creditor also entitled to attorneys' fees as part of allowed secured claim.
Confirmation	*Dropbox, Inc. v. Thru, Inc. (In re Thru, Inc.)*, Nos. 3:17-CV-1958 and 3:17-CV-1959, 2018 US Dist. LEXIS 179769 (N.D. Tex. Oct. 19, 2018)	N.D. Texas	Business Bankruptcy Case Developments – 2018	Bankruptcy court's approval of cramdown interest rate under Chapter 11 plan of 1.22% (the then-applicable federal judgment rate) affirmed in light of secured creditor's failure to provide any credible evidence of an appropriate alternative market rate.
Confirmation	*Ortiz-Peredo v. Viegelahn*, 587 B.R. 321 (W.D. Tex. 2018)	W.D. Texas	Recent Developments in Chapter 13: Selected Cases	For purposes of § 1325(b), current monthly income does not exclude exempt assets; therefore, in calculating disposable income, exempt assets are included.
Constitutional Authority	*Saenz v. Gomez (In re Saenz)*, 899 F.3d 384 (5th Cir. 2018)	5th Circuit	Recent Developments in Discharge and Dischargeability	Determining whether party has knowingly and voluntarily waived right to Art. III adjudication may entail a deeply factbound analysis of the procedural history of the proceeding. Opining that bankruptcy court undertook such analysis and found sufficient evidence of implied waiver.
Discharge	*Lamar, Archer & Cofrin, LLP v. Appling*, 138 S.Ct. 1752 (2018)	Supreme Court	Recent Developments in Consumer Bankruptcy 2018; Recent Developments in	Debtor's pre-petition fraudulent promise to law firm to pay it from expected tax refund constituted statement respecting debtor's financial condition entitling law firm to non-

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			Discharge and Dischargeability	dischargeability determination.
Discharge	*In re Hale*, 17-40229, 2017 WL 6729967 (5th Cir. Dec. 29, 2017)	5th Circuit	Recent Developments in Consumer Bankruptcy 2018	Pre-petition judgment for fraud based upon general verbal statements regarding "financial shape" and cash flow dischargeable because related to financial condition [requiring writing].
Discharge	*Selenberg v. Bates (In re Selenberg)*, 856 F.3d 393 (5th Cir. 2017)	5th Circuit	Recent Developments in Discharge and Dischargeability	Attorney debtor's delivery of promissory note to former client in order to induce former client to not pursue malpractice claim was "extension of credit" for purposes of § 523(a)(2)(A).
Discharge	*Haler v. Boyington Capital Group, LLC (In re Haler)*, 708 Fed. Appx. 836, 2017 WL 6729967 (5th Cir. Dec. 29, 2017)	5th Circuit	Recent Developments in Discharge and Dischargeability; Business Bankruptcy Case Developments - 2018	Oral statements re corporation being in "very fine legally [sic] financial shape" and that it had "plenty of cash to operate" were statements respecting financial condition that had to be in writing in order to be non-dischargeable under § 523(a)(2)(B) [v. dischargeable per § 523(a)(2)(A)]
Discharge	*Weil v. Elliott*, 859 F.3d 812 (9th Cir. 2017)	9th Circuit	Recent Developments in Discharge and Dischargeability	1-year filing deadline for complaint to revoke discharge per § 727(e)(1) is a non-jurisdictional, limitations-based provision that can be waived if not asserted as an affirmative defense.
Discharge	*Lorensen v. Taggart (In re Taggart)*, 888 F.3d 438 (9th Cir. 2018)	9th Circuit	Recent Developments in Discharge and Dischargeability	Good faith belief that discharge injunction did not apply – even if unreasonable – precluded award of contempt sanctions for violation of discharge injunction.
Discharge	*Claybar v. Huffman (In re Huffman)*, 16-10344, 2017 WL 4621703 (Bankr. E.D. Tex. Oct. 13, 2017)	Bankr. E.D. Texas	Recent Developments in Consumer Bankruptcy 2018	Post-answer default judgment against debtor in pre-petition litigation may collaterally estop debtor from challenging non-dischargeability under

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				§ 523.
Discharge	*Mid-South Maintenance, Inc. v. Jones (In re Jones)*, 15-14513-JDW, 2018 WL 1281757 (Bankr. N.D. Miss. Mar. 9, 2018)	Bankr. N.D. Miss.	Recent Developments in Consumer Bankruptcy 2018	Debtors' daughter falsified employment of debtors in scheme to embezzle money and then launder nearly $500,000 of it through debtors' bank accounts. Court didn't buy that the debtors never noticed all the extra cash in the account. Debt for funds held non-dischargeable under § 523(a)(2)(A) and (a)(4).
Discharge	*In re Burk*, 483 B.R. 655 (Bankr. N.D. Miss. 2018)	Bankr. N.D. Miss.	Recent Developments in Consumer Bankruptcy 2018	[Must be kin to the Jones] Mother/mother-in-law embezzled funds and ran it through the bank accounts of the kids (the later debtors). One of the kids was in high school at time and mother controlled account – discharge not barred. The others had control of accounts and even spent some of the money. Non-dischargeable debt under § 523(a)(2)(A).
Discharge	*Thomas v. U.S. Dep't of Ed. (In re Thomas)*, 17-31060-HDH-7, 2017 WL 7050664 (Bankr. N.D. Tex. Dec. 8, 2017)	Bankr. N.D. Texas	Recent Developments in Consumer Bankruptcy 2018	Dischargeability of student loan debt under "total incapacity" exception almost never achievable.
Discharge	*De La Rosa v. Kelly (In re Kelly)*, 582 B.R. 905 (Bankr. S.D. Tex. 2018)	Bankr. S.D. Texas		Co-signor guarantor of student loan debt satisfied debtor's obligations to lender when debtor defaulted. Resulting reimbursement claim of guarantor against debtor deemed non-dischargeable under § 523(a)(8).
Discharge	*Hiner v. Koukhtiev (In re Koukhtiev)*, 2017 WL 5514541 (Bankr. S.D. Tex. Nov. 1, 2017)	Bankr. S.D. Texas	Recent Developments in Consumer Bankruptcy 2018	Pre-petition refusal to turn over property to its owner can constitute willful and malicious injury for purposes of non-dischargeability under § 523(a)(6)

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Discharge	*Lee v. Ali (In re Ali)*, 17-30413, 2018 WL 889362 (Bankr. S.D. Tex. Jan. 30, 2018)	Bankr. S.D. Texas	Recent Developments in Consumer Bankruptcy 2018	Contempt for failure to participate in pre-petition state court discovery can result in nondischargeability under § 523(a)(6) (willful and malicious exception)
Discharge	*Prado v. Erickson (In re Erickson)*, 16-10437-TMD, 2017 WL 4404286 (Bankr. W.D. Tex. Sep. 29, 2017)	Bankr. W.D. Texas	Recent Developments in Consumer Bankruptcy 2018	For § 523(a)(2)(A) actual fraud, there must be some connection between the debt to be excepted from discharge and the fraudulent transfers referenced (keying off of Husky v. Ritz)
Discharge	*GT Dave v. Baessler (In re Baessler)*, 11-10670-TMD, 2018 WL 3816773 (Bankr. W.D. Tex. Jul. 19, 2018)	Bankr. W.D. Texas	Recent Developments in Consumer Bankruptcy 2018	After trial, state court entered pre-petition judgment against debtor on several legal theories, including one that did not require proof of intent to deceive. Nevertheless, collateral estoppel applied in dischargeability action because unitary set of facts supported judgment on all of the causes of action asserted.
Discovery	*In re Correra*, 589 B.R. 76 (Bankr. N.D. Tex. 2018)	Bankr. N.D. Texas		Detailed discussion of permissible scope of FRBP 2004 examination discovery, duty to preserve records, spoliation issues, and personal jurisdiction.
Discovery	*In re HJH Consulting Group, Inc.*, 18-50788-RBK, 2018 WL 4090594 (Bankr. W.D. Tex. Aug. 24, 2018)	Bankr. W.D. Texas		Former executive of debtors objected to production of various categories of documents under Fifth Amendment right against self-incrimination based upon existence of parallel criminal investigation. Court explores scope of protection in this context.
Eligibility	*Franchise Servs. of N. Am. v. U.S. Trustee (In re Franchise Servs. of N. Am.)*, 891 F.3d 198 (5th Cir. 2018)	5th Circuit	Business Bankruptcy Case Developments – 2018	Debtor's articles of incorporation required bankruptcy filing to be approved by all classes of stock. Court dodged question of whether, on

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				fiduciary duty grounds, a creditor holding "golden shares" in a class could be precluded from voting on bankruptcy filing because the creditor didn't hold a controlling interest in the class. However, reaffirms basic concept that state law dictates the procedures a corporation must follow to authorize a bankruptcy filing.
Estate	*Martinez v. OGA Charters, LLC (In re OGA Charters, LLC)*, 901 F.3d 599 (5th Cir. 2018)	5th Circuit		Debtor's liability insurance policies constitute property of the estate. Whether the proceeds of such policies are also included within the estate depends upon a fact-specific determination. Where proceeds are likely to be insufficient to satisfy all covered claims, the debtor may have a sufficient equitable interest in having the proceeds applied towards as many of the claims as possible so as to bring the proceeds into the estate.
Excusable Neglect	*Sanchez v. Wells Fargo, NA (In re Sanchez)*, 17-51721-CAG, 2018 WL 3816775 (Bankr. W.D. Tex. Jul. 24, 2018)	Bankr. W.D. Texas	Recent Developments in Consumer Bankruptcy 2018	Plaintiff missed deadline to appeal and filed motion to extend deadline on basis of counsel being too busy. Counsel's busy schedule did not constitute excusable neglect; motion to extend denied.
Executory Contracts	*Sabine Oil & Gas Corp. v. Nordheim Eagle Ford Gathering, LLC (In re Sabine Oil & Gas Corp.)*, No. 17-1026, 2018 US App. LEXIS 13975 (2nd Cir. May 25, 2018)	2nd Circuit	Business Bankruptcy Case Developments – 2018	For a real property covenant to run with the land under Texas law (*Inwood N. Homeowners' Ass'n Inc. v. Harris*, 736 S.W.2d 632 (Tex. 1987)): (1) it must touch and concern the land, (2) it must relate to a thing in existence or specifically bind the parties and their assigns, (3) it must be intended by the original parties to run with the land, and (4) the successor to the burden

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				must have notice. Court upheld bankruptcy court's determination that agreements could be rejected as executory contracts because Texas law requires horizontal privity for real covenants and Noredheim failed to establish such privity.
Exemptions	*In re DeBerry*, 17-50315, 2018 WL 1178353 (5th Cir. Mar. 7, 2018)	5th Circuit	Recent Developments in Consumer Bankruptcy 2018	In Chapter 7, proceeds from sale of homestead that is claimed as exempt that are not reinvested within 6 months are not recoverable by Trustee (on same rationale as Hawk (871 F3d 287 (5th Cir 2017))
Exemptions	*Peake v. Ayobami (In re Ayobami)*, 879 F.3d 152 (5th Cir. 2018)	5th Circuit	Recent Developments in Consumer Bankruptcy 2018; Recent Developments in Chapter 13: Select Cases	For purposes of claiming federal exemptions, a debtor may claim "100% interest" of an asset as exempt on Schedule C if the FMV of such interest does not exceed any applicable statutory cap.
Exemptions	*Viegelahn v. Lopez (In re Lopez)*, 987 F3d 663 (5th Cir. 2018)	5th Circuit	Recent Developments in Consumer Bankruptcy 2018; Recent Developments in Chapter 13: Selected Cases	In Chapter13 case, any unused proceeds from sale of homestead that are not reinvested within 6 months (*i.e.* non-exempt proceeds) are returnable to debtors upon dismissal of case
Exemptions	*In re Terrill*, 17-60087-RLJ-7, 2018 WL 3025399 (Bankr. N.D. Tex. June 15, 2018)	Bankr. N.D. Texas	Recent Developments in Consumer Bankruptcy 2018	Pre-petition homestead designation made by debtor for purposes of county tax records/purposes not dispositive of extent of homestead exemption claim
Exemptions	*In re Haynes*, 17-701130-hdh13, 2017 WL 7050635 (Bankr. N.D. Tex. Dec. 26, 2017)	Bankr. N.D. Texas	Recent Developments in Chapter 13: Selected Cases	Joint debtors entitled to 2, not 4, firearms as exempt property under Texas Property Code.
Judicial Estoppel	*Fornesa v. Fifth Third Mortgage Company*, 897 F.3d 624 (5th Cir. 2018)	5th Circuit	Recent Developments in Consumer Bankruptcy 2018	Failure to properly disclose property interest and list lienholder as creditor in case resulted in debtor being judicially estopped from pursuing stay violation

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				when lienholder foreclosed on property.
Jurisdiction	*Wayne v. United States Soc. Sec. Admin. (In re Wayne)*, AP 17-3321, 2018 WL 572998 (S.D. Tex. Jan. 26, 2018)	S.D. Texas	Recent Developments in Consumer Bankruptcy 2018	Bankruptcy court lacks jurisdiction to determine validity of IRS' recoupment for pre-petition overpayments of social security benefits because debtor required to first pursue relief through administrative process. [Note: square this with § 505]
Lien Avoidance	*In re Ramos*, 4:17-CV-1002-A, 2018 WL 210328 (N.D. Tex. May 5, 2018)	N.D. Texas	Recent Developments in Consumer Bankruptcy 2018	Post-maturity payment on mortgage note and listing of mortgage debt on schedules did not constitute acknowledgment of debt for purposes of litigation to avoid mortgage lien on basis of statute of limitations.
Means Test	*In re Hernandez*, 17-10473, 2018 WL 3054765 (Bankr. S.D. Tex. June 18, 2018)	Bankr. S.D. Texas	Recent Developments in Consumer Bankruptcy 2018	Rent expenses are not mortgage debt that must be included on line 9b of Means Test
Plans	*In re Randall*, 17-33322-HDH-13, 2018 WL 1737620 (Bankr. N.D. Tex. Apr. 10, 2018)	Bankr. N.D. Texas	Recent Developments in Consumer Bankruptcy 2018	Post-petition interest on pre-petition domestic support obligation must be paid in full through Chapter 13 plan notwithstanding fact that unsecured creditors will not be paid in full.
Plans	*In re Amaya*, 585 B.R. 403 (Bankr. S.D. Tex. 2018)	Bankr. S.D. Texas	Recent Developments in Consumer Bankruptcy 2018; Recent Developments in Chapter 13: Selected Cases	Chapter 13 Trustee's internal policies result in debtor's counsel being paid first as an administrative claim – resulting in gap before payments start to secured creditor. Given the policy and short gap period, § 1325(a)(5)(B)(iii)(I) does not necessarily require equal payments in every month of the plan – just that they be equal once they begin.
Plans	*In re Santillan*, 15-35753, 2018 WL 4674573 (Bankr. S.D. Tex.	Bankr. S.D. Texas	Recent Developments in Chapter 13: Selected Cases	Approved plan modification to lower payments is effective as of filing of

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	Sept. 26, 2018)			modification. Gap overpayments to be credited against new, lower payment schedule under modified plan.
Plans	*In re Vega-Lara*, 17-52553-CAG, 2018 WL 2422427 (Bankr. W.D. Tex. May 4, 2018) *In re Orozco*, 17-52818-CAG, 2018 WL 2425971 (Bankr. W.D. Tex. May 10, 2018) *In re Diaz*, 17-52761-CAG, 2018 WL 2425969 (Bankr. W.D. Tex. May 14, 2018)	Bankr. W.D. Texas	Recent Developments in Consumer Bankruptcy 2018; Recent Developments in Chapter 13: Selected Cases	Chapter 13 debtors cannot freely deviate from District's standard plan
Plans	*Evolve Fed. Credit Union v. Barragan-Flores (In re Barragan-Flores)*, 585 B.R. 397 (W.D. Tex. 2018)	W.D. Texas	Recent Developments in Consumer Bankruptcy 2018; Recent Developments in Chapter 13: Selected Cases	Where care loans are cross-collateralized, § 1325(a)(5) prevents debtor from proposing to retain one car and surrender the other – all collateral securing a debt needs to be treated similarly.
Procedure	*In re Lindsey*, 17-50746, 2018 WL 3409995 (5th Cir. July 11, 2018)	5th Circuit	Recent Developments in Consumer Bankruptcy 2018	Complaint that contains mere statements [presumably tracking statutory provision for relief] without the assertion of any supporting facts is subject to dismissal under 12(b)(6).
Procedure	*In re Whelan*, 15-41659, 2018 WL 947641 (Bankr. E.D. Tex. Feb. 16, 2018)	Bankr. E.D. Texas	Recent Developments in Consumer Bankruptcy 2018	While FRCP 60(c) provides that relief under 60(b) for certain types of matters cannot be brought after 1 year, it does not provide for a 1-year deadline – 60(c) requires that motion must be brought "within a reasonable time." Debtor's request denied as untimely even though within 1 year.
Procedure	*In re Newberry*, 12-52072-CAG, 2017 WL 4564704 (Bankr. W.D. Tex. Oct. 11, 2017)	Bankr. W.D. Texas	Recent Developments in Consumer Bankruptcy 2018	Request to reopen case in order to attempt to tardily respond to notice of final cure under BR 3002.1 not permitted

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Procedure	*In re Uribe-Cruz*, 14-52566-RBK, 2018 WL 3816774 (Bankr. W.D. Tex. Aug. 1, 2018)	Bankr. W.D. Texas	Recent Developments in Consumer Bankruptcy 2018	A creditor's post-discharge/post-closing of the case discovery of pre-petition conduct that may have rendered its claim non-dischargeable if timely challenged not permitted to reopen case for purpose of pursuing non-dischargeability action.
Procedure	*Smart-Fill Mngt. Group, Inc. v. Froiland (In re Froiland)*, 589 B.R. 309 (Bankr. W.D. Tex. 2018)	Bankr. W.D. Texas	Recent Developments in Consumer Bankruptcy 2018	BR 9006(a) does not operate to extend a deadline that falls on a federal holiday to the next business day if the deadline was fixed by order of the court. [Yikes!]
Procedure	*Kuenstler v. Half Price Books, Records, Magazines, Inc.*, 4:17-CV-775, 2018 WL 3187178 (E.D. Tex. June 28, 2018)	E.D. Texas	Recent Developments in Consumer Bankruptcy 2018	Late-filed adversary may proceed where creditor initially attempted to pursue claims via motion practice.
Proofs of Claim	*In re Milliman*, 17-10393, 2018 WL 1475937 (Bankr. D. Kan. Mar. 23, 2018)	Bankr. D. Kansas	Recent Developments in Chapter 13: Selected Cases	After creditor failed to correct overstatement in proof of claim in response to request/inquiries from individual debtor, court assessed attorney's fees and expenses by debtor pursuant to FRBP 3001(c)(2)(D).
Settlements	*New Indus., Inc. v. Byman (In re Sneed Shipbuilding, Inc.)*, 18-40350, 2019 WL 895687 (5th Cir. Feb. 5, 2019)	5th Circuit		Where proposed settlement an integral component of proposed sale of assets, then § 363(m) may cause appeal of settlement to be statutorily moot if stay not obtained pending appeal.
Settlements	*In re Thomas*, 583 B.R. 385 (Bankr. E.D. Ky. 2018)	Bankr. E.D. Kentucky	Recent Developments in Chapter 13: Selected Cases	Refusing to permit filing of settlement agreement in putative class action involving AT&T and DirectTV under seal because insufficient basis for such established under § 107(b). "No seal, no deal" threat disregarded.
Statement of Intention	*In re Seiffert*, 18-43114, Dkt. No. 48 (Bankr. N.D. Tex. Mar. 8,	Bankr. N.D. Texas		Discussion of interplay among §§ 521(a)(2), 521(a)(6), 521(d) and

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	2019)			362(h), potential awkward results for a secured creditor after the stay is automatically lifted and the collateral is no longer deemed property of the estate, and the lack of an obligation on the part of the debtor to "deliver" surrendered collateral.
Trustees	*Lejeune v. JFK Capital Holdings, LLC (In re JFK Capital Holdings, LLC)*, 800 F.3d 747 (5th Cir. 2018)	5th Circuit	Business Bankruptcy Case Developments – 2018	Compensation in accordance with commission percentages set forth in § 326 is presumptively reasonable in relation to awarding compensation to trustees under § 330.
UST Quarterly Fees	*In re Buffets, LLC*, 16-50557-RBK, 2019 WL 518318 (Bankr. W.D. Tex. Feb. 8, 2019)	Bankr. W.D. Texas		2017 Congressional amendment to 28 U.S.C. § 1930(a) to provide for 833% increase in the maximum post-confirmation quarterly fees payable to the UST system determined to be unconstitutional as applied to Buffets case because of its lack of uniformity in application and retroactive effect.

***In re Petty*, No. 18-40258, 2018 WL 1956187 (Bankr. E.D. Tex. Apr. 24, 2018) (Rhoades)** (Rejecting *In re Pratola*, 578 B.R. 414 (Bankr. N.D. Ill. Dec. 27, 2017) (Baer), and agreeing with *In re Bailey-Pfeiffer*, No. 1-17-13506-bhl, 2018 WL 1896307 (Bankr. W.D. Wis. Mar. 23, 2018) (Ludwig), and *In re Mendenhall*, No. 17-40592-JDP, 2017 WL 4684999 (Bankr. D. Idaho Oct. 17, 2017) (Pappas), student loans are noncontingent, liquidated unsecured debts for eligibility purposes under § 109(e) that must be counted; debtors are rendered ineligible and trustee's motion to convert or dismiss based on ineligibility is granted.).

***In re Moniello*, No. 3:17-cv-01801 (SRU), 2018 WL 4405611 (D. Conn. Sept. 17, 2018) (Underhill)** (Attorney for Wells Fargo was appropriately sanctioned for misrepresenting in a motion for stay relief that Wells Fargo was the owner of property that Wells Fargo had sold to a third party a month before.).

***McBride v. Riley*, No. 1:17-01302, 2018 WL 1768602, at *5–*7 (W.D. La. Apr. 12, 2018) (Trimble)** (Filing fees, credit counseling fees and credit report fees are not reimbursable to debtor's counsel under 11 U.S.C. § 503(b)(1)(A) or § 503(b)(2) or under 11 U.S.C. § 330(a) because they are not administrative expenses of the Chapter 13 estate. "This court agrees with Judge Kolwe and finds that he (1) did not err in holding that the filing fee for a Chapter 13 case is not a post-petition expense (2) did not err in holding that the filing fee for a Chapter 13 case accrues pre-petition (3) did not err in holding that advances of filing fees, credit counseling fees, and credit report fees by debtor's counsel in Chapter 13 are not reimbursable under 22 U.S.C. § 503 (b)(1)(A). . . . [A]llowing debtor's counsel to advance that fee and then subsequently seek reimbursement of that fee through the plan, would take away the discretion of the Court to allow the fee to be paid in installments because of necessity, eviscerate Rule 1006(b) and divert available funds from unsecured creditors to the debtors' counsel.").

***Romeo v. Maney (In re Romeo)*, No. AZ-17-1215-BLKu, 2018 WL 1463850, at *3–*6 (B.A.P. 9th Cir. Mar. 23, 2018) (unpublished) (Brand, Lafferty, Kurtz)** (When Chapter 13 debtor is required by § 521(f) to file federal income tax returns or transcripts during each year of the case, consistent with § 521(g)(2) and the Final Guidance from the Director of the Administrative Office of the United States Courts, the trustee must file a motion and demonstrate need to have access to those returns or transcripts. Need was established by trustee's argument that access to the returns was necessary to determine whether modification of the confirmed plan was appropriate to pay more to unsecured creditors based on changes in income. Because only federal income tax returns are specified in § 521(g)(2), there is no authority for access to state income tax returns during a Chapter 13 case. "Section 315(c) of BAPCPA mandates that the Director of the Administrative Office of the United States Courts establish procedures for safeguarding the confidentiality of tax information required to be produced under § 521. On September 20, 2005, the Judicial Conference approved interim guidance drafted to implement this statutory directive . . . . In March 2015, the Director issued the Final Guidance, which established . . . procedures for obtaining access to a debtor's tax information filed with the bankruptcy court . . . . [T]he movant must file a motion with the court . . . . [W]e could not locate[ ] any published (or unpublished) authority stating what constitutes sufficient evidence to show a demonstrated need for tax information. . . . Trustee's counsel articulated . . . ' . . . that the reason for wanting to see it is to confirm that there doesn't need to be a modification to the plan . . . .' . . . We conclude that the bankruptcy court's finding that Trustee had shown a 'demonstrated need' for accessing Romeo's Federal income tax return transcripts was not illogical, implausible, or without support in the record. . . . [T]he purpose of § 521(f) . . . appears to be to allow interested parties like Trustee to monitor a debtor's financial condition during the pendency of the chapter 13 case and to seek plan modification under § 1329 . . . if there are material increases in net income that can be captured for contribution. . . . [W]hile § 521(f) requires the filing of postpetition Federal income tax returns or transcripts with the court, it makes no mention of 'State' income tax returns. . . . [T]he Final Guidance references only Federal income tax returns or transcripts . . . . Notably, a chapter 13 debtor is required under § 1308 . . . to file all prepetition Federal, State and local tax returns due for all of the taxable periods ending during the four year period ending on the date the bankruptcy petition was filed. . . . If Congress intended that postpetition State income tax returns or transcripts be filed with the court under § 521(f), it could have easily stated so.").

***In re Reichard*, No. 2:16-bk-12633-BMW, 2018 WL 3323870, at *2, *3–*5 (Bankr. D. Ariz. July 5, 2018) (Whinery)** (New local plan form permissibly requires Chapter 13 debtors to provide to the trustee state and federal tax returns every year during the case. Local plan form provided, "'While the case is pending, the Debtor shall provide to the Trustee a copy of any post-petition tax return within 14 days after filing the return with the tax agency.'" Debtor modified the local form to provide that federal income tax returns would be filed with the court. "The Debtors argue that the Local Plan Form violates the Bankruptcy Code and the Federal Rules on the basis that the Trustee is required to follow Code §§ 521(f) and (g) in order to obtain access to post-petition tax returns. . . . The provision in the Local Plan Form that requires Chapter 13 debtors to submit post-petition tax returns directly to the trustee is consistent with the Code and Federal Rules, as well as the National Plan Form. Code § 1302(b)(1) . . . requires trustees to 'investigate the financial affairs of the debtor[.]' . . . Neither the Code nor Federal Rules address accessibility to or disclosure of debtors' post-petition state tax returns, but the Code imposes a duty on debtors to supply their post-petition federal tax returns under certain circumstances. . . . A trustee's use of debtors' tax return information for purposes of evaluating whether a plan modification is warranted is consistent with the Code. . . . Code § 521(f) does not provide the exclusive mechanism by which a trustee may obtain access to such tax returns. . . . The Trustee has a statutory duty to investigate the financial affairs of the Debtors. In order to fulfill this duty, he needs to have the ability to readily access debtors' post-petition tax returns, in order to monitor changes in disposable income. . . . It would be cost prohibitive to require trustees to file a motion every year that a case is pending, in order to obtain post-petition tax returns in every case, given the number of cases each trustee handles. . . . The Local Plan Form provision at issue here permissibly streamlines the procedure by which a trustee obtains the debtors' post-petition tax returns, and promotes cost efficiencies and efficient administration. . . . [I]t appears that the Debtors['] intent in objecting to this local plan provision is to purposely increase the cost to the Trustee of obtaining an important source of financial information . . . and to avoid the disclosure of any changes in their projected disposable income, in order to prevent the Trustee from seeking modification pursuant to Code § 1329. . . . [T]he turnover of post-petition state tax returns causes no greater infringement upon debtors, given the requirement for turnover of the federal tax returns.").

***No v. Gorman*, 891 F.3d 138, 140–41 (4th Cir. May 24, 2018) (Duncan, Agee, Shedd)** (Local bankruptcy rule that permitted dismissal of Chapter 13 case without a hearing upon certification from trustee that debtor failed to commence payments within 30 days as required by § 1326(a)(1) was inconsistent with § 1307 and invalid. "[T]he Chapter 13 Trustee . . . filed a 'Local Bankruptcy Rule 3070-1(C) Certification' stating that No had failed to commence timely payments as required by 11 U.S.C. § 1326. Local Bankruptcy Rule 3070-1(C) provides that '[u]pon receipt of such a certification, the Clerk shall enter an order dismissing the case.' . . . The bankruptcy court scheduled a hearing . . . . However, the bankruptcy court dismissed the case . . . before the scheduled hearing could occur. . . . § 1307 does not require a 'motion' to dismiss, per se, but rather the '*request* of a party in interest or the United States trustee.' . . . We view [the trustee's] certification . . . as constituting such a 'request.' . . . Local Bankruptcy Rule 3070-1(C) allows dismissal pursuant to 11 U.S.C. § 1326 without the hearing that 11 U.S.C. § 1307 requires. . . . A local rule of bankruptcy procedure cannot be inconsistent with the Bankruptcy Code. . . . Local Bankruptcy Rule 3070-1(C) is invalid to the extent that it is inconsistent with 11 U.S.C. § 1307's hearing requirement.").

***In re Haynes*, No. 17-701130-hdh13, 2017 WL 7050635 (Bankr. N.D. Tex. Dec. 26, 2017) (Hale)** (Interpreting Texas Property Code, joint Chapter 13 debtors are allowed two firearms as exempt property, not four.).

***Peake v. Ayobami (In re Ayobami)*, 879 F.3d 152, 154 (5th Cir. Jan. 3, 2018) (Jolly, Smith, Graves)** (Narrowly answering certified question: there are situations in which a Chapter 13 debtor can exempt "100% interest" in an asset—when the value of the debtor's interest in the asset does not exceed the statutory cap on the exemption. Circuit panel expresses no opinion whether the debtor can use a 100% interest exemption to clear title or to "walk away" with the assets underlying the exemptions. "§ 522(d) limits the *value* that may be exempted, not the debtor's *interest* that may be exempted. On its face, exempting a 100% *interest* in an asset does not violate any provision of § 522. . . . Of course, there are circumstances where exempting a 100% interest in an asset would not be allowable under § 522, e.g., when the statutory cap is exceeded. But addressing only the certified question before us, we hold that if, when considering any other exemptions claimed, the debtor's entire interest in an asset is less than or equal to any dollar-value limitation imposed by the applicable § 522(d) subsection, then the debtor may exempt her 100% interest in that asset. . . . Although we do not address the question today, we note that the Supreme Court has found 'questionable' whether 'a claim to exempt the full value of the equipment would, if unopposed, entitle [the debtor] to the equipment itself as opposed to a payment equal to the equipment's full value[ ]' . . . ."), *certifying question from* No. 15-35488, 2016 Wl 3854052, at *4 (Bankr. S.D. Tex. June 9, 2016) (Isgur) ("If a debtor claims an interest in an asset that is measured in dollar value . . . , any increase in value goes to the Estate. . . . If a debtor claims an interest that is measured in a percentage ownership of an asset . . . , any increase in value goes to the debtor.").

***Isaacs v. DBI-ASG Coinvestor Fund, III, LLC (In re Isaacs)*, 895 F.3d 904, 916 (6th Cir. July 18, 2018) (Batchelder, Gilman, Rogers)** (*Rooker-Feldman* effect of state court foreclosure judgment does not bar Chapter 13 debtor's adversary proceeding under § 544 asserting that mortgage recorded after prior bankruptcy petition was not perfected because of automatic stay—perfection was not an issue decided by the state court foreclosure judgment. Chapter 13 debtor has derivative standing to challenge perfection of mortgage under § 544 when mortgage was recorded after a prior bankruptcy petition and automatic stay voids perfection of the mortgage. Chapter 13 debtor can be granted derivative standing after filing of adversary proceeding under § 544. "A bright-line rule that bankruptcy courts may never authorize derivative standing after a debtor has filed an adversary complaint would frustrate this flexible equitable power.").

***In re Pence*, 581 B.R. 654, 667 (Bankr. D. Utah Feb. 15, 2018) (Thurman)** (In a case study of what is and isn't within the divorce exception to the automatic stay in § 362(b)(2): dissolution, child custody and child support determinations are not subject to the automatic stay; award of equity in former marital residence is subject to automatic stay but not to extent debtor claimed an exemption in former residence; division of personal property was subject to automatic stay to extent personal property remained nonexempt. Annulment of stay to validate portions of decree that addressed property of the estate and were not saved by domestic relations exception is not appropriate but stay relief is granted to allow divorce court to "either reaffirm its ruling . . . as it was originally issued or re-litigate the division of estate property.").

***Kenderes v. Nationstar Mortg. LLC*, No. 17-03103dwh, 2018 WL 1442233, at *2 (Bankr. D. Or. Mar. 21, 2018) (unpublished) (Hercher)** (Material disputed facts preclude summary judgment for Nationstar in adversary proceeding alleging that Nationstar violated automatic stay by including prepetition escrow shortage in the arrearage portion of its proof of claim and then using the same escrow shortage as the basis for a postpetition notice of mortgage payment change. "[T]he stay does not prohibit creditors from using the claims-filing process or requesting relief from the stay . . . . Nationstar invites me to conclude, on the same logic, that a notice of mortgage-payment change can never be a stay violation. I disagree. The purpose of a notice of mortgage-payment change is to enable a chapter 13 debtor-homeowner to make mortgage-maintenance payments required by section 1322(b)(5). . . . As long as a creditor uses the notice only to specify the amounts and due dates of postpetition mortgage-maintenance installment payments and not to include any amounts that were due before the petition date or that come due because of a prepetition default or the filing of the petition, the creditor of course does not violate the stay. But the Kendereses have alleged that the amount that Nationstar stated in its notice of mortgage-payment change included not just their required postpetition installment payment, but also some or all of the amount by which they were in default to Nationstar as of the petition date. If true, that act by Nationstar would constitute a stay violation. . . . [T]he Kendereses essentially allege that Nationstar tricked them into paying a prepetition shortage by making them believe it was a postpetition shortage. That kind of trickery might not qualify as coercion or harassment, but it would be equally, if not more, likely than coercion or harassment to result in a debtor's payment of a prepetition debt.").

***In re Thomas*, 583 B.R. 385, 387–94 (Bankr. E.D. Ky. Mar. 1, 2018) (Wise)** (Motion to seal settlement agreement in putative class action alleging AT&T and DirecTV routinely violated stay in Chapter 13 cases is denied because no basis was shown under § 107(b). "Debtor halted her class action lawsuit in favor of a quick settlement of her own claims. . . . Debtor's motion does not offer any evidence to show that the Settlement Agreement falls within a category of documents subject to protection from disclosure under § 107(b). . . . Their Supplement states that '[t]he Defendants are unwilling to enter into the Settlement Agreement unless the terms thereof remain confidential' . . . . Congress has codified a strong presumption in favor of public access to all papers . . . . Section 107(b), however, identifies certain narrow categories of documents that, notwithstanding the presumption, may be entitled to protection . . . . [T]he parties contend that the Settlement Agreement and its terms constitute confidential 'commercial information' under § 107(b)(1). . . . '"Commercial information" has been defined as "information which would cause an unfair advantage to competitors by providing them information as to the commercial operations of the debtor"' . . . . The parties have not established that the Settlement Agreement and Debtor's Supplemental Memorandum constitute 'commercial information' subject to protection. . . . 'The Movants['] argument that the "no seal, no deal" condition is reason enough for sealing a document under § 107 is not only wrong under the law, it is also illogical. . . . ' . . . [T]his Court cannot abdicate its responsibility to ensure that public access to court records is restricted only in appropriate circumstances.").

***Hunsaker v. United States*, 902 F.3d 963, 966–68 (9th Cir. Aug. 30, 2018) (McKeown, Paez, Bashant)** (Rejecting contrary conclusion by United States Court of Appeals for the First Circuit in *United States v. Rivera Torres (In re Rivera Torres)*, 432 F.3d 20 (1st Cir. Dec. 16, 2005) (Torruella, Lynch, Howard), sovereign immunity does not preclude award of emotional distress damages for violation of automatic stay by IRS. "The waiver at issue here, Section 106(a), applies to fifty-nine provisions of the Bankruptcy Code. . . . Section 106(a)'s text plainly waives sovereign immunity for court-ordered monetary damages under the waiver's enumerated provisions, although the damages may not be punitive. . . . Emotional distress damages are a form of monetary relief—compensatory damages—but they are not punitive. . . . In sum, the Hunsakers may recover emotional distress damages against the government under Section 362(k) because Section 106(a)'s waiver of sovereign immunity 'extend[s] unambiguously to such monetary claims.'"), *rev'g* No. 6:16-cv-00386-MC, 2016 WL 6134530, at *2 (Bankr. D. Or. Oct. 20, 2016) (McShane) (Sovereign immunity bars recovery of emotional distress damages in action against IRS for violating automatic stay under § 362(k). "The United States 'is immune from suit unless it has expressly waived such immunity and consented to be sued.' . . . Section 106(a) of the Bankruptcy Code clearly waives sovereign immunity for some claims under § 362(k). . . . In [*Dawson v. Washington Mutual Bank, F.A. (In re Dawson)*, 390 F.3d 1139, 1149 (9th Cir. Dec. 10, 2004) (Hall, Graber, Weiner)], the Ninth Circuit resolved the question of whether Congress intended 'actual damages' to include claims for emotional distress. . . . The court concluded allowing emotional distress damages best fulfills legislative intent to protect debtors from excessive psychological and emotional harm. . . . The *Dawson* court concluded the phrase 'actual damages' was ambiguous . . . . Because the phrase 'actual damages' is ambiguous, this Court must construe § 362(k) in favor of immunity.").

***In re Orozco*, No. 17-52818-CAG, 2018 WL 2425971, at *5–*7 (Bankr. W.D. Tex. May 10, 2018) (Gargotta)** (Notwithstanding correct placement in Part 8 of local form for Chapter 13 plan, debtors cannot strike out provision requiring remittance of all tax refunds in excess of $2,000 and cannot replace that standard provision with a proration of anticipated tax refunds as income in Schedule 106I. "Allowing any debtor the ability to modify the form or terms of the District Plan would render its use meaningless. The purpose of Fed. R. Bankr. P. 3015.1 was to establish an Official Form of chapter 13 plan so that creditors and litigants could rely upon the same chapter 13 plan being used throughout the country without regard to variances in local practice or rules. Further, to accommodate a number of bankruptcy courts and judges who took issue with the Official Form Plan, Rule 3015.1 provides in the alternative that a bankruptcy court can adopt a district plan. . . . The exclusive right to file a chapter 13 plan, however, does not mean that a chapter 13 debtor is the only party who can determine the form of a chapter 13 plan. . . . Section 4.1 is consistent with this Court's view that tax refunds are disposable income under § 1325(b)(2) and must be turned over to the Trustee. . . . [A]t least two courts have . . . held that a debtor must, according to the Bankruptcy Code and instructions to the Official Forms, account for tax refunds as income on Schedule I. . . . [*Marshall v. Blake*, 885 F.3d 1065 (7th Cir. Mar. 22, 2018) (Bauer, Flaum, Manion), and *In re Morales*, 563 B.R. 867, 872 (Bankr. N.D. Ill. Feb. 27, 2017) (Doyle),] were issued prior to the bankruptcy court . . . adopting a national form or district chapter 13 plan. . . . The Court recognizes that the Seventh Circuit did affirm [*In re Blake*, 565 B.R. 871, 876 (Bankr. N.D. Ill. Mar. 16, 2017 (Thorne)], noting that the pro-rating of a tax refund on a monthly basis is permissible under the Bankruptcy Code. . . . The Seventh Circuit's decision, however, is based on a practice that predated . . . adoption of Official Form 113.").

***In re Bingham*, No. 16-53217 MEH, 2018 WL 2059604, at *1–*2 (Bankr. N.D. Cal. May 1, 2018) (Hammond)** (Subject to specific disclosure and safeguards, confirmed plan can permit debtor and attorney to agree that approved attorney fees not paid through the plan will be excepted from discharge and paid by the debtor after completion of payments to other creditors. "Debtor cites to [*Wolff v. Johnson (In re Johnson)*, 344 B.R. 104 (B.A.P. 9th Cir. May 1, 2006) (Montali, Pappas, Bufford),] for the proposition that a debtor and attorney may arrange for fees to be paid outside of the plan. There, the confirmed plan excepted unpaid attorney's fees from discharge. The court held that the provision whereby the attorney waived his right to full payment under the plan so long as full payment was made by the debtor after discharge was permitted if agreed to by the attorney, as holder of a priority claim. . . . Debtor and counsel have agreed to a payment arrangement that may continue following completion of the Plan notwithstanding the discharge. . . . Their agreement does not flout the requirements of 11 U.S.C. § 1322(a)(2), which states only that priority claims must be paid through the plan unless the claimant agrees to a different treatment.").

***In re Amaya*, 585 B.R. 403, 407–09 (Bankr. S.D. Tex. Apr. 11, 2018) (Rodriguez)** (Citing *In re DeSardi*, 340 B.R. 790, 808 (Bankr. S.D. Tex. Apr. 21, 2006) (Isgur), plan that pays $1,100 per month to trustee for two months and then $1,200 per month to trustee for 58 months with "pro rata" distribution to secured creditors after administrative expenses are paid in full satisfies equal-monthly-installments requirement in § 1325(a)(5)(B)(iii)(I). Equal-payments requirement is measured against debtor's payments to the trustee, not against the distribution waterfall used by the trustee to first pay administrative expenses in full. Code prefers administrative claims over secured claims in the order of distribution. "The plain language of § 1326(b) requires full payment of administrative claims prior to—or simultaneously with—payments to other creditors; whereas, the plain language of § 1325(a)(5)(B)(iii)(I) does not include a requirement for equal payments to begin in the first month of the plan. . . . Debtor's Plan does not violate § 1325(a)(5)(B)(iii)(I) because it explicitly provides for pro rata payments to be made from months one through fifty-eight. . . . Although secured creditors are required to receive 'equal monthly payments,' a plan that provides for 'periodic "pro rata" payments does not necessarily result' in a violation of § 1325. . . . Courts following the reasoning of *DeSardi* have noted that § 1325(a)(5)(B)(iii) only requires a debtor 'to make equal monthly payments to the plan, . . . not to a particular creditor.' . . . A debtor submits the monthly plan payments to the chapter 13 trustee, who in turn distributes those funds to the debtor's creditors. . . . Debtor's proposal to continue making equal monthly payments of $1,100.00 and $1,200.00, respectively, to the same creditors throughout the life of the Plan satisfies Debtor's duty to make equal monthly payments pursuant to § 1325(a)(5)(B)(iii)(I).").

***In re Miceli*, 587 B.R. 492, 496–501 (Bankr. N.D. Ill. July 9, 2018) (Lynch)** (Rejecting *In re DeSardi*, 340 B.R. 790 (Bankr. S.D. Tex. Apr. 21, 2006) (Isgur), plan that pays attorney fees in full before payments begin to cure prepetition mortgage arrearage violates equal-monthly-installment requirement in § 1325(a)(5)(B)(iii)(I). "The plan proposes to pay Associated Bank only its current monthly contractual payment . . . for the first 8 or 9 months, after which the monthly distribution will bump up . . . for the remainder of the plan . . . . Courts are divided whether a Chapter 13 plan can provide for such a two-step repayment arrangement for paying off attorneys' fees without the secured creditor's consent. . . . Periodic payments to a secured creditor under a Chapter 13 plan in an amount necessary to protect the creditor's interest in depreciating collateral are 'periodic payments' as such term is used in section 1325(a)(5)(B)(iii)(I). Labeling them as 'adequate protection' does not change that result . . . . Regardless of the label affixed to the 'current contractual installment payments' and the 'arrearage' . . . they, too, are periodic payments within the meaning of the statute. Section 1325(a)(5)(B)(iii) requires the total monthly payments on such claim—regardless of label and regardless of whether through the trustee or direct—to be in equal amounts unless the creditor consents to different treatment. . . . The plain language of section 1325(a)(5)(B)(iii)(I) prevents expedited repayment of attorney's fees through a plan if the result is unequal periodic payment to a secured creditor without its consent.").

***Evolve Fed. Credit Union v. Barragan-Flores (In re Barragan-Flores)*, 585 B.R. 397 (W.D. Tex. Apr. 19, 2018) (Cardone)** (Applying *Williams v. Tower Loan of Mississippi, Inc. (In re Williams)*, 168 F.3d 845 (5th Cir. Mar. 11, 1999) (Davis, Duhé, Parker), Chapter 13 plan cannot surrender one car and keep a second car when two secured claims are cross-collateralized by both cars. Plan must surrender all the collateral for each loan. Debtor cannot use § 1325(a)(5)(B) with respect to one car and use § 1325(a)(5)(C) with respect to the other when both claims are cross-collateralized by both cars.).

***21st Mortg. Corp. v. Glenn (In re Glenn)*, 900 F.3d 187, 190–93 (5th Cir. Aug. 13, 2018) (Elrod, Costa, Ho)** (Applying § 506(a) and *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 117 S. Ct. 1879, 138 L. Ed. 2d 148 (June 16, 1997), delivery and setup costs for a manufactured home are not included in "replacement cost" when Chapter 13 plan proposes to retain and use the home. "[T]here is nothing in § 506(a)(2) that prohibits considering the 'proposed disposition or use' of the property in the valuation. . . . [C]onsidering the property at issue under § 506(a)(2)'s specific replacement-value standard and in light of the property's 'proposed disposition or use,' we hold that delivery and setup costs of a mobile home retained by a debtor must be excluded from the mobile home's valuation under § 506(a) of the Bankruptcy Code. . . . § 506(a)(2)'s prohibition on deducting costs of sale or marketing does not compel including delivery and setup costs.").

***Title Max v. Northington (In re Northington)*, 876 F.3d 1302, 1308–15, 1314 n.9 (11th Cir. Dec. 11, 2017) (Wilson, Newsom, Moreno)** (Distinguishing (poorly) *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 276, 130 S. Ct. 1367, 1380, 176 L. Ed. 2d 158 (Mar. 23, 2010), pawn broker is not bound by confirmed plan that pays title pawn in full with interest as a secured claim because pawn broker filed preconfirmation motion for stay relief; car subject to title pawn "dropped out" of Chapter 13 estate "automatically" when state law redemption period expired postpetition, nullifying the power to modify in § 1322(b)(2). Debtor filed Chapter 13 petition before state law grace period expired with respect to title pawn of car. Grace period under Georgia law expired and pawn broker moved for stay relief. Without objection from pawn broker, plan was confirmed that treated title pawn as secured claim for payment in full with interest. Bankruptcy court denied stay relief based on binding effect of confirmed plan. "TitleMax was not required to file an 'Objection'—styled as such—but rather adequately preserved its position through its pre-confirmation motion for relief from the automatic stay . . . . TitleMax didn't need to file a styled-as-such 'Objection' in order to preserve its position that the Charger ceased to be estate property upon the expiration of the redemption period; rather, that argument was adequately teed up . . . in a motion for relief from the stay. . . . In order to hold (as the district court did) that Wilber's Chapter 13 plan could modify TitleMax's rights, it would be necessary not only to conclude (as the district court did) that the Charger initially became part of Wilber's bankruptcy estate with the filing of his petition, but also to find (as the district court did *not*) that it remained in the estate even after the expiration of the prescribed redemption period. We agree with the district court that the Charger entered Wilber's estate, but we hold that it dropped out—pursuant to the 'automatic[ ]' operation of Georgia's pawn statute—when the grace period lapsed. . . . Under Georgia's pawn statute, '[p]ledged goods not redeemed within the grace period shall be *automatically* forfeited to the pawnbroker ... and any ownership interest of the pledgor or seller shall *automatically* be extinguished as regards the pledged item.' . . . [T]he Bankruptcy Code prevents and counteracts the ordinary operation of Georgia's pawn statute only if we find some clear textual indication that Congress intended that result. . . . [W]e don't. . . . Because we hold that the car ceased to be property of the bankruptcy estate upon the expiration of the redemption period, it follows that 11 U.S.C. § 1322(b)(2) . . . has no field of application to this case. . . . [B]y the time the bankruptcy court confirmed Wilber's Chapter 13 plan . . . TitleMax didn't have a mere 'claim'—it had (by operation of Georgia law) a 2006 Dodge Charger." In a footnote: "As to the dissent's '*expressio unius*'[–]based suggestion . . . that Section 541(b)(8) implicitly (and 'permanently') *includes* in a debtor's estate unredeemed property in a title-pawn transaction like the one here . . . by specifically excluding from the estate unredeemed property in an ordinary pawn transaction . . . we can only say that we think that it stretches the negative-implication canon too far.").

***Schnitzel, Inc. v. Sorensen (In re Sorensen)*, 586 B.R. 327, 332–35 (B.A.P. 9th Cir. June 15, 2018) (Faris, Brand, Taylor)** (Distinguishing *Title Max v. Northington (In re Northington)*, 876 F.3d 1302 (11th Cir. Dec. 11, 2017) (Wilson, Newsom, Moreno), based on differences between California and Georgia law, pawned jewelry became property of Chapter 13 estate and could be redeemed through confirmed plan because postpetition notice of termination required by California law violated automatic stay and was void. Without valid termination notice, § 541(b)(8) did not remove pawned property from bankruptcy estate. "[W]hen Ms. Sorensen filed her bankruptcy petition, all of her interests in her jewelry at that time became part of her bankruptcy estate. . . . The bankruptcy court correctly held that her estate included her right to redeem her jewelry. . . . California Financial Code . . . provides that, if a pawned item is not redeemed before the end of the loan period, the pawnbroker must give notice of the loan termination and provide a ten-day redemption period . . . . [T]he right to redeem pawned property under California law does not expire until ten days after the pawnbroker gives proper notice to the pledgor. . . . R & J's issuance of the ten-day notice was an act 'to exercise control over property of the estate[,]' . . . to 'enforce a lien [that] ... secures a claim[,]' and 'to collect, assess, or recover a claim against the debtor[.]' . . . It thus violated § 362(a). . . . Accordingly, the ten-day redemption period never began to run . . . , Ms. Sorensen's redemption right was never extinguished, R & J never took title to the jewelry . . . , and § 541(b)(8) did not remove the jewelry from the estate. . . . [I]n *Northington*, the Eleventh Circuit held that, under state law automatically vesting title in the pawnbroker at the expiration of the redemption period, the pawned property 'dropped out' of the estate pursuant to § 541(b)(8). . . . We agree with the *Northington* court's analysis, . . . but the result here is different because Georgia's pawnshop law differs from California's. In Georgia, following a statutory redemption period, the interest in the pawned property is automatically vested in the pawnbroker; the pawnbroker does not need to take any action. . . . In contrast, California Financial Code . . . required R & J to send notice to Ms. Sorensen before it obtained legal title to the jewelry. That notice . . . was void because it violated the automatic stay.").

***Burkhart v. Grigsby*, 886 F.3d 434, 438–41 (4th Cir. Mar. 29, 2018) (King, Diaz, Shedd)** (Chapter 13 plan can strip off wholly unsecured junior mortgage lien using §§ 1322(b)(2) and 506(a) without regard to whether lienholder has filed a proof of claim. "Our past decisions make clear that the power to effectuate a lien strip in a Chapter 13 case stems from §§ 506(a) and 1322(b). . . . Section 506(d), on the other hand, voids liens . . . . The provision therefore implements the bankruptcy court's broad power over claim allowance—permitting the court to remove a lien after it has extinguished the underlying debt. . . . [T]he Burkharts are not challenging the validity of the underlying debt . . . . Nor has a Chapter 13 plan's power to modify rights ever been restricted to the universe of allowed claims. . . . [T]he valuation process in § 506(a) does not determine a creditor's rights under § 1322(b)(2). Such rights turn on whether there is *any* value in the collateral. . . . [A]n entirely valueless lien may be stripped under § 1322(b) whether or not a proof of claim has been filed. . . . [T]he ability of a Chapter 13 debtor to strip off an underwater lien stems from § 1322(b) not § 506(d). The former provision permits plans to modify the rights of holders of unsecured claims. Whether a creditor has an unsecured claim turns on the value of the underlying collateral not the mere existence of a security interest. And in making this determination, courts are not limited to valuing claims that have been filed and allowed.")

***In re Randall*, No. 17-33322-hdh13, 2018 WL 1737620, at *2 (Bankr. N.D. Tex. Apr. 10, 2018) (Hale)** (Acknowledging split of authority, Chapter 13 plan can pay postpetition interest on a child support claim notwithstanding that unsecured creditors will not be paid in full. "The definition of DSO under Section 101(14A) as including interest, coupled with the amended priority scheme of Section 507(a)(1), evidences that postpetition interest must be paid on the prepetition DSO Claims. . . . [I]t appears that through Section 101(14A), Congress has allowed for priority treatment of interest accruing on a special subset of DSOs by making the interest accruing pursuant to applicable nonbankruptcy law part of the DSO itself. The interest and principal are intertwined and inseparable, and enforcement of the interest carries the same weight as enforcement of the principal.").

***Martinez v. Viegelahn*, 581 B.R. 486, 493–97 (W.D. Tex. Oct. 26, 2017) (Ezra)** (Language in plan required by bankruptcy judge at request of trustee—that any modified plan must pay 100% of unsecured claims—is inconsistent with debtors' rights to modify after confirmation under § 1329(a)(1). Debtors had excess disposable income and offered plan that paid unsecured creditors in full over 60 months notwithstanding financial ability to pay more quickly. Trustee objected and bankruptcy court added language that restricted right of debtors to seek modification of the plan. Debtors appealed confirmation. "[T]he Plan met all requirements under Section 1325(a), and one of the requirements under Section 1325(b). . . . [I]t was within the bankruptcy court's broad judicial discretion to determine that the Chapter 13 Plan would be better served if the Conditional Language was added. . . . [T]he inclusion of any conditions that contravene the express provisions of the Bankruptcy Code are not appropriate. . . . [T]he clear purpose of Section 1329(a)(1) is to allow debtors, trustees, and approved unsecured creditors to request modification of the total amount paid should financial circumstances change following confirmation of the Chapter 13 plan. . . . [T]he plain meaning of [the conditional language] provides that the debtors cannot seek modification of the Plan, unless the modification will continue to result in a 100% dividend paid to their unsecured claims. . . . [T]he bankruptcy court directly contravened the Debtors' right to modify a plan, which is an express right granted to the Debtors in Section 1329(a)(1). . . . If Debtors eventually did file a request for modification, the Trustee would then have a strong argument against modification due to a lack of good faith on the part of the Debtors, because it is undisputed that Debtors are presently failing to pay 100% of their disposable income to unsecured creditors.").

***Briggs v. Johns*, 591 B.R. 664, 670–74 (W.D. La. Sept. 28, 2018) (Foote)** (Interpreting *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (Mar. 23, 2010), because projected disposable income test is not "self-executing," bankruptcy court inappropriately denied confirmation by recalculating projected disposable income when neither trustee nor creditor objected. "[T]he proper interpretation of *Espinosa* is a central issue in this case . . . . *Espinosa* leaves uncertain . . . the extent to which a bankruptcy court must object *sua sponte* to provisions of the Code other than those concerning student loans. . . . A self-executing provision of the Code is one that a bankruptcy court must enforce even if no creditor objects. . . . [T]he characteristic of the Code's self-executing provisions is that they require a debtor to invoke a proceeding. . . . The use of the 'self-executing' modifier suggests that the Supreme Court believed that other provisions of the Code are not self-executing and that Part III of its decision did not apply to those provisions. Thus, this Court holds that *Espinosa* requires a bankruptcy court to object *sua sponte* to terms in proposed Chapter 13 plans that violate self-executing provisions of the Code. . . . [O]bjections on the basis of non-self-executing provisions must be made by a party that the Code authorizes to object. . . . [T]he Bankruptcy Court's interpretation of *Espinosa* as authorizing *sua sponte* objections to any provision of a proposed Chapter 13 plan is erroneous. . . . § 1325(b)(1) contains a subordinate clause that has no counterpart in § 523(a)(8) and that assigns a specific role to the trustee and unsecured creditors. The presence of this additional clause assigning a role to persons other than the debtor and the bankruptcy court distinguishes the two provisions. In the absence of any additional indication that § 1325(b)(1) requires a debtor to initiate a proceeding, this Court holds that § 1325(b)(1) is not self-executing. . . . [B]ecause *Espinosa* only authorizes *sua sponte* objections on the basis of self-executing provisions and because § 1325(b)(1) is not self-executing, the Bankruptcy Court could not object *sua sponte* based on the mere fact that it believed Briggs's proposed plan improperly calculated her disposable income. . . . A court may raise the issue of a debtor's good faith *sua sponte*.").

***Ortiz-Peredo v. Viegelahn*, 587 B.R. 321, 326–27 (W.D. Tex. Mar. 29, 2018) (Garcia)** (Settlement of workers' compensation lawsuit after Chapter 13 petition and before confirmation of a plan produces disposable income that must be accounted for under § 1325(b) notwithstanding that proceeds are exempt. "Both before and after BAPCPA, the plain language of Section 1325(b) 'makes no express or implied reference to the exempt status of income' and 'does not classify income by reference to its exempt status.' . . . '[S]ince current monthly income does not exclude exempt assets and it is the starting point for calculating disposable income, disposable income includes exempt assets.' . . . BAPCPA's statutory definition of 'current monthly income' makes no mention of the categories excluded from income by the Census Bureau . . . . In the case of the BAPCPA definition of current monthly income, the statutory language is plain: 'Quite simply, the term "all" *means* "all."' . . . This is true regardless of the difficulties that may arise in some cases in distinguishing between assets and income derived from the sale of those assets.").

***In re Hernandez*, 588 B.R. 186, 186–90 (Bankr. S.D. Tex. June 18, 2018) (Rodriguez)** (Sua sponte, court determines that residential rent is not debt and local standards amount for rent entered at Line 9a on Form 122C-2 is not reduced by any amount at Line 9b."[T]he question before this Court is whether an above-median income earner must, on Official Form 122C-2, account for his actual monthly rent expense in calculating his net rent expense for purposes of determining his monthly disposable income. . . . Debtor filed an amended Means Test which lists $678.00 on Line 9a as the local standard for mortgage or rent expenses. . . . However, on Line 9b, Debtor does not list any payments as 'total average monthly payment for all mortgages and other debts secured by your home.' . . . Debtor and Trustee submitted a joint brief in support of confirmation, which argued that Form 122C-2 does not require Debtor to list his rent on Line 9b because it is not a mortgage or debt secured by his home. . . . [T]his Court finds that 'debts' must be excluded from the calculation of a debtor's monthly expenses pursuant to § 707(b)(2)(A)(ii)(I). . . . Only mortgages and other debts secured by a debtor's home are deducted from the IRS mortgage/rent allowance because they are debt payments, which are excluded from a debtor's monthly expenses under § 707(b)(2)(A)(ii)(I). . . . Debtor's net mortgage or rent expense is appropriately listed as $678.00 and Debtor correctly excluded his rent from Line 9b.").

***Gorman v. Cantu*, 713 F. App'x 200, 203–04 (4th Cir. Dec. 18, 2017) (unpublished) (Diaz, Thacker, Harris)** (Converting pension loan repayment into pension contribution is not bad faith when pension contribution is less than maximum allowed amount and debtor had some history of making pension contributions. Showing of good faith is minimum requirement for exclusion of postpetition retirement contributions from disposable income. Over dissent, the Circuit panel does not resolve propriety of pension contributions. "[C]ourts have come to 'three divergent' conclusions as to whether debtors may exclude voluntary retirement contributions from disposable income, turning largely on their differing interpretations of 11 U.S.C. § 541(b)(7) . . . . This appeal, however, does not require that we resolve that statutory issue. . . . [T]he Trustee argues . . . that a showing of good faith is a minimum requirement for exclusion of post-petition retirement contributions, and . . . that the bankruptcy court erred in its good-faith determination. . . . The bankruptcy court's finding of good faith in this case is not clearly wrong. . . . That the Debtor sought to resume making contributions does not demonstrate bad faith. . . . [T]he Debtor's proposed annual contribution of approximately $3,200 is well below the maximum allowable contribution of $18,000, and the Debtor has no other retirement benefits."), *aff'g* 553 B.R. 565, 572–77 (Bankr. E.D. Va. July 14, 2016) (Kennedy) (Embracing *Baxter v. Johnson (In re Johnson)*, 346 B.R. 256 (Bankr. S.D. Ga. July 21, 2006), and rejecting *Burden v. Seafort (In re Seafort)*, 437 B.R. 204 (B.A.P. 6th Cir. Sept. 14, 2010), and *Seafort v. Burden (In re Seafort)*, 669 F.3d 662 (6th Cir. Feb. 15, 2012), which affirmed the BAP on other grounds, debtor can begin retirement plan contributions when retirement loans are paid off, and full amount of retirement contributions is deductible from current monthly income to determine projected disposal income so long as amount is consistent with good faith. "The issue of voluntary retirement contributions has been the subject of some debate . . . . There are essentially three divergent lines of cases. The first line of cases holds that the debtor is not entitled to any deduction for voluntary retirement contributions, whether or not he or she was making voluntary retirement contributions pre-petition. . . . The second view, that voluntary retirement contributions may be continued post-petition as long as they are consistent with the debtor's pre-petition history of contributions, is represented by the Sixth Circuit Bankruptcy Appellate Panel's decision in *In re Seafort* . . . . The third line of cases, which is the majority view, concludes that Section 541(b)(7) allows the deduction, whether or not the debtor was making voluntary contributions prior to the bankruptcy filing, but subject to a determination of the debtor's good faith. . . . The Court . . . adopts the *Johnson* view, for the simple reason that Section 541(b)(7) does not limit the debtor's ability to make contributions post-petition, nor is there any distinction between pre-petition contributions and post-petition contributions in the statute. There is nothing in the text of Section 541(b)(7) from which the Court can conclude that Congress intended any such distinctions. . . . [T]he absolutist position represented by . . . the Sixth Circuit's opinion in *Seafort* places an unwarranted emphasis on the placement of Section 541(b)(7) outside of Chapter 13. . . . Under . . . the Sixth Circuit's opinion in *Seafort*, the enactment of Section 541(b)(7) in 2005 would have been redundant for pre-petition contributions, given 541(c)(2) and *Patterson v. Shumate*[, 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992)]. . . . The Court similarly rejects the middle ground represented by the Sixth Circuit B.A.P.'s opinion in *Seafort*. The . . . B.A.P.'s requirement that post-petition contributions be comparable to the debtor's historic, pre-petition contributions appears to be grounded more in policy concerns than in the text of Section 541(b)(7).").

***Nationstar Mortg., LLC v. Iliceto (In re Iliceto)*, 706 F. App'x 636 (11th Cir. Dec. 11, 2017) (Wilson, Rosenbaum, Robreno)** (Citing *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (Mar. 23, 2010), Nationstar as transferee of US Bank's $500,000 mortgage was bound by confirmed plan that treated it as an unsecured creditor based on prior court orders sustaining objections to claims with findings that bank could not produce the mortgage or note and would forfeit its lien when the debtor completed payments and received a discharge. Nationstar was bound by confirmed plan and could not challenge findings that it was unsecured by objecting after completion of payments and discharge to the debtor's motion to deem the mortgage lien extinguished.).

***In re Santillan*, No. 15-35753, 2018 WL 4674573, at *3 (Bankr. S.D. Tex. Sept. 26, 2018) (Isgur)** (Applying *Meza v. Truman (In re Meza)*, 467 F.3d 874, 875 (5th Cir. Oct. 16, 2006) (Jones, Barksdale, Benavides), plan modification that lowered payments that was approved in July is effective to reduce payments retroactively to filing of modification motion in May under § 1329(b)(2). Overpayment that resulted during gap between motion and approval is credited against new, lower payment under modified plan. "[T]he Court applies the Fifth Circuit's ruling in *Meza* to hold that an approved modified plan is retroactively effective to the date that the modification is filed.").

***In re Nacci*, 586 B.R. 733, 736–40 (Bankr. N.D. Ohio July 5, 2018) (Kendig)** (Bankruptcy court reluctantly allows Chapter 13 debtors to incur postconfirmation PLUS loan debt of $15,737 to cover shortfall in first-year college expenses for daughter. Chapter 13 debtors moved for authority to borrow money to incur student loan debt on behalf of their daughter. Plan confirmed in December of 2015 proposed to pay 72% dividend but apparently unsecured creditors would actually be paid in full over the life of the plan. Repayment of the PLUS loan would begin in 2020, after Chapter 13 plan payments were completed. "There is no provision in the Bankruptcy Code that specifically authorizes an individual chapter 13 debtor to incur postpetition debt. . . . Only self-employed debtors engaged in business are entitled to exercise the § 364 powers of a trustee. . . . Yet simultaneously, § 1305 creates a pathway for certain postpetition debt to be included in a plan. . . . Congress anticipated situations where a debtor incurs postpetition debt. Although there is no provision that authorizes it, § 1305 acquiesces its existence. . . . [A]ny determination on postpetition debt is driven by the specific facts of each case . . . with an eye on the reasonableness and necessity of the postpetition debt and any impact on the confirmed plan. . . . Debtors appeared to be current on their secured debt payments on the petition date. And within the confines of their confirmed plan, they seem to be doing well. . . . Debtors are current on plan payments and are paying a one hundred percent (100%) dividend to unsecured creditors. . . . Since the loan will not be payable until after the chapter 13 plan completes, it is unlikely that estate property will be involved in repayment. There is no expectation that this loan will affect their plan payments or the prepetition creditors. . . . While they may not have an entirely fresh start, upon discharge, they will have reduced their secured debts and eradicated over $150,000 in unsecured debt, accomplishing their financial rehabilitation. The terms of the PLUS loan do not appear wholly unreasonable. . . . Although the loan does not rise to a necessity, it is unlikely to impinge on plan performance. In short, the court is not convinced that it has the authority to stop Debtor from making a very bad choice. The court will therefore grant the motion and overrule Trustee's objection.").

***In re Milliman*, No. 17-10393, 2018 WL 1475937, at *2–*5 (Bankr. D. Kan. Mar. 23, 2018) (Nugent)** (Ocwen Loan Servicing's stubborn refusal to correct overstatement of escrow shortage on proof of claim triggers sanctions under Bankruptcy Rule 3001(c)(2)(D) for attorney fees and expenses incurred by the debtors to correct the mistake. Ocwen filed a Mortgage Proof of Claim Attachment stating an escrow shortage of $4,383.26. Ocwen's counsel filed an Official Form 410S2 notice of postpetition mortgage fees requesting an allowance of $400 for filing the proof of claim. After months of fruitless inquiries to Ocwen and its counsel about the escrow shortfall the debtors objected to Ocwen's proof of claim and served discovery. Ocwen did not respond. "At the claim objection hearing, [counsel] admitted that Ocwen filed an erroneous initial claim, conceded that the escrow shortage was much less than represented, and apologized for his client's error. . . . [T]he claim lacked 'an itemized statement of . . . charges' as required by Rule 3001(c)(2)(A), an accurate statement of the 'amount necessary to cure' as required by Rule 3001(c)(2)(B), and accurate information on the Attachment that is required to be filed by Rule 3001(c)(2)(C). That opens the door to sanctions as provided by Rule 3001(c)(2)(D). . . . Accurate information is particularly critical in a chapter 13 . . . . For reasons unexplained, Ocwen didn't do it right. And, when called upon to explain or correct its misstatements, Ocwen and its counsel failed to meaningfully respond to the debtors' concerns, their lawyers' informal inquiries, or even their formal discovery efforts. . . . Ocwen and any other creditors who read this need to know that courts take filing incorrect proofs of claim seriously. We get more serious (and suspicious) when creditors are unresponsive or evasive about their errors and refuse to fix them. Bankruptcy judges cannot permit an environment to exist in which claims supposedly filed under penalty of perjury can no longer be trusted to be correct without rendering Rule 3001's presumption of validity meaningless. This would cripple the ability of the bankruptcy system to function efficiently. Filing accurate claims is a bedrock requirement and, as I said at the top, it's not that hard.").

***In re Dworek*, 589 B.R. 267, 270–76 (Bankr. W.D. Pa. Aug. 22, 2018) (Agresti)** (Quicken Loans is allowed to withdraw 3002.1 notices with respect to postpetition attorney fees that are not allowable under Pennsylvania law with conditions: withdrawal is with prejudice to any collection of postpetition attorney fees; mortgagee must certify that the fees have been removed from the debtors' loans and will not be assessed again in the future; fees for litigating the withdrawal of these notices may not be added to the loans; mortgagee must supply a complete loan history to prove compliance with all conditions; and court reserves right to seek sanctions under Bankruptcy Rule 9011 given that mortgagee had no good-faith claim to fees under Pennsylvania law but litigated at great length before moving to withdraw its notices. Pennsylvania law contains limitation that attorney fees are recoverable only if a foreclosure or other legal action had been commenced. Quicken filed 3002.1 notice seeking attorney fees of $550 and a second notice seeking attorney fees of $150 for filing an amended proof of claim. The trustee objected. After months of back-and-forth with the trustee, Quicken moved to withdraw its notices. "Counsel for Quicken stated that the Notice in this and the other cases were being withdrawn because Quicken had concluded that under [Pennsylvania law] attorney fees were not recoverable in the current matter. . . . [T]he dispute between Quicken and the Trustee as to whether Quicken should be permitted to add attorney fees on to its claims against the various debtors in these matters is a contested matter, and dismissal of that matter is therefore governed by *Fed.R.Civ.P. 41*. . . . [T]he only way that the Notices may be voluntarily withdrawn is by court order, on such terms as the Court considers proper, pursuant to *Rule 41(a)(2)*. . . . It is troubling to the Court that Quicken commenced this litigation in the first place by filing the Notices, and then vigorously pursued it for so long after the Objections were filed, before coming to the realization that [Pennsylvania law] posed a statutory roadblock to the requested fees . . . . [M]any such Notices were being filed with little or no supporting documentation, yet were passing through the system without objection, apparently because the amounts being sought in the Notices (typically less than $1000) meant that the legal expense the debtor would incur in challenging them could not be financially justified. . . . [W]hat happened in the three cases addressed in the present Order is not merely an isolated problem. . . . Quicken's filing of the Notices and its continued litigation of the Objection in the face of the [Pennsylvania law] prohibition seems a clear violation of *Fed.R.Bankr.P. 9011(b)(1)* . . . . Should not an attorney conducting a reasonable inquiry in advance of filing the Notices have realized that existing law did not support the claim for attorney fees? . . . Quicken shall file a certification in each of these three cases stating that it has provided an Affidavit to the Trustee and the respective debtors to the effect that the loan history in each case has been corrected to eliminate any reference to the attorney fees that are the subject of the particular Notice, that it will not seek to impose any of its expenses related to this litigation on the debtors, and that it has provided the Trustee with a complete loan history from the inception of the loan to the date of this Order.").

***In re Garcia*, No. 17-60124-RLJ-13, 2018 WL 3203385, at *1–*2 (Bankr. N.D. Tex. June 28, 2018) (Jones)** (Two 3002.1 notices for postpetition fees filed by Nationstar Mortgage—one for $300 and one for $600—are allowed over trustee's objection, notwithstanding general order that allows secured creditors a "no look" fee of $700. Trustee did not contest the reasonableness of the $900 total of the two notices. "The first notice (for the first $300.00) states that the fees are for counsel's reviewing the Garcias' chapter 13 plan . . . . The second notice (for $600.00) reflects a charge of $250.00 for 'Proof of Claim Loan Payment History' and $350.00 for 'Proof of Claim' . . . . These charges . . . are the agreed-upon standard charges between Nationstar and its counsel. . . . The services and charges here fall within the so-called Fannie Mae guidelines . . . . The Court's General Order 2017-01, which governs the chapter 13 practice in the Northern District of Texas, deems $700.00 as reasonable compensation for a secured creditor's attorney, provided that such fees and expenses are otherwise allowable under 'applicable non-bankruptcy law.' The Court regularly approves such amount in chapter 13 cases without a supporting application . . . . Nationstar satisfactorily explained the basis for the fees and expenses. The Court will therefore approve the requested fees and expenses of $900.00. This should not, however, be construed as an endorsement of secured creditors seeking fees in excess of the no-look fee without filing a proper application or motion as required by the General Order.").

***In re Ochab*, 586 B.R. 803, 807–10 (Bankr. M.D. Ala. Mar. 30, 2018) (Sawyer)** (Mortgage servicers failed to prove entitlement to or reasonableness of $300 or $500 postpetition charges for filing proofs of claim and of $350 or $400 fees for review of Chapter 13 plans when mortgages were protected from modification by § 1322(b)(2). Applying § 1322(e), state law and contract control allowance of postpetition fees and expenses when debtor moves for determination after 3002.1 notice. No presumptions apply. Contract in one case only allowed attorney fees in foreclosure, precluding fees for participation in the Chapter 13 case. State law imposed reasonableness requirement. Filing proof of claim does not justify $300 or $500 fees. Plan that is protected from modification by § 1322(b)(2) does not require $400 review by an attorney. Once debtor moves for determination under Bankruptcy Rule 3002.1(e) creditor must put on proof of reasonableness and of a contract or state law right to fees. "Upon a debtor filing a motion to determine mortgage fees, expenses, and charges pursuant to § 1322(e), the Court must look to the underlying agreement and applicable nonbankruptcy law to determine if the amounts are permissible. . . . It is well-established law in Alabama that the parties to a mortgage may agree to the payment of *reasonable* fees if certain circumstances arise or actions are taken. . . . [T]he mortgage pertaining to the Englands' personal residence only permits the recovery of fees incurred during a foreclosure proceeding initiated pursuant to a power of sale clause; however, the fees listed in the Notice of Postpetition Mortgage Fees, Expenses, and Charges were incurred in connection with a bankruptcy, not a foreclosure, proceeding. . . . [C]harging $400 for an attorney to review the Debtor's Chapter 13 plan is unreasonable considering the protections provided to lenders by the antimodification rule . . . . Some courts even go as far as to say that reviewing a debtor's plan is purely ministerial and not necessary to file a proof of claim; thus, an attorney fee for plan review should not be permitted. . . . Likewise, the act of filing of proof of claim is a relatively simple matter. . . . A $500 fee for filing a proof of claim on a debtor's personal residence is excessive and unreasonable, whether or not an attorney prepares the proof of claim. Loan documents and payment history are regularly kept in the ordinary course of business. Filing a proof of claim should merely require transcribing information, which is already available to the lender, to a proof of claim form. . . . [O]nce a debtor files a Motion to Determine Fees pursuant to Rule 3002.1(e), the burden shifts to the creditor to substantiate the fees, expenses, and charges stated in the Rule 3002.1 Notice. . . . Failure to provide an adequate description of the charges in response to a motion [to] determine fees will not suffice.").

***Forson v. Nationstar Mortg., LLC (In re Forson)*, 583 B.R. 704, 707–16 (Bankr. S.D. Ohio Mar. 21, 2018) (Preston)** (On summary judgment before class certification, letters and phone calls from Nationstar Mortgage violated discharge injunction by demanding amounts discharged during Chapter 13 case. Order entered after notice of final cure under Bankruptcy Rule 3002.1 declared mortgage current, declared all arrears paid, required reamortization based on loan being current at discharge and discharged all fees, costs and expenses not otherwise sought and allowed during the Chapter 13 case. Without explanation, Nationstar demanded payments after discharge that included arrears and other charges that were discharged. "Plaintiff's confirmed Chapter 13 Plan provided for regular monthly payments on the Mortgage Loan to be made by 'conduit' through the Chapter 13 Trustee. Plaintiff successfully completed the Plan, and . . . upon motion by the Chapter 13 Trustee, the Court entered an order deeming the Mortgage Loan current . . . . The Mortgage Order also directed Defendant to adjust the Mortgage Loan balance to reflect the balance delineated in the original amortization schedule . . . and ordered that any amounts in excess of that balance were discharged. Thereafter, . . . Plaintiff maintained his monthly payments to Defendant, Defendant sent letters and mortgage statements to Plaintiff indicating the Mortgage Loan was delinquent. . . . The Amended Complaint . . . alleges that Defendant has a uniform set of policies and procedures for servicing mortgage loans, that Defendant has routinely failed to correct its records following a debtor's receipt of a Chapter 13 discharge, and that Defendant systemically collects and/or attempts to collect discharged debts from Chapter 13 debtors. . . . The Mortgage Order . . . specifically provided . . . (a) All pre-petition arrearage claims of [Nationstar Mortgage] have been paid in full . . . (b) All regular, post-petition mortgage payments have been made by the Trustee . . . (c) The mortgage obligation to [Nationstar Mortgage] is hereby deemed current . . . (d) [Nationstar Mortgage] shall adjust its loan balance to reflect the balance delineated in the original amortization schedule . . . . Any amounts in excess of that balance, including any alleged arrearage, costs, fees or interest are hereby discharged . . . . Defendant provides no explanation . . . as to why the . . . mortgage statement indicated the total amount due was $6,900.28 even after Plaintiff made all the monthly mortgage payments after entry of the Mortgage Order. . . . The Court can draw no conclusion but that the . . . Mortgage Loan statement was an attempt to collect discharged debt and violated the discharge injunction. . . . The Court notes that [one] letter did contain a disclaimer that stated if the account holder had received a discharge in bankruptcy, the letter is not an attempt to collect a debt from the account holder personally, but was provided for informational purposes. This disclaimer, however, does not neutralize the remaining provisions of the letter that were designed to encourage if not coerce payment from Plaintiff. . . . Defendant was an active participant in Plaintiff's Chapter 13 proceeding, and as a result, had actual knowledge of the discharge injunction when it sent the letters and mortgage statement to Plaintiff.").

***In re Ferrell*, 580 B.R. 181, 185–89 (Bankr. D.S.C. Oct. 13, 2017) (Waites)** (Responding inaccurately and failing to prove delinquency after contest of final cure notice results in 3002.1 order that declares mortgage current, forbids Shellpoint Mortgage to collect disputed amounts or any other amount not included in a proper 3002.1 notice and court awards $1,500 attorney fees for the inaccurate and misleading information. Confirmed plan provided for cure of mortgage default and maintenance of regular payments under § 1322(b)(5). In response to notice of final cure payment, Shellpoint indicated the debtors were delinquent on postpetition payments of $6,671.65. Debtor's counsel provided Shellpoint with evidence that debtors had tendered every monthly mortgage payment. Shellpoint then represented to debtor's counsel that the arrearage was actually $12,459.64. Debtors moved for a hearing pursuant to Bankruptcy Rule 3002.1(h). Shellpoint did not appear. "[A] 3002.1(g) supplement does not enjoy the same *prima facie* presumption of validity as does the mortgage creditor's underlying proof of claim. . . . [T]he mortgage creditor must appear at the hearing on the debtor's Rule 3002.1(h) motion and present evidence to establish its entitlement to the postpetition amounts claimed . . . . [I]n response to the Supplement, the Debtors filed and served a timely motion pursuant to Rule 3002.1(h) . . . . Pursuant to Bankruptcy Rule 3002.1(h), the Court finds that Shellpoint has waived its right to the Disputed Amounts. The Court further finds that the Debtors have paid all required postpetition amounts . . . and declares that Loan 7209 is current . . . . Shellpoint failed to appear to prove its entitlement to the Disputed Amounts, and the evidence presented at the hearing calls into question the amounts the Supplement claims are due. . . . Because of the importance and mandatory nature of the Supplement, the Court has little difficulty finding that implicit in Rule 3002.1 is the requirement that the information the mortgage creditor provides be accurate. . . . Shellpoint provided the Debtors with inconsistent information regarding the status of their postpetition mortgage, failed to object to the Motion and Notice, and failed to appear at the hearing and submit evidence to support the figures contained in the Supplement. These factors, coupled with the Debtors' testimony that contradicts the amounts set forth in the Supplement, cause the Court to find the Supplement is incorrect and inaccurate. The filing of an incorrect and inaccurate Rule 3002.1(g) statement is the equivalent of filing no statement at all. Indeed, an incorrect statement could be viewed as worse than no statement. . . . [I]t is appropriate to treat Shellpoint's inaccurate Supplement as the equivalent of a failure to provide the information required by Bankruptcy Rule 3002.1(g), thus subjecting Shellpoint to sanctions pursuant to Bankruptcy Rule 3002.1(i) . . . and § 105. . . . Loan 7209 is deemed to be current . . . . The Disputed Amounts are deemed waived and/or cured by the Debtors' completion of their confirmed Chapter 13 plan. . . . To the extent that there exists any other postpetition amounts for fees, charges, and/or expenses that Shellpoint might assert were incurred . . . these sums are deemed waived, cancelled, and discharged. . . . Any attempt by Shellpoint to collected [*sic*] the Disputed Amounts or any other postpetition amounts for fees, charges, and or expenses, is and shall be a willful violation of this Order and the discharge injunction of § 524, and punishable by the contempt powers of this Court.").

***In re Luzier*, 580 B.R. 725, 730–31 (Bankr. N.D. Ohio Oct. 3, 2014) (Woods)** (Nationstar's failure to respond to Notice of Final Cure in prior Chapter 13 case precludes Nationstar under Bankruptcy Rule 3002.1(i) from presenting evidence that it is owed amounts that were not paid during the prior case. Confirmed plan cured default through the trustee and required debtor to make ongoing payments directly to mortgagee. Trustee gave Notice of Final Cure and Nationstar did not respond. Debtor received discharge. Nationstar then threatened foreclosure claiming that debtor did not make all the required direct payments and claiming that some of the debts discharged in prior case were still owing. Debtor filed second case to stop foreclosure. "Federal Rule of Bankruptcy Procedure 3002.1(g) required Nationstar to respond to the Notice of Final Cure if it did not agree with the amounts set forth therein. . . . Nationstar has offered no explanation for its failure to file the statement required by Rule 3002.1(g); there is no basis for a finding that the failure was substantially justified. As a consequence, . . . Nationstar is precluded from presenting any information that could have been included in a statement in response to the Notice of Final Cure, in any form, as evidence in any contested matter or adversary proceeding in this case . . . . [The court] will set a further hearing to determine reasonable expenses and attorney's fees caused by Nationstar's failure to file the statement required by Rule 3002.1(g).").

***In re Lovo*, 584 B.R. 79, 80, 80 n.1 (Bankr. S.D. Fla. Mar. 28, 2018) (Mark)** (In a Chapter 13 case filed before the 2017 amendments to Bankruptcy Rule 3002(c), bankruptcy court is without discretion to allow untimely filed claim notwithstanding that creditor alleges lack of notice. Claim is disallowed without prejudice to creditor's rights under § 523(a)(3). "The Court finds that its discretion to enlarge the time for filing a proof of claim in a chapter 13 case is limited to the exceptions specifically identified in Rule 3002(c)." In a footnote: "Rule 3002(c)(6) was amended in 2017 'to expand the exception to the bar date for cases in which a creditor received insufficient notice of the time to file a proof of claim.' . . . Because the 2017 amendments were not in effect when the Debtor filed her chapter 13 petition, Rule 3002(c)(6) is inapplicable to this chapter 13 case.").

***In re Barbour-Freeman*, 590 B.R. 147 (Bankr. E.D. Mich. Sept. 10, 2018) (Shefferly)** (Bankruptcy Rule 3004 is permissive: when mortgagee failed to file proof of claim, debtors' attorney could have filed a claim for the mortgagee to stop the trustee from distributing accumulated funds to unsecured creditors. Attorney waited too long, trustee distributed funds to unsecured creditors and debtors suffered by having to extend plan an additional 11 months to make up the arrearage that resulted. Attorney ordered to disgorge fees under §§ 329 and 330 because failure to file Bankruptcy Rule 3004 claim in time to stop disbursement defeated purpose of the Chapter 13 plan.).

***Thomas v. Midland Funding, LLC (In re Thomas)*, 592 B.R. 99 (Bankr. W.D. Va. Sept. 28, 2018) (Connelly)** (Amended complaint states claim for relief that Midland's business practices for filing proofs of claim in Chapter 13 cases violated Bankruptcy Rule 3001 and may violate FDCPA. Midland admittedly lumped fees, interest and expenses into finance charges without revealing separate amounts as required by Bankruptcy Rule 3001(c)(2)(A) and then admitted that mistake in an amended claim only after debtors filed adversary proceedings. Other allegations included that Midland was unable to provide an accurate account statement and did not supply contracts and other documents on request as required by Bankruptcy Rule 3001(c)(3)(B). Determining whether Midland's business practices violated the proof of claim rules in bankruptcy is an inherently bankruptcy determination that is not appropriately submitted to arbitration.).

***Bank of N.Y. Mellon v. Lane (In re Lane)*, 589 B.R. 399, 407–11 (B.A.P. 9th Cir. Sept. 26, 2018) (Brand, Spraker, Taylor)** (Distinguishing *HSBC Bank USA, N.A. v. Blendheim (In re Blendheim)*, 803 F.3d 477 (9th Cir. Oct. 1, 2015) (Paez, Bybee, Callahan), default disallowance of first mortgage claim based on lack of standing to enforce the note was a substantive decision for purposes of lien voidance under § 506(d) but unlike *Blendheim*, debtor never disputed that he owed someone and disallowance of BONY's claim did not include any finding or holding that the debt was not enforceable by someone else. Debtor did not serve any other entity and the underlying lien was still enforceable by that other lienholder notwithstanding disallowance of BONY's claim in the Chapter 13 case. Bankruptcy court should not have voided lien under § 506(d) and should not have awarded debtor fees under California's reciprocal attorney fee statute. Lane scheduled Bank of America as holding the first-position mortgage on the debtor's residence. BONY filed proof of claim for the first-position lien. The debtor objected arguing that BONY failed to establish that it was the entity entitled to enforce the debt. BONY failed to oppose the claim objection and a default order was entered disallowing the claim. Lane made no payments on the first lien during a five-year Chapter 13 case and BONY never moved for relief from stay. After plan completion and discharge, BONY moved for reconsideration of disallowance of its claim. The bankruptcy court denied that motion and sustained the debtor's adversary proceeding with a judgment voiding the first deed of trust under § 506(d). "[T]he question of whether standing is a substantive or procedural objection has been addressed by only a few courts. However, those courts are unanimous in stating that it is a substantive objection under § 502(b)(1), which provides that a claim may be disallowed to the extent it is unenforceable against a debtor under any applicable law, including state law. . . . [A] challenge to a claimant's standing is a substantive objection under § 502(b)(1), and not merely a procedural one, because it goes directly to the claimant's ability to enforce the debt. . . . Thus, the bankruptcy court did not err in concluding that lack of standing is a substantive objection under § 502(b)(1). And it matters not that the Claim Disallowance Order was entered as a result of BONY's default. . . . This is where we part company with the bankruptcy court's decision. We conclude that *Blendheim* is not applicable . . . because the bankruptcy court never adjudicated the validity of the first-position lien and the underlying note in the Claim Disallowance Order. . . . Implicit in *Blendheim*'s analysis is a conclusion that § 506(d) should apply only when a claim disallowance addresses the merits of the underlying debt. . . . The bankruptcy court never judged the first-position lien to be invalid in substance, only that BONY lacked standing to enforce it. . . . [T]he 'true' lienholder never subjected itself to the bankruptcy court's jurisdiction by filing a proof of claim; nor was this never-filed claim deemed disallowed. . . . In the Lien Avoidance action, Lane served only BONY and asked the court to avoid BONY's first-position lien. . . . Lane failed to notice the proper lienholder of his intent to avoid the lien under § 506(d), and the bankruptcy court violated an unknown party's due process rights by expunging its deed of trust without notice and an opportunity to be heard.").

***In re Huenerberg*, 590 B.R. 862, 868–71 (Bankr. E.D. Wis. Sept. 28, 2018) (Halfenger)** (Applying *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 539, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (June 28, 2012), shared responsibility payment imposed under Affordable Care Act for failure to comply with individual mandate is not a penalty but it is not entitled to priority under § 507(a)(8) because it is not an excise tax on a transaction. "Under *National Federation*, the shared responsibility payment does not fall within *Reorganized CF & I Fabricators*' 'penalty' model as 'punishment for an unlawful act or omission'. . . . To prevail, the IRS must also establish not only that the shared responsibility payment is a tax for purposes of § 507(a)(8) but also that the payment is an 'excise tax' under § 507(a)(8)(E). . . . The shared responsibility payment is not a tax on the manufacture, sale, or use of goods or on an occupation or activity. It is a payment owed by 'individuals precisely *because* they are doing nothing'. . . . [O]nly by embracing an expansive construction of 'excise tax' can one conclude that the shared responsibility payment is such a tax. Narrowly construed, § 507(a)(8)(E), which grants priority status to claims for excises, does not encompass the IRS's claim for a debtor's unremitted shared responsibility payment. . . . [E]ven if 'excise tax', for purposes of § 507(a)(8)(E), were broad enough to encompass the shared responsibility payment, that subparagraph only grants priority status to 'claims . . . for . . . an excise tax *on* . . . *a transaction*'. . . . [I]t offers no definition of 'transaction' that reasonably encompasses an individual's unilateral and solitary decision *not* to act. . . . Narrowly construed, as it must be, § 507(a)(8)(E), which grants priority to claims for an excise on a transaction, cannot reasonably be read to bring within its scope the IRS's claim for an unremitted shared responsibility payment[.]").

***Goudelock v. Sixty-01 Ass'n of Apartment Owners*, 895 F.3d 633, 637–41 (9th Cir. July 10, 2018) (Smith, Murguia, Robreno)** (Embracing *In re Rosteck*, 899 F.2d 694 (7th Cir. Apr. 13, 1990) (Bauer, Flaum, Manion), and rejecting *River Place East Housing Corp. v. Rosenfeld (In re Rosenfeld)*, 23 F.3d 833 (4th Cir. May 4, 1994) (Hamilton, Chapman, Young), postpetition condominium assessments are prepetition debts that are dischargeable at completion of payments in a Chapter 13 case. In dicta, this outcome is not affected by whether the debtor surrenders or continues to occupy the condo unit. "We agree with the reasoning of *Rosteck* . . . . While the *in rem* lien is not dischargeable under Chapter 13, the pre-petition *in personam* obligation is. . . . In the Ninth Circuit, courts use the 'fair contemplation' test to determine when a claim arises. . . . Sixty-01 does not contest seriously that Goudelock's *in personam* obligation meets the fair contemplation test. Here, at the time of the purchase of the condominium unit, Sixty-01 fairly could have contemplated that the monthly CA assessments would continue to accrue based upon Goudelock's continued ownership of the condominium unit. Thus, Goudelock's *in personam* obligation to pay CA assessments arose prepetition when she purchased the condominium unit. . . . Before becoming due each month, the assessments . . . unmatured and are also contingent upon continued ownership of the property. Unmatured contingent debts are, however, dischargeable under Section 1328(a). . . . [U]nder 11 U.S.C. § 523(a)(16), post-petition association assessments are excepted from discharge for petitions under Sections 727 (Chapter 7), 1141 (Chapter 11), 1228(a) and (b) (Chapter 12), and Section 1328(b) (Chapter 13 cases where the debtor is discharged without completing her payments). . . . Notably absent from the list of discharge exceptions in Section 1328(a) is a reference to Section 523(a)(16) . . . . [T]here is no legal basis for distinguishing between whether Goudelock retained possession of her condominium unit post-petition and, thus, continued to enjoy the benefit of occupancy at no cost, or, instead, surrendered it at some point.").

***Spellman v. Bradley R. Kirk & Assocs. (In re Spellman)*, No. 15-56508, 2018 WL 2996772 (9th Cir. June 15, 2018) (unpublished) (McKweon, Callahan, Quist)** (Applying Full Faith and Credit Act, 28 U.S.C. § 1738, state court judgment for prepetition attorney fees is entitled to full faith and credit but 11 U.S.C. § 502(b) creates room for review by bankruptcy court for reasonableness when state court addressed enforceability of prepetition contingent fee contract but state court did not address whether the fees were reasonable. Bankruptcy court appropriately determined amount of reasonable fee and disallowed claim in part.).

***Creutz v. U.S. Bank Nat'l Ass'n (In re Creutz)*, No. 17-1110, 2018 WL 2733942, at *4–*5 (Bankr. D. Mass. June 5, 2018) (Hoffman)** (Although assignee of mortgage claim is not liable for the misconduct of its assignor, Chapter 13 debtor's objection to assignee's claim based on misconduct by the loan originator/assignor survives as a recoupment defense to the assignee's claim. A Chapter 13 debtor claimed that the loan originator in 2006 fabricated the loan application and misstated the debtor's income and other information on the forms. U.S. Bank became holder of the loan and all of the alleged improper or illegal behavior described by the debtor was perpetrated by the loan originator. "U.S. Bank is the holder of the note by assignment . . . . A loan servicer cannot be charged with liability for the misconduct of a loan originator or lender with whom it had no relationship. . . . On the other hand, . . . Mr. Creutz's [*sic*] may assert his . . . claims defensively against U.S. Bank for purposes of reducing or eliminating amounts claimed by U.S. Bank. . . . Mr. Creutz's objection to U.S. Bank's proof of claim grows out of the 2006 loan transaction and thus sounds in recoupment. . . . [T]o the extent U.S. Bank's claim rests on the 2006 note and mortgage, its claim is subject to recoupment based on Mr. Creutz's . . . claims.").

***Molloy v. Sikes*, No. 16-0218, 2018 WL 794708, at *1–*6 (W.D. La. Feb. 7, 2018) (Hicks)** (Nothing in *Harris v. Viegelahn*, __ U.S. __, 135 S. Ct. 1829, 191 L. Ed. 2d 783 (May 18, 2015), or in § 348 prevents bankruptcy court from granting attorney fee application before confirmation and before conversion to Chapter 7; that debtor intends to convert to Chapter 7 after fees are allowed does not change result. "With the Debtor's approval and before any motion to convert the case had been filed, Appellant filed an 'Application for Compensation by Attorney for Debtor . . . ' . . . . The compensation for attorney fees sought in the Application were [*sic*] for services provided in the Chapter 13 case. . . . The Application recognized that the Debtor intended to convert his case to one under Chapter 7. . . . *Harris* does not preclude payment of attorney's fees in a Chapter 13 case prior to the conversion and the Bankruptcy Court was in error when it ruled it could not award such fees prior to conversion. . . . Nothing in [*Harris*] indicates that administrative fees of the Chapter 13 case cannot be distributed prior to the conversion. The ruling simply holds that after conversion any funds retained by the Chapter 13 Trustee must be returned to the Debtor. . . . In the instant matter, no motion to convert had been filed prior to the fee application and it was the intent of both the [attorney] and the Debtor that the case would not be converted until after the Court ruled on the Application. . . . Although not commonly sought, courts have awarded interim compensation to attorneys in Chapter 13 cases. . . . Section 331 does not require the confirmation of a plan in order to provide interim compensation. . . . Although it may be the 'historical practice' of the Bankruptcy Court to wait for a dispositive event to occur before ruling on fee applications, there is nothing in the law that requires such practice. . . . The Bankruptcy Court's ruling makes the collection of attorney fees for work performed during a Chapter 13 case 100% contingent upon the successful confirmation of a Chapter 13 plan. Confirmations of Chapter 13 plans are not common. . . . To require such an event would be inequitable. . . . [T]he Bankruptcy Court had the authority, pursuant to Sections 330 and 331, to award the Appellant's fee he sought in his Application filed before the Chapter 13 case was converted.").

***Olson v. Van Meter (In re Olson)*, No. NV-17-1168-LTiF, 2018 WL 989263, at *5–*6, *7 (B.A.P. 9th Cir. Feb. 5, 2018) (unpublished) (Lafferty, Tighe, Faris)** (In a marijuana case, BAP reverses *sua sponte* dismissal by bankruptcy court that made no fact-finding or legal conclusions with respect to cause under § 1307(c). Debtor was 92 years old, legally blind, living in assisted living facility. Shopping center was quitclaimed to the debtor the same day the Chapter 13 petition was filed. Among the tenants was a marijuana dispensary, legal under California law. Lease was apparently arranged by debtor's son on behalf of an LLC that owned and managed the shopping center before transfer to the debtor. Plan proposed to terminate lease to dispensary and to sell the property to pay creditors. "[T]he bankruptcy court did not articulate the legal basis for its ruling or make findings to support its conclusions that the [Controlled Substances Act] was being violated and that that violation was grounds for dismissal. . . . Some courts have held that, to the extent estate assets are used for or generated by the operation of a federally prohibited marijuana business, a trustee or debtor in possession may not administer those assets without violating federal law. . . . The bankruptcy court here made no finding, however, that the trustee would be administering the proceeds of an illegal business, and there is no evidence in the record that the rents were to be used to fund the plan. Some courts have held that a bankruptcy filing or a plan of reorganization proposed by a debtor who is involved in an illegal enterprise is not in good faith, even where the debtor does not have a subjective bad motive, is in legitimate need of bankruptcy relief, and there is otherwise no indicia of an attempt to abuse the bankruptcy process. . . . [S]ome courts have concluded that a debtor engaged in an illegal business who seeks bankruptcy relief comes into court with unclean hands and is not eligible for relief. . . . The bankruptcy court here made no finding of bad faith or unclean hands. Further, it concluded that it was a crime for Debtor to be accepting rents from Mr. Bass' business without making any findings showing that all the elements of a CSA violation had been established (such as the requirement that the conduct be 'knowing')." In a concurring opinion: "This Debtor's plan did not necessarily require the rental income from the dispensary to fund the proposed payments. . . . The sale of Debtor's real property would have been simply a liquidation of legal estate assets. . . . Any prosecution . . . would require a showing that Debtor knew that Mr. Bass leased the property to operate a marijuana dispensary, and that she intended to allow that use. The Debtor's personal knowledge is an especially critical inquiry for an elderly, blind woman residing in assisted living with an attorney-in-fact in charge of the lease. . . . Debtor's son's knowledge in acting for her cannot be imputed to Debtor for purposes of showing criminal knowledge and intent. . . . Although debtors connected to marijuana distribution cannot expect to violate federal law in their bankruptcy case, the presence of marijuana near the case should not cause mandatory dismissal.").

***Viegelahn v. Lopez (In re Lopez)*, 897 F.3d 663, 669–72 (5th Cir. July 31, 2018) (King, Elrod, Graves)** (At dismissal after confirmation, nonexempt proceeds from sale of homestead during Chapter 13 case vest in debtors and bankruptcy court did not err when it declined to find cause to order otherwise under § 349(b). Chapter 13 debtors sold a home without court permission during the Chapter 13 case. Because debtors did not use the sale proceeds to purchase another homestead, the net proceeds became nonexempt property under Texas law. Trustee moved to modify to capture the net proceeds for unsecured creditors. Debtors responded with voluntary dismissal. Trustee objected. "Holding that homestead proceeds that debtors acquire post-petition generally revest in them upon voluntary dismissal best comports with § 349(b)(3)'s textual directive to return to debtors 'the property of the estate' following dismissal. . . . Restoring the status quo requires returning to the Debtors the proceeds from the sale of that asset. . . . [W]e hold that under § 349(b)(3) . . . proceeds from the post-petition sale of a debtor's exempt homestead generally must be returned to the debtor upon voluntary dismissal. . . . The Bankruptcy Code does not appear to define what constitutes 'cause' under § 349(b). . . . [W]e are not 'left with the definite and firm conviction' that the bankruptcy court erred in determining that there was no 'cause' to order that the homestead proceeds be kept from the Debtors.", *aff'g in part, vacating in part* 570 B.R. 51, 63 (W.D. Tex. Mar. 7, 2017) (Lamberth) At dismissal after confirmation, when debtor sold homestead without notice or court approval and then lost exemption by not investing proceeds in new homestead within six months, trustee had no authority to unilaterally distribute to creditors proceeds from sale but instead needed court approval or plan modification before distributing sale proceeds. "'[T]he only provision in Chapter 13 which authorizes or permits a Chapter 13 trustee to handle property of any nature is found in section 1302(b)(3), which requires the trustee to distribute the plan payments received from a debtor. Consequently, other than relaying the funds directly entrusted to the trustee by the debtor pursuant to a confirmed plan, a Chapter 13 trustee . . . has no statutory obligation, right, duty or power to sell, use, lease, collect, liquidate or distribute any property, whether that property is denominated "property of the estate" or "property of the debtor."' . . . [A]lthough the sale proceeds reverted to the bankruptcy estate . . . the trustee is incorrect in stating that she did not need to seek approval from the court or modification of the plan before distributing the proceeds to creditors.").

***In re Gibson*, 582 B.R. 15, 18–24 (Bankr. C.D. Ill. Mar. 5, 2018) (Perkins)** (Rejecting *In re Heinzle*, 511 B.R. 69 (Bankr. W.D. Tex. May 30, 2014) (Gargotta), default in direct payment of second mortgage is not ground for dismissal without discharge when debtor has completed all payments to the trustee. Direct payments by the debtor are not payments "under the plan" but they are payments "provided for by the plan." Debtor completed payments under the plan and is entitled to full-payment discharge notwithstanding default in direct payments to second mortgage holder. "While the statutory term 'all payments under the plan' has been in place in section 1328(a) since the Bankruptcy Code became effective in 1978, [*sic*] it had not previously been construed as a basis for dismissal without discharge where direct payments were in arrears. . . . Some courts following *Heinzle* regard the interpretation of the phrase 'payments under the plan' to be plain and unambiguous, as encompassing all payments referred to in the confirmed plan. . . . This Court disagrees. Chapter 13 debtors are permitted to bypass the trustee and pay certain creditors direct. . . . [W]hether direct payments are payments "under the plan" for purposes of section 1328(a) is not discernible from the statutory text. Either interpretation is plausible, meaning the statute is ambiguous. A general policy is recognized favoring resolution of ambiguities in the Bankruptcy Code in favor of debtors and even more so where the provision at issue affects a debtor's right to a discharge. . . . It is apparent that what triggered this recently identified theory of dismissal without discharge was the adoption of Rule 3002.1, added by the 2011 amendments to the Federal Rules of Bankruptcy Procedure. . . . It is safe to say that from 1978 until very recently, countless Chapter 13 debtors received a discharge despite an uncured default in payments to a creditor made direct by the debtor, either because the trustee was unaware of the default or because a default on direct plan payments was not viewed as a basis to seek dismissal without discharge. . . . Rule 3002.1 was not intended to serve as the impetus for dismissal without discharge. . . . [T]he recent trend favoring dismissal without discharge as a punitive remedy for a debtor's failure to pay all direct payments is occurring not as a consequence of a statutory amendment reflecting a change in legislative policy, but merely by the happenstance of the introduction of Rule 3002.1, a Rule adopted for an entirely different and debtor-friendly purpose. . . . In section 1328(a), 'all payments under the plan' is used to define when completion of payments occurs . . . while the similar but different alternative phrase 'provided for by the plan' is used to describe the scope of the discharge. . . . In this Court's view, the alternative phrase 'under the plan' was intended to have a narrower effect, allowing for the possibility that not all creditors holding debts *provided for by the plan* are receiving payments *under the plan*. There may be some payments made to creditors who are provided for by the plan that are *not* payments under the plan. The most logical line of demarcation is between payments made by the trustee from funds received from the debtor versus payments made by the debtor direct to a creditor. It follows that the resolution of the difference in phraseology is to construe the requirement under section 1328(a) of 'completion by the debtor of all payments under the plan,' to mean the payments that the debtor is required to make to the trustee. . . . Nothing in the Bankruptcy Code imposes an affirmative duty on the trustee to confirm that all direct payments are being made to creditors during the term of the plan. . . . Secured creditors who receive direct payments from the debtor are expected to protect themselves. . . . Here, there was no fraud or other misconduct, the absence of which makes it difficult to see why dismissal without discharge is the appropriate remedy for an innocent mistake that caused no harm to unsecured creditors. . . . The punishment does not fit the crime. . . . This Court holds that a Chapter 13 debtor's direct payments on a nonmodifiable, nondischargeable residential mortgage loan, provided for under section 1322(b)(5), are not 'payments under the plan' for purposes of section 1328(a). A debtor's failure to complete all such direct payments is not grounds to dismiss the case without a discharge. . . . The payments that the Debtors were required to make to the Trustee, i.e., 'all payments under the plan,' have been completed. . . . [T]he Debtors are entitled to a full compliance discharge under section 1328(a).").

***In re Humes*, 579 B.R. 557, 559–67 (Bankr. D. Colo. Jan. 23, 2018) (Brown)** (Rejecting *In re Klaas*, 858 F.3d 820 (3d Cir. June 1, 2017) (Fisher, Vanaskie, Krause), bankruptcy court refuses stipulation between debtor and trustee that would have allowed debtor to complete payments under confirmed plan seven months after 60-month initial period expired. Court defines 60-month duration to begin from first payment due under the plan or 30 days from the petition, whichever is earlier. "Pursuant to § 1326, a debtor must commence making payments under the plan 'not later than 30 days after the date of the filing of the plan or the order for relief, whichever is earlier.' . . . The start of plan payments does not coincide with the plan confirmation process. . . . Some courts hold that the beginning of the plan's term is the first date a plan payment comes due *after* confirmation. . . . Other courts hold that the five-year period runs from the date specified in the plan for the first plan payment. . . . Debtors should not have to make more than sixty payments because the confirmation process does not dovetail with the payment requirements. . . . Section 1326(a)(1) specifies that this date must be no later than thirty days after the order for relief or filing of a plan, whichever is earlier. It is not tied to the confirmation date in any[ ]way. . . . The date specified by the plan is controlling as long as that date meets the requirements of § 1326(a)(1)(A). . . . [D]ebtors must continue to make ongoing payments due on their secured debts on a postpetition basis . . . . [I]f the Postpetition Payments on the debtor's secured debts are due on a different day of the month, then there may be an additional secured debt payment that falls due before the end of the five-year period. . . . [T]he Debtors confirmed a plan that specified an initial payment date of January 28, 2012. This date is thirty-one days after the petition date, rather than the thirty days specified by § 1326(a)(1). This means that, despite what is listed in the plan, the Debtors actually had to start their plan payments no later than January 27, 2012 and, therefore, their five-year plan ended on January 26, 2017. All required plan payments, toward both their prepetition and postpetition debts, had to be completed no later than January 26, 2017. The Stipulation that the Trustee and the Debtors have asked this Court to approve allowed the Debtors to make four monthly payments of $500, beginning 'April 2017' and a final payment of $15,000 'in August 2017.' . . . [T]he Stipulation allowed the Debtors to make their final plan payments more than seven months after the end of the five-year period. . . . [D]oes the bankruptcy court have discretion to grant the debtor a reasonable grace period to cure an arrearage in plan payments beyond the five years? . . . In a recent case, *In re Klaas*, . . . the Third Circuit concluded that a bankruptcy court has the necessary discretion. . . . Other courts have refused to allow a debtor to make payments past the end of the five-year plan term, deeming the end of the term to be a 'drop dead date.' . . . [T]he Court does not find the overall reasoning of the *Klaas* decision persuasive. . . . § 1329 reinforces the five-year limitation by forbidding a debtor from doing through modification what it could not do at plan confirmation. The Third Circuit in *Klaas* attempts to sidestep this language by characterizing a cure payment as a debtor just catching up on existing plan payments rather than modifying the plan's term. . . . [T]his Court respectfully disagrees. The plain terms of § 1329 state that one of ways a plan may be modified is to 'extend or reduce the time for . . . payments . . . .' . . . Thus, extending the time for making payments is explicitly defined by the Code to be a plan modification controlled by § 1329. . . . There is nothing in Rule 3002.1 that authorizes a debtor to make a cure payment after the plan term has ended. . . . [T]his Court holds that it does not have the discretion to allow a debtor to make plan payments beyond five years. . . . [E]ven if this Court were to follow the *Klaas* decision, it would not reach a different result in this case. . . . Debtors have already made the proposed cure payments. However, the length of time they needed to make the payments was not a brief period of time, such as the sixteen days in *Klaas.* Here it took the Debtors an additional seven months. On the other hand, no creditor has objected to the Stipulation and the $17,000 payment would obviously benefit unsecured creditors. . . . [T]he Debtors have not substantially complied with their Modified Plan because they failed for three years to modify it, as promised, to account for a significant increase in income. . . . Debtors have another remedy available to them in the form of conversion to chapter 7, which will permit them to achieve a discharge.").

***Plys v. Ang (In re Ang)*, 589 B.R. 165, 171–81 (Bankr. S.D. Cal. Aug. 16, 2018) (Latham)** (State court judgment for provocative and harassing text messages was willful and/or malicious injury that was nondischargeable under § 1328(a)(4). "Plaintiff initially sought a nondischargeability finding . . . under §§ 523(a)(2), (a)(4), and (a)(6). . . . But he brought his complaint nearly two months after Rule 4007's deadline for asserting such claims. So the court dismissed them. It, however, allowed Plaintiff to pursue a nondischargeability judgment under § 1328(a)(4), which was not time-barred. . . . [T]he '"willful *or* malicious" injury component of § 1328(a)(4) differs from § 523(a)(6), which discharges debts that result from "willful *and* malicious" injury.' . . . That being said, the legal standards for willfulness and maliciousness under § 523(a)(6) apply in the § 1328(a)(4) context. . . . Section § 1328(a)(4) does not apply to debts arising from injury to property. . . . The vast majority of courts define 'personal injury' as harm both physical and nonphysical (such as defamation and intentional infliction of emotional distress). . . . [A] post-petition award of restitution or damages satisfies § 1328(a)(4)'s requirements.").

Easley v. Collection Serv. of Nevada, 910 F.3d 1286 (9th Cir. Dec. 20, 2018) (Fisher, Smith, Piersol) (Expanding *In re Schwartz-Tallard*, 803 F.3d 1095 (9th Cir. 2015) (en banc), Chapter 13 debtor can recover attorney's fees for successful appeal of inadequate award of attorney's fees for violation of automatic stay.).

***Roseberry v. U.S. Tr. Interested Party*,** No. 18-01039-DRH, 2018 WL 6624202, at *3 (S.D. Ill. Dec. 18, 2018) (Herndon) (Provision of local model Chapter 13 plan that required debtors to amend schedules when any property interest was acquired postconfirmation and which presumed that any new property interest was disposable income was inconsistent with confirmation requirements in § 1325(a); debtor's appeal of confirmation is sustained by district court. "Absent exceptional circumstances, to permit a bankruptcy court to exercise undefined equitable powers to supplement the requirements of 1325(a) would alter that section beyond the scope that Congress intended . . . . The new language requires a debtor to amend the schedules every time she/he acquires any property of more than nominal value and requires that the disclosed asset is presumed to be 'disposable income' to be turned over to the trustee if it is cash . . . . These requirements are not merely menial tasks of reporting. . . . [T]he Court rejects the argument that 'exceptional circumstances' exist in each and every Chapter 13 case filed after January 1, 2018 to require the application of these new rules.").

In re Mazik, 592 B.R. 812, 815-18 (Bankr. E.D. Pa. Nov. 29, 2018) (Frank) (Applying Bankruptcy Rule 3002(c)(6)(A) as amended effective December 1, 2017, Chicago Title was entitled to a 14-day extension of time in which to file a timely proof of claim because Chicago Title is not on the original matrix and was not added by amendment notwithstanding that Chicago Title was a known creditor scheduled as unsecured and disputed. "Effective December 1, 2017, Rule 3002(c)(6) was amended to add a new ground for enlarging the time to file a timely proof of claim. . . . [U]nder current Rule 3002(c)(6), the court may extend the claims deadline if the 'list of creditors' names and addresses required by Rule 1007(a)' does not provide a creditor sufficient notice. . . . In this district, the list of creditors required by Rule 1007(a) is filed in a specialized format, commonly referred to as the . . . 'Matrix.' . . . [T]he Debtor filed her schedules, which listed Chicago Title on Schedule E/F as an unsecured creditor with a disputed, unliquidated claim for $753,000.00. . . . [T]he Debtor's counsel did not amend the Matrix to add Chicago Title even after filing bankruptcy schedules that listed the creditor. . . . [S]cheduling a creditor does not place the creditor on the Matrix. . . . [T]he requirement before an extension may be granted under the Rule 3002(c)(6)(A) -- i.e., that the lack of notice must be caused by the debtor's 'failure to timely file the list of creditors' names and addresses required by Rule 1007(a)' is satisfied if the debtor files a list of creditors that omits the name and address of the creditor seeking relief under the rule.").

Clark v. Select Portfolio Servicing, Inc. (In re Clark), No. 11-11723-R, 2018 WL 6266179, at *6-*11 (Bankr. N.D. Okla. Nov. 26, 2018) (Rasure) (Mortgagee's failure to respond to notice of final cure from trustee precludes mortgagee under Rule 3002(i) from presenting evidence that there is an arrearage based on a preconfirmation notice of payment change five years earlier. Mortgagee was bound by amount of payment in confirmed plan and cannot claim after discharge that its preconfirmation notice of payment change allows foreclosure after completion of payments and discharge. Combined with plan provision that mortgage would be current at discharge, all arrears cured and all postpetition amounts paid if debtor completed payments, effect of Rule 3002.1(i) ruling is that mortgage was current at discharge and mortgagee cannot collect any amount other than the contractual, amortized amount going forward. Mortgagee's withdrawal of notice of payment change years earlier when it could not explain large escrow default defeated purpose of Rule 3002.1 because it precluded debtors from adjusting payments in the middle of the case. Consistent with proof of claim filed before confirmation, plan proposed to pay a prepetition arrearage of $32,000 and to maintain payments. Servicer claimed that four months before confirmation mortgagee filed a notice of payment change that was approximately $350 per month higher than the amount stated in the proposed plan. Mortgagee did not object to plan and confirmed plan provided for ongoing payments at the lesser amount. Two years after confirmation, mortgagee filed a notice of payment change based on an escrow shortage in excess of $12,000. The debtors objected and the mortgagee withdrew the notice without presenting any evidence of how or when the large escrow balance accrued. Three years later the trustee filed a notice of final cure payment indicating that the mortgage was current and the debtors were eligible for discharge. "The Mortgagee did not file a statement indicating whether, consistent with § 1322(b)(5), the Clarks were current on their postpetition mortgage payments. . . . [T]he Court entered an Order of Discharge . . . Fifteen months after the Clarks' bankruptcy case was closed, the Mortgagee filed . . . yet another Notice of Mortgage Payment Change . . . to which it attached another escrow analysis that reflected an escrow surplus of $4,568.43. . . . The Final Cure Notice advised the Mortgagee of its obligation to file and serve a response under Rule 3002.1(g) . . . . The Mortgagee failed to file the mandatory response . . . . Accordingly, the Clarks are entitled to an order under Rule 3002.1(i) barring SPS from presenting any evidence that the mortgage was not current as of the date of the Final Cure Notice. . . . The purpose of Rule 3002.1(g) is to let debtors know what the mortgagee contends is the status of the mortgage *at the conclusion of the plan.* SPS's failure to give the Clarks information to which they were entitled deprived them of their right to seek a judicial determination of the alleged underpayments under Rule 3002.1(h). . . . SPS's admitted failure to comply with Rule 3002.1(g) was not substantially justified nor was it harmless. . . . The Mortgagee, having due notice . . . slept on its rights. It remained silent in the face of a proposed plan that failed to provide for adequate maintenance payments in addition to cure payments, which violated the Mortgagee's rights under § 1322(b)(2) and (5). . . . Because the Mortgagee did not object to its treatment, the Court assumed that the Second Amended Plan fully complied with § 1322(b), and confirmed the Plan under § 1329(a), binding all parties to its terms under § 1327(a). . . . To the extent that SPS now contends that the Plan did not comply with § 1322(b)(5) . . . its position is barred by the binding effects of the unopposed and unappealed orders of confirmation and discharge. . . . The Mortgagee did not object to the discharge . . . . [P]ursuant to paragraph 10 of the Plan, the

In re Okafor, No. 17-41679-13-BTF, 2018 WL 6722423, at *2-*5 (Bankr. W.D. Mo. Dec. 17, 2018) (Dow) (California attorney allowed reduced fee of $600 for review of plan and filing proof of claim in Chapter 13 case in Missouri. California attorney did not practice law unlawfully in Missouri because work was done in California and attorney did not make appearance in Missouri bankruptcy court. Requested fee of $900 was unreasonable. Bank instead allowed two hours at $300 per hour. Debtor objected to notice of postpetition mortgage fees, expenses and charges by Bank of New York Mellon. Bank retained a national law firm in California to review the debtor's plan and prepare the proof of claim. The attorneys were not licensed in Missouri. Attorneys filed notice of postpetition mortgage fees, expenses and charges requesting $550 for preparing the proof of claim and $350 for reviewing the plan. "The plain language of the Deed of Trust authorizes the allowance of attorneys' fees in the case of the Debtors' bankruptcy filing. . . . Reviewing the plan and filing a proof of claim are unquestionably appropriate actions to protect a lender's interest in estate property. . . . Rule 9010 governs the authority of persons or entities to act in bankruptcy proceedings . . . . This Rule is not applicable here because the Attorneys did not appear before the Court. . . . If the preparation and filing of the proof of claim and review of the plan was all done outside of Missouri then it was not the unauthorized practice of law in Missouri by the out of state Attorneys. . . . [T]he review of a plan and filing of a proof of claim is not an appearance or practice before this Court. . . . Something more that an out-of-state attorney's review of a Chapter 13 plan and preparing and filing a proof of claim (and the Notice of Fees that supplements such proof of claim) while in that other state is required to meet the threshold of unauthorized practice of law in Missouri. . . . Secured creditors are not entitled to be reimbursed for fees incurred in every action taken by their counsel. . . . Lender's Attorneys have requested $900.00 . . . . These fees were likely flat fee amounts but the Court is not bound by an attorney's flat fees. . . . While the Court believes that it was reasonable for the Attorneys to prepare and file a proof of claim and review the plan, it does not believe that $900.00 is a reasonable fee for a large law firm that regularly performs such tasks for lenders. The time and labor involved for these tasks should have been minimal for attorneys specializing in this area and familiar with the procedure. . . . [I]t would not be unreasonable for the legal tasks required to file a proof of claim and review the plan to take one (1) hour each. Thus, the Court finds that fees in the amount of $600.00 ($300.00/hour x 2 hours) is reasonable.").

Smith v. State of Maine Bureau of Revenue Servs. (In re Smith), 910 F.3d 576, 578-91 (1st Cir. Dec. 12, 2018) (Lynch, Stahl, Barron) (Adopting minority view, stay that expires 30 days after second petition within a year under § 362(c)(3)(A) is entire stay, including the stay of actions against property of the estate. "On this close question, we hold that § 362(c)(3)(A) terminates the entire stay thirty days after the filing of a second petition. . . if the procedure for extending the stay . . . has not been successfully invoked. . . . [W]e also identify oddities, including redundancy, in § 362(c)(3)(A) which lead us to conclude that strict application of the canons of interpretation, including the rule against superfluities, would be unhelpful here. . . . Section 362(c)(3)(A) is not an exemplar of precision . . . . The provision is a collection of 'with respect to' phrases, and it is not obvious how the phrases relate to each other, or how the phrases connect to other related provisions. . . . We conclude that the most sensible middle ground, and the one most likely intended by Congress, is found under MRS's reading, under which second-time filers get the benefit of the stay, but only temporarily (albeit with a procedure to seek the stay's continuation). . . . [T]he 1998 Congress intended to terminate the automatic stay after thirty days for all repeat filers. . . . If Congress had intended to change the 1998 language's meaning or scope, we would expect that shift to be reflected in the BAPCPA House Report, or elsewhere in BAPCPA's legislative history. . . . [W]e hold that § 362(c)(3)(A) terminates the entire automatic stay -- as to actions against the debtor, the debtor's property, and property of the bankruptcy estate -- after thirty days for second-time filers.").

Penn v. Viegelahn, No. 5:18-CV-354-OLG, 2018 WL 5984844, at *3 (W.D. Tex. Nov. 13, 2018) (Garcia) (Bankruptcy court appropriately rejected nonstandard plan provision that would allow retention of tax refund in excess of amount allowed by form plan based on finding that additional amount of refund was not necessary to support the debtor. Nonstandard provision reserved to debtor the right to file a motion to retain tax refund of $5,832. Form plan in district required tax refunds in excess of $2,000 to be turned over to the trustee. Debtor argued that precluding deviation from local plan form was inconsistent with the bankruptcy code and debtor needed the additional tax refund to make home repairs. "Tax refunds, whether derived from the return of an income tax overpayment or from a refundable tax credit, fall . . . within the definition of disposable income, and must be turned over to the Chapter 13 Trustee as provided under Section 4.1 of the district's form plan. . . . However, income tax returns (sic), like any other form of income, may fall outside the statutory definitions of disposable income and projected disposable income to the extent that those amounts are 'reasonably necessary to be expended for the maintenance and support of the debtor or a dependent of the debtor.' . . . [T]he Bankruptcy Court did not err in concluding that it was not reasonably necessary for Appellant to retain the entire tax refund in order to make repairs to the Potomac property.").

Dukes v. Suncoast Credit Union (In re Dukes), 909 F.3d 1306, 1310-22 (11th Cir. Dec. 6, 2018) (Carnes) (Confirmed plan that paid mortgage directly by the debtor did not "provide for" the mortgage and debtor's personal liability for deficiency after foreclosure was not discharged; confirmed plan could not be interpreted to provide for discharge of mortgage because modification was prohibited by § 1322(b)(2). Confirmed plan stated that mortgage would be paid directly by the debtor. Debtor completed payments under the plan and received a discharge. Debtor had defaulted on mortgage payments directly to mortgage holder and after foreclosure, mortgagee sought judgment against the debtor for the deficiency. "[W]e hold that, for a debt to be 'provided for' by a plan under § 1328(a), the plan must make a provision for or stipulate to the debt in the plan. Because Debtor's plan did nothing more than state that the Credit Union's mortgage would be paid outside the plan, it was not 'provided for' and was not discharged. Even if it was provided for, we hold that discharge of the Credit Union's debt would violate § 1322(b)(2) by modifying the Credit Union's right under the original loan documents to obtain a deficiency judgment against Debtor. . . . [T]he plan lists the amount for the adequate protection payments required under the Bankruptcy Code. . . . [N]o money would be paid through the plan to the Credit Union, meaning that any payments made on the Credit Union's mortgages will be made directly to the Credit Union, not through the bankruptcy trustee. . . . The bankruptcy court . . . issued two orders authorizing direct payments to the Credit Union . . . . The orders accordingly terminated the automatic stay against the Credit Union for its mortgages, permitting it 'to seek *in rem* relief against the property securing [the Credit Union's] claim[s].' . . . Debtor made a few of the scheduled payments to the Credit Union on her mortgages but stopped paying altogether in 2011. Both mortgages entered default. In 2013, the Credit Union foreclosed . . . and sought a personal judgment against Debtor . . . . Supreme Court precedent defines 'provided for' more narrowly to require that the plan either stipulate to or make a provision for the debt. In other words, the plan's terms must, in some way, affect or govern the debt's repayment. By stating only that Debtor would make any payments to the Credit Union directly, Debtor chose not to handle the Credit Union's debt through her bankruptcy. . . . Unlike the plan in *Rake*, Debtor's plan did not set forth any repayment terms for any portion of the Credit Union's mortgage. Instead, the plan merely stated that the Credit Union's mortgage would be paid outside the plan—nothing more. . . . The statement that Debtor was to make payments directly to the Credit Union was merely a clarification of what was included and what was excluded from the plan. . . . By failing to set forth any terms governing repayment of the Credit Union's mortgage, the plan did not 'provide for' it. . . . *Rake* does not stand for the proposition that a plan 'provides for' a claim merely by mentioning it. . . . [L]ikely because Chapter 13 bankruptcy is particularly ill-suited for most debtors who have long-term mortgage debt due to the inability to either modify such debt or repay it on an accelerated five-year schedule, Debtor chose not to address the Credit Union's mortgage in her plan. The simplest conclusion then is that Debtor's plan, by not addressing the Credit Union's mortgage, did not 'provide for' it. . . . The Code gives debtors a choice to either repay such long-term debt 'inside' the plan—with the trustee acting as disbursing agent—or 'outside' the plan, with payments coming directly from the debtor, often under the terms of the original debt instruments. . . . Even if the plan were somehow construed as 'provid[ing] for' the Credit Union's mortgage, there could still be no discharge of the mortgage given the antimodification provision in § 1322(b)(2). . . . By terminating the Credit

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Bankruptcy Rule 8002(a) is Jurisdictional

Kenneth Michael Wright, L.L.C. v. Kite Bros., L.L.C. (In re Kite), 710 Fed. App'x 628 (5th Cir. 2018)(per curiam).

R. Alan Kite, now deceased, filed for bankruptcy protection. Kite Bros., L.L.C. ("Kite Bros.") filed a timely proof of claim for more than one million dollars based upon a December 2013 state court judgment in Louisiana. Kenneth Michael Wright, L.L.C. ("Wright"), an unsecured creditor, objected to the proof of claim and collaterally attacked the state court judgment with a removal argument that had already been rejected by both a state court and federal district court. Following a hearing, the bankruptcy court entered an order denying Wright's objection.

On December 13, 2016, one day after the fourteen days to file a notice of appeal of the court's order, Wright filed an appeal. Kite Bros. filed (a) a motion to dismiss the appeal in the district court because Wright's appeal was untimely under Bankruptcy Rule 8002(a)(1), and (b) a motion for sanctions under Bankruptcy Rules 8020(a) and 9011, 28 U.S.C. § 1927, and the court's inherent authority because the Wright appeal was untimely and frivolous. Wright countered that Rule 8002 was not jurisdictional and its removal argument was not frivolous. The district court (i) granted the Kite Bros.'s motions, imposing sanctions for the frivolous appeal, and granted reasonable costs and attorneys' fees for the Kite Bros.'s appellate defense; and (ii) concluded that it lacked jurisdiction to hear Wright's appeal because it was not timely filed.

The court gave parties until April 17, 2017, to submit a fee application. Kite Bros. filed their fee application timely. Wright missed the deadline and waited more than s week to request additional time to respond, which the court denied. On May 4, 2017, the district court entered sanctions against Wright, and Wright timely appealed the second sanctions order. Further, Kite Bros. filed an additional motion for sanctions against Wright and its counsel, individually.

Because Wright failed to properly raise two of its three appeals claims before the district court, the Fifth Circuit only addressed Wright's assertion that its appeal to the district court was not frivolous. The circuit court confirmed that the fourteen-day deadline for appeals pursuant to Bankruptcy Rule 8002(a) is jurisdictional and noted that Bankruptcy Rule 8002(a) is in fact mandated by Congress because jurisdiction is determined by 28 U.S.C. § 158(c)(2), which incorporates the time limits prescribed in Rule 8002(a). In its per curiam opinion, the Fifth Circuit found Wright's instant appeal to be frivolous; granted sanctions against Wright; denied sanctions against Wright's counsel, individually; and awarded nominal damages of $1 and double costs to Kite Bros.

B. Property of the Estate, the Automatic Stay and Other "First Day" Issues

A State's Pecuniary Reasons to Lift the Stay Cannot be Substituted for Section 362's Police and Regulatory Exception

In re Bloomfield Nursing Operations, LLC, et al., No. 17-42769 (Bankr. N.D. Tex. May 1, 2018)(Mullin, J.)(order denying state of New Mexico's motion for order confirming automatic stay inapplicable to medicaid fraud enforcement action).

Effective November 1, 2012, the ownership of two New Mexico skilled nursing facilities was transferred from Bloomfield Nursing Operations, LLC and its affiliates ("Bloomfield") to Preferred Care, Inc. and its affiliates ("Preferred"). In December 2014, New Mexico's Attorney General brought a primarily pecuniary suit against Bloomfield, Preferred Care, and additional parties in Santa Fe County, New Mexico. The allegations included violations of the New Mexico Fraud Against Taxpayers Act, the New Mexico Medicaid Fraud Act, and New Mexico common law. The only non-monetary relief requested was related to the New Mexico Unfair Practice Act. However, because Bloomfield was no longer operating the two facilities, the requested remedy under the New Mexico Unfair Practices Act was inapplicable to Bloomfield.

On July 2, 2017, Bloomfield filed for bankruptcy protection; several days later, the New Mexico state court stayed the New Mexico Attorney General's case due to the bankruptcy. In November 2017, Preferred Care and additional defendants in the Santa Fe County case filed for bankruptcy protection.

In April 2018, the bankruptcy court held a hearing on the New Mexico Attorney General's motion to determine whether New Mexico's state court action was subject to the *Bloomfield* bankruptcy automatic stay because it is "an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . police and regulatory power." 11 U.S.C. § 362(b)(4). The court applied both the "pecuniary purpose test" and the "public policy test" and determined the New Mexico Attorney General's state court action was primarily in search of funds from the defendants and not attempting to deter ongoing conduct that could seriously threaten public safety and welfare. Based upon the totality of the circumstances, including New Mexico's lack of evidence to support its public safety argument, the bankruptcy court held that New Mexico did not satisfy its burden of proof that section 362(b)(4) exception was applicable.

DIP Motion Denied for the Collateral's Insufficient Value and Debtors' Failure to Investigate Additional Financing

In re Laffite's Harbor Dev. I, LP, No. 17-36191-H5-11, 2018 Bankr. LEXIS 2 (Bankr. S.D. Tex. Jan. 2, 2018)(Brown, J.).

Real estate developers on Galveston Island, Texas, borrowed millions secured by all of their assets and begun platting their property to construct luxury vacation homes. When the developers ran out of money and filed their bankruptcy petitions in November 2017, the loan balance outstanding was approximately $11.5 million. Six weeks into their case, the court held a hearing on the debtors' request to (i) employ a selling agent and property manager, and (ii) grant an emergency motion for interim relief to (a) authorize post-petition secured financing, (b) enter into an agreement with the entity providing financing, and (c) other related relief ("DIP Motion"). The court reserved its ruling on the motion to employ and denied the DIP Motion.

The DIP Motion requested court approval to borrow $4 million, with $2.5 million of those funds to be disbursed within two to three months. The terms of the borrowing included granting the lender (i) a priming lien on the property in the bankruptcy estate; (ii) a superpriority claim; (iii) a lien on avoidance actions, subject only to certain administrative expenses; and (iv) a waiver of surcharge under section 506(c). In addition, the debtors' proposed budget included a payment of $72,000 to their principal's management company.

At the hearing the court heard a variety of evidence. First, the court heard testimony on two appraisals of the debtors' property. In February 2016, the current value was $13.363 million, with an anticipated value of more than $20 million upon the completion of the property's 142 lots. However, in October 2017, the liquidation value of the property was $17.225 million, in part because several lots listed for sale in February 2016 had not yet closed. Next, the evidence indicated the debtors' revised business plan consisted of financing lot sales to builders through the EB-5 visa program, allowing foreign nationals to live and work in the United States after making a $500,000 business investment. Third, the evidence indicated that prior to filing their petitions, the debtors completed a deeply discounted sale. Instead of garnering $300,000 per lot, which the debtors' representative testified was the average price, the debtors sold a group of seven lots for $750,000. Finally, the debtors failed to investigate any alternative post-petition financing sources prior requesting approval of the DIP Motion. Thus, the court denied the debtors' DIP Motion.

C. Estate Professionals and Compensation

Employment Applications are Mandatory; Fee-Sharing Arrangements Must Follow Section 504

Wright v. Csabi, et al. (In re Vicky Gribble Wright), 578 B.R. 570 (Bankr. S.D. Tex. 2017)(Rodriguez, J.).

In late 2016, a chapter 13 debtor filed a complaint against three attorneys 9i) to disgorge an unauthorized fee; (ii) seek a turnover of property of the estate; and (iii) for violations of the automatic stay. The court, only addressing the attorneys' liability, found each defendant violated 11 U.S.C. §§ 105, 329, 330, 362, 504, and 542; Bankruptcy Rules 2014(a) and 2016(a); and Local Rule 2014-1(d).

The chapter 13 debtor filed her petition on October 31, 2013. Several months later, the debtor entered into a contingency fee contract with Mr. James Grissom. On December 8, 2014, Mr. Grissom filed an employment application, which the bankruptcy court granted, requesting that he, and no other attorney, serve as the debtor's special counsel. Subsequent to Mr. Grissom's employment application, he entered into two fee-sharing agreements related to the debtor's case with Francisco Rodriguez and William Csabi. At no time did Mr. Grissom file an updated employment application or affidavit of disinterestedness to disclose his fee-sharing agreements with Mr. Rodriguez and Mr. Csabi. Further, Mr. Rodriguez and Mr. Csabi failed to inform the court of their respective arrangements to serve as special counsel or share fees with Mr. Grissom.

In 2016, the court (i) approved a settlement related to the case Mr. Grissom handled as special counsel; (ii) awarded Grissom $90,000.00 in attorneys' fees; and (iii) ordered Grissom to distribute the remaining funds to the chapter 13 trustee, as the funds were property of the debtor's estate. Instead, Grissom sent $73,333.00 to both Rodriguez and Csabi from his IOLTA account. In June 2016, Mr. Limon, the debtor's bankruptcy counsel, sent demand letters to Rodriguez and Csabi to return the payments they received from Mr. Grissom. Mr. Csabi deposited $73,333.00 in the court's registry eight months later in February 2017. Mr. Rodriguez had not returned his portion of the funds as of the date of the court's opinion. In July 2016, the debtor and Grissom entered into an agreed order instructing Grissom to turnover $133,085.10 as property belonging to the debtor's estate by August 1, 2016. Grissom failed to comply with the order, resulting in the adversary proceeding.

At trial, the documentary and testimonial evidence supported the courts holdings that each attorney: (a) violated the Code, Rules, and Local Rules by not properly seeking employment approval from the court; (b) failed to inform the court of payments received from the debtor in conjunction with counsel's representation; (c) violated the Code's fee-sharing prohibitions; (d) failed to turnover property of the estate; and (e) willfully violated the automatic stay. In the interest of comity, the court declined to address the defendants' violations of the Texas Disciplinary Rules of Professional Conduct.

Chapter 7 Trustees' Section 326 Fees are Presumptively Reasonable

Lejeune v. JFK Capital Holdings, L.L.C. (In re JFK Capital Holdings, L.L.C.), 880 F.3d 747 (5th Cir. 2018)(Southwick, J.).

In July 2014, John F. Kelly, who had been defrauding investors through the operation of dozens of businesses entities, filed under chapter 7; Barbara Rivera-Fulton was appointed the chapter 7 trustee to Mr. Kelly's case. JFK Capital Holdings, L.L.C. ("JFK Capital"), one of Mr. Kelly's solvent entities, was awaiting a settlement payment from a different bankruptcy case. Counsel to JFK Capital involved in that settlement filed state-court suits to preserve their claims against the settlement. Ms. Rivera-Fulton placed JFK Capital into chapter 7 to preserve settlement proceeds; Aaron Caillouet was appointed chapter 7 trustee to JFK Capital's case. Ms. Rivera-Fulton attempted to consolidate the Kelly and JFK Capital bankruptcies under an alter ego theory; however, Mr. Caillouet challenged the consolidation because JFK Capital's only creditors were the attorneys who represented JFK Capital in the relevant settlement. Each trustee hired counsel to resolve the issues.

When Mr. Caillouet's attorneys filed their fee application, Ms. Rivera-Fulton objected to the reasonableness of those fees. The bankruptcy court awarded attorneys' fees in the amount of $5,000.00 plus costs and promised a similar deduction when the attorneys for Ms. Rivera-Fulton filed their fee application. Additionally, without explanation, the court reduced Mr. Caillouet's uncontested fee application from 7% to 3%; Mr. Caillouet appealed to the district court. Because the bankruptcy court provided no explanation for its order reducing the trustee's fee application, the district court vacated and remanded the order with instructions for the bankruptcy court to "redetermine" fees in line with its detailed analysis of the relevant statutes. Mr. Caillouet appealed the district court's order vacating and remanding to the bankruptcy court. While Mr. Caillouet and Ms. Rivera-Fulton agreed that the district court's remand was proper, they disagreed upon the legal standard on remand and appealed the district court's holding.

The circuit court first addressed the BAPCPA changes to chapter 7 trustees' compensation: (i) chapter 7 trustees were removed from the list of professionals subject to the factors of section 330(a)(3); and (ii) section 330(a)(7) was added, requiring chapter 7 trustees to receive reasonable compensation

pursuant to section 326. While the district court, and other courts in the Fifth Circuit, have adopted the approach to chapter 7 fees that permits courts' discretion when awarding reasonable compensation to chapter 7 trustees, the instant panel changed directions. Instead, relying on *Mohns, Inc. v. Lanser*, 552 B.R. 594 (E.D. Wis.), *aff'd sub nom.*, the circuit court found the percentages set forth in section 362 presumptively reasonable. The court further emphasized the Code shifted to a commission-based award in the BAPCPA amendments, contrary to the pre-BAPCPA compensation-based awards. The Fifth Circuit also emphasized that section 330 still permits a bankruptcy court to reduce or deny a chapter 7 trustee's fees but that these adjustments should occur in rare events. In line with this analysis, the circuit court vacated the bankruptcy court's order and remanded for determination of Mr. Caillouet's fee application consistent with its opinion.

D. Sales

Without Evidence to Undermine Court's "Good Faith" Findings, Appeal of § 363 Order Fell Flat.
Keystone Mine Co., Ltd. v. Parker (In re Keystone Mine Mgmt.), No. 17-60013, 2018 U.S. App. LEXIS 17933 (9th Cir. June 29, 2018).

Appeal of sale order was properly dismissed as statutorily moot under section 363(m). The secured creditor presented the only bid for the sale of the debtor's mining rights and, thus, purchased the rights by credit bid. The court rejected the appellant's challenge to the bankruptcy court's "good faith" finding, because there was ample evidence in the record supporting the trustee's business judgment, including his review of the secured creditor's claims, investigation of potential claims against the secured creditor and its principals, and consideration of alternatives. The court also rejected the appellant's argument that the trustee was required to prove the absence of an adequate remedy of law. While an appellee may need to demonstrate such an absence in an appeal of a foreclosure judgment, no such requirement exists for statutory mootness under 11 U.S.C. § 363(m).

E. Dismissal, Conversion, and Involuntary Filings

Fifth Circuit Affirmed Dismissal of Case Filed Without Approval from Preferred Shareholders.
Franchise Servs. of N. Am. v. U.S. Trustee (In re Franchise Servs. of N. Am.), 891 F.3d 198 (5th Cir. 2018)(King, J.).

The opinion opens: "Under longstanding Supreme Court precedent, state law dictates the procedures a corporation must follow to authorize a bankruptcy filing. When those procedures place the decision in the hands of the corporation's creditors, some courts have allowed the bankruptcy to proceed even though the creditors withheld consent. This case presents a related but distinct question: when the certificate of incorporation requires the consent of a majority of the holders of each class of stock, does the sole preferred shareholder lose its right to vote against (and therefore avert) a voluntary bankruptcy petition if it is also a creditor of the corporation?"

There was significant buzz around this case after the bankruptcy court certified a question to the Court of Appeals regarding the validity of "golden shares" and "blocking provisions" as a means to prevent a company's bankruptcy filing. However, in this decision, the Fifth Circuit was quick to explain that the facts of this case did not require it to reach the merits on the certified question. To avoid issuing an impermissible advisory opinion, the Court of Appeals narrowed its decision to the facts presented: "Instead we confine our analysis to whether U.S. and Delaware law permit the parties to do what they did here: amend a corporate charter to allow a non-fiduciary shareholder fully controlled by an unsecured creditor to prevent a voluntary bankruptcy petition."

In this case, an equity group invested $15 million to the debtor in exchange for 100% of the preferred shares of the debtor. As part of the transaction, the debtor reincorporated in Delaware and amended its articles of incorporation to require approval from all classes of stock before taking corporate actions such as filing for bankruptcy protection. After a failed transaction, the debtor filed a chapter 11 petition in Texas without even asking the preferred stock holders for approval. The stock holders moved for dismissal, arguing that the filing was unauthorized, and the bankruptcy court agreed. Specifically, the bankruptcy court

declined to treat the preferred stockholders differently just because they were also owed $3 million for an unpaid fee.

Considering Delaware state law, the Fifth Circuit noted that "Delaware's corporate statute is widely regarded as the most flexible in the nation." First, the Court of Appeals considered whether Delaware law allowed corporate charters to require approval from preferred stock holder classes. The debtor made this argument in bankruptcy court, but failed to raise it on appeal. Thus, without deciding the merits of the argument, the Fifth Circuit considered it waived and assumed that the provisions in the debtor's articles of incorporation were valid under Delaware state law.

Second, the Court of Appeals considered whether the preferred shareholders could act in their own self-interests as both creditors and equity holders, despite holding a potentially blocking position through the preferred equity class. Noting that the preferred shareholder group owned only 49.76% of the total stock on a fully diluted basis, the Court explained that "[p]otential control is not enough" to impose fiduciary obligations on the preferred stock holders. Rather, the debtor was required to prove *actual* control, which it failed to do. For that reason, the Court of Appeals concluded that the preferred stock holders were not fiduciaries, and nothing under Delaware law prevented them from acting in their own self interests. For those reasons, the Court of Appeals concluded that the preferred stock holders were well within their rights to oppose the bankruptcy filing, and that the bankruptcy court had ruled correctly that the bankruptcy filing was not authorized under applicable Delaware law. Dismissal affirmed.

Creditors are Not Permitted to Hold the Bankruptcy Process Hostage with Mere Allegations that a Debtor Does Not Belong in Bankruptcy Court

JD Holdings, L.L.C. v. John Q. Hammons Fall 2006, LLC, et al. (In re John Q. Hammons Fall 2006, LLC, et al.), No. KS-16-037, 2017 Bankr. LEXIS 4426 (B.A.P. 10th Cir. Dec. 28, 2017)(Michael, J.).

The bankruptcy appellate panel affirmed the bankruptcy court's holding that the debtors' rejection of a right of first refusal agreement was a proper exercise of their business judgment, and rejected the creditors' attacks on the bankruptcy court's jurisdiction to rule on the debtors' rejection motion.

Debtors John Q. Hammons Fall 2006, LLC (a trust) and its affiliates were formed by hotel developer John Q. Hammons. In 2005, the debtors executed a right of first refusal (the "ROFR") related to the sale of several hotels in favor of JD Holdings, L.L.C. ("JD Holdings"). In 2012, creditor JD Holdings sued the future debtors in Delaware alleging they had breached their obligations under the ROFR; in 2015, the court entered a status quo order requested by JD Holdings. Shortly thereafter, the debtors filed their bankruptcy petitions in 2016. JD Holdings responded by filing a motion to dismiss, alleging (i) the affiliate debtors lacked proper authorization to file petitions, (ii) the trust debtor was not eligible to file a petition, and (iii) all of the cases were filed in bad faith because the cases had no valid purpose. JD Holdings also filed an objection to the debtors' motion to reject the ROFR, in part, because the court had not yet ruled on its motion to dismiss (not as a challenge to the exercise of the debtors' business judgment). The bankruptcy court granted the debtors' rejection motion, including a holding that the debtors' eligibility to seek bankruptcy relief is not jurisdictional.

The bankruptcy appellate panel relied on *In re Hamilton Creek Metropolitan District*, 143 F.3d 1381 (10th Cir. 1998), in affirming the bankruptcy court's approval of the trust debtor's ROFR rejection despite JD Holdings' challenge to the trust's eligibility to file bankruptcy because "[n]o creditor can be allowed to hold the [bankruptcy] process hostage by the mere allegation that a debtor does not belong in bankruptcy court." The panel also affirmed that the bankruptcy court had jurisdiction over the rejection motion without first ruling on the affiliates' authority to file their petitions. Citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), the panel held that the debtors' eligibility goes to the merits of JD Holdings' motion to as opposed to but not to the subject matter of the bankruptcy court.

A Desire to Invoke Bankruptcy Powers Under the Code does not Establish a Case was Filed in Good Faith

In re Rent-A-Wreck of Am., Inc., et al., 580 B.R. 364 (Bankr. D. Del. 2018)(Silverstein, J.).

The predecessor of Rent-A-Wreck of America, Inc. ("RAWA"), a car rental business, began in the 1970s. Around the same time, David Schwartz began operating a RAWA outpost in Los Angeles. As the business expanded and was formalized with franchise agreements, Mr. Schwartz continued to operate his location without any formal arrangement. In 2006, J.J.F. Management Services, Inc. ("JJF") purchased RAWA and its wholly-owned subsidiary, Bundy American, LLC ("Bundy"). Beginning with the initiation of the sale process, the lawsuits between Mr. Schwartz, JJF, RAWA, and Bundy began. The primary issue in these suits was Mr. Schwartz's franchise agreement to operate a RAWA franchise.

After two jury trials and several appeals to the Fourth Circuit, the courts found Mr. Schwartz had an implied-in-fact royalty and [free-free franchise] agreement to run his franchise, and the courts acknowledged that RAWA was consistently attempting to undermine Mr. Schwartz's franchise operations. The courts also acknowledged that Jack Fitzgerald, the controlling party of JJF, had spent approximately $2.7 million working against Mr. Schwartz and held RAWA in contempt.

RAWA and Bundy soon filed for chapter 11 protection and submitted a motion to reject several franchise agreements, including Mr. Schwartz's franchise agreement. As anticipated, Schwartz objected to the rejection motion and filed a motion to dismiss the debtors' cases, asserting that the debtors' bankruptcies were simply a continuation of the parties' pre-bankruptcy litigation, and if the debtors were in financial distress, then it was of their own creation. At the evidentiary hearing, the debtors could not demonstrate they were in financial distress and argued that financial distress was not an element of good faith. The evidence indicated that (i) the debtors were not insolvent; (ii) the debtors' unsecured debt did not cause them to file their petitions, (iii) the debtors' secured debt was from their parent company and substantial, athough the parent company was not collecting on this debt; (iv) most of the debt was to the debtors' affiliated entities; (v) the debtors failed to provide information related to their liquidity; (vi) the debtors had not analyzed their ability to pay their debts as they came due; (vii) the debtors had not explored any third party financing; and (viii) the debtors could manage future litigation threats, such as those from Mr. Schwartz. The debtors, however, claimed that they intended to maximize value by rejecting burdensome franchise agreements, such as Mr. Schwartz's agreement, and relieving their balance sheets of debt. In particular, the debtors claimed that because they intended to utilize the powers provided under the Bankruptcy Code, their cases could not have been filed in bad faith.

The bankruptcy court applied the Third Circuit's two questions for evaluating good faith: (i) does the petition serve a valid bankruptcy purpose; and (ii) was the petition filed to serve a tactical purpose. The bankruptcy court found that the debtors' primary reason for filing was to reject the Schwartz franchise agreement. In addition, the court reviewed the parties' significant litigation history and found that the debtors could have reached their stated goals outside of a bankruptcy proceeding but chose not to undertake those efforts. As such, the court concluded the cases were not filed in good faith and dismissed both.

F. Appeals

The Bankruptcy Stay Tolls Texas Foreclosure Suits

HSBC Bank USA, N.A. v. Crum, No. 17-11206, 2018 U.S. App. LEXIS 29180, __ F.3d __, (5th Cir. Oct. 17, 2018)(Wiener, J.).

The Fifth Circuit affirmed the district court's holding that HSBC Bank USA, N.A. ("HSBC") timely filed its foreclosure suit.

Mr. Crum executed a home equity note and subsequently defaulted. HSBC sent a notice of default, an intent to accelerate, and a notice of acceleration of loan maturity. HSBC's notice of acceleration informed Mr. Crum that HSBC could foreclose within the next four years, through and including June 10, 2013. On June 3, 2010, Crum filed a chapter 7 petition and received a discharge on October 7, 2010. HSBC then filed for foreclosure, and Mr. Crum filed a state-court lawsuit on July 4, 2011, to prevent the foreclosure. HSBC prevailed on summary judgment on November 14, 2012. On October 15, 2013, Crum received another

notice of default, which abandoned the earlier acceleration; however, the loan was reaccelerated in March 2014. The new servicer of the loan revoked the reacceleration in April 2014, but on May 21, 2014, Crum received a final notice of acceleration.

HSBC filed a foreclosure suit on September 29, 2014, and the state district court granted summary judgment. Crum appealed, contending (i) HSBC was not the note holder; (ii) HSBC's foreclosure suit was untimely; and (ii) the final judgment was invalid because it failed to comply with Texas Rule of Civil Procedure 309. In addressing Mr. Crum's appeal that HSBC's foreclosure suit was untimely, the parties agreed that the common law tolling principle was an applicable nonbankruptcy law state law tolling provision, which may be incorporated by 11 U.S.C. § 108(c), but disagreed on how to calculate the tolling period. Crum asserted his bankruptcy case created a tolling period of 126 days, and relied on Bankruptcy Rule 9006(a)(1) and Federal Rule 6(a)(1); the Fifth Circuit concluded that these rule are not tolling provisions. HSBC argued the bankruptcy case created a 127-day tolling period by applying Texas common law: the time HSBC was prevented from exercising its legal remedies should not be counted against HSBC. The Fifth Circuit affirmed the district court's holding that the bankruptcy stay extended the tolling period by 127 days, petition date through the day the stay is lifted, because on each of those days HSBC was prevented from foreclosing on Mr. Crum's property.

Who Has Standing to Appeal Claim Settlements? Not the Slovak Republic.

Slovak Republic v. Loveridge (In re EuroGas, Inc.), 576 B.R. 648 (B.A.P. 10th Cir. 2017)(Romero, J.).

Even though the Slovak Republic was a creditor in the debtor's chapter 7 bankruptcy case, the court found that the trustee's settlement with the estate's largest unsecured creditor resulted in a significant increase in the distribution to unsecured creditors. In other words, there was no reason for the Slovak Republic to complain about the settlement. The only logical reason for the Slovak Republic's appeal of the settlement order was to improve its position in an unrelated arbitration proceeding pending in Paris, France. In this case, the bankruptcy appellate panel held the reasoning to be "insufficient to confer standing to appeal the [d]ecision" or to establish appellate jurisdiction.

An Insider's Oral Representations Pertaining to the Overall Financial Strength and Stability of a Company are Dischargeable

Randall Haler v. Boyington Capital Grp., L.L.C. (In re Randall Lee Haler), 708 Fed. App'x 836 (5th Cir. 2017)(per curiam).

Prior to Mr. Haler's bankruptcy, Boyington Capital Group, L.L.C. ("Boyington") brought suit against Mr. Haler for fraud and other state-law causes of action in his role as an insider at McKinney Aerospace, L.P. ("McKinney"). Following an appeal, the state district court entered an amended judgment in June 2015 (i) finding Haler made false representations and was liable for fraud, and (ii) awarding Boyington approximately $258,000.00 in damages. [Before the state court's first final judgment in December 2011, and the state court's amended judgment following the appeal in 2015, Haler filed a voluntary chapter 7 case.] Boyington initiated the adversary proceeding, seeking a declaration the state-court judgment debt was non-dischargeable.

Following the entry of the state-court's amended judgment, the bankruptcy court found the debt owed to Boyington was non-dischargeable pursuant to section 523(a)(2)(A) and (a)(4) because Haler was collaterally estopped from relitigating the state court issues. The district court affirmed the bankruptcy court's ruling. Haler appealed, asserting that his representations that McKinney was in "very fine legally [sic] financial shape" and had "plenty of cash to operate [the] business" were statements concerning the company's financial condition; thus, the debtor dischargeable under section 523(a)(2)(A).

Relying on the distinctions set forth in *Bandi v. Becnel (In re Bandi)*, 683 F.3d 671 (5th Cir. 2012), the circuit court considered whether Haler's oral statements qualified as "statement[s] respecting . . . financial condition," falling outside the scope of 11 U.S.C. 523(a)(2)(A). Because the Fifth Circuit found Haler's statements pertained to the overall financial strength and stability of McKinney, the circuit court reversed the bankruptcy court's summary judgment in favor of Boyington.

When Are Orders Final? Sixth Circuit Clarifies the Standard for Finality.

Ritzen Grp., Inc. v. Jackson Masonry, LLC (In re Jackson Masonry, LLC), Nos. 18-5157/5161, 2018 U.S. App., LEXIS 29009, __ F.3d __ (6th Cir. Oct. 16, 2018)(Thapar, J.).

The Sixth Circuit addressed whether the appellant timely appealed the order denying the motion for relief from the automatic stay. Before the bankruptcy filing, the movant ("Ritzen") had contracted with the debtor to purchase the debtor's property. Litigation was brought over whether the debtor breached the purchase contract, but the litigation was stayed by the debtor's bankruptcy filing. Ritzen moved for relief from the stay to liquidate its claims in state court, but the bankruptcy court denied the motion. Ritzen then brought a lawsuit against the debtor for breach of contract, but the debtor counterclaimed that Ritzen—not the debtor—breached the contract by failing to close on time.[1] The bankruptcy court entered judgment in the debtor's favor.

Only then, after the bankruptcy court adjudicated the underlying contract dispute did Ritzen file two appeals – one appealing the order denying stay relief, and the other appealing the bankruptcy court's contract ruling. The Sixth Circuit affirmed the merits of the breach of contract ruling, but dismissed the stay relief appeal as untimely. The dismissal for untimeliness warrants discussion.

In addressing whether Ritzen's appeal of the stay relief order was timely, the court of appeals noted that "courts have taken the loose finality in bankruptcy as a license for judicial intervention," resulting in tests that are vague and impossible to apply consistently. The Sixth Circuit explained that the source of the problem was the failure of courts to start with the text of the bankruptcy appeals statute, 28 U.S.C. § 158(a). Under that statute, district courts have appellate jurisdiction over final judgments, orders, or decrees from all "cases and proceedings." In other words, finality is determined as a two-step process: (1) identify the "judicial unit" that constitutes the case or proceeding, and (2) determine whether the order, judgment, or decree disposes of all issues in that discrete case or proceeding.

Applied to the stay relief order, the Court of Appeals recognized that a motion for relief from stay commenced a discrete "proceeding"—*i.e.*, "there is a discrete claim for relief, a series of procedural steps, and a concluding decision based on the application of a legal standard." An order denying stay relief is final because "there are no more 'rights and obligations' at issue in the stay-relief proceeding" once the motion is granted or denied. As such, the order denying Ritzen's stay relief motion was final upon entry, and its appeal several months later at the conclusion of the adversary proceeding was untimely.[2]

Object to a Cram Down at the Federal Judgment Rate? Provide Credible Evidence of the Appropriate Market Rate

Dropbox, Inc. v. Thru, Inc., et al. (In re Thru, Inc.), Nos. 3:17-CV-1958 and 1959, 2018 U.S. Dist. LEXIS 179769 (N.D. Tex. Oct. 19, 2018)(Fish, J.).

At the conclusion of a California district court battle between two technology companies, future debtor Thru, Inc. and appellant Dropbox, Inc., primarily concerning a trademark, Dropbox prevailed on summary judgment and Thru was ordered to reimburse Dropbox in the amount of $2.3 million for its attorneys' fees and costs. The debtor filed its bankruptcy petition on March 22, 2017. Following a contentious confirmation hearing, the bankruptcy court confirmed the debtor's plan which crammed down the debtor's judgment debt owed to Dropbox. Dropbox promptly appealed the confirmation order, requesting that the district court (i) reverse the confirmation order and appoint a chapter 11 trustee, and (ii) reverse the confirmation order to take testimony for its witness who was not allowed to testify. Dropbox supported its request with eleven claims. However, the court addressed only ten of these claims in holding that it would not reverse the confirmation order. Concurrently with the bankruptcy case and Dropbox's Texas appeal, the parties continued their California appeal of the $2.3 million judgment. Prior to the Texas

[1] As the court explained in its introductory paragraph: "Deadlines matter. Ritzen Group missed two of them: the closing deadline in a contract and the appellate deadline for bankruptcy orders."

[2] The court recognized a possible exception for orders denying stay relief without prejudice because the movant may have the opportunity to re-file upon a change in circumstances. However, because the order entered in this case was not "without prejudice," the Sixth Circuit concluded that the 14-day period to appeal under Bankruptcy Rule 8002(a) began to run upon entry.

district court's ruling on Dropbox's bankruptcy appeals, the Ninth Circuit (i) affirmed the California district court's holdings that Dropbox had senior rights in the trademark at issue, and (ii) held that the California district court did not abuse its discretion in granting the $2.3 million judgment.

In its review of Dropbox's claims, the Texas district court first addressed whether each claim was equitably moot before addressing the merits. In this analysis, the court relied on the guidance in *Bank of N.Y. Tr. Co., N.A v. Official Unsecured Creditors' Committee (In re The Pacific Lumber Co.)*, 584 F.3d 229 (5th Cir. 2009), stating that, in its review, the court should use "a scalpel rather than an axe." *Id.* at 240. As such, the court determined seven counts (counts one, two, three, five, six, eight, and nine) were equitably moot. The remaining three counts (four, seven, and ten) were affirmed, reversed and remanded, and denied, respectively. In count four, Dropbox alleged that the confirmed plan violated the "fair and equitable" requirement of section 1129(b)(1) because the bankruptcy court held that its claim's interest rate was confirmed at 1.22 percent, the federal judgment rate. After determining the count was not equitably moot, the Texas district court held that the bankruptcy court properly relied on *In re Texas Star Refreshments, LLC*, 494 B.R. 684 (Bankr. N.D. Tex. 2013), and Dropbox provided no credible evidence as to the appropriate market rate for the bankruptcy court to apply. Next, in count seven, Dropbox contended that the bankruptcy court made an error in its determination that there were no impermissible third-party releases or exculpation provisions in the confirmed plan. Because the district court found the claim could be addressed with narrow relief, it relied on *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 760 (5th Cir. 1995), and found that the plan barred the debtor's creditors from pursuing actions against certain non-debtor third parties. As such, the Texas district court reversed and remanded count seven. Finally, Dropbox claimed the bankruptcy court did not meet its obligations under Bankruptcy Rules 7052 and 9014 by fully briefing the issues, specifically Dropbox's allegation the case was filed in bad faith. The Texas district court found this claim was not equitably moot because it was able to remand a case to the bankruptcy court for additional elaboration. Even so, the final claim failed because the bankruptcy court reviewed the totality of circumstances and concluded the debtor's case and plan were filed in good faith.

G. Debtors (and Counsel) Behaving Badly

Don't Take the Money and Run

Patek, et al. v. Alfaro, et al. (In re Primera Energy, LLC), 579 B.R. 75 (Bankr. W.D. Tex. 2017)(Gargotta, J.).

Brian K. Alfaro served as CEO and sole managing member of Primera Energy, LLC, Alfaro Oil and Gas, LLC, Alfaro Energy, LLC, King Minerals, LLC, Silver Star Resources, LLC, 430 Assets, LLC, and Ana and Avery's Candy Island, LLC, focusing his time and effort in oil and gas investing. Alfaro operated a boiler room, "where registered representative placed thousands of cold calls each week to solicit investments in Alfaro's captive oil and gas drilling joint ventures." Instead of investing the funds in his oil and gas joint ventures, Mr. Alfaro used the funds for personal expenditures and for wholly unrelated business purposes.

More than 30 investors filed suit against Alfaro, among other defendants—*i.e.*, his wife, his companies, and his family's living trust, claiming a "complete loss" of their investment funds. The following causes of action were tried before the court: (1) common law fraud and fraud in the inducement; (2) fraud in a real estate transaction; (3) negligent misrepresentation; (4) DTPA claims; (5) violations of the Texas Securities Act; (6) conversion; (7) TUFTA claims against all but two defendants; (8) unjust enrichment/disgorgement; (9) money had and received; and (10) civil conspiracy. Notably, the Alfaro defendants rested without offering any controverting evidence or argument.

After a six-day trial, Judge Gargotta issued a fact-intensive memorandum opinion totaling 181 pages. The court found the Alfaro defendants liable for common law fraud, fraud in the inducement, fraud in a real estate transaction, negligent misrepresentation, and TUFTA claims. The plaintiffs were awarded nearly $8 million in actual damages, in addition to the court imposing a constructive trust on Alfaro's salary and compensation (transferred to the family's living trust), Alfaro's Bentley (purchase price of $189,000), and Alfaro's Cadillac (purchase price $33,705). Lesson learned: don't take the money and run.

Lawyers Behaving Badly

Robbins v. Delafield (In re Williams), Nos. 16-07024 and 16-05014, 2018 Bankr. LEXIS 382 (Bankr. W.D. Va. Feb. 12, 2018)(Black, J.).

Two Chicago law firms, Upright Law, LLC and Law Solutions Chicago, LLC, solicited potential chapter 7 debtors online to allegedly assist the potential clients by providing legal services to an underserved market through local partners, such as Mr. Delafield and Mr. Morgan. The processes established by the Chicago law firms included marketing and sales strategies to be executed by non-lawyers employing a pressure-filled playbook to force potential clients to hire the Chicago firms and file for bankruptcy. The law firms eventually experienced difficulties collecting payments from its clients and became involved in a scam with a non-lawyer, Mr. Fenner. Fenner and his company, Sperro, LLC, offered to subsidize the firms' legal fees in exchange for the chapter 7 debtors turning over their vehicles (which the debtors already intended to surrender to the appropriate lien holder) to Sperro. Sperro then transported each vehicle to a state where Sperro's lien would trump the first lien. Ultimately, Sperro would either return the car to the lien holder, or make a profit auctioning the vehicle when the lien holder abandoned the car.

Chapter 7 debtors Timothy and Adrian Williams and chapter 7 debtor Jessica Dawn Scott (and many more) were ensnarled in the defendants' scheme. The U.S. Trustee ("UST") brought adversary proceedings against the attorneys, the law firms, Mr. Fenner, Sperro, and Sperro's affiliates. The UST requested the court (a) disgorge fees from the attorneys and Sperro pursuant to sections 329(a), 105(a), and 329(b); (b) void the Scott fee agreement; (c) enjoin each of the attorneys to prevent potential violations of section 526; (d) issue civil penalties under section 526(c)(5)(B) against the attorneys; (e) issue sanctions against each defendant under the court's inherent powers, including prohibiting the attorneys from practicing law before the bankruptcy court; and (f) disgorge the funds earned by the individuals and entities that profited from Sperro's vehicle repossession scam.

In its methodical analysis, the court reached the following conclusions. First, even though Upright Law, LLC argued that its earlier refund of the debtors' payments mooted the UST's request for the court to disgorge its fees, the court disagreed and instructed the Upright firm to return all of the fees it received to each debtor's estate. The court emphasized the integral connection between disclosures under section 329 and Bankruptcy Rule 2016(b) and the integrity of the bankruptcy process. Next, because the court found that (i) Upright and local counsel were in fact a law firm, and (ii) Ms. Scott already received her discharge (the current adversary caused her case to remain open), the court would not void Scott's agreement with Upright. The court also decided that it would not enjoin the attorneys from violating section 526 because the UST failed to meet the requirements needed for the court to issue the injunction. Further, the court concluded that each of the defendants preyed on some of society's most vulnerable and issued penalties accordingly. The court (a) fined the Chicago law firms and their attorneys $250,000.00, collectively, to be paid to the UST; (b) fined Mr. Chern, the Chicago attorney who coordinated the scam with Mr. Fenner, an additional $50,000.00 to be paid to the UST; (c) fined Mr. Morgan $5,000.00 to be paid to Ms. Scott and suspended him from appearing before the bankruptcy court for 18 months; (d) fined Mr. Delafield $5,000.00 to be paid to Mr. and Mrs. Williams and suspended him from appearing before the bankruptcy court for 12 months; and (e) ordered Sperro to (i) disgorge all funds received from disposing of the debtors' property and from lenders that recovered the debtors' property; and (ii) disclose all clients referred by the Chicago firms, including recovery details, to the UST.

Clean Hands: Do Not Arrange for the Arrest of a Debtor at Court Ordered Mediation

Baek v. Halvorson (In re John Olaf Halvorson), 581 B.R. 610 (Bankr. C.D. Cal. 2018)(Wallace, J.).

Years before Mr. John Halvorson's bankruptcy filing, he was married to Ms. Grace Baek. Grace Baek and her brother, Mr. Richard Baek, owned and operated several businesses. Eventually, Halvorson and the Baeks became business partners. Related or not, the business relationships between Halvorson and the Baeks became strained, and in 2012, Halvorson and Ms. Baek filed for divorce in California. The parties initiated at least five lawsuits in Oregon and California related to their business dealings. During this litigation, Halvorson forged Ms. Baek's name on an amended pre-nuptial agreement, and [Mr. Baek] filed police reports in Oregon against Halvorson for forgery and embezzlement. In 2014, the Baeks made a "final

settlement offer" to resolve the outstanding suits that required Halvorson to (i) sell his mother's home (which she had lived in for more than forty years) to satisfy his debts to the Baeks, and (ii) pay Ms. Baek $4,000.00 per month for five years.

In July 2015, Halvorson sought protection under chapter 7 and received a discharge. Meanwhile, the Baeks filed several adversary proceedings. The Baeks, through their counsel, Mr. Tolliver, followed through with the earlier Oregon police reports; in May 2016, an Oregon grand jury indicted Halvorson for perjury, forgery, identity theft, etc. Mr. Tolliver remained in contact with Oregon Deputy District Attorney Kevin Demer with the goal of arresting Halvorson. The obstacles to arresting Halvorson included (i) the cost of extradition (which the Baeks, through Tolliver, offered to pay), and (ii) the correct type of arrest warrant (which was actually a non-issue). During the course of the adversary proceedings, Judge Wallace directed the parties to mediation before Judge Jury in her chambers. Through multiple emails, calls, and text messages, District Attorney Demer and Mr. Tolliver coordinated Halvorson's arrest by the United States Marshal Service at the courthouse during the court-ordered mediation.

Once the bankruptcy court became aware of Halvorson's arrest at mediation, it raised the "unclean hands doctrine" sua sponte, stayed the adversary proceedings, and permitted parties to take discovery on the issue of whether any mediation party was guilty of unclean hands. Among other things, the discovery brought to light a large volume of communications between Tolliver and District Attorney Demer coordinating Halvorson's arrest. Although the trial was delayed by discovery disputes, including sanctions against Mr. Tolliver for discovery abuse, the Baeks' attempted to dismiss the unclean hands affirmative defense and enter into a settlement with the chapter 7 trustee.

The court found that the direct relationship requirement was satisfied because the misconduct at issue occurred at the court-ordered mediation in the adversary proceedings. In addition, the court gave a detailed history of the need for parties to come to a court of equity, such as the bankruptcy court, with clean hands and keep their hands clean during the litigation. Upon applying the balancing test to the parties involved, the court found the Baeks to have had unclean hands. Thus, the court: (a) dismissed the Baeks' claims against the chapter 7 trustee; (b) dismissed the claims against Halvorson's mother and brother; (c) dismissed the causes of actions against Halvorson's entities; and (d) dismissed all of Ms. Baek's claims against Halvorson in one of the two adversary proceedings, leaving Halvorson's counterclaims against Ms. Baek intact.

II. CONTESTED MATTERS AND OTHER LITIGATION

A. Claim Allowance, Subordination, Lease Rejection, Priority and Lien Disputes

Dirt for Debt Valuation was Properly Handled by the Bankruptcy Court

Bate Land Co LP v. Bate Land & Timber LLC (In re Bate Land & Timber LLC), 877 F.3d 188 (4th Cir. 2017)(Duncan, J.).

The Fourth Circuit (i) reversed the district court's dismissal of the creditor's appeal on equitable mootness, and (ii) affirmed the bankruptcy court's (a) determination of the indubitable equivalent of the creditor's claim in the partial dirt-for-debt plan, and (b) the amount of post-petition interest awarded to the creditor.

In 2006, Bate Land Company ("BLC") sold 79 tracts of land to Bate Land & Timber ("BL&T") for $65 million. When BL&T became unable to pay BLC or renegotiate the outstanding note, it filed for chapter 11 protection in 2013. The debtor's plan proposed a partial dirt-for-debt provision (land plus cash) to satisfy BLC's $13 million claim, the largest secured claim. Because BLC objected that it would not receive full compensation through the proposed plan, the bankruptcy court initiated cramdown proceedings. The bankruptcy court held multiple hearings on the "highest and best use" for the 8 tracts of land the debtor proposed to return to BLC. Both parties provided experts on the use of the tracts for timber production, residential use, and agricultural use, among others. The bankruptcy court's detailed analysis of the experts' testimony noted that the debtor's expert was more credible than BLC's expert. In particular, the court found that BLC's expert made contradictory statements.

The court confirmed the debtor's plan, which satisfied BLC's secured claim of $14.6 million. The claim amount was inclusive of $1.356 million in post-petition interest, which the court had reduced by 266 days based on the court's schedule and BLC's unreasonable delays. The confirmed plan provided that the debtor would return 8 tracts of land, valued at $13.7 million, to BLC and pay approximately $1 million in cash to satisfy BLC's total secured claim. BLC appealed several of the bankruptcy court's orders, including plan confirmation. Twice BLC requested that the district court stay the confirmed plan to prevent substantial consummation, and twice the district court denied the motions. Finding the appeals were equitably moot, the district court dismissed the consolidated appeal. When BLC appealed to the Fourth Circuit, the creditor, again, requested a stay relating to the confirmation order.

The Fourth Circuit found that BLC's appeal should not have been dismissed as equitably moot. The court analyzed all four *Mac Panel* factors, including an assessment that because BLC was the debtor's largest secured creditor and the bankruptcy was essentially a two-party dispute, the other secured creditors would be unaffected if the debtor was required to pay BLC additional amounts (in land or cash) to satisfy the claim at issue. Next, the circuit court rejected BLC's claim that a dirt-for-debt plan can never provide the indubitable equivalent to satisfy a secured claim. The analysis confirmed that a bankruptcy court has the expertise to handle these valuations. The bankruptcy court also properly valued the tracts of land at issue through its extensive factual analysis, including evaluating the credibility of the expert witnesses. Finally, the circuit court upheld the reduction in BLC's post-petition interest amount because the section 506(b) permits a court to consider equitable factors, such as delays, when calculating the amount of interest owed.

Valuations: Consider the Collateral's Post-Petition Use

Hous. Sportsnet Fin., L.L.C. v. Hous. Astros, L.L.C. (In re Hous. Reg'l Sports Network, L.P.), 886 F.3d 523 (5th Cir. 2018)(Owen, J.).

The Fifth Circuit determined that the bankruptcy court properly valued the television station's agreement with Comcast as of the petition date but improperly valued the agreement pursuant to section 506(a) and *Rash*, which requires the court's valuation to consider the post-petition use of the collateral. The circuit court remanded the issue to the bankruptcy court.

In re Hous Reg'l Sports Network, L.P., No. 13-35998, 2018 Bankr. LEXIS 3375 (Bankr. S.D. Tex. Nov. 2, 2018)(Isgur, J.).

On remand, the bankruptcy court considered whether it had discretion to re-open the evidentiary record in order to re-value the agreement in light of the plan. The court provided an opportunity for the parties to brief the issue and held a hearing.

In its analysis, the bankruptcy court emphasized Comcast's request that the circuit court reverse the bankruptcy court's holding; instead, the Fifth Circuit remanded the case. The bankruptcy court also discussed the mandate rule as a corollary of the law of the case doctrine. Because the Fifth Circuit did not specify the method by which the bankruptcy court was to follow its instructions, the bankruptcy court retained its judicial discretion and chose to re-open the record.

Medicaid Payments Cannot be Assigned to a Third Party

In re Assist-Med, Inc., No. 16-31624-H5-11, 2017 Bankr. LEXIS 4062 (Bankr. S.D. Tex. Nov. 27, 2017) (Brown, J.).

The debtor was a home healthcare agency which provided services to its patients and received payments from Medicaid as it sole source of income. The debtor entered into two factoring agreements during the pre-petition period, each with a different factor. Each factor filed a claim in the case. The debtor objected to both claims, alleging each agreement was (i) a usurious loan disguised as a sale of accounts receivable, and (ii) by law, the debtor's Medicaid payments cannot be purchased. The bankruptcy court found that the applicable state law for each factor agreement (Texas and Florida) categorized the relevant factoring agreement contracts as sales - not usurious loans - and, based upon federal statute, determined that the debtor's Medicaid funds could not be assigned to a third party. As such, the factors' contract claims were wholly unsecured.

Separate Conveyances Cannot Establish Horizontal Privity

Sabine Oil & Gas Corp. v. Nordheim Eagle Ford Gathering, LLC (In re Sabine Oil & Gas Corp.), No. 17-1026, 2018 U.S. App. LEXIS 13975 (2d Cir. May 25, 2018)(summary order).

For a real covenant to run with the land under Texas law, it must (1) touch and concern the land, (2) relate to a thing in existence or specifically bind the parties and their assigns, (3) be intended by the original parties to run with the land, and (4) the successor to the burden must have notice. *Inwood N. Homeowners' Ass'n. Inc. v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987)(citation omitted).

The bankruptcy court authorized the rejection of agreements between Nordheim and Sabine Oil and Gas; the district court affirmed. Noredheim appealed the holdings, arguing that the bankruptcy court misconstrued the agreements as "personal obligations" instead of "real covenants that run with the land." If the agreements were in fact "real covenants that run with the land," then the bankruptcy court would have no authority to approve the debtor's rejection of such agreement.

In its analysis, the bankruptcy court concluded that Texas law requires horizontal privity, and the agreement at issue failed to meet the requirement. Nordheim asserted that horizontal privity is established by two agreements-one conveying the pipeline easement and the other conveying a separate parcel land. However, Nordheim was not able to support this proposition. As such, the separate conveyances at issue cannot establish horizontal privity between the parties. The Second Circuit affirmed the district court's holding.

B. Confirmation Disputes

A Timely Section 1111(b) Election Resulted in Secured Claim Entitled to Include Post-Petition Attorneys' Fees

In re Pioneer Carriers, LLC & Transport Dry Freight, LLC, 581 B.R. 809 (Bankr. S.D. Tex. Feb. 8, 2018) (Bohm, J.).

The bankruptcy court held, over the debtor's objection, that the lender, whose original undersecured claim became secured pursuant to timely section 1111(b)(2) election, was entitled to include post-petition attorneys' fees as part of its allowed secured claim.

Several months before the petition date, Equify Financial, LLC extended financing to the debtor, Pioneer Carriers, LLC, in the original principal amount of $389,268.93. The debtor pledged virtually all of its non-real property collateral and executed a promissory note, security agreement, and other relevant documentation. The executed note specifically stated the debtor and its guarantors would be liable for Equify's costs, expenses and reasonable attorneys' fees in enforcing and/or collecting on the note.

Equify timely filed its proof of claim, asserting a bifurcated claim: an unsecured claim of $76,439.96, and the remainder secured by the debtors collateral to the extent of $267,500.00. Prior to the court's hearing on the debtor's disclosure statement, Equify made its section 1111(b)(2) election. Equify also objected to the treatment of its claim under several versions of the debtor's plan, subsequently amending its proof of claim to reflect (i) the section 1111(b)(2) election, and (ii) post-petition attorneys' fees. The debtor argued that Equify's section 1111(b)(2) election did not allow the lender to include attorneys' fees as part of its secured claim.

The court acknowledged that courts are split on this issue and addressed four issues: (i) whether such claims are disallowed under section 506(b); (ii) whether such claims are allowed under section 502(b); (iii) whether such claims are prohibited under *United Sav. Ass'n of Tex. v. Timbers of Inwood Forrest Assocs., Ltd.*, 484 U.S. 365 (1988); and (iv) whether such claims should be disallowed pursuant to public policy. The court concluded that renewing courts should rely on section 502 when evaluating whether a fee claim is made by a wholly unsecured creditor or an undersecured creditor, noting that section 506(b) does not limit attorneys' fees to onlyoversecured creditors. Concerning the post-petition accrual of attorneys' fees, the court emphasized (a) the Code's broad definition of a "claim," which can include contingent rights to payment, and (b) section 502(c)'s allowance for estimation. In its consideration of the *Timbers* argument that the "security cushion" is the only source of post-petition interest, the court contrasted section 502(b)'s lack of bar for such attorneys' fees incurred by Equify. Finally, the court was not persuaded by the public

policy argument that post-petition attorneys' fees should be disallowed. Instead, the court relied on the Code's goal of preserving "nonbankruptcy legal rights except to the extent necessary to facilitate the purpose of the bankruptcy proceeding,"[3] and the lack of bar to post-petition attorneys' fees in section 506(b). As such, the court found Equify's 1111(b)(2) election created a secured claim and entitled the lender to include post-petition attorneys' fees.

C. Post-Confirmation Issues

To Be (Released), or Not To Be (Released)
Kravitz v. Samson Energy Co., LLC (In re Samson Res. Corp.), No. 17-51524 (BLS), 2018 Bankr. LEXIS 2610 (Bankr. D. Del. Aug. 30, 2018)(Shannon, J.).

The long-ago confirmed plan created a trust that would pursue litigation against multiple parties, including previous owners of the debtor, on behalf of the committee. However, when the trustee filed the complaint to recover fraudulent transfers, several defendants filed motions for summary judgment, asserting they fit within the definition of a "released party" under the confirmed plan. Upon a close reading of the confirmed plan and its incorporated documents, the court found that two of the defendants were in fact released parties under the plan and entitled to summary judgment in their favor.

D. Avoidance Actions

Trustee Could Not Prove the Debtor's Property Interest in Funds Following Account Sweeps.
FBI Wind Down Inc. Liquidating Tr. v. Innovative Delivery Sys. (In re FBI Wind Down, Inc.), 581 B.R. 387 (Bankr. D. Del. 2018)(Sontchi, J.).

The bankruptcy court held that transfers were not avoidable under sections 547 or 548 because the debtor's funds were commingled, and the trustee could not trace the transfers. Although the debtor's funds indisputably were swept into the cash aggregation and management account from which the transfers were made, the account was titled to a different entity. Once the funds were swept, the court found no evidence of the debtor's interest in the funds. "[N]o evidence was presented to show that the [t]ransfers were earmarked from TRI deposit accounts, nor does the evidence show that TRI exercised any indicia of control over the funds once the [t]ransfers left the deposit accounts. TRI lost legal title over the funds once they were swept."

Discharged Debtor Filed an Adversary Proceeding to Determine if the Student Loan was Fraudulently Consolidated; Creditor's Motion to Dismiss Failed
Jimenez v. Navient Sols., LLC (In re Jimenez), No. 17-08008, 2017 Bankr. LEXIS 3977 (Bankr. S.D. Tex. Nov. 20, 2017)(Isgur, J.).

After Ms. Nicole Jimenez successfully completed her chapter 13 plan and received her discharge, Navient Solutions, LLC the successor-in-interest to the relevant note, attempted to collect on the debtor's outstanding student loan balance. Through Navient's demand, Ms. Jimenez became aware that her former husband without her knowledge or consent, fraudulently filed a loan application to consolidate his debt with her debt. Ms. Jimenez properly re-opened her case and filed the adversary proceeding, requesting that the court determine (i) the debtors ex-husband fraudulently consolidated both of their student loans under her name, and (ii) Navient, violated the Court's discharge injunction.

Navient's motion to dismiss argued that Ms. Jimenez had not previously discharged the relevant debt through an undue hardship determination, or, alternatively, if the debt was fraudulent and the debtor is not personally liable, then no debt exists for the discharge to attach to. The Court denied Navient's motion to dismiss, allowing the debtor's adversary to proceed.

The court made several findings in resolving the adversary proceeding. First, the court determined that Ms. Jimenez satisfied Rule 8(a)(2)'s pleading requirements by pleading facts that permitted a court to infer that she was entitled relief beyond a speculative level. Next, the court found that Navient violated Ms. Jimenez's discharge injunction. Although Navient was a successor-in-interest, the court found that its

[3] *Qmect, Inc., v. Burlingame Capital Partners II, L.P. (In re Qmect)*, 368 B.R. 882, 886 (Bankr. N.D. Cal 2007).

knowledge of the discharge injunction was imputed because its predecessor received all of the proper notices. Moreover, Navient attempted to collect the amount it believed was outstanding, and the court found that Navient's collection efforts did not qualify under the existing exceptions to discharge. Finally, the court found Navient's arguments for dismissal, which relied on the lack of a previous hardship determination, ignored Ms. Jimenez's complaint, and focused on whether the instant student loan was fraudulently obtained, placing it outside the exception to discharge.

RECENT DEVELOPMENTS IN DISCHARGE AND DISCHARGEABILITY

Domingo v. Portugues-Santana, BAP No. NV-17-1135-BHTa, 2017 WL6601773 (B.A.P. 9th Cir. Dec. 26, 2017) (unpublished) (Sixty-day limitation in Bankruptcy Rule 4007(c) expired when complaint was not timely served under Fed. R. Civ. P. 4(m). Timely service on debtor's attorney but not on debtor was not sufficient. "[T]he bankruptcy court granted [debtor's] Motion to Dismiss under Civil Rule 12(b)(5) for insufficient service of process, because [debtor] had not been served with the summons and complaint within the 120–day period as required under Civil Rule 4(m). The court also granted [debtor's] Motion to Dismiss under Civil Rule 12(b)(6), because the dischargeability complaint failed to state sufficient facts to support a claim under § 523(a)(2)(A). However, the court dismissed the complaint 'with leave to amend' and to allow completion of service of the amended complaint within a reasonable time. The court did not address the fact that the 60–day period within which to file [plaintiff's] complaint under Rule 4007(c) had expired. . . . Granting [plaintiff] leave to amend in this case was reversible error. While a Civil Rule 4(m) dismissal is a dismissal without prejudice, a dismissal 'without prejudice' does not mean 'without consequence.' . . . 'The "without prejudice" condition permits a plaintiff to refile the complaint as if it had never been filed.' . . . A Civil Rule 4(m) dismissal does not, however, give the plaintiff the right to refile without the consequence of time defenses, such as the statute of limitations. . . . A plaintiff is precluded from refiling a case that was dismissed without prejudice for failure to perfect service of process where the statute of limitations has run, even if the dismissal was without prejudice. . . . The 60–day statute of limitations under Rule 4007(c) was tolled when [plaintiff] filed his original complaint . . . . However, once his complaint was dismissed under Civil Rule 12(b)(5) for failure to comply with the service requirements of Civil Rule 4(m), it was as though the original complaint had never been filed and the statute of limitations ran[.]").

McDermott v. St. George (In re St. George), Nos. 16–8017/8018, 2017 WL 1379321 (B.A.P. 6th Cir. Apr. 17, 2017) (United States Trustee's second request for additional 75-days to file a complaint objecting to discharge should have been denied when UST failed to exercise diligence. "'[E]xtensions of the deadline to challenge a debtor's discharge should be rarely granted and . . . cause for such a request should be narrowly construed. . . .' . . . . [Here], the key factor is the UST's failure to exercise diligence. . . . The UST attended the meeting of creditors and questioned the debtor extensively. The meeting of creditors was adjourned based on the trustee's need for additional documentation to be provided. . . . The UST's first motion for additional time was filed . . . , presumably because the UST was [ ] waiting on the production of these documents. The second motion for additional time was filed four days before the first extension

deadline or 116 days after the initial meeting of creditors. It was at this time that the UST filed its 2004 examination motion as well. The UST provided no definitive explanation why no action occurred during the first extension of 60 days. . . . [T]he UST failed to explain why nothing was done during the 29 days between the second motion for additional time and the date of the hearing. . . . [T]he UST did not present any evidence to support the second request to extend the deadline, even though it was the UST's burden to defend against the debtor's objection and to show cause for the request.").

Saenz v. Gomez (In re Saenz), 899 F.3d 384 (5th Cir. Aug. 7, 2018) (Finding that "all parties consented to the bankruptcy court's issuance of the final judgment" that liquidated a state law claim that was excepted from discharge, Fifth Circuit declined to address *Stern* issues or the bankruptcy court's constitutional authority. "The Supreme Court has recognized 'allowing bankruptcy litigants to waive the right to Article III adjudication of *Stern* claims does not usurp the constitutional prerogatives of Article III courts.' . . . Such consent may be either express or implied, so long as it is knowing and voluntary; the determination whether a party consented to the bankruptcy court's jurisdiction requires 'a deeply factbound analysis of the procedural history' in the proceeding. . . . The bankruptcy court undertook that analysis, relying on facts such as Appellants' (1) submission of a pre-trial statement in which they listed no jurisdictional issues; (2) representation by experienced bankruptcy counsel; and (3) voluntary participation in the proceedings, including seeking affirmative relief by filing Rule12(b)(6) motions and not expressing any limitations on its consent throughout the trial. We . . . find no error in the conclusion that all parties gave implied consent, thus vesting the bankruptcy court with jurisdiction to issue a final judgment.").

Selenberg v. Bates (In re Selenberg), 856 F.3d 393 (5th Cir. May 8, 2017) (Promissory note given by debtor/attorney to former client that induced client not to file malpractice action was an "extension of credit" for purposes of § 523(a)(2)(A). "'[A]n extension, within the meaning of § 523(a)(2), is "an indulgence by a creditor giving his debtor further time to pay an existing debt."' . . . [T]he Bankruptcy Code 'protects the creditor who is deceived into forbearing collection efforts.' . . . [T]he promissory note that [debtor] executed had its intended effect of giving [debtor] more time to pay. . . . [Debtor] gave [plaintiff] the promissory note in order to induce her to forego any attempts to pursue a malpractice claim against him. . . . [Debtor] received an extension of credit from [plaintiff] when she agreed to accept the promissory note.").

Bennett v. Lindsey (In re Lindsey), No. 17-50746, 2018 WL 3409995 (5th Cir. July 11, 2018) (per curiam) (Allegations of fraud in § 523(a)(2) complaint were insufficient to meet heightened pleading requirement under Fed. R. Civ. P. 9(b); denial of motion for leave to amend was not an

abuse of discretion. Rule 9(b) requires "that a plaintiff allege 'the nature of the fraud, some details, a brief sketch of how the fraudulent scheme operated, when and where it occurred, and the participants.' . . . [P]laintiff must lay out 'the who, what, when, where, and how' of the alleged fraud. . . . [P]laintiff must allege 'more than an unadorned, the defendant-unlawfully-harmed-me accusation.' . . . '"[N]aked assertion[s]" devoid of "further factual enhancement"' do not suffice. . . . [Plaintiff's] averment that [debtor] 'falsely swore . . . that each [subcontractor] had been paid in full . . . when in fact other persons were still owed . . .' does not adequately explain how [debtor's] fraudulent scheme operated to the detriment of [plaintiff]. [Plaintiff's] barebones assertion, made without any explanation for his belief that certain subcontractors were not paid, or, more importantly, any explanation of how [debtor's] actions harmed [plaintiff], is conclusory. . . . [Plaintiff] alleged only that he 'relied upon the false misrepresentations . . . and as a proximate result ha[s] sustained injuries.' [Plaintiff's] complaint does not meet the heightened pleading requirements of Rule 9(b) and Bankruptcy Rule 7009; therefore, dismissal under Rule 12(b)(6) was proper.").

Lamar, Archer & Cofrin, LLP v. Appling, ___ U.S. ___, 138 S. Ct. 1752, 201 L. Ed. 2d 102 (June4, 2018) (Statement about value or availability of a single asset can be a "statement . . . respecting the debtor's . . . financial condition" within meaning of § 523(a)(2)(B) which must be in writing to be excepted from discharge. "This case is about what constitutes a 'statement respecting the debtor's financial condition.' Does a statement about a single asset qualify, or must the statement be about the debtor's overall financial status? The answer matters to the parties because the false statements at issue concerned a single asset and were made orally. So, if the single-asset statements here qualify as 'respecting the debtor's financial condition,' § 523(a)(2)(B) poses no bar to discharge because they were not made in writing. If, however, the statements fall into the more general category of 'false pretenses, . . . false representation, or actual fraud,' § 523(a)(2)(A), for which there is no writing requirement, the associated debt will be deemed nondischargeable. The statutory language makes plain that a statement about a single asset can be a 'statement respecting the debtor's financial condition.' If that statement is not in writing, then, the associated debt may be discharged, even if the statement was false. . . . [A] statement is 'respecting' a debtor's financial condition if it has a direct relation to or impact on the debtor's overall financial status. A single asset has a direct relation to and impact on aggregate financial condition, so a statement about a single asset bears on a debtor's overall financial condition and can help indicate whether a debtor is solvent or insolvent, able to repay a given debt or not. Naturally, then, a statement about a single asset can be a 'statement respecting the debtor's financial condition.'").

Haler v. Boyington Capital Grp., L.L.C (In re Haler), No. 17-40229, 2017 WL 6729967 (5th Cir. Dec. 29, 2017) (per curaim) (unpublished) (Oral statements that corporation was in "'very fine legally [sic] financial shape'" and had "'plenty of cash to operate [the] business'" were statements respecting financial condition that had to be in writing under § 523(a)(2)(B). "The phrase 'statement respecting . . . financial condition' appears in subsections (A) and (B) of 11 U.S.C. § 523(a)(2) . . . . Section 523(a)(2)(A) generally renders debt obtained by false pretenses, false representations, or actual fraud non-dischargeable. . . . But it contains an exception: if the debt is obtained by a false oral statement respecting financial condition, then it is dischargeable. . . . In contrast, a false written statement respecting financial condition is non-dischargeable under § 523(a)(2)(B) . . . . In [*Bandi v. Becnel (In re Bandi)*, 683 F.3d 671 (5th Cir. 2012)], we held that statements respecting financial condition are 'those that purport to present a picture of the debtor's overall financial health.' . . . A representation regarding a specific asset 'says nothing about the overall financial condition of the person making the representation or the ability to repay debt.' . . . 'Ownership of specific assets does not mean that the assets are unencumbered or that other debts or liabilities of the owner do not exceed the value of the assets.' . . . [Debtor's] representations were general and intimated that the overall value of [the corporation's] property and income was greater than its debt and liabilities. . . . [Debtor'] statements represented that [the corporation] was overall financially sound. These oral representations were 'statement[s] respecting . . . financial condition' and thus did not render the debt non-dischargeable under § 523(a)(2)(A).").

Cowin v. Countrywide Home Loans, Inc. (In re Cowin), 864 F.3d 344 (5th Cir. July 18, 2017) (Scheme to unlawfully deprive mortgage holders of excess foreclosure sale proceeds through use of tax transfer liens was nondischargeable larceny under § 523(a)(4); actions of co-conspirators were attributed to debtor for § 523(a)(4) purposes. "Under Texas law, after a foreclosure sale, tax- transfer liens take priority, junior liens are extinguished, and any excess funds are paid to the junior lienholders in seniority order. . . . [D]eeds of trust, which [debtor] prepared, omitted language requiring the Trustee to distribute 'any amounts required by law to be paid before payment to Grantor.' By omitting this language, the . . . [debtor] intended to divert the excess proceeds from the foreclosure sales away from the preexisting mortgage holders and to entities controlled by a co-conspirator. . . . [T]he intent and actions of [debtor's] co-conspirators is sufficient to support nondischargeability under § 523(a)(4). . . . Section 523(a)(4) excepts from discharge debts 'for . . . larceny.' The text adds no further criteria or qualifications. Like § 523(a)(2), a plain reading of the provision is that a debtor cannot discharge a debt that arises from larceny so long as the debtor is liable to the creditor for the larceny. . . . It is the character of the debt rather than the character of the debtor that determines whether the debt is

nondischargeable under § 523(a)(4). . . . [Debtor] does not challenge the bankruptcy court's findings that he participated in the civil conspiracy to deprive Countrywide of excess proceeds from foreclosure sales or that he owes Countrywide a debt stemming from the resulting state law violations. Nor does [debtor] dispute the court's conclusion that together, [debtor] and his co-conspirators committed illegal acts constituting 'larceny' within the meaning of § 523(a)(4). . . . [Debtor's] debts to the Countrywide Plaintiffs . . . 'arise' from larceny and are nondischargeable in bankruptcy.").

Goudelock v. Sixty-01 Ass'n of Apartment Owners, 895 F.3d 633 (9th Cir. July 10, 2018) (Postpetition association fees and assessments are prepetition debts that are dischargeable in a Chapter 13 case at completion of payments under § 1328(a). "Congress' decision not to add post-petition association assessments [under 11 U.S.C. § 523(a)(16)] to the exceptions listed in Section 1328(a) was purposeful. . . . This is not a case implicating a drafting error or a Congressional oversight. Rather, it is an instance where Congress confronted an issue of policy, and spoke by creating explicit exceptions to discharge in Section 1328(a) but did not include (as it did for other chapters) post-petition [condominium association] assessments . . . .").

Weil v. Elliott, 859 F.3d 812 (9th Cir. June 14, 2017) (Complaint to revoke discharge based on fraudulent concealment of house, filed 15 months after discharge, should not have been dismissed by BAP because one-year filing deadline in 11 U.S.C. § 727(e)(1) is nonjurisdictional claim processing rule and debtor waived the defense by failing to plead the limitation. "The time limit imposed by § 727(e)(1) is not a 'jurisdictional' constraint. It is an ordinary, run-of-the-mill statute of limitations, specifying the time within which a particular type of action must be filed. . . . A non-jurisdictional time bar is an affirmative defense that may be forfeited if not timely raised, and [debtor] forfeited the defense by failing to raise it in the bankruptcy court.").

Fitzhugh v. Birdsell (In re Fitzhugh), BAP No. AZ–17–1141–BLKu, 2018 WL 1789596 (B.A.P. 9th Cir. Apr. 13, 2018) (unpublished) (When trustee did not seek extension of time as permitted by 2011 amendment to Bankruptcy Rule 4004(b), trustee had to prove he was unaware of the alleged fraud at the time the discharge was entered to revoke discharge under § 727(d)(1) or (d)(2). "The bankruptcy court revoked [debtor's] discharge under § 727(d)(1) for his intentional failure to disclose assets and pending litigation, which could support a denial of discharge claim under § 727(a)(4) if the elements are met, and is a proper basis to revoke discharge under § 727(d)(1). The court revoked [debtor's] discharge under § 727(d)(2) for his knowing and fraudulent failure to report the [contingency claim] to Trustee, which could support a claim under § 727(d)(2). . . . [T]he court erred in applying the elements of § 727(d)(1) and (d)(2). Trustee had to also prove, under both statutes, that he was unaware of the alleged fraud at

the time the discharge was entered. . . . The bankruptcy court applied the objection to discharge bar date . . . as the relevant date for revoking [debtor's] discharge under § 727(d)(1) and (d)(2), not the entry of discharge date . . . . The record shows that Trustee knew about [most if not all of the undisclosed claims before discharge was entered]. At oral argument before the Panel, Trustee seemed unaware that he could have sought an extension of time to object to [debtor's] discharge under Rule 4004 . . . even though the time for filing a [discharge] complaint had expired . . . . In 2011, Rule 4004(b) was amended to allow a party to request an extension of time to object to discharge after the time for objection has expired and before discharge is granted, if (A) the objection is based on facts that, if learned after the discharge, would provide a basis for revocation under § 727(d), and (B) the movant did not have knowledge of those facts in time to permit an objection. . . . The motion is to be filed promptly after the movant discovers the facts on which the objection is based. [ ] The 2011 amendment eliminated what was known as the 'gap period'—the time between the expiration of the time to object to discharge and the actual entry of discharge. Under former Rule 4004, any requests for extensions of time to object to discharge had to be made before the bar date. Thus, if a party did not learn of the debtor's fraudulent conduct until after the bar date, but before the discharge was entered, the party was precluded from bringing a § 727(d) complaint. . . . With the 2011 amendment to Rule 4004, . . . , the party must now utilize Rule 4004(b)(2) and obtain an extension of time to object to discharge or risk losing the ability to bring a complaint under § 727(d)(1) or (d)(2).").

IRS v. Murphy, 892 F.3d 29 (1st Cir. June 7, 2018) (per curiam) (IRS's good faith belief that it has a right to collect a discharged debt is not relevant to determining whether it "willfully violated" the discharge order. "The IRS argues it does not 'willfully violate' an automatic stay or discharge order if it has a good faith belief that its actions do not violate the bankruptcy court's order. . . . Section 7433(e) provides that: 'If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service willfully violates any provision of section 362 (relating to automatic stay) or 524 (relating to effect of discharge) of title 11, United States Code (or any successor provision), . . . such taxpayer may petition the bankruptcy court to recover damages against the United States.'" . . . Section 7433(e) directly links the phrase 'willfully violates' to two pre-existing sections of the Bankruptcy Code: section 362, which addresses automatic stays, and section 524, which addresses discharges and discharge orders. . . . [W]e find the phrase 'willful violation' had an established meaning in the context of violations of automatic stays as of 1998: a creditor willfully violated the automatic stay if it knew of the automatic stay and took an intentional action that violated the automatic stay. A good faith belief in a right to the property was not relevant to determining whether the creditor's violation was willful. . . . [W]e find that when Congress enacted § 7433(e), it sought to

apply the same generally accepted standard to violations of both automatic stays and discharge orders. . . . and that Congress used that established meaning in § 7433(e) to set the standard for evaluating violations of both automatic stays and discharge orders. . . . The IRS remains free to 'wait until the bankruptcy discharge is invoked as a defense to its collection efforts, and then prove a factual basis for the tax fraud exception in the collection proceedings.' . . . [W]e believe compelling policy justifications, embodied in § 7433(e), weigh against allowing the IRS to attempt to collect purportedly discharged debts without facing potential consequences. . . . Congress enacted § 7433(e) to protect taxpayers who invoked the bankruptcy process, providing them with a means of recovering damages if an employee of the IRS willfully violates either the automatic stay or the discharge order, the two foundational orders of the bankruptcy process.").

Lorensen v. Taggart (In re Taggart), 888 F.3d 438 (9th Cir. Apr. 23, 2018) (Good faith belief that discharge injunction did not apply—even if unreasonable—precluded award of contempt sanctions against creditor for violation of discharge injunction. "[B]ankruptcy court may hold a party in contempt for knowingly violating the discharge injunction. . . . '[T]o justify sanctions, the movant must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction.' . . . To satisfy the first prong, knowledge of the applicability of the injunction must be proved as a matter of fact and may not be inferred simply because the creditor knew of the bankruptcy proceeding. . . . [T]he creditor's good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable. . . . [Here] the Creditors possessed a good faith belief that the discharge injunction did not apply to their claims based on their contention that [debtor] had 'returned to the fray[]' . . . . [T]he Creditors relied on the state court's judgment that the discharge injunction did not apply to their claim for post-petition attorneys' fees. Although the Creditors . . . were ultimately incorrect, their good faith belief, even if unreasonable, insulated them from a finding of contempt.").

RECENT DEVELOPMENTS IN CONSUMER BANKRUPTCY 2018

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MISCELLANEOUS

***In re Marquez*, 2017 WL 5438306 (Bankr. W.D. Tex. Nov. 13, 2017)**. *Pursuant to §521(a)(2), debtors must select between surrender, redemption, and reaffirmation; there is no "ride through" option.* Chapter 7 debtors filed a statement of intent indicating that they intended to retain a mobile home and continue making payments without reaffirming. Secured lender sent reaffirmation agreement to debtors, but debtors refused to sign. Secured lender moved the court to compel the debtors to make a selection under §521(a)(2) to either surrender, redeem, or reaffirm their debt on the mobile home. The court found that post-BAPCPA there is no "ride-through" option and that the debtors were limited to choosing between surrender, redemption, and reaffirmation.

***Haynes v. Wells Fargo Bank, N.A. et al*, 208CV00183RWSRSP, 2017 WL 5895160 (E.D. Tex. Oct. 30, 2017), report and recommendation adopted sub nom. *Haynes v. Wells Fargo Bank*, N.A., 208CV00183RWSRSP, 2017 WL 5890050 (E.D. Tex. Nov. 29, 2017)**. *Class certification denied with respect to claims that mortgage holder assessed fees and costs in violation of Rule 2016(a) and § 506.* Chapter 13 debtor's plan included provisions to pay mortgage arrearages. After successful completion of plan, mortgage holder sent default notices claiming debtor was in default based upon undisclosed fees assessed during the Chapter 13 case. Debtor sought class certification in lawsuit claiming FDCPA violations related to the mortgage holders failure to comply with Rule 2016(a). The court denied class certification, holding that the predominance and superiority requirements of Rule 23(b)(3) were not met because Rule 2016(a) had not been uniformly applied nationally and that the implementation of Rule 3002.1 meant that most of the proposed class members were individuals who did not face further harm from the mortgage holder's actions.

***Matter of JFK Capital Holdings*, L.L.C, 16-31151, 2018 WL 564371 (5th Cir. Jan. 26, 2018)**. *Absent extraordinary circumstances, the commissions for Chapter 7 trustee's governed by Section 326 are presumptively reasonable compensation not to be subject to downward adjustment*. In a Chapter 7 case that had seen many contested issues, objection was made to the trustee's fee application. Applying Section 330 and 326, the Circuit held that the commission percentages reflected in Section 326(a) are presumptively reasonable and that only under "extraordinary circumstances" could that compensation scheme be altered.

***Carmona v. Carmona (In re Carmona)*, 16-50155, 2018 WL 889358 (Bankr. S.D. Tex. Jan. 19, 2018)**. *Foreign judgment will not be recognized when it contradicts resolution provided by divorce decree that was entered previously.* Debtor and ex-wife were involved in long-running dispute that included cross-border issues. As part of the their divorce, the former spouses had entered into a mediated settlement agreement that purported to settle all disputes between them. After the divorce decree (which incorporated the mediated settlement agreement) was entered, the debtor sued his ex-wife in Mexico for claims that had been raised during the divorce proceedings. The debtor obtained judgments in Mexico, subsequently filing for Chapter 11. The ex-wife brought an adversary seeking a nondischargeability determination as to certain amounts owed

under the divorce decree and the debtor sought to enforce the Mexican judgments against his ex-wife. The ex-wife moved for non-recognition of the Mexican judgments under the Texas Recognition Act (Tex. Civ. Prac. & Rem. Code § 36A). Because the Mexican judgments dealt exclusively with issues that the bankruptcy court found had been resolved in the divorce proceedings, the court declined to recognize them on the grounds that to do so would violate Texas public policy and would conflict with the previously entered divorce decree.

***In re Parson*, 15-30080-BJH, 2018 WL 1452295 (Bankr. N.D. Tex. Mar. 22, 2018)**. *Debtor will not be entitled to relief where automatic stay terminates because debtor fails to show court that mortgage payments required pursuant to agreed order on mortgage lender's motion for relief from stay*. Debtor entered into agreed order with mortgage lender which required debtor to timely make certain payments and file with the court proofs of such payment, with the automatic stay terminating automatically if debtor failed to do so. Debtor subsequently failed to do so, but then filed objection to mortgage lender's notice of termination of automatic stay and requested that the automatic stay be reinstated, as well as multiple other pro se requests aimed at punishing the mortgage lender. The bankruptcy court granted debtor various extensions prior to hearing, but debtor failed to file proof of payment and bankruptcy court subsequently denied the request to reinstate and formally cautioned the debtor to avoid filing any pleadings in violation of Rule 9011.

***In re Rucker*, 17-04552-NPO, 2018 WL 3244458 (Bankr. S.D. Miss. July 3, 2018)**. *Valuation of manufactured home does not need to be location specific as mobility of home allows it to be moved to different markets*. Chapter 13 debtor listed her manufactured home as having value substantially below what she owed on the note and moved for valuation and lien avoidance. The appraiser for the debtor emphasized that his appraisal reflected only what the home could sell for in the geographic location where it was located, while the appraiser for the lender focused on an appraisal that was not location-specific. Applying 11 U.S.C. § 506(a) and leaning heavily on the NAS's NADA guide's methodology, the court concluded that manufactured homes are more like vehicles than real property on account their mobility and found the valuation to be closer to the lender's than the debtor's.

***In re Calvillo*, 96-55458-RBK, 2018 WL 2425967 (Bankr. W.D. Tex. May 24, 2018)**. *Renewal of judgment will be denied where judgment went dormant and was not revived within the timeframe required under statute*. Plaintiff obtained judgement of nondischargeability in 1998 and a writ of execution issued in 2008, at which time the plaintiff also obtained an order renewing the judgment. In 2018, plaintiff filed another application to renew judgment, but failed to present sufficient evidence that the writ of execution had been delivered to an appropriate officer for enforcement. Applying Fed. R. Civ. P. 69(a)(1) and Texas law regarding writs of execution and dormancy of judgments, the bankruptcy court held that the failure to deliver the writ of execution to an officer for enforcement meant that the judgment went dormant in 2008 and could only have been revived within two years of going dormant. Accordingly, the application to renew judgment was denied.

***In re Osborn*, 1602016EE, 2018 WL 2754488 (Bankr. S.D. Miss. June 6, 2018)**. *Chapter 7 trustee's Rule 9019 application will be denied where court determines that value of settlement is substantially lower than the value of the asset being disposed of by the proposed settlement*. Pre-petition, debtor discovered that her purported marriage to her current husband was invalid because she had never finalized her divorce from her prior husband. Debtor and her almost-husband ultimately had a falling out and multiple state court lawsuits followed. Post-petition, Chapter 7 trustee filed Rule 9019 application to compromise adversary proceeding against the almost-husband over ownership and a Section 363(h) sale of house in which debtor and almost-husband had lived. The debtor objected and presented a competing appraisal and testimony to that which the Trustee entered into evidence. The court concluded that the debtor's appraisal, which was substantially higher than the trustee's, was the accurate appraisal and that the Trustee's proposed settlement (which was based on his lower appraisal) was therefore not fair and equitable and in the best interests of the estate. Accordingly, the court denied the Rule 9019 application.

LIENS

***Viegelahn v. Randolph Brooks Federal Credit Union (In re Guiles)*, 15-52742-CAG, 2017 WL 4570704 (Bankr. W.D. Tex. Oct. 12, 2017)**. *When a lien is initially noted on a title, the payment of one loan through later-issued funds from the lienholder does not extinguish the security interest or require re-notation of the lienholder's interest on the title.* Debtor took out loan from credit union ("CU") secured by truck; the security agreement contained a future advances clause. CU noted its security interest on the certificate of title. Four years later, debtor took out second loan from CU, again secured by truck but using portion of loan to pay off original loan from CU. CU did not change the lien date on the certificate of title. Chapter 13 trustee brought adversary proceeding under § 544 seeking ruling that lien on automobile was invalid on basis that first indebtedness had been extinguished at the time of the second loan and CU failed to perfect "new" security interest. The court rejected the CU's argument that the avoidance action should be disallowed because it would harm the debtor finding that no such balancing test existed; however, the court found that the second loan constituted a future advance under the security agreement and that the CU's security interest therefore remained perfected.

***Wilmington Savings Fund Society v. Garza (In re Garza)*, 15-80446, 2017 WL 5197857 (Bankr. S.D. Tex. Nov. 9, 2017)**. *Abandonment of acceleration of mortgage stops clock on limitations period for foreclosure and release of lien can be rescinded where debtors indisputably have not paid off debt.* Debtors argued that mortgage holder had accelerated the note more than four years prior without foreclosing and therefore were barred by statute of limitation from foreclosing (Tex. Civ. Prac. & Rem. Code § 16.035(a)) and that release issued by mortgage holder's predecessor in interest was binding as to the mortgage holder. Mortgage holder argued that several actions it had taken subsequent to acceleration had served as abandonment of the acceleration, including a letter informing the debtors that the mortgage holder intended to accelerate but demanding only the

default amounts (not the entire allegedly accelerated amounts), and requested that the release issued by its predecessor in interest be deemed rescinded. The court held that the mortgage holder had established abandonment of the acceleration and that the release would be rescinded because the debtors' had failed to present any evidence that they were no longer obligated to repay the purchase money on their home.

***In re Dahlin*, 16-36169, 2018 WL 1162533 (Bankr. S.D. Tex. Mar. 1, 2018)**. *Failure to have notice filing in the deed records can be fatal to attempt to claim equitable subrogation of lien where the original lien holder filed a release of lien.* Pre-petition, defendants had agreed to pay off the debtor's existing mortgage and expected to be subrogated to the lien rights of the mortgage holder. The mortgage holder filed a release of lien and the debtor was not responsive to the defendants' efforts to get her to provide them with a deed of trust. The home burned down and then immediately after giving the defendants a deed of trust (and before that deed of trust could be filed) the debtor filed for bankruptcy and claimed the insurance proceeds as her homestead exemption. The Chapter 7 trustee brought an adversary against the defendants seeking to avoid the lien under Section 544 and preserve it for the benefit of the estate under Section 550. The bankruptcy court rejected the defendants' argument that they were equitably subrogated to the lien rights of the mortgage holder because the mortgage holder had filed a release of lien and at the time of the filing of the bankruptcy petition there was nothing in the deed records to put the hypothetical bona fide purchaser on notice of the defendants' claimed interest in the property.

***In re Ramos*, 4:17-CV-1002-A, 2018 WL 2103218 (N.D. Tex. May 4, 2018)**. *Partial payment of a mortgage debt does not constitute acknowledgment such as will enable a mortgageholder to pursue foreclosure outside the limitation period for enforcing a mature note*. Debtor initiated adversary seeking to avoid mortgage lien based on failure by mortgage holder to enforce a note that had matured more than four years prior. Mortgage holder argued that debtor had acknowledged the debt by continuing to make monthly payments post-maturity and by including the mortgage holder as a secured creditor in her schedules. The bankruptcy court ruled for the debtor, and the mortgage holder appealed the determination that the debtor had not acknowledged the debt. On appeal, the district court held that under Texas law partial payment of a debt does not constitute acknowledgment and that the mere listing of a creditor in bankruptcy schedules cannot constitute acknowledgment.

***In re Crymes*, 2018 WL 4006320 (Bankr. N.D. Tex. 2018).** *Failure to file a proof of claim in a bankruptcy case does not void the lien.* The Chapter 13 Debtor filed a complaint against his mortgage company, seeking determination of the validity, priority and extent of the lien. The court granted the Defendants' motion to dismiss the complaint, finding that the complaint did not allege facts to support a violation of RICO, failed to state a claim for "lack of standing to foreclose," Section 506(d)(2) specifically excepts Defendants' asserted lien from the Debtor's avoidance claim and the Debtor had no claim for damages or sanctions. Failure to file a claim in the bankruptcy proceeding is not a basis for lien avoidance.

EXEMPTIONS – STATE

***Matter of DeBerry*, 17-50315, 2018 WL 1178353 (5th Cir. Mar. 7, 2018)**. *Snapshot rule preserves exempt status of proceeds from post-petition sale of homestead.* Seven months after filing Chapter 7 bankruptcy, debtor obtained authorization from the bankruptcy court to sell his homestead. When debtor did not reinvest the proceeds in a new homestead within six months, the Chapter 7 trustee sought to invoke Tex. Prop. Code § 41.001(c)'s six-month rule requiring homestead proceeds to be reinvested in new homestead or else lose their exempt (under state law) status). On appeal, the Circuit Court found that the analysis applied in *Hawk v. Enhelhart (In re Hawk)*, 871 F.3d 287 (5th Cir. 2017) to funds withdrawn from exempted retirement accounts post-petition likewise applied to homesteads sold post-petition and that therefore proceeds from homestead sold after the filing of a Chapter 7 bankruptcy remain exempted from the bankruptcy estate regardless of whether they are reinvested in a new homestead.

***In re Clark*, 17-51130-CAG, 2017 WL 5505135 (Bankr. W.D. Tex. Nov. 13, 2017)**. *Baseball cards and collectibles do not qualify for "home furnishings" exemption under Tex. Prop. Code § 42.002(a)(1).* Debtors had previously filed four Chapter 13 cases that were dismissed and one Chapter 7 case in which they received a discharge, claiming baseball cards and Nascar collectibles as exempt home furnishings under Tex. Prop. Code § 42.002(a)(1) and drawing no objections. Debtors filed another Chapter 13 case and the trustee objected to the exemption of the baseball cards and Nascar collectibles as home furnishings; debtors argued that res judicata precluded the trustee from objecting. The bankruptcy court found that res judicata did not apply because the Chapter 13 cases had been dismissed and because the Chapter 13 trustee had not been a party to the Chapter 7 case. Looking to dictionary definitions of "collectible", the court concluded that collectibles do not qualify as "home furnishings" and granted the trustee's objection to the exemptions.

***In re Haynes*, 17-70113-HDH13, 2017 WL 7050635 (Bankr. N.D. Tex. Dec. 26, 2017)**. *Unless otherwise stated in the Texas Property Code, the Texas exemptions do not apply on a per-debtor basis when couple files jointly.* Joint Chapter 13 debtors claimed four firearms as exempt under Texas Property Code section 42.002 (a)(7), which allows a debtor to claim two firearms as exempt. The bankruptcy court held that the exemptions were designed to be applied to both individual debtors and joints debtors rather than on a per-debtor basis, and that therefore the joint debtors could only claim as exempt a combined total of two firearms.

***In re Westen*, 17-40030, 2018 WL 1174888 (Bankr. E.D. Tex. Mar. 5, 2018)**. *Artwork that is actually used to furnish a home can qualify as exempt home furnishings under Tex. Prop. Code § 42.001(a).* Chapter 7 debtors claimed certain artwork as exempt home furnishings under Texas Property Code § 42.001(a). The trustee objected to the exemption and in the alternative alleged that the value of the artwork exceeded the $100,000.00 statutory cap for home furnishings. The bankruptcy court concluded that

artwork can qualify under state-law as exempt home furnishings if it is actually used to furnish the debtors' home.

***Matter of DeBerry*, 17-50315, 2018 WL 1178353 (5th Cir. Mar. 7, 2018)**. *Snapshot rule preserves exempt status of proceeds from post-petition sale of homestead.* Seven months after filing Chapter 7 bankruptcy, debtor obtained authorization from the bankruptcy court to sell his homestead. When debtor did not reinvest the proceeds in a new homestead within six months, the Chapter 7 trustee sought to invoke Tex. Prop. Code § 41.001(c)'s six-month rule requiring homestead proceeds to be reinvested in new homestead or else lose their exempt (under state law) status). On appeal, the Circuit Court found that the analysis applied in *Hawk v. Enhelhart (In re Hawk)*, 871 F.3d 287 (5th Cir. 2017) to funds withdrawn from exempted retirement accounts post-petition likewise applied to homesteads sold post-petition and that therefore proceeds from homestead sold after the filing of a Chapter 7 bankruptcy remain exempted from the bankruptcy estate regardless of whether they are reinvested in a new homestead.

***In re Terrill*, 17-60087-RLJ7, 2018 WL 3025399 (Bankr. N.D. Tex. June 15, 2018)**. *Debtor will not be limited to homestead based upon designations made for state tax purposes*. At the time of filing his bankruptcy petition, debtor had designated in the county records two acres as his homestead (out of an 88 acre tract) for purposes of tax relief under the Texas Tax Code. In bankruptcy, the debtor claimed the full 88 acre tract as his exempt homestead and a creditor objected on the grounds that the debtor should be limited to the two acres he claimed in the county tax records. The bankruptcy court held that homestead designations made for state tax purposes are not dispositive of whether rural property constitutes a debtor's constitutional homestead.

COMMENCEMENT OF CASE-VOLUNTARY-INVOLUNTARY-SUBSTANTIAL ABUSE

***Janvey v. Romero*, 883 F.3d 406 (4th Cir. 2018)**. *Fact that debtor has substantial assets does not necessarily indicate bad faith where assets are mostly exempt.* Largest creditor of individual sought to have Chapter 7 petition dismissed under Section 707(a), arguing that the debtor had acted in bad faith by filing 1) because it was done primarily to avoid a judgment obtained by that creditor, 2) because pre-petition efforts by the debtor to settle that creditor's claim betrayed his bad faith motive, and 3) because the debtor had substantial assets and an ability to pay the creditor's judgment. The circuit court held that each of those points could be part of a bad faith analysis, but that no single one of them could be the basis for a per se test. Noting that the debtor's assets were mostly exempt, the court in particular rejected the notion that the debtor should be required to use his substantial assets to pay the judgment concluding that doing so would undercut the concept of exemptions and eviscerate the notion of a fresh start.

***In re Petty*, 18-40258, 2018 WL 1956187 (Bankr. E.D. Tex. April 24, 2018)**. *Debtor cannot exclude student loan debts from their calculation of unsecured debt for purposes of determining eligibility for Chapter 13*. Chapter 13 debtors argued that they should be allowed to exclude their large student loan debts from the calculation of their unsecured debt under Section 109(e) for purposes of determining eligibility to file Chapter 13, and

the alternative that failure to meet eligibility requirement did not require dismissal of case. The court rejected both arguments based on the plain language of the Bankruptcy Code and based on the debtors' ineligibility found cause for conversion or dismissal under Section 1307(c).

***In re: Richard Edward Hunt, Alleged Debtor*, 18-10802, 2018 WL 3586712 (Bankr. E.D. La. July 24, 2018)**. *Court will not award punitive damages against filer of improper involuntary bankruptcy where filer was child support creditor proceeding pro se*. Ex-wife filed as sole petitioner involuntary petition against ex-husband alleging debtors primarily associated with child support. The alleged debtor disputed that the third element of 11U.S.C. 303(b)(2) was met by asserting that ex-wife did not have a non-contingent, liquidated, and not subject to bona fide dispute claim of at least $15,775.00. After taking evidence, the court agreed. Alleged debtor moved for punitive damages under Section 303(i)(1), but the court declined to grant on account of the ex-wife having had close to the $15,775.00 claim required, having been unrepresented by counsel, and having received only a tiny portion of the child support owed her in the past four years.

***In re Hernandez*, 17-10473, 2018 WL 3054765 (Bankr. S.D. Tex. June 18, 2018)**. *Rent expenses are not mortgage debts that must be included on line 9b of the Means Test*. Chapter 13 debtor did not include his rent expense in line 9b of the Means Test. The court sua sponte took up the question of whether rent expenses were similar enough to mortgage debts to be required to be included on line 9b. Applying a plain language analysis focused on Section 707, the court concluded that rent expenses did not fall into the same category for purposes of the Means Test and that the debtor had therefore properly excluded that expense from line 9b.

AUTOMATIC STAY (SEE ALSO TURNOVERS/PROP. OF ESTATE)

***In re Mosher*, 17-34430, 2017 WL 6939884 (Bankr. S.D. Tex. Nov. 9, 2017)**. *Automatic stay will be lifted to prevent sophisticated debtor from reneging on agreed judgment to be entered against him pursuant to settlement agreement with IRS*. Retired attorney (Debtor) failed to pay IRS taxes for multiple years, then began moving money in effort to thwart IRS collection efforts. Settlement was reached providing that Debtor would pay IRS within 120 days in lieu of foreclosure and that if Debtor failed to pay an agreed judgment would be entered allowing the IRS to foreclose on the Debtor's homestead. Debtor failed to timely make payment and then filed Chapter 13 petition in order to prevent entry of agreed judgment. Finding the Debtor's conduct to be shameful and in bad faith, the bankruptcy court lifted the automatic stay so that the IRS could have the agreed judgment entered.

***In re Guevara*, 2018 WL 4677431 (Bankr. S.D. Tex. 2018).** *Automatic Stay should be annulled due to Debtor misconduct.* The Bankruptcy Court retroactively annulled the automatic stay because the purchaser at the foreclosure sale paid $56,529 in delinquency property taxes to acquire the property and because the Debtor failed to provide the purchaser notice of the bankruptcy filing.

EXEMPTIONS IN BANKRUPTCY

***Matter of Ayobami*, 16-20589, 2018 WL 266409 (5th Cir. Jan. 3, 2018)**. *Debtor claiming federal exemptions may exempt 100% of interest in an asset*. Chapter 13 debtor claimed federal exemptions and in her Schedules indicated an intent to exempt "100% of fair market value, up to any applicable statutory limit" for many of her exempt assets. Chapter 13 trustee argued that debtor could only claim exempt a dollar amount. The Fifth Circuit held that if, when considering any other exemptions claim, a debtor's entire interest in an asset is less than or equal to any dollar-value limitation imposed by the applicable Section 522(d) provision, then a debtor may exempt her 100% interest in the asset. The Court explicitly decline to determine whether such an exemption removed the asset and its post-petition appreciation from the estate, suggesting that the contrary would be true.

***In re Odam*, 17-50035-RLJ-7, 2018 WL 1054115 (Bankr. N.D. Tex. Feb. 22, 2018)**. *There is no special federal exemption for rental properties.* Pro se debtor using federal exemptions claimed exemption in a house and in 17 rental properties. Debtor's schedules reflected equity in the house that exceeded the federal exemption cap. Chapter 7 trustee did not object to the homestead exemption, but did object to the exemption of the rental properties. The bankruptcy court sustained the Chapter 7 trustee's objection to the claimed exemption in the rental properties, finding that debtor was limited to the $1,250.00 excess value exemption contained in section 522(d).

***Matter of Lopez*, 17-50297, 2018 WL 3626628 (5th Cir. July 31, 2018)**. *Absent cause to do otherwise, court will order proceeds from homestead sold during pendency of Chapter 13 case returned to debtors upon voluntary dismissal of case*. Chapter 13 debtors sold their homestead and did not use the proceeds to purchase another homestead. When the Chapter 13 trustee moved to modify the confirmed plan to compel debtors to turnover proceeds from the sale of their homestead, the debtors moved to dismiss their Chapter 13 case. The bankruptcy court granted the motion to dismiss and ordered the proceeds from the sale of the homestead to be returned to the debtors because it did not find that the facts established cause to do otherwise. Applying Section 349(b)(3), the Fifth Circuit noted the many efforts the debtors made to make their Chapter 13 plan work and concluded that upon dismissal of the bankruptcy case ownership of the homestead proceeds re-vested in the debtors.

JURISDICTION AND VENUE

***Wayne v. United States Social Security Administration (In re Wayne)*, AP 17-3321, 2018 WL 572998 (S.D. Tex. Jan. 26, 2018)**. *Bankruptcy court lacks jurisdiction over tax dispute if debtor has failed to obtain a final decision in accordance with the applicable administrative procedures*. Pre-petition, debtor had served as payee on Social Security disability benefits paid to his mentally impaired sister. As per IRS regulations and the notices provided to debtor, has was liable for repayment of any overpayment of benefits to his sister. The sister started working again without informing the IRS,

resulting in overpayment of benefits. Without following the administrative procedures available for challenging the IRS's determination that there had been an overpayment of benefits, debtor entered into a payment plan to repay the IRS. Upon filing for Chapter 7, debtor brought an adversary proceeding challenging the IRS's recoupment of overpayment. Because the debtor had failed to challenge that administrative procedures and as a consequence no "final" decision had been made by the IRS, the court dismissed the adversary finding that it lacked subject matter jurisdiction because 42 U.S.C. §405(g) precludes federal courts from exercising jurisdiction over such tax-related disputes except for conducting judicial review of a final decision made by the IRS.

***Barstad v. CNU of Texas, LLC,* SA-17-CV-00581-OLG, 2017 WL 7789541 (W.D. Tex. Dec. 19, 2017)**. *Withdrawal of reference is not required prior to trial of claims where jury demand is made on non-core claims.* Debtor filed lawsuit in federal district court alleging that creditor had violated the automatic stay and the Texas Fair Debt Collection Practices Act (TFDCPA). Creditor moved to dismiss on jurisdictional grounds or in the alternative that the case be referred to the bankruptcy court pursuant to the district's standing reference order, and debtor moved for leave to file amended complaint and to withdraw the reference on the grounds that the bankruptcy court could not enter final order on the non-core TFDCPA claims and could not conduct a jury trial because the debtor did not consent. The court granted to motion for leave to amend the complaint, finding that no prejudice would result because there was no scheduling order in place, held that the amended complaint adequately addressed the jurisdictional challenge, and declined to withdraw the reference prior to trial determining that the bankruptcy court could adequately and constitutionally handle all pre-trial matters on the non-core claims.

PROCEDURE

***In re Chapter 13 Plan Administration in the Brownsville, Corpus Christi and McAllen Divisions,* Case No. 17-40273 (5th Cir. 2018).** *Trustee was not provided adequate due process and opportunity for evidentiary hearing.* Disposition without opinion. Findings of fact and conclusions of law set forth in the remedy order are VACATED by the circuit court. On remand, the bankruptcy court was instructed to provide the Trustee with an opportunity to present evidence and argument. Also ordered that this cause is remanded with instructions to transfer the miscellaneous proceedings to the U.S. Bankruptcy Court for the Western District of Texas. The court also mentions that the Trustee may be entitled to assert affirmative defenses, including derivative judicial immunity.

***In re Newberry*, 12-52072-CAG, 2017 WL 4564704 (Bankr. W.D. Tex. Oct. 11, 2017).** *Mortgage servicer cannot re-open Chapter 13 case in order to repair failure to comply with Rule 3002.1 requirements as a means of gaining a litigation advantage in pending state court proceeding*. Chapter 13 debtors were delinquent on post-petition mortgage obligations, but mortgage servicer filed response to trustee's final cure notice that failed to identity any delinquencies. Debtors eventually went into foreclosure and brought a state-court suit whose factual underpinning included the mortgage servicer's response to the final cure notice not identifying any post-petition deficiencies. Mortgage servicing

company filed motion to re-open Chapter 13 case in order to amend the response to the trustee's final cure notice. The bankruptcy court denied the motion, finding that Rule 3002.1 exists to avoid the types of mistakes made by the mortgage servicer and that the state court proceeding was the proper forum for the mortgage servicer to attempt to address the factual issues relating to the status of the debtors' mortgage payments.

***RSL Funding, LLC v. Date (In re Date)*, 15-31568-H5-7, 2017 WL 5004641 (Bankr. S.D. Tex. Oct. 31, 2017).** *Bankruptcy court order enjoining party from filing adversary complaints without prior permission of court is not invalidated by removal of the reference.* In 1996, bankruptcy court entered order permanently enjoining party from filing adversary proceedings without permission of the court based on the party's bad faith vexatious litigation tactics. Nearly twenty years later, party filed adversary without first obtaining court permission. Party argued that district court's withdrawal of reference in the 1996 case eliminated the bankruptcy court's ability to enforce the injunction. The court held that the 1996 injunction remained in effect and awarded sanctions against the party in the form of attorney's fees incurred by defendant.

***Raborn v. Schott*, CV 17-000292-BAJ-RLB, 2017 WL 5473885 (M.D. La. Nov. 14, 2017)**. *Chapter 7 debtor appealing approval of Rule 9019 Settlement must establish standing and obtain stay from bankruptcy court in order to preserve appeal.* Chapter 7 debtor appealed bankruptcy court's approval of a Rule 9019 settlement that brought money into the estate and resolved outstanding litigation pending in state and federal court. Court struck affidavits and other exhibits that appellant attempted to add to record on appeal despite having failed to present them at trial and found that debtor lacked standing because she failed to show that a successful appeal would generate assets in excess of liabilities; the court further found that the appeal was moot because the debtor had not obtained a stay in the bankruptcy court and the settlement had already been consummated.

***In re Whelan*, 15-41659, 2018 WL 947641 (Bankr. E.D. Tex. Feb. 16, 2018)**. *Debtor with notice of adversary complaint and default judgment will not obtain Rule 60 relief not requested until 364 days after entry of the default judgment.* Creditor filed adversary proceeding alleging fraudulent inducement on the part of the debtor and seeking a non-dischargeability finding under Section 523(a)(2)(A) and (6). The debtor failed to respond and the court took evidence and entered a default judgment against the debtor. 364 days later, the debtor filed a motion for relief from judgment pursuant to Rule 60 of the Federal Rules of Civil Procedure and argued that he had not responded to the adversary complaint because he had been unable to afford to hire an attorney. The bankruptcy court rejected the debtor's argument that his Rule 60 motion was timely because it had been made within the one-year specifically contemplated in Rule 60, holding instead that the one-year referenced in the status constituted an outer limit beyond which the court would have no power to consider such a motion. Based on the fact that the debtor indisputably had notice of the adversary complaint and the entry of the default judgment and yet took no action for nearly a year, the court concluded that he was not entitled to any relief.

***In re Thomas*, BR 10-40785, 2018 WL 1210723 (S.D. Tex. Mar. 8, 2018)**. *Res judicata may preclude debtor from seeking in bankruptcy court relief from alleged violations of the automatic stay where those alleged violations could have been presented in a prior civil lawsuit.* Debtor filed Chapter 7 to prevent foreclosure on her house; in her statement of intent, she indicated that she intended to keep the house. Post-discharge and after her Chapter 7 case was closed, debtor began bringing numerous and various lawsuits against mortgage holder and others related to assignment of her mortgage; at least one of those lawsuits was dismissed with prejudice. Bankruptcy court denied debtor's request to reopen case which was made with the goal of seeking contempt against defendants for allegedly violating the automatic stay by recording the assignment of the mortgage and by communicating with the debtor about her mortgage, reasoning in part that res judicata precluded the claims because they could have been brought in the lawsuit that had been dismissed with prejudice. On appeal, the district court affirmed, finding that the bankruptcy court had not abused its discretion.

***In re Ward*, 3:17-CV-0692-G, 2018 WL 1368794 (N.D. Tex. Mar. 15, 2018)**. *Creditors are entitled to rely upon deadlines given them in notices provided by clerk of court and debtor's numerous false oaths during bankruptcy case cannot be excused.* Chapter 7 debtor filed in Eastern District of Texas and the clerk of the court issued notices with respect to the deadline for bringing challenges to discharge and dischargeability. Creditors filed an unopposed motion to transfer the case to the Northern District of Texas and the court granted the transfer. The clerk for the Northern District sent a second notice containing new deadlines. Based on the second set of deadlines, certain creditors obtained extensions to the deadline and ultimately filed a 727 complaint. After trial, the court found that the debtor had made numerous false oaths in the bankruptcy case and entered judgment denying the discharge. On appeal, the debtor argued that the adversary complaint should have been dismissed as untimely because it was not filed in accordance with the first deadline indicated by the court in the Eastern District and because the court in the Northern District had improperly extended the deadline, and that the false oaths he had made during the bankruptcy did not rise to the level necessary to deny the discharge because he had been under a lot of stress and made the false statements mistakenly. On appeal, the district court held that creditors were entitled to rely upon the deadline given them in the notice from the clerk for the Northern District and the bankruptcy court had not improperly enlarged the time for the filing of their adversary complaint and that the debtor's multiple false oaths constituted "overwhelming evidence" that the denial of discharge was not clearly erroneous.

***Matter of Lindsey*, 17-50746, 2018 WL 3409995 (5th Cir. July 11, 2018)**. *Complaint will be dismissed where complainant cannot identify any facts supporting substantive allegations*. Property owner filed nondischargeability complaint against debtor, who had been sole owner of a construction company that property owner had hired to construct a home. The bankruptcy court dismissed the complaint under Rule 12(b)(6), finding that the property owner's allegations were mere statements without any supporting facts. Leaning on the fact that in response to direct questions from the bankruptcy judge at the hearing on the motion to dismiss the property owner had been unable to identify any

substantive allegations that he could add to the complaint, the circuit court affirmed dismissal without allowing an attempt to amend the complaint.

***Kuenstler v. Half Price Books, Records, Magazines, Inc.*, 4:17-CV-775, 2018 WL 3187178 (E.D. Tex. June 28, 2018)**. *Late filed adversary may proceed where creditor initially attempted to raise issue via motion practice*. Creditor filed "Motion for Determination of Dischargeability" (the "Motion") prior to objection deadline but failed to file adversary complaint prior to the objection deadline. The motion objected to the discharge of specific debts on grounds listed in Section 523. Debtor filed response to the motion alleging that creditor failed to timely initiate a proper adversary proceeding. The creditor then commenced a proper adversary proceeding by filing a "first amended complaint" and filed a motion to deem complaint timely filed along with a motion for leave to amend complaint. At the hearing on the motion to deem, the debtor argued that he had not received actual notice of the Motion, a contention that the court rejected because the Motion had been served on counsel that had been retained for the specific purpose of defending against any objections to dischargeability. On appeal, the district court held that the relation back doctrine applied and that service on counsel for the debtor was sufficient for purposes of achieving actual service on the debtor where counsel had been retained for the purpose of handling matters like that for which counsel had received service.

***In re Garcia*, 17-60124-RLJ-13, 2018 WL 3203385 (Bankr. N.D. Tex. June 28, 2018)**. *While secured creditors seeking fees in excess of no-look fee should file applications as per Rule 3002.1, objecting to failure to do so will be overruled where hearing on objection serves notice purpose behind the rule requiring the application*. Mortgage servicer filed two notices of fees and expenses under Rule 3002.1(c) totaling more than the district's no-look fee. The Chapter 13 trustee objected under Rule 3002.1(e), objecting not to the reasonableness of the fees/expenses but rather only to the failure of the mortgage servicer to file an application for its fees/expenses. The court denied the trustee's objection and approved the fees, but did so on the basis that the objection and subsequent hearing had served the purposes intended behind the requirement related to applying for approval of fees and admonishing that secured creditors seeking fees in excess of the no-look fee should file applications.

***Smart-Fill Management Group, Inc. v. Froiland (In re Froiland)*, 17-10979-HCM, 2018 WL 3343491 (Bankr. W.D. Tex. July 6, 2018)**. *Deadlines fixed by order are not extended where deadline falls on a federal holiday*. Creditor sought and obtained two agreed extensions to deadline to file nondischargeability complaint. The second extensions set the deadline as January 15, 2018, a date which turned out to a federal holiday (MLK Day). The creditor filed its adversary complaint on January 16, 2018 and the debtor filed a motion to dismiss asserting that the complaint was time-barred. The bankruptcy court held that Rule 9006(a)'s automatic extensions of deadlines that fall on a federal holiday does not apply to deadlines fixed by specific orders from the court and that the complaint was therefore time-barred and would be dismissed.

***In re Uribe-Cruz*, 14-52566-RBK, 2018 WL 3816774 (Bankr. W.D. Tex. Aug. 1, 2018)**. *Creditor with notice of bankruptcy case cannot re-open it in order to bring dischargeability adversary based on newly learned facts regarding its claim.* Post-discharge and post-closing of the bankruptcy case, creditor of Chapter 7 debtor learned through state court lawsuit that debtor may have forged the signatures of various parties on a guaranty agreement. Creditor moved to re-open the bankruptcy case so that it would bring an adversary seeking a non-dischageability adversary against the debtor. Because creditor had had notice of the bankruptcy case, the court denied the motion to reopen holding that the creditor's failure to bring an adversary proceeding within the deadline would preclude it from doing so.

***Holbrook v. J.P. Morgan Chase Bank, Natl. Assn.*, 3:18-CV-109-DPJ-FKB, 2018 WL 3213155 (S.D. Miss. June 25, 2018)**. *Failure to respond to motion seeking withdrawal of reference under mandatory abstention results in automatic withdrawal of reference.* Chapter 7 debtors filed adversary against mortgage lender for claims arising out of allegations that mortgage lender's agents trespassed and caused damage to their home, with the parties disputing whether there was a default on the debtors' mortgage obligations at the time. The mortgage lender moved to withdraw the reference, arguing that mandatory withdrawal under 28 U.S.C. § 157(d) applied. When debtors failed to respond, the court found that the failure to rebut the assertion of mandatory withdrawal was fatal and that it had no option but to enter an order granting withdrawal of the reference.

CLAIMS

***In re New*, 2018 WL 4212316 (Bankr. N.D. Miss. 2018).** *Attorney fees related to establishment of support obligations and for a protective order were DSOs.* Fees incurred in court proceedings between ex-spouses were "domestic support obligations" as being incurred for the benefit and support of the child of the marriage. In this case, those fees included attorney's fees related to the establishment of support obligations and in support of a protective order for abuse of the child. As domestic support obligations, the fees are non-dischargeable and a priority claim.

***Matter of Glenn*, 2018 WL 3846202 (5th Cir. 2018).** *Valuation of mobile home would not include delivery and set up costs.* The Fifth Circuit affirmed a bankruptcy court ruling that delivery and set up costs should not be included in the valuation of the debtors' mobile home. The court relied on the plain language of Section 506(a).

***In re Healey*, 15-60471, 2017 WL 4863014 (Bankr. E.D. Tex. Oct. 26, 2017).** *Under Texas law, unsuperseded judgment is final and allowable for proof of claim purposes even though appeal of the judgment is pending.* Pre-petition, substantial state court judgment was awarded against debtor. Debtor appealed, but failed to supersede the judgment. While appeal remained pending, debtor objected to the proof of claim filed by the judgment creditor on the grounds that it was not a final judgment because it was under appeal. The bankruptcy court overruled the objection to claim, finding that under

Texas law the failure to supersede the judgment resulted in the judgment becoming procedurally final even though the appeal remained pending.

***In re Chesteen*, 17-11472, 2018 WL 878847 (Bankr. E.D. La. Feb. 9, 2018)**. *Amounts owed to the IRS for failure to comply with the Affordable Care Act's Individual Mandate are penalties and not taxes*. IRS claimed that Chapter debtor's liability under IRC § 5000A (the so-called "individual mandate" of the Affordable Care Act) for failure to maintain health insurance was an excise tax and entitled to priority treatment pursuant to § 507(a)(8). Debtor objected, arguing that those liabilities were more properly classified as penalties and therefore not entitled to priority treatment. The bankruptcy court, noting that the critical point of analysis is whether the primary purpose of the individual mandate is to support the government or to discourage certain conduct, held that the individual mandate was a penalty, a decision that was supported by the fact that the statute referred to the individual mandate eighteen times as a "penalty" and not once as a "tax."

***Quezada v. Internal Revenue Service (In re Quezada)*, 16-10467-TMD, 2018 WL 4191856 (Bankr. W.D. Tex. Aug. 31, 2018)**. *Debtor's failure to file certain tax forms despite notices from IRS that he was required to do so can result in statute of limitation for tax debt never beginning to run.* Over the course of several years, Debtor filed Forms 1040 and 1099, but failed to file Forms 945 despite receiving multiple notices from IRS that he was required to do so. Debtor argued that statute of limitation barred IRS from collecting the taxes owed associated with the unfiled Forms 945. Applying the *Beard* analysis, the bankruptcy court held that the statute of limitations had not been triggered because Debtor had failed to file the Forms 945 and, as reflected by the Debtor's failure to comply with the notices from the IRS informing him that he needed to file Forms 945, had not made an honest and reasonable attempt to satisfy the requirements of tax law.

***Pate v. Tow*, 4:15-CV-01804, 2018 WL 2426662 (S.D. Tex. May 29, 2018)**. *Child support claimants may not obtain priority treatment under Section 726(a)(1) on argument that they did not receive notice where state agency authorized to file proofs of claim on their behalf received notice*. Claimants whose claims were for child support arrearages filed untimely claims and sought distribution priority treatment under Section 726(a)(1), arguing that they had not received proper notice of the claims deadline because notice had only been sent to the state agency charged with collecting child support and not to them individually. The district court rejected that argument, noting that the appellants had expressly authorized the state agency to file proofs of claim on their behalf.

***In re Tejeda*, 17-51561-CAG, 2018 WL 2433196 (Bankr. W.D. Tex. May 3, 2018)**. *Lack of privity does not prevent creditor from having claim where creditor's claim is related to property of the estate*. Prepetition, debtor entered into assumption agreement with owners of real property against which mortgage holder held deed of trust and promissory note. Debtor's chapter 13 plan proposed to pay the mortgage holder, and the Chapter 13 trustee objected arguing that mortgage holder was not in privity with the debtor and therefore did not have a claim against the debtor. The Court held that despite

the lack of privity the mortgage holder held as "claim" as that term is defined in Section 102(2) and pursuant to Section 502(b)(1), both of which emphasize that a person with a claim against property of the debtor qualifies as a creditor of the debtor.

DISCHARGE - OVERALL-EFFECT OF DISCHARGE

***Wellmon et al v. Vigil (In re Vigil)*, 16-41463, 2017 WL 4773108 (Bankr. E.D. Tex. Oct. 18, 2017).** *Plaintiff seeking default judgment in discharge/dischargeability proceeding may be required to provide evidence to support its claims*. Creditor sought default judgment in 727 and 523 action against debtors, making allegations arising out of debtors' ownership of a corporate entity in which the creditor was a member. The court took evidence at hearing. Noting that default judgments are committed to the discretion of the court and that under Rule 7055 proof of necessary facts may be required, the court found that the creditor had failed to prove 727(a)(7) wrongful conduct in a related case, 727(a)(2)(A) transfer or concealment of property, 727(a)(4)(A) false oaths, and 727(a)(5) failure to explain loss of assets. Because the debtors had failed to provide the trustee with requested financial information related to the corporate entity of which they were owners, the court found that the discharge should be denied under 727(a)(4)(D) withholding of recorded information. Because the court found that the discharge should be denied, it dismissed the Section 523 claims as moot.

***Satija v. Robert (In re Robert)*, 2017 WL 5007146 (Bankr. W.D. Tex. Oct. 31, 2017).** *Amending Schedules and SOFA may be insufficient to save debtors from having discharge denied under Section 727(a)(4)(A) for making false oaths*. Chapter 7 trustee sought to deny debtors' discharge under Sections 727(a)(4)(A), (a)(3), and (a)(5), alleging that debtors had made false oaths in their bankruptcy case, had concealed or failed to preserve financial documents necessary to determine their financial condition, and had failed to satisfactorily explain the loss of assets. The court found that the debtors had failed to disclose in their Original Schedules and Original and Amended SOFA multiple bank accounts, cash, ownership of time shares, stock, several life insurance policies, rental income, investment income, consulting income, and payments for the benefit of insiders. Based on the type of assets, income, and transactions that the debtors failed to disclose, the court concluded that the debtors had made false statements in their bankruptcy filings with reckless disregard for truth sufficient to establish fraudulent intent and granted the objection to discharge under Section 727(a)(4)(A).

***Handway v. Bank of America*, 17-CV-00565, 2018 WL 453912 (E.D. Tex. January 17, 2018)**. *Under Fair Credit Reporting Act, republication of credit information relating to bankruptcy discharge that results in a new credit denial constitutes a distinct harm for purposes of determination of applicability of statute of limitation*. Chapter 7 debtor stayed current on mortgage during and after bankruptcy case. Post-discharge, and while debtor was making payments, debtor's bank reported to credit reporting agencies that obligation owed by debtor had been discharged in bankruptcy. Debtor was denied credit multiple times over the following years. Debtor eventually filed suit under the Fair Credit Reporting Act (FCRA) and bank moved to dismiss based on a two-year statute of limitation that ran from the time the debtor discovered the alleged misreporting. The

court held that the two-year limitation had run with respect to the initial credit reporting, but that republications of credit information that result in new denials of credit constitute distinct harms that give rise to cause of action and that therefore some of debtor's claims fell within the two-year limitation period and could go forward.

***Schott v. Sirico et al (In re Sirico)*, 16-11028, 2018 WL 4378653 (Bankr. M.D. La. Sept. 12, 2018)**. *Debtors that omit information from SOFA regarding prepetition transactions may have discharged denied under Section 727.* Chapter 7 trustee brought Section 727 action against debtors based on omissions in their schedules and SOFA that included the pre-petition sale of a home, entitlement to child support payments, and sales of stock. Debtors made various arguments boiling down to asserting that they had no intent to hide the transactions. Focusing on the sale of the home, which netted the debtors over $1 million in proceeds, the court denied the debtors' discharge under Section 727(a)(4)(A) finding that the debtors had knowingly and fraudulently withheld information.

DISCHARGE - PARTICULAR DEBTS

***Lamar et. Al. v. Appling*, 584 U.S. ____, No. 16-1215 (S. Ct. 2018).** *Chapter 7 Debtor had promised his law firm that he would pay them from his expected tax refund. Such statement was a statement respecting his financial condition.* The Debtor owed his law firm $60,000 and promised to pay them from his expected tax refund. The refund was ultimately less than expected and the Debtor spent it on business expenses. The Supreme Court affirmed the lower court rulings that this statement was respecting his financial condition and was false and therefore would not be discharged.

***Matter of Pendergraft*, 2018 WL 3803040 (5th Cir. 2018).** *The appellate court affirmed a finding of defalcation while acting in a fiduciary capacity.* In an unpublished disposition, the Fifth Circuit affirmed the bankruptcy court determination that the subject debt was non-dischargeable due to the Debtor's defalcation while acting in a fiduciary capacity. The court also affirmed the denied of the Debtor's Motion for Recusal as the Debtor failed to show any actual bias by the judge.

***In re Quackenbush*, 2018 WL 4056993 (Bankr. S.D. Miss. 2018).** *Student loan was not dischargeable due to undue hardship.* The Debtor reopened his chapter 7 case to file a complaint against Great Lakes Financial Services seeking discharge of student loan debt due to undue hardship. The Debtor then added the Department of Education as a defendant and dismissed Great Lakes. The court found that the Brunner/Gerhardt factors applied. The DOE's motion for summary judgment was granted as the Debtor failed to defend the motion.

***Claybar et al v. Huffman (In re Huffman)*, 16-10344, 2017 WL 4621703 (Bankr. E.D. Tex. Oct. 13, 2017)**. *Prepetition post-answer default judgment against debtor may collaterally estop debtor from challenging adversary complaint brought under Section 523.* Pre-petition, district court had entered post-answer default when debtor failed without justification to appear at pre-trial conference despite having been ordered to do

so. The final judgment entered by the district court was based upon evidence submitted by the plaintiff and included extensive findings of fact. When the debtor filed for Chapter 7, judgment-plaintiffs sought determination that judgment debt was nondischargeable as a matter of law under Section 523(a)(2)(A). Applying federal principles of issue preclusion, the bankruptcy court found that the factual holdings in the district court judgment adequately supported each of the elements of a Section 523(a)(2)(A) action for false, misleading, deliberate, and material misrepresentations to the plaintiffs and therefore granted summary judgment against the debtor.

***State Bar of Texas Client Security Fund v. James (In re James*), 16-40752, 2017 WL 4564694 (Bankr. E.D. Tex. Oct. 11, 2017)**. *Restitution award pursuant to Texas Rules of Disciplinary Procedure is non-dischargeable under Section 523(a)(7) even though restitution is to be paid to former non-governmental client.* Attorney was disbarred and order to pay restitution to former client. State Bar Security Fund made the restitution payment to the former client. Attorney and the women that he married after the restitution award was made filed for bankruptcy. State Bar Security Fund sought determination that award of restitution against disbarred attorney was non-dischargeable under Section 523(a)(7). Debtor argued that at the time that the award was made it was not owed to a governmental unit but rather to his former client and therefore did not qualify for Section 523(a)(7) treatment. The bankruptcy court granted the State Bar Security Fund summary judgment against the disbarred attorney, finding that under 1.06(z) of the Texas Rules of Disciplinary Procedure the restitution award was a disciplinary sanction intended to protect the public and qualified for Section 523(a)(7) treatment. Summary judgment against the wife was denied because no evidence was presented to impute against her the husband's pre-marital liability on the restitution award.

***Prado v. Erickson (In re Erickson)*, 16-10437-TMD, 2017 WL 4404286 (Bankr. W.D. Tex. Sept. 29, 2017)**. *Under Husky v. Ritz, for Section 523(a)(2)(A) "actual fraud" there must be some connection between the debt to be excepted from discharge and the fraudulent transfers.* Adversary plaintiff sought to have debts excepted from discharge on the basis of certain allegedly fraudulent transfers; debtors sought summary judgment on the grounds that the claim was obtained through a guarantee and there was no connection between the guarantee and the allegedly fraudulent transfers. Because there was no allegation or evidence that there was any connection between the complained of transfers and the pre-existing debt owed to the plaintiff, the court held that the debt could not be excepted from discharge under the "actual fraud" provision of Section 523(a)(2)(A).

***Hiner v. Koukhtiev (In re Koukhtiev)*, 2017 WL 5514541 (Bankr. S.D. Tex. Nov. 1, 2017)**. *Debtor's prepetition refusal to turn property over to its owner can justify finding of non-dischargeability for willful and malicious injury under Section 523(a)(6).* Pre-petition, creditor had hired debtor to develop source code for software program; although both creditor and debtor were named on patent, by their agreement the software was to belong to the creditor. After their business relationship soured, creditor obtained judgment declaring her to be the owner of software. Post-judgment, debtor had sold

some of the software without remitting the sales price to the creditor and refused to give the creditor the source code for the software. When debtor filed Chapter 7 petition, creditor brought adversary seeking determination that state court judgment and post-judgment actions taken by debtor gave rise to non-dischargeable obligations under Sections 523(a)(2)(A) and (a)(6). The bankruptcy court found that Section 523(a)(2)(A) did not apply, but ruled in favor of the creditor on Section 523(a)(6) finding that the debtor's refusal to give her the source code and pocketing of proceeds from sales of the software constituted willful and malicious injury.

***Jimenez v. Navient Solutions, LLC (In re Jimenez)*, 10-80693, 2017 WL 5592260 (Bankr. S.D. Tex. Nov. 20, 2017)**. *Holder of student loans may be liable for violating discharge injunction if student loans at issue were fraudulently obtained by the discharged debtor's spouse.* After receiving discharge and after case was closed, Chapter 13 debtor moved to re-open and filed adversary seeking Section 523(a)((8) undue hardship determination as to student loans and relief for alleged violation of discharge injunction by holder of the student loans based on the argument that she was not personally liable for the student loans because her husband had put them under her name fraudulently. The holder of the student loans moved to dismiss for lack of jurisdiction and for failure to state a claim. The bankruptcy court denied the motion to dismiss because the debtor was not merely seeking a dischargeability determination but rather also seeking affirmative relief based on the allegation that the holder of the student loan was violating the discharge injunction by attempting to collect student loan debts that the debtor claimed she did not actually owe by virtue of her husband's fraud.

***Christian v. Pac. West Bank*, 4:17-CV-493, 2017 WL 6274488 (E.D. Tex. Dec. 8, 2017)**. *Contempt order entered post-petition remains pre-petition debt if it relates to debtor's actions taken pre-petition.* At time of filing Chapter 7 petition, Debtor was the subject of a motion to show cause requesting that she be found in contempt for violation of a cash collateral order entered in a separate Chapter 11 case for an entity with which the debtor was associated. Bankruptcy court lifted stay to permit contempt hearing to proceed against Chapter 7 debtor. Contempt order was entered in the Chapter 11 assessing sanction against debtor in amount of $100,000.00. Bankruptcy court held that civil contempt order for $100,000.00 entered by sister court was not discharged in debtor's case because it was a post-petition debt on account of the fact that the contempt order was entered after the debtor filed her Chapter 7 petition. On appeal, the district court found that under all of the pre-petition relationship, accrual, and conduct tests the contempt award related to pre-petition conduct and therefore was a pre-petition debt that was subject to being discharged.

***Matter of Haler*, 17-40229, 2017 WL 6729967 (5th Cir. Dec. 29, 2017)**. *Debt related to debtor's generic verbal statements regarding "financial shape" and cash-flow is dischargeable.* State court judgment was entered finding debtor liable for fraud related to verbal representations he had made regarding a business's financial shape and cashflow. Bankruptcy court held that collateral estoppel precluded debtor from challenging non-dischargeability of the debt pursuant to Section 523(a)(2)(A). Circuit court reversed,

holding that debtor's statements related to financial condition and therefore were excluded from application of Section 523(a)(2)(A).

***United States v. Busch*, 17-CV-183-ALM-CAN, 2017 WL 6987666 (E.D. Tex. December 4, 2017)**. *One-day-late rule applies to federal tax returns for purposes of Section 523(a) dischargeability analysis and IRS can revoke an erroneously issued release of a tax lien*. Debtor, an attorney, failed to timely file federal income tax returns for 1994-2001, filing them many years after they were due. Debtor subsequently filed a Chapter 7 case and received his discharge. Post-discharge, Internal Revenue Service brought a lawsuit seeking to collect over $1 million in tax assessments and interest on the late filed taxes. Debtor sought determination that those tax debts had been discharged and argued that IRS was bound be a release of lien that is had issued. The court held that under *McCoy v. Miss. State Tax Comm'n*, 666 F.3d 924 (5th Cir. 2012), the one-day-late rule applied to debtor's federal tax returns thereby making them nondischargeable, rejected the argument that debtor's signed Forms 4549 (Income Tax Examination Changes) qualified at Section 6020(a) Returns for purposes of dischargeability considerations, and held that IRS had adequately revoked certificates of release of federal tax lien such that debtor was not released from the tax liabilities; accordingly, the court found that the IRS was entitled to summary judgment and that the tax debts had not been discharged.

***Thomas v. U.S. Department of Education (In re Thomas)*, 17-31060-HDH7, 2017 WL 7050664 (Bankr. N.D. Tex. Dec. 8, 2017)**. *Student loan debts will almost never be dischargeable under the "total incapacity" standard*. Unemployed debtor suffering from diabetic neuropathy and age 62 sought to discharge student loan debt. The bankruptcy court found that the debtor was unable to meet the "total incapacity" standard created by the *Brunner/Gerhardt* test. In an aside aimed at the appellate courts, the bankruptcy court noted that the total incapacity test is an incredibly high burden that results in very few debtors ever being able to discharge their student loans and that the Fifth Circuit thus far had not provided guidance with respect to what weight should be given to the fact that a debtor does not participate in alternative repayment plans associated with their federal student loans.

***Louisiana Central Credit Union v. Stewart (In re Stewart)*, 17-11031, 2018 WL 909970 (Bankr. E.D. La. Feb. 14, 2018)**. *Creditor's failure to understand the legal standards for nondischargeability can result in debtor being awarded attorney's fees and cost under 523(d)*. Pre-petition, Credit Union extended additional credit to debtor in modest amount knowing full well the details of the debtor's financial situation. When the debtor filed for bankruptcy less than 90 days later, the Credit Union sought a determination of nondischargeability under 523(a)(2)(A) and (6). Credit Union presented no facts showing that debtor made misrepresentations or that information had been withheld from the Credit Union; instead, it appeared that Credit Union had filed the adversary believing that loans instituted within 90 days of the petition date were per se nondischargeable. Finding that the Credit Union had acted frivolously in failing to investigate its claims or to understand the law under which it was seeking relief, the bankruptcy court held that

the Credit Union had not been substantially justified and held that the debtor would be awarded attorney's fees and costs pursuant to 523(d).

***Lee v. Ali (In re Ali)*, 17-30413, 2018 WL 889362 (Bankr. S.D. Tex. Jan. 30, 2018)**. *Contempt of court failure to participate in state court discovery can result in nondischargeability under 523(a)(6).* Pre-petition, debtor was involved in state court lawsuit. When debtor failed to respond to discovery requests, plaintiff sought and obtained an order compelling debtor to respond to discovery and sanctioning debtor for failure to comply. After debtor filed Chapter 7 case, plaintiff sought determination that the discovery sanction was nondischargeable. Bankruptcy court held that it was nondischargeable under the willful and malicious exception contained in 11 U.S.C. § 523(a)(6).

***Mid-South Maintenance, Inc, et al v. Jones (In re Jones)*, 15-14513-JDW, 2018 WL 1281757 (Bankr. N.D. Miss. Mar. 9, 2018)**. *Debtors with business experience are not likely to be believed when arguing that they did not notice that someone else was laundering nearly half a million dollars in embezzled money through their bank accounts.* Debtors' daughter had engaged in embezzlement scheme that involved falsifying employment of her parents with her employer and causing paychecks to be deposited in the debtors' bank accounts. Employers brought nondischargeability complaint against the debtors seeking to have the embezzled funds deposited in their accounts excepted from discharge under 523(a)(2)(A) and (4). At trial, both debtors testified that they were experience business management professionals but that they did not notice all of the extra money that was flowing through their accounts as a result of the embezzlement. The court declined to believe that the debtors had no knowledge that they were receiving misappropriated funds and instead held that they had actual knowledge of the fraud and knowingly received and spent the embezzled monies in a manner sufficient to justify a determination that they owed a nondischargeable debt for the embezzled monies.

***Matter of Oubre*, 17-1073, 2018 WL 1384381 (Bankr. E.D. La. Mar. 16, 2018)**. *Lender can obtain default judgment on dischargeability action despite failure to file financing statement against non-existent assets.* Debtors obtained a small loan and pledged various personal property items as collateral. The lender neglected to timely file a UCC financing statement. When debtors subsequently filed for bankruptcy, it was revealed that at the time they pledged those items they no longer owned them (some had been stolen and some they had already sold). The lender brought a 523(a)(2)(A) action and prevailed in obtaining a default judgment, with the court ruling that the failure to file the financing statement against the non-existent collateral did not preclude the lender from establishing the five elements necessary to deny discharge under 523(a)(2)(A).

***In re Kelly*, 17-32295-H4-13, 2018 WL 1474890 (Bankr. S.D. Tex. Mar. 23, 2018)**. *Guarantor of student loan debt may be entitled to nodischargeability determination under Section 523(a)(8)(A)(ii) where guarantor did not receive consideration in exchange for guaranteeing the debt.* Guarantor of debtor's student loan debt had paid off loan after debtor defaulted. When debtor filed a Chapter 13 case, the guarantor brought an adversary seeking to have the debt excepted from discharge under Section 523(a)(2),

(4), (6), and (8). Guarantor then moved for summary judgment with respect to her Section 523(a)(8) claim. The court granted summary judgment, noting that the guarantor had agreed to guarantee the debt as an accommodation to the debtor (i.e. the guarantor did not receive any consideration).

***Crocker et al v. Navient Solutions, LLC et al (In re Crocker)*, 15-35886, 2018 WL 1626245 (Bankr. S.D. Tex. Mar. 26, 2018)**. *Loans to debtors that were used for educational purposes do not necessarily meet the nondischargeability requirements of Section 523(a)(8)(A)(ii).* Debtor in Chapter 7 case pending in S.D. Tex. and debtors from cases in other states filed a putative class action adversary proceeding against a common creditor and making claims that that creditor had violated their discharge injunctions by seeking to collect on third part loans (one was a bar exam study loan and the other was a training loan for tuition expenses at an unaccredited technical school) that the creditor argued qualified as non-dischargeable under Section 523(a)(8)(A)(ii) as obligations to repay funds received as an educational benefit, scholarship, or stipend. The creditor sought to have the adversary proceeding dismissed, arguing that only the courts that issued the respective discharge orders could enforce the discharge injunctions and that the loans it had been attempting to collect were obligations to repay excepted from discharge under Section 523(a)(8)(A)(ii). The bankruptcy court rejected both arguments, the first on the grounds that the discharge injunction is a creation of statute that does not involve any subjective thought process on the part of the court and therefore does not require enforcement to be permissible only to the court issuing the injunction, and the second on the grounds that the plain language of Section 523(a)(8)(A)(ii) did not reach so far as to cover loans that were used for educational purposes. Due to the perceived importance of the issues in dispute, the bankruptcy authorized interlocutory appeal and certified direct appeal to the Fifth Circuit.

***Bruce et al v. Long (In re Long)*, 17-60401, 2018 WL 1577894 (Bankr. E.D. Tex. Mar. 28, 2018)**. *Jury finding that tort was committed with malice may collaterally estop debtor from arguing that debt is not subject to 523(a)(6).* Pre-petition, debtors' neighbors obtained a judgment against the debtors for trespass to real property with the jury finding that one of the debtors had committed trespass with malice. When the debtors filed bankruptcy, the neighbors brought an adversary seeking to have their judgment determined to be nondischargeable under Section 523(a)(6). Applying principles of collateral estoppel, the bankruptcy court granted summary judgment to the neighbors with respect to the debtor that the jury had found had committed trespass with malice but denied summary judgment against the debtor who had only been found liable for mere trespass.

***In re Burk*, 583 B.R. 655 (Bankr. N.D. Miss. 2018)**. *Willful blindness as to source of monies in bank account will cause debtors to be liable on nondischargeable debt to creditor of their embezzling mother.* Creditor brought nondischargeability adversary under Section 523(a)(2)(A) (actual fraud) against debtors relating to debtors' receipt and use of funds obtained by their mother/mother-in-law through embezzlement from the creditor. Debtors claimed that the mother-in-law perpetrated the embezzlement without their knowledge and that they had no knowledge as to the source of the funds that went

through their bank accounts (much of which they personally spent). One of the debtors was in high school at the time that the embezzled funds began going through his account; because the mother was managing that debtor's financial affairs completely at that time, the court held that that debtor had no knowledge of the embezzlement nor was he willfully blind to it and therefore that debtor lacked the requisite intent for actual fraud. The court found that the other two debtors, adults at the time of the embezzlement and in full control of their own finances, had either actual knowledge of the source of their monies or were willfully blind on a level that satisfied the intent element of actual fraud and therefore their debt to the creditor was nondischargeable.

CHAPTER 13 - GENERAL

***In re Schilling*, 16-13153-JDW, 2017 WL 4676244 (Bankr. N.D. Miss. Oct. 16, 2017)**. *Eligibility for Chapter 13 is measured as of the petition date and can still result in dismissal based on size of claim that is disallowed for being untimely filed.* Debtor failed to disclose in Schedules and SOFA full amount and nature of divorce-related debt of nearly $1 million. After ex-spouse's proof of claim was disallowed on the basis of untimely filing, ex-spouse moved to dismiss Chapter 13 case on grounds that debtor's unsecured debt as of petition date rendered debtor ineligible for Chapter 13 under Section 109(e). Debtor argued that ex-spouse lacked standing because she did not have an allowed claim. The bankruptcy court held that it was immaterial whether the ex-spouse had standing because bankruptcy courts can consider eligibility under Section 109(e) sua sponte, but also held that the ex-spouse had standing even without an allowed claim because she had a pecuniary interest in the case. Measuring eligibility as of the petition date, the court held that the debtor was ineligible for Chapter 13 because the $1 million debt was the subject of a pre-petition judgment entered against the debtor and the debtor therefore had unsecured debt in excess of the limits for eligibility for Chapter 13.

Chapter 13 - PLAN

***In re Parkman*, 2018 WL 4091804 (Bankr. S.D. Miss. 2018).** *The bankruptcy court denies total rewrite of district-wide form plan.* One month after the Mississippi form Chapter 13 plan was adopted by the bankruptcy courts, counsel for the debtor filed a plan which, in addition to its 15 standard plan provisions, included 23 non-standard provisions. The Trustee objected. The bankruptcy court found 22 non-standard provisions objectionable. Confirmation of the plan was denied.

***Barnaba v. Joubert*, 2018 WL 3999731 (W.D. La. 2018).** *Conditional confirmation of the chapter 13 plan was proper.* Confirmation of a chapter 13 plan was not erroneous because the court included a provision in the confirmation order which reserved the objecting creditor's right to request allowance and calculation of its claim.

***In re Gonzales*, 17-50150-RLJ13, 2018 WL 501332 (Bankr. N.D. Tex. Jan. 19, 2018)**. *Odd jobs and support from family do not constitute regular and reliable income such as will make a Chapter 13 plan feasible.* Below-median income Chapter 13 debtor with irregular income proposed plan in an effort to save her house. The secured creditor and

the Chapter 13 trustee objected primarily on the basis that the debtor's income was insufficient to enable her to make her proposed plan payments and that the debtor was acting in bad faith because she had failed to provide the trustee with adequate information to determine whether she was dedicating all net disposable income to the plan. The court summarily agreed that the debtor had failed to show an ability to make the proposed plan payments and that the plan was therefore infeasible. Applying the totality of the circumstances test, the court concluded that the debtor had not acted in bad faith even though she had not accurately disclosed all of the required information.

***Ortiz-Peredo v. Viegelahn*, 5:17-CV-796-OLG, 2018 WL 1598676 (W.D. Tex. Mar. 29, 2018)**. *Denial of Chapter 13 plan confirmation is interlocutory order that need not be appealed in order to preserve arguments; definition of "income" is broad and Chapter 13 plan must generally treat settlement proceeds as income.* Debtors claimed worker's compensation proceeds as exempt and did not include them in their Chapter 13 plan. The Chapter 13 trustee objected on the grounds that the proceeds constituted disposable income that was required to be included in the plan. Bankruptcy court sustained Chapter 13 trustee's objection to confirmation of plan and entered orders denying plan confirmation and requiring debtors to file amended plan with 14 days. Debtors failed to file amended plan and court dismissed the case. Fourteen days after the dismissal order, but more than fourteen days after the orders denying plan confirmation, the debtors appealed all of the orders. The Chapter 13 trustee moved to dismiss with respect to the orders relating to denying plan confirmation, but the appellate court denied that motion because the bankruptcy court orders had been interlocutory. The court found that the settlement proceeds constituted income under Section 1325(b) because the definition of "income" is broad and inclusive; accordingly, the court affirmed the denial of plan confirmation and the dismissal of the Chapter 13 case.

***In re Randall*, 17-33322-HDH13, 2018 WL 1737620 (Bankr. N.D. Tex. Apr. 10, 2018)**. *Post-petition interest on a prepetition domestic support obligation must be paid in full through Chapter 13 plan.* Chapter 13 debtors proposed a plan that included post-petition interest on domestic support obligations but did not pay all general unsecured creditors in full. The Chapter 13 trustee and the Office of the Attorney General took opposing position as to whether that post-petition interest could be paid in light of the fact that the plan did not call for 100% payment of all claims. Looking to Section 101(14(A) and its definition of domestic support obligation that specifically included interest as well as Texas Family Code § 157.265's provisions regarding the accrual of interest on domestic support obligations, the court concluded that Section 507(a)(1)'s treatment of domestic support obligations as a priority claim and the requirements of Section 1322(a)(2) combined to make payment of post-petition interest on the domestic support obligation in question mandatory. The court further noted that this requirement would not apply to all forms of domestic support obligation because in Texas only certain types of domestic support obligations accrue interest.

***In re Vega-Lara*, 17-52553-CAG, 2018 WL 2422427 (Bankr. W.D. Tex. May 4, 2018)**. *Chapter 13 debtors cannot freely deviate from district's standard plan.* Chapter 13 debtors submitted proposed plan that struck through the portion of the standard district

plan regarding treatment of tax refunds and instead included special provision that debtors would amortize any annual tax refunds as income. The trustee objected, arguing that debtors could not pro-rate their tax refunds and the debtors argued that the district plan violated the Bankruptcy Code and the Bankruptcy Rules. Rejecting the premise that standard district plans run afoul of Section 1321's provision that "[t]he debtor shall file a plan[,]", the bankruptcy court held that form plans are authorized under Rule 3015.1 and that allowing debtors to amend treatment of tax returns would defeat the purposes behind the creation of the form plan.

***In re Garcia*, 18-50061-RLJ13, 2018 WL 3726157 (Bankr. N.D. Tex. Aug. 2, 2018)**. *Court can sua sponte consider inherent flaws in proposed Chapter 13 plan.* Chapter 13 debtor proposed plan that included payments to creditor secured by home owned by debtor in Puerto Rico in which debtor appeared to have negative equity and which the debtor was only keeping in the homes that it might appreciate in value. Chapter 13 trustee objected on the basis that the plan was not proposed in good faith debtor's proposed expenses (particularly that of keeping the Puerto Rico house) were too high; debtor responded that her expenses were within the guidelines and therefore could not support a charge of bad faith. Looking past the arguments of the parties, the court found that it did not need to reach the bad faith analysis because there were other problems with the plan, such as various inconsistencies between her plan and her schedules/SOFA, although the court disapproved of the debtor's effort to keep the Puerto Rico house on the basis that it was a net loss of $300.00 per month to keep it and it was not necessary.

***In re Amaya*, 17-70280, 2018 WL 1773096 (Bankr. S.D. Tex. Apr. 11, 2018)**. *Section 1325(a)(5)(B)(iii)(I) does not necessarily require equal payments in every month of the plan*. Debtor's proposed Chapter 13 Plan, when combined with Chapter 13 trustee's internal policies, would result in debtor's counsel being paid first as an administrative claim and secured creditor of debtor therefore not receiving payments until month three of the sixty month plan. Secured Creditor objected, arguing that under Section 1325(a)(5)(B)(iii)(I) it was entitled to equal payments in every month of the plan. The court denied the objection, finding that under Section 507(a)(2) attorney's fees for debtor's counsel are entitled to priority payment and that Section 1325's proper construction is that payments are required to be equal once the begin as opposed to in every month of the plan.

***Booker v. Johns*, CV 16-1604, 2018 WL 1831418 (W.D. La. Apr. 17, 2018)**. *Totality of circumstances test with respect to analysis of whether Chapter 13 plan was proposed in good faith can include economic factors*. Court sua sponte rejected proposed Chapter 13 plan that included retention by the debtors of an old boat (the Chapter 13 trustee supported the plan and no parties objected). On appeal, the debtors argued that economic considerations (e.g. how much debtor proposes to pay, how much debtor is able to pay) cannot be considered when determining good faith but rather that only the four specific economic tests contained in Sections 1325(a)(4) (best interests of creditors), 1325(a)(6) (feasibility), 1325(b) (disposable income) and 1322(d) (term or commitment period) could be used to measure good faith and that the bankruptcy court misapplied the totality of the circumstances test. The district court affirmed, finding no clear error in the

bankruptcy court's interpretation of the totality of the circumstances and that the four specific tests contained in Chapter 13 were not exclusive with respect to the good faith analysis.

***Miner v. Johns*, 5:17-CV-0879, 2018 WL 2347095 (W.D. La. May 23, 2018)**. *Post-petition retirement contributions are not disposable income but remain part of the "good faith" requirement contained in Section 1325(a)(3).* Chapter 13 debtors appealed bankruptcy court's conclusion that post-petition voluntary 401(k) contributions constitute disposable income required to be included in the Section 1325(b)(1)(B) analysis. Applying Section 541(b)(7), the Fifth Circuit held that post-petition retirement contributions are not disposable income, but that they remain part of the "good faith" requirement contained in Section 1325(a)(3).

***In re Orozco*, 17-52818-CAG, 2018 WL 2425971 (Bankr. W.D. Tex. May 10, 2018)**. *Chapter 13 debtor cannot freely deviate from district's standard plan.* Chapter 13 trustee objected to provision in debtor's proposed plan that struck through the district's standard plan provision regarding treatment of tax refunds and added a special provision calling for the debtor to amortize any annual tax refunds as income. Debtor argued that the district plan violated the Bankruptcy Code and Rules and that requiring the debtor to turn over her tax refund would result in capturing non-disposable income in contravention of Section 1325 of the Bankruptcy Code. The bankruptcy court rejected those arguments, holding that the district's standard plan was not only permissible under the Bankruptcy Code and Rules but also was explicitly authorized. Expressing concern that the district's standard plan would become a nullity if debtors were allowed to freely deviate from it, the court denied confirmation of the proposed Chapter 13 plan.

***In re Diaz*, 17-52761-CAG, 2018 WL 2425969 (Bankr. W.D. Tex. May 14, 2018)**. *Chapter 13 debtor cannot freely deviate from district's standard plan.* Single debtor with two dependents was earning approximately $30,000.00 annually with a projected tax refund for the year prior to filing in the amount of $3,261.00. Chapter 13 trustee objected to provision in debtor's proposed plan that struck through the district's standard plan provision regarding treatment of tax refunds but did not include any non-standard provisions addressing the topic. Debtor argued that the district plan violated the Bankruptcy Code and Rules and that requiring the debtor to turn over her tax refund would result in capturing non-disposable income in contravention of Section 1325 of the Bankruptcy Code. The bankruptcy court rejected those arguments, holding that the district's standard plan was not only permissible under the Bankruptcy Code and Rules but also was explicitly authorized. Expressing concern that the district's standard plan would become a nullity if debtors were allowed to freely deviate from it, the court denied confirmation of the proposed Chapter 13 plan.

***In re Barragan-Flores*, EP-17-CV-364-KC, 2018 WL 2798411 (W.D. Tex. Apr. 19, 2018)**. *Chapter 13 debtor cannot keep and cramdown as to some cross-collateralized assets and surrender others.* Prepetition, debtor entered in two loan agreements that cross-collateralized two automobiles owned by the debtor. Debtor obtained confirmation of Chapter 13 plan that provided for him to retain one vehicle and surrender the other.

Secured creditor objected on the grounds that under Section 1325(a)(5) debtor's only options to obtain confirmation over its objection were to cramdown as to both vehicles or to surrender both vehicles. The district court reversed, holding that debtor had to treat similarly all collateral securing each claim and therefore in cross-collateralization context could not choose to keep some collateral and surrender other collateral.

CONVERSION

***In re Hurtado*, 17-10074, 2017 WL 5153567 (Bankr. S.D. Tex. Nov. 6, 2017)**. *Chapter 7 debtors who had not acted in bad faith could convert to Chapter 13 to prevent avoidance action for pre-petition transfers to their daughter, but Chapter 7 trustee that brought action would be entitled to administrative expense claim to be paid under Chapter 13 plan*. Four and a half years prior to filing Chapter 7 petition, debtors transferred a rental property to their daughter. When the Chapter 7 trustee filed an adversary seeking to avoid the transfer of the rental property to their daughter, the debtors moved to convert their case to one under Chapter 13 in order to pay their creditors in full or pay the value of the rental property in question. Despite the fact that the debtors' SOFA had some inaccuracies, the court found any such deficiencies to be inadvertent and that the debtors had not acted in bad faith. While permitting the debtors to convert to Chapter 13 under Sections 706 and 1307(c), the court nevertheless noted that under Section 503(b) the Chapter 7 trustee would be entitled to an administrative expense that would be collected through their Chapter 13 plan.

ATTORNEYS (FEES AND CONDUCT)

***Wright v. Csabi et al (In re Wright)*, 13-10472, 2017 WL 6001685 (Bankr. S.D. Tex. Dec. 1, 2017)**. *Undisclosed attorney fee-sharing agreements can result in violation of the automatic stay*. In his application to employ, special litigation counsel to Chapter 13 debtor failed to disclose fee-sharing agreement he had with other attorneys. After achieving settlement of debtor's tort claim, the attorney wired money to his fee-sharing counterparts. Upon discovery of the fee sharing, the bankruptcy court held that the special litigation counsel and the attorneys with whom he was sharing fees had violated Sections 327 and 329 of the Bankruptcy Code, Bankruptcy Rules 2014 and 2016, and Local Rule 2014-1 by not obtaining court approval for their arrangement, and that the arrangement was fee-sharing prohibited under Section 504. Holding that the attorneys had violated the automatic stay by accepting their payments, the court held that they would be liable for the same and set a separate trial to address the damages question.

***Stewart v. Sikes*, CV 16-1187, 2017 WL 6567989 (W.D. La. Dec. 22, 2017)**. *Special counsel that fails to get contingency fee agreement approved in advance by bankruptcy court may be denied employment on contingency fee basis and required to instead submit fee application under Section 330.* After confirmation of a Chapter 13 plan, the debtor was involved in a motor vehicle accident and initiated a state court lawsuit with contingency fee counsel without filing an application to employ with the bankruptcy court. Approximately two years after the accident and one month before the end of the Chapter 13 plan, the contingency fee counsel filed an application to employ. The

bankruptcy court entered an order approving the employment of the counsel but rejected the contingency fee basis and instead ordered counsel to file a fee application under Section 330. Counsel appealed and the district court affirmed, finding that because counsel did not seek prior approval of the contingency fee agreement the bankruptcy court had not clearly erred in rejecting the employment on a contingency fee basis.

***In re Banks*, 17-10456, 2018 WL 735351 (Bankr. W.D. La. Feb. 2, 2018)**. *Nationwide consumer debtor mill that negligently handles clients and cases will be subjected to disgorgement and other sanctions*. Chapter 7 debtor represented by UpRight, a nationwide consumer bankruptcy mill, had her case bungled on multiple levels by UpRight. After second dismissal, UST stepped in to get case reinstated and seek sanctions on behalf of debtor against UpRight. Finding that Upright had made numerous misrepresentations to the debtor, failed to have an attorney licensed in Louisiana handling her case, provided and engagement letter that violated the Louisiana Code of Professional Responsibility and the court's practice with respect to unbundling of basic bankruptcy services, and ultimately negligently allowed the debtor's case to get dismissed. After a scathing factual analysis, the court found that disgorgement pursuant to Section 329, Section 526(c), and Bankruptcy Rule 2017 were appropriate and entered various sanctions including a temporary prohibition on filing cases in the Western District of Louisian, mandatory disclosure language for all future contracts with residents of the Western District of Louisiana, and monetary sanctions.

***Molloy v. Sikes*, CV 16-0218, 2018 WL 794708 (W.D. La. Feb. 7, 2018)**. *Post Harris v. Viegelahn, Chapter 13 counsel can get fee application approved prior to looming conversion*. Knowing that conversion to Chapter 7 was pending, Chapter 13 counsel sought (with the debtor's approval) an order approving his fees. Looking to *Harris v. Viegelahn*, the bankruptcy court denied the motion ruling that it could not award attorney's fees in a Chapter 13 prior to confirmation, conversion, or dismissal and that local historical practice precluded allowing fee applications prior to dispositive events. The district court reversed, holding that nothing in *Harris* indicated that administrative fees of a Chapter 13 case cannot be distributed <u>prior</u> to conversion. Relying upon Sections 330 and 331, the district court further held that the bankruptcy court abused its discretion by refusing carte blanche to entertain the possibility of allowing fee applications prior to conversion of a case from Chapter 13 to one under Chapter 7.

***In re Galloway*, 15-12646, 2018 WL 1065124 (Bankr. E.D. La. Feb. 23, 2018)**. *Consumer debtor attorney claiming retirement will be sanctioned for failure to represent clients from whose cases he has not withdrawn.* Consumer practitioner retired and moved out of state. When the consumer practitioner failed to appear to represent his clients in matters before the bankruptcy court, the court entered a show cause order in an effort to determine what was going on. The consumer practitioner represented to the court that he had sold his practice to another practitioner; as a result the court entered show cause orders against both practitioners in order to take evidence and determine which attorney should be responsible for failing to represent the clients. The evidence strongly supported the conclusion that the retiring attorney had not transferred his practice to the other practitioner but rather only the building in which he officed; among

other things, the retiring attorney had used his secretary to monitor his pending cases, had remained counsel of record and received payments from clients for the vast majority of his cases, and had not proactively informed any clients that he was retiring. The court ordered to retiring attorney to disgorge various sums and pay sanctions to the practitioner whose role in the matter he had misrepresented.

***In re Standley*, 14-36711, 2018 WL 1457242 (Bankr. S.D. Tex. Mar. 20, 2018)**. *Because debtor is not liable for attorney's fees associated with fee defense, creditor liable for debtor's attorney's fees cannot be liable for those fees either.* Post-confirmation of Chapter 13 plan, mortgage servicer file a late proof of claim and notice of mortgage payment change. Debtor objected to the claim because the bar date had passed. The parties settled the underlying objection with the mortgage servicer agreeing to reduce its claim to the amount contained in the confirmed Chapter 13 plan, but the parties disputed to what extent debtor was entitled to recover attorney's fees from the mortgage servicer. Relying upon the *Asarco* ruling, the bankruptcy court held that because debtor could not be liable for attorney's fees associated with defense of fee requests there could therefore be no shifting of fees with respect to attorney time spent on fee defense.

***Hobbs v. Chesson*, MC 16-00201, 2018 WL 4172667 (Bankr. W.D. La. Aug. 29, 2018)**. *Attorney will not escape responsibility for impersonating debtors by casting blame on his non-attorney employees*. US Trustee alleged that a law firm impersonated debtors for purposes of completing mandatory online credit counseling briefings and subsequently filed multiple false credit counseling verifications in Chapter 13 cases and failed to comply with Section 528(a)'s requirements regarding providing executed written contracts to clients. Multiple former and current employees testified that they had taken credit counseling courses for clients and multiple clients testified that although they had signed the verification they had never personally taken the credit counseling course. The attorney-defendants argued that they were not directly involved in nor had direct knowledge of any impersonation by their employees of debtors. The court found by clear and convincing evidence that the attorneys were involved in a pervasive scheme to impersonate debtors and file false pleadings, emphasizing that the attorneys were responsible for the actions of their non-attorney employees. The court ordered disgorgement of fees, temporary suspension of the attorneys from practicing in the district, and for the attorneys to prepare a remediation plan subject to the approval of the UST in order to ensure no further abuses.

***Decloutte v. Austin (In re Decloutte, In re Austin)*, 12-35092, 2018 WL 3078153 (Bankr. S.D. Tex. June 20, 2018)**. *Debtor's counsel involved in egregious misconduct will be sanctioned, referred for discipline, and referred to United States Attorney for investigation of potential bankruptcy crimes*. Debtor brought claims against her bankruptcy counsel for improper post-petition transfers in violation of Section 549, willful violation of the automatic stay, turnover of estate property and contempt. Attorney filed for bankruptcy and debtor's claims were converted to an adversary proceeding. Court found that attorney had (among other things) engaged in egregious course of misrepresentation to the court in her disclosures of compensation, had sworn out a criminal complaint against the debtor for theft of funds knowing that it was false the

result of which had been the arrest of the debtor, and had misappropriated monies belonging to the estate in the form of funds in her IOLTA on the petition date. The bankruptcy court found that the attorney had violated Rules 3.03 (Candor Toward the Tribunal), 4.04 (Respect for the Rights of Third Person), 1.14 (Safekeeping Property), and 8.04 (Misconduct) of the Texas Disciplinary Rules and that the attorney's debts to the debtor were nondischargeable under Section 523(a)(4), awarded punitive sanctions and referred the attorney to the State Bar of Texas for discipline and the United States Attorney for investigation and potential prosecution for violation of Title 18 crimes.

***In re Pace*, 13-14017-JDW, 2018 WL 1891311 (Bankr. N.D. Miss. Mar. 22, 2018)**. *Chapter 7 trustee can hire self to represent self and fee application can be approved even when there are not yet funds with which fees could be paid*. Application by Chapter 7 trustee to retain herself as attorney for herself was approved without opposition. Trustee qua attorney subsequently engaged in litigation against Chapter 7 debtors over whether debtors could stack their state law homestead exemption and filed a fee application. Debtors objected, essentially arguing that trustee should be limited to her statutory commission and that because there were not yet any funds in the estate the fee application could not be approved. The bankruptcy court overruled the debtor's objections, noting that approval of a fee application and payment of approved fees were two separate issues and that fees could be approved even if there were no funds available to pay them, and rejecting the premise that the trustee could be limited to her statutory commission where she had obtained an order authorizing her to retain herself as attorney.

***McBride v. Riley*, CV 1:17-01302, 2018 WL 1768602 (W.D. La. Apr. 12, 2018)**. *Filing fees, credit counseling fees, and credit report fees are assumed to be included in no-look fee under local standing order*. Debtor's counsel sought reimbursement of filing fee, credit counsel fee, and credit report as administrative claim to be included in Chapter 13 plan above and beyond his no-look fee. The bankruptcy court disagreed, relying on the local standing order regarding no-look fees which by its terms included expenses, further concluding that allowing debtor's counsel to obtain reimbursement of the filing fee would eviscerate Rule 1006(b)'s provisions giving bankruptcy courts the discretion to allow debtors to pay the filing fee in installments. On appeal, the district court that filing fees, credit counseling fees, and credit report fees are not administrative expenses of a Chapter 13 debtor's estate and were included instead in the no-look fee under the local standing order.

ESTOPPEL THEORIES

***In re Thomas*, BR 10-40785, 2018 WL 1210723 (S.D. Tex. Mar. 8, 2018)**. *Res judicata may preclude debtor from seeking in bankruptcy court relief from alleged violations of the automatic stay where those alleged violations could have been presented in a prior civil lawsuit.* Debtor filed Chapter 7 to prevent foreclosure on her house; in her statement of intent, she indicated that she intended to keep the house. Post-discharge and after her Chapter 7 case was closed, debtor began bringing numerous and various lawsuits against mortgage holder and others related to assignment of her mortgage; at least one of those lawsuits was dismissed with prejudice. Bankruptcy court denied debtor's request to

reopen case which was made with the goal of seeking contempt against defendants for allegedly violating the automatic stay by recording the assignment of the mortgage and by communicating with the debtor about her mortgage, reasoning in part that res judicata precluded the claims because they could have been brought in the lawsuit that had been dismissed with prejudice. On appeal, the district court affirmed, finding that the bankruptcy court had not abused its discretion.

***Claybar et al v. Huffman (In re Huffman)*, 16-10344, 2017 WL 4621703 (Bankr. E.D. Tex. Oct. 13, 2017)**. *Prepetition post-answer default judgment against debtor may collaterally estop debtor from challenging adversary complaint brought under Section 523.* Pre-petition, district court had entered post-answer default when debtor failed without justification to appear at pre-trial conference despite having been ordered to do so. The final judgment entered by the district court was based upon evidence submitted by the plaintiff and included extensive findings of fact. When the debtor filed for Chapter 7, judgment-plaintiffs sought determination that judgment debt was nondischargeable as a matter of law under Section 523(a)(2)(A). Applying federal principles of issue preclusion, the bankruptcy court found that the factual holdings in the district court judgment adequately supported each of the elements of a Section 523(a)(2)(A) action for false, misleading, deliberate, and material misrepresentations to the plaintiffs and therefore granted summary judgment against the debtor.

***Montalvo v. Vela et al (In re Montalvo)*, 16-70186, 2017 WL 4621704 (Bankr. S.D. Tex. Oct. 13, 2017)**. *Res judicata can preclude a court from considering the merits of new motions for summary judgment where prior motions for summary judgment had been denied.* Debtor removed to bankruptcy court a lawsuit against several defendants. Debtor and defendants filed cross motions for summary judgment and the bankruptcy court granted in part and denied in part. Debtor amended his complaint but did not amend the portions against which defendants had sought and been denied summary judgment. Defendants again brought motions for summary judgment. Finding that the new motions for summary judgment merely raised again issues against which the court had previously denied summary judgment, the court held that res judicata precluded considering the merits of the new motions for summary judgment.

***Williams v. Smiddy et al*, CV 16-1586, 2017 WL 4845859 (W.D. La. Oct. 26, 2017)**. *Equitable estoppel should not be used to render judgment against a debtor in personal injury lawsuit without first providing the bankruptcy trustee an opportunity to substitute in as the real party in interest.* After an automobile accident, debtor filed Chapter 7. Debtor's schedules did not disclose a personal injury claim. Debtor subsequently initiated a lawsuit in state court based on her personal injury claims. The bankruptcy court entered an order authorizing the retention of special counsel to represent the estate's interest in the state court proceeding. The defendant in the state court proceeding moved for summary judgment arguing that the debtor was equitably estopped from prosecuting her claim based on the failure to disclose the claim in her bankruptcy schedules. The court found that all of the equitable estoppel elements were met, but that it would be inequitable to grant judgment for the defendant because doing so would punish the innocent Chapter 7 trustee for the debtor's failure to disclose the asset. Accordingly, the

court entered an order giving the Chapter 7 trustee a deadline to substitute in as the real party in interest.

***Fornesa v. Fifth Third Mortgage Company*, 897 F.3d 624 (5th Cir. 2018).** *Debtor's failure to properly disclose an asset barred the Debtor from pursuing a stay violation.* Ricardo Fornesa, Jr. sued Fifth Third Bank for foreclosing on a property in violation of the automatic stay in his Chapter 13 bankruptcy. The Debtor shared an equity interest in the property with his son but he disclosed this in his bankruptcy schedules only as "equity sharing agreement in son's house" without providing the property description and without listing the lienholder as a creditor. Son transferred property to Ricardo but Ricardo did not amend his bankruptcy schedules. When Ricardo and son stopped making payments to the bank, Fifth Third proceeded to foreclosure. The Fifth Circuit affirmed the district court's judgment, finding the Debtor was judicially estopped to complain of a stay violation.

***Bourg v. Citibank NA*, CV 17-1519, 2017 WL 5157559 (E.D. La. Nov. 7, 2017)**. *Chapter 7 debtors lack standing to pursue claims belonging to bankruptcy estate*. After a state court entered a judgment foreclosing on debtors' property, debtors brought claims in federal court against the mortgage company. The court dismissed the claims, finding that under *Rooker-Feldman* it lacked subject matter jurisdiction to hear what was in essence an attack on the state court foreclosure judgment and that because the debtors had filed for Chapter 7 relief after the claims arose they lacked standing to bring them because they belonged to the Chapter 7 trustee.

***King v. Select Portfolio Servicing, Inc.*, 4:15-CV-00830-KPJ, 2017 WL 5998222 (E.D. Tex. Dec. 4, 2017)**. *Failure to disclosure litigation claim on Schedules does not necessarily give rise to judicial estoppel against debtor.* Debtor did not disclose mortgage lawsuit in his Schedules but did include it in his SOFA and had an email exchange with the Chapter 7 trustee regarding the mortgage lawsuit. Defendant moved for summary judgment, arguing among other things that debtor lacked standing and was judicially estopped from prosecuting the claim. Although it granted judgment on other grounds, the court held that it was not clear that collateral estoppel applied as a matter of law because Debtor had made at least some disclosure of the mortgage lawsuit in the bankruptcy case.

***Pegg v. Steel Dynamics, Inc. et al*, 1:16-CV-241-SA-DAS, 2018 WL 1247874 (N.D. Miss. Mar. 9, 2018)**. *Court can refrain from applying judicial estoppel against debtor who fails to disclose in his bankruptcy case causes of action that accrue less than one year before the final plan payment is made where debtor seeks to re-open bankruptcy case in order to amend schedules to disclose causes of action.* Chapter 13 debtor was injured in workplace accident during pendency of Chapter 13 case but did not disclose in the bankruptcy case the cause of action arising from the accident. After bankruptcy was closed, debtor filed lawsuit in and defendant moved for judicial estoppel summary judgment based on debtor's failure to disclose the causes of action in his bankruptcy case. Debtor sought to re-open his bankruptcy close in order to disclose the causes of action. The federal district court, noting that the causes of action arose only six months prior to

the debtor making his final Chapter 13 plan payment and that the bankruptcy court could still require any recovery to be repaid creditors, declined to apply judicial estoppel against the debtor on the grounds that doing so would result in an unwarranted windfall for the alleged tortfeasor.

***Plains Seafood, Inc. et al v. Thomason (In re Thomason)*, 17-10164-RLJ7, 2018 WL 4354376 (Bankr. N.D. Tex. Sept. 11, 2018)**. *State court jury finding that debtor acted with malice in causing harm to plaintiff will collaterally estop debtor from challenging dischargeability of judgment debt*. Pre-petition, debtor had caused constable to lock out restaurant in effort to enforce a judgment. In subsequent legal proceedings arising out of the lockout, state court jury had found debtor responsible for damages and awarded exemplary damages based on its specific finding that the debtor had acted with malice. When debtor filed for bankruptcy, judgment creditors brought nondischargeability action under Section 523(a)(6). The bankruptcy court held that the jury's findings established facts sufficient to cause collateral estoppel to prevent the debtor from re-litigating the dischargeability of the state court judgment in its entirety on its conclusion that the jury's finding of malice underlying the primary debt (i.e. the direct damages) made all ancillary debts (e.g. punitive damages, attorney's fees, court costs, interest) nondischargeable as well.

***GT Dave v. Baessler (In re Baessler)*, 11-10670-TMD, 2018 WL 3816773 (Bankr. W.D. Tex. July 19, 2018)**. *Where state court judgment included unitary set of facts that support judgment on nondischargeable causes of action, collateral estoppel will preclude debtor from challenging the nondischargeability of the debt*. After ten day trial, state court had entered judgment against debtor on several legal theories, including one which did not require proof of an intent to deceive. Judgment creditor sought nondischargeability determination in bankruptcy court and argued that collateral estoppel applied. The bankruptcy court held that because the state court judgment included a unitary set of facts that supported judgment based on all of the causes of action including the nondischargeable ones, collateral estoppel precluded the debtor from challenging the nondischargeability of the debt (including punitive damages and attorney's fees awarded in the state court judgment).

***Culotta v. Lafayette Par. Consol. Govt.*, CV 17-0093, 2018 WL 3550499 (W.D. La. July 20, 2018)**. *Finding of judicial estoppel against debtor should be crafted so as not to cut off ability of Chapter 7 trustee to pursue claims in the event of conversion of the Chapter 13 case*. Chapter 13 debtor failed to disclose existence of pending lawsuit in which he was the plaintiff/claimant. Defending parties filed motions for summary judgment arguing that debtor was judicially estopped from proceeding against them based on this failure to disclose in the bankruptcy case; no response was filed. The court found that the elements of judicial estoppel were met and dismissed the debtor's suit, but did so without prejudice so that if the debtor's bankruptcy were to at some point be converted to Chapter 7 the bankruptcy trustee would still be able to pursue those claims.

***Pete v. Capital One, N.A.*, 4:17-CV-594-A, 2018 WL 3150424 (N.D. Tex. June 26, 2018)**. *Ability to pay debts without interest over five years constitutes sufficient*

motivation to judicially estop a Chapter 13 debtor from pursuing undisclosed claims. Chapter 13 debtor failed to disclose litigation claims during pendency of his bankruptcy case. After discharge, defendants in the litigation sought summary judgment under judicial estoppel principles. The debtor argued that he had no motivation to conceal his claims, as he paid all allowed claims in full and even received a refund for overpayments made in the bankruptcy. The district court held that being allowed to pay his debts over five years without having to pay interest provided sufficient motivation for concealment and that the debtor would therefore be judicially estopped from pursuing his claims.

***In re Dahlin*, 16-36169, 2018 WL 2670501 (Bankr. S.D. Tex. May 15, 2018)**. *Pre-petition pleadings that are struck by a state court as a sanction can constitute a post-answer default such as collaterally estops a debtor from challenging claims arising out of divorce proceedings*. Debtor filed adversary proceeding challenging ex-husband's claims arising out of their divorce proceeding and asserting claims against the ex-husband. The ex-husband filed a motion for summary judgment, arguing collateral estoppel prevented the debtor from re-litigating certain orders entered by the divorce court, that debtor's failure to disclose in her schedules/SOFA causes of action brought in the adversary judicially estopped her from pursuing them, and that orders from debtor's prior bankruptcy case collaterally estopped other issues. The bankruptcy court held that certain issues were subject to collateral estoppel in favor of the ex-husband because the debtor's pleadings in the divorce proceeding had been ordered struck by the divorce court as a sanction and therefore constituted a post-answer default, that the debtor's failure to disclose in her schedules/SOFA other causes of action resulted in judicial estoppel precluding her from pursuing them, and that because the debtor's prior bankruptcy case had been dismissed for failure to confirm a Chapter 13 plan the orders from that case could not be used as a basis for collateral estoppel against the ex-husband because upon dismissal Section 349(b) operated to nullify those particular orders.

ARBITRATION

***Griffin v. Country Credit, LLC (In re Griffin)*, 2018 WL 1268466 (Bankr. S.D. Miss. Mar. 9, 2018)**. *Bankruptcy court cannot refuse to compel arbitration of non-core claims that are related to a valid arbitration agreement*. Defendant sought to compel arbitration in adversary proceeding brought by debtor alleging violations of the Truth in Lending Act. The court found that the arbitration agreement in question was valid and that it did not have discretion to refuse to compel arbitration because the claims in question were non-core.

APPELLATE PROCEDURE

***Nevarez v. Monge (In re Monge)*, 17-50319, 2017 WL 5041084 (5th Cir. Nov. 2, 2017)**. *Interlocutory order will not be addressed on separate appeal when final judgment incorporating interlocutory order is also on appeal*. Bankruptcy court entered interlocutory orders denying motion to stay pending arbitration and movant appealed. While that appeal was pending, bankruptcy court entered final judgment on the underlying claims and movant appealed. The district court consolidated the appeals and

dismissed the interlocutory appeal indicating that it would consider the merits of that dispute as part of the appeal of the final judgment. Movant appealed that dismissal and appellee moved to dismiss. The Circuit Court granted the motion to dismiss, finding that the district court would consider the merits as part of the appeal of the bankruptcy court's final judgment.

***In re Riley*, 17-80108, 2017 WL 4990441 (Bankr. W.D. La. Oct. 27, 2017).** *Chapter 13 counsel receiving no-look fee under district standing order is not entitled to additional reimbursements.* Chapter 13 debtor proposed plan which would pay her attorney the no-look fee permitted under the district's standing order regarding no-look fees with additional reimbursements to be made to pay the filing fee, credit counseling fee, and credit report fee. The bankruptcy court disallowed the reimbursements and limited the attorney to the no-look fee. The attorney appealed and moved the bankruptcy court to stay the confirmation order pending appeal. The bankruptcy court denied the motion to stay, finding that movant failed to establish a likelihood of success on the merits, irreparable injury if stay not granted, absence of substantial harm to other parties from granting the stay, and service to the public interest from granting the stay.

***Matter of Kite*, 17-30450, 2018 WL 400743 (5th Cir. Jan. 12, 2018)**. *Stand-alone appeal of Rule 8002's fourteen day deadline to appeal is frivolous*. Unsecured creditor (Appellant) objected to proof of claim filed by judgment creditor (Appellee)) of debtor with removal argument that had been previously rejected by both the state court and a federal district court. The bankruptcy court denied the objection based on the Rooker-Feldman doctrine. Appellant filed a notice of appeal one day after the appeal deadline had passed. Appellee moved to dismiss on grounds that appeal was untimely and frivolous, and district court granted the motion and awarded sanctions against Appellant. The only argument properly preserved by the Appellant on appeal to the circuit court was the argument that Rule 8002's deadline is not jurisdictional. The circuit court found that jurisdictional argument by itself was frivolous because all ten circuit courts that had ruled on Rule 8002 had found it to be jurisdictional.

***Alpha Omega CHL, Inc. v. Min (In re Min)*, 16-33804-SGJ-7, 2018 WL 276162 (N.D. Tex. Jan. 3, 2018)**. *Attorney's failure to notice docketing of record on appeal does not constitute excusable neglect sufficient to justify missing briefing deadline*. Appellant's attorney failed to notice that bankruptcy clerk had transmitted the record on appeal and therefore failed to timely file appellant's brief. District court ordered parties to show cause why appeal should not be dismissed. Appellant moved to extend time to file brief. Finding that prejudice to debtor resulted from delaying his fresh start, the court held that appellant's failure to timely file its brief did not arise out of excusable neglect and dismissed the appeal.

***Alpha Omega CHL, Inc. v. Min (In re Min)*, 16-33804-SGJ-7, 2018 WL 684875 (N.D. Tex. Feb. 1, 2018)**. *Mistake of law might establish excusable neglect where failure to act is not*. On motion for rehearing, Alpha Omega presented evidence that its attorney had misunderstood the docketing of the appellate record to include an indication that the record was incomplete and that as a consequence the appellate deadlines had not begun

running. Expressing frustration with the attorney for failure to investigate, the court nevertheless concluded that counsel's mistake of law was not as egregious as the initial indication that she had simply not read the docket entry (see prior synopsis) and held that excusable neglect had been established and the appeal would be reinstated.

***Lohri v. Specialized Loan Servicing, LLC*, 4:17-CV-866, 2018 WL 893892 (E.D. Tex. Feb. 14, 2018)**. *District court does not have jurisdiction to hear untimely appeal*. Homeowner filed numerous pro se lawsuits against mortgage companies attempting to avoid foreclosure, arguing that the mortgage servicer could not foreclose because it did not hold the note (the so-called "split-the-note theory"). In one of those lawsuits, the federal district court dismissed the lawsuit holding that the split-the-note theory upon which the homeowner was relying had no merit under Texas law. Upon filing Chapter 7, homeowner initiated an adversary proceeding again arguing the split-the-note theory; the bankruptcy court dismissed the adversary, holding that res judicata and collateral estoppel applied. Homeowner filed her notice of appeal twenty days later and did not timely seek additional time under Rule 8002(d)(2)(B). The district court dismissed the appeal as untimely on the grounds that under Rule 8002 and 28 U.S.C. § 158 the district court to lack jurisdiction over an untimely appeal.

***White v. United States Trustee et al. (In re White)*, 1:18-CV-66-HSO-JCG, 2018 WL 1096854 (S.D. Miss. Feb. 28, 2018)**. *District court does not have jurisdiction to hear an untimely appeal*. Bankruptcy court entered order dismissing debtor's case. Thirty-one days later, debtor filed notice of appeal. District court sua sponte dismissed the appeal for lack of jurisdiction due to the debtor's failure to comply with the appeal deadlines contained in Rule 8002 and 28 U.S.C. § 158.

***In re Odam*, 17-50035-RLJ-7, 2018 WL 1070864 (Bankr. N.D. Tex. Feb. 22, 2018)**. *Debtor's appeal may be dismissed where debtor is patently acting in bad faith*. Chapter 7 debtor submitted bogus checks of over $200,000 to the Chapter 7 trustee in payment for claims held by secured creditor against seventeen rental properties owned by the debtor. The bankruptcy court rejected the debtor's claims to have paid the secured creditor in full. The debtor appealed and filed application to proceed in form pauperis. The district court noted the ludicrousness of the debtor's claim to be indigent in light of his claims to have paid the trustee over $200,000 and likewise found his appeal to be frivolous because the bankruptcy court had previously found the secured creditor's claim to be valid. Because the court found the debtor's appeal and his request to proceed in forma pauperis to be in bad faith, it dismissed the appeal.

***In re Duggan*, 17-41190, 2018 WL 4210203 (Bankr. E.D. Tex. Sept. 4, 2018)**. *Debtor seeking to appeal denial of confirmation and dismissal of case must show that appeal is being made in good faith in order to qualify to proceed in forma pauperis*. Chapter 13 debtor was involved in running dispute with HOA that had a lie non her condo. After multiple continuances of the confirmation hearing, the bankruptcy court ultimately denied confirmation and dismissed the case finding that the debtor's proposed plan did not meet the feasibility requirements of Section 1325(a)(6) and because the debtor had been in bankruptcy for more than a year without confirming a plan, had failed to file

required documents, and was in arrears on payments to the Chapter 13 trustee. Debtor sought permission to appeal in forma pauperis. The bankruptcy court found that she met the standard with respect to her inability to pay but denied the request based on its finding that the debtor was not proceeding in good faith as reflected by the same facts that caused the court to deny confirmation.

***Sanchez v. Wells Fargo, NA (In re Sanchez)*, 17-51721-CAG, 2018 WL 3816775 (Bankr. W.D. Tex. July 24, 2018)**. *Busy-ness of counsel does not constitute excusable neglect*. Plaintiff missed deadline to appeal by nine days and filed motion to extend deadline on the basis that plaintiff's counsel had been too busy for appeal to be timely filed. Applying Rule 8002(d)(1), the bankruptcy held that the busy schedule of a party's counsel does not constitute excusable neglect and therefore denied the motion to extend.

***Mawatu v. OneMain Fin. of Texas, Inc.*, A-17-CA-1222-SS, 2018 WL 1886712 (W.D. Tex. Apr. 19, 2018)**. *Appeal of order that was based on reasons stated on the record at hearing must include a transcript of the hearing*. Chapter 7 debtor's motion to avoid lien on her automobile was denied by the bankruptcy court for the reasons stated on the record at the hearing on the motion. On appeal, pro se debtor failed to include copy of transcript of the hearing in the record. The district affirmed the bankruptcy court's ruling, finding that without the hearing transcript it had no basis upon which to review the bankruptcy court's findings of fact and conclusions of law.

***Parson v. Unknown*, 3:18-CV-1449-L, 2018 WL 3046248 (N.D. Tex. June 20, 2018)**. *Interlocutory appeal will be dismissed if no leave obtained*. Pro se appellant appealed bankruptcy court order denying her motion to stay proceedings pending appeal and sanctioning appellant. The District court held that the order was interlocutory and the appeal would be dismissed because appellant had not obtained leave to appeal and could not have met any of the three elements for interlocutory appeal reflected in 28 U.S.C. § 1292(b).

***In re Brown*, 17-52324-CAG, 2018 WL 2425968 (Bankr. W.D. Tex. May 23, 2018)**. *Direct appeal of issue related to Chapter 13 plan is not appropriate where appeal does not involve an urgent issue that is necessary to materially advance the bankruptcy case*. Above-median Chapter 13 debtor proposed plan that would pay 100% of unsecured claims but did not call for debtor to include all of his available monthly net income in his plan payments. The court approved the Chapter 13 plan with the proviso that if the debtor modified his plan to pay less than 100% to unsecureds he would not receive his discharge. Debtor sought certification of direct appeal on issue of whether court could add that proviso to his proposed plan. Finding that the appeal did not involve an urgent issue necessary to materially advance the bankruptcy case, the court denied certification.

TRANSFERS AND CLAIMS

***Martin v. JP Morgan Chase Bank, N.A. et al (In re Martin)*, 17-51507-KMS, 2017 WL 6803550 (Bankr. S.D. Miss. Dec. 28, 2017)**. *Debtors must allege facts sufficient to support every element of adversary claims asserted in order to survive Rule 12(c) motion*

to dismiss. Shortly after their house was sold at foreclosure sale, debtors filed Chapter 13 case. Debtors sued mortgage lender seeking to set aside foreclosure sale under Sections 547 and 548 and damages under the Real Estate Settlement Procedures Act (RESPA) and the Fair Debt Collection Practices Act (FDCPA), as well as negligent infliction of emotional distress. The bankruptcy court dismissed the adversary proceeding finding that the complaint failed to allege all of the elements of Sections 547 and 548; failed to allege facts that would have made the mortgage lender meet the statutory definition of "debt collector" under the FDCPA; failed to allege that the debtors had a federally related mortgage loan such as would be governed by the RESPA; and failed to allege any facts describing any physical effects of distress such as might support the intentional infliction of emotional distress claim. The court also held that the RESPA does not created a private right of action.

***Litton v. Apperson Crump, PLC* (In re Litton), 15-12871-JDW, 2018 WL 632315 (Bankr. N.D. Miss. Jan. 30, 2018)**. *There is no avoidable preference where the transfers at issue were from debtor's father to non-debtor and the funds at issue were earmarked for payment to the non-debtor*. Woman's father made payments directly to her divorce attorneys in the form of loans to the daughter; those monies never passed through the daughter's possession. Upon filing bankruptcy, the daughter brought a preference action against the attorney. The bankruptcy court held that because the funds had been loaned to the debtor specifically to pay the attorney's fees and because the funds had never actually been in the debtor's possession or under her control that there was no avoidable preference.

***Whitlock v. Lowe*, SA-16-CV-00049-RCL, 2018 WL 1528236 (W.D. Tex. Mar. 28, 2018)**. *Funds fraudulently transferred to transferee may be recovered pursuant to Section 550 even if post-transfer the funds were effectively spent for the benefit of the debtor*. Debtor, in anticipation of filing bankruptcy, transferred money to party (the "Transferee") who then transferred that money to the debtor's wife and to company associated with debtor; the transferred money was arguably then used by the debtor but there was no evidence that any additional property came into the bankruptcy estate as a result. Bankruptcy court held that the Chapter 7 trustee could avoid and recover from the Transferee the full amount of the transfers. In initial decision, district court affirmed bankruptcy court's ruling that recovery of certain funds as fraudulent transfer based on the conclusion that the estate was not in the same position that it would have been had the transfer to the Transferee not been made. The Transferee sought reconsideration, arguing that the single-satisfaction provisions of Section 550(d) was violated because the transferred monies had effectively been spent by the debtor after they were transferred to the wife and the company. The district court amended its opinion to conclude that the estate was in the same position that it would have been had the transfer to the Transferee not been made because the debtor spent the money elsewhere anyway, but held that the single-satisfaction rule was nevertheless not violated by continuing to allow the trustee to recover from the Transferee under Section 550.

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ABI Editor-at-Large

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Courts Divided on Venue for Small-Dollar Avoidance Actions

Judges Pappas and Teel permit avoidance actions for small amounts to be prosecuted in the debtors' bankruptcy courts.

When a trustee pursues an avoidance action for less than $12,850, is the debtor's bankruptcy court the proper venue?

The courts are divided, but Bankruptcy Judges Jim D. Pappas of Pocatello, Idaho, and S. Martin Teel, Jr., of Washington, D.C., concluded that venue is proper in the debtor's court, even if their conclusions were based on a drafting error that Congress may have committed in adopting 28 U.S.C. § 1409(b).

The facts in both cases were typical of a small-dollar avoidance actions. The trustees were seeking to recover about $11,000 and $12,000, respectively. In Idaho, the trustee was pursuing a constructively fraudulent transfer under Section 548 and Idaho law. In Washington, D.C., the trustee was after a preference under Section 547.

Claiming that venues in the debtors' courts were improper under Section 1409(b), both defendants filed motions to dismiss under Rule 12(b)(3).

Saying that the courts do not agree, Judges Pappas and Teel relied on the plain meaning of Section 1409(b) in concluding that venue was proper in the debtors' courts.

Section 1409 governs venue in bankruptcy cases. Subsection (a) says that "a proceeding arising under title 11 or arising in or related to a case under title 11 may be commenced in the district court in which such case is pending."

Subsection (b) provides that a trustee "may commence a proceeding arising in or related to such a case to recover a money judgment of or property worth less than $1,300 or a consumer debt of less than $19,250, or a debt (excluding a consumer debt) against a noninsider of less than $12,850, only in the district court for the district in which the defendant resides."

The two subsections use notably different language. Subsection (a) applies to proceedings arising under, arising in, or related to a title 11 case. Subsection (b) only refers to proceedings "arising in or related to" a title 11 case. Is the distinction significant, or is the absence of "arising under" in subsection (b) a distinction without a difference?

Because the suits sought less than $12,850, the defendants contended that they could only be sued where they resided, not in the debtors' home courts.

Like Judge Teel, Judge Pappas pointed out that subsection (b) "makes no mention of cases 'arising under' title 11." For both judges, the distinction was important, given the parties' concessions that the avoidance actions — based on Sections 547, 548, 544(b) and 550 — were proceedings arising under title 11.

If subsection (a) alone was applicable, venue in the debtor's bankruptcy court was proper because the proceedings arose under title 11. However, the defendants made several arguments contending that subsection (b) applied, but both judges knocked them all down.

Judge Pappas said that the "plain language interpretation" of subsection (b) "has led many courts to conclude that it applies only to claims 'arising in' and 'related to' under title 11, but not to those 'arising under' title 11." Other courts, including the Bankruptcy Appellate Panel for the Ninth Circuit, held otherwise, he said, believing "that Congress unintentionally omitted 'arising under' from subsection (b)."

Citing Lamie v. U.S., 540 U.S. 526 (2004), both judges said that the Supreme Court nixed the idea that a court may disregard the plain language of a statute by presuming that Congress made a mistake. Even if the BAP opinion were binding, Judge Pappas said it was not good law because it preceded Lamie.

Finding no absurd result, Judge Pappas held that the monetary limitations of subsection (b) did not apply because the avoidance action arose under title 11. Because subsection (a) applied, Judge Pappas concluded that venue was proper in the debtor's court.

Likewise, Judge Teel agreed with decisions concluding "that Section 1409(b) does not apply to a proceeding 'arising under title 11.'"

Cases to the contrary, according to Judge Teel, were "unpersuasive." Similarly, Judge Pappas declined to follow a pair of bankruptcy court decisions that had invoked the $12,850 threshold for avoidance actions, saying they gave "terse treatment" to the question.

Judge Teel pointed out several "odd results" that would occur if "arising under" cases were included in subsection (b). A trustee could avoid a transaction in the debtor's home court under subsection (a) but then be forced to obtain a money judgment for the value of the property in the defendant's hometown under subsection (b).

Judge Teel came up with another odd result: Subsection (b) only applies to trustees. Thus, a debtor could always sue in the debtor's home court, but a trustee seeking the same relief on the same claim could not.

Another question: If subsection (b) did apply, which part governed? Was the suit (1) "a case to recover a money judgment of or property worth less than $1,300," where venue would be proper in the debtor's bankruptcy court, or was it (2) a case to recover "a debt . . . of less than $12,850," in which event venue would be improper, Judge Pappas asked?

Employing a "practical reading" of the statute, Judge Pappas said that the "real effect" of the suit was "to recover money judgments or property" for more than $1,300, making the $12,850 threshold inapplicable and meaning that venue was proper.

Judges Pappas and Teel denied the motions to dismiss for improper venue.

The opinions are Klein v. ODS Technologies LP (In re J & J Chemical Inc.), 18-08029 (Bankr. D. Id. Jan. 11, 2019); and Webster v. Republic National Distributing Co. LLC (In re Tadich Grill of Washington DC LLC), 18-10029 (Bankr. D. D.C. March 12, 2019).

Reading Stern Narrowly, Delaware Judge to Issue Final Order in Fraudulent Transfer Suit

Judge Sontchi declines to rule that 28 U.S.C. § 157 is unconstitutional by denominating fraudulent transfer suits as 'core' proceedings.

Narrowly interpreting Supreme Court authority, Chief Bankruptcy Judge Christopher S. Sontchi of Delaware disagreed with the Ninth Circuit and several district courts by holding that the bankruptcy court has constitutional authority to enter a final judgment in a fraudulent transfer suit against a defendant who neither filed a claim nor consented to final adjudication in bankruptcy court.

Judge Sontchi concluded that the Supreme Court has not explicitly ruled that Sections 157(b)(1) and (b)(2)(H) are unconstitutional when applied to fraudulent transfer suits against defendants who have not filed proofs of claim. Absent high court authority, he declined to find the statute to be unconstitutional.

When thinking about Judge Sontchi's opinion, consider this question: Did he ignore an obvious implication of Stern v. Marshall, 564 U.S. 462 (2011)?

The Suit by the Creditors' Trust

The Paragon Offshore PLC chapter 11 plan created a trust to pursue claims on behalf of creditors. The trust filed suit after confirmation to recover allegedly fraudulent transfers that occurred before Paragon's chapter 11 filing.

The defendants filed a motion asking Judge Sontchi to declare that he could only enter proposed findings of fact and conclusions of law. Judge Sontchi denied the motion in a scholarly March 11 opinion that surveys the ups and downs (mostly downs) of bankruptcy courts' powers following Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (plurality opinion).

Judge Sontchi laid out the statutory framework, beginning with 28 U.S.C. § 157(b)(1), where Congress gave bankruptcy courts power to "hear and determine . . . all core proceedings." Section 157(b)(2)(H) lists fraudulent transfer suits among "core proceedings." Thus, the statute permits bankruptcy courts to enter final judgments in fraudulent transfer suits.

By contending that he could not issue a final judgment in a fraudulent transfer suit, Judge Sontchi said that the defendants were asking him to rule that parts of 28 U.S.C. § 157 are unconstitutional.

Granfinanciera and Stern

Judge Sontchi parsed the Supreme Court's bankruptcy decisions to identify what the justices held and how they limited their opinions. After Marathon Pipe Line, he examined Granfinanciera S.A. v. Nordberg, 492 U.S. 33 (1989), which, he said, was closely related but not binding, even though the facts were "closely analogous." Like the case at bar, Granfinanciera involved a fraudulent transfer suit against a defendant who had not filed a claim. The high court ruled that the defendant was entitled to a jury trial.

Judge Sontchi said that Granfinanciera at bottom was a Seventh Amendment case involving the right to a jury trial, not an Article III case regarding the constitutional limitations on the powers of bankruptcy judges. He said that Granfinanciera "alone" did not compel him to rule that Section 157(b)(2) violates Article III of the Constitution.

Judge Sontchi said that Granfinanciera "intentionally and explicitly refrained from extending its opinion to the constitutionality of the entry of final orders by bankruptcy courts pursuant to [Section 157] — the very issue before this Court today."

Next, Judge Sontchi turned to Stern. Like Granfinanciera, he said that Stern "does not bind lower courts on issues that were not directly before it."

While "its rhetoric may have been at points, sweeping," Judge Sontchi said that Stern's "ultimate holding was not." Rather, he alluded to how the Chief Justice said that Stern should little affect the distribution of work between district and bankruptcy judges.

Stern, Judge Sontchi said, "included a crystal-clear statement that 'Congress, in one isolated respect, exceeded' its Article III power when passing the 1984 Amendments — and that 'isolated' issue is not the issue before this Court today."

Nodding to the Ninth Circuit and other courts that have ruled otherwise, Judge Sontchi said, "Perhaps Stern provides compelling evidences of how the Supreme Court would rule on this issue if it were to address it directly, but it does not decide it." [Emphasis in original.]

Since neither Stern nor Granfinanciera were controlling, Judge Sontchi said that the defendants "are not asking this Court to apply controlling precedent to the matter at hand. Instead, Movants are asking this court to extend the holdings of those cases, in order to find that 28 U.S.C. § 157(a) is unconstitutional to the extent it directs bankruptcy judges to enter final orders in fraudulent transfer claims against parties who have not filed claims against the bankruptcy estate. The Court decline to make that leap." [Emphasis in original.]

Judge Sontchi made two other notable rulings. First, he held that a claim for unjust enrichment is noncore even when the claim is based on the same facts as a fraudulent transfer claim that is core. He also held that the defendants had not waived their objections to the final adjudicatory power of the bankruptcy court by participating in the formulation of the plan.

Observations

Stern found a constitutional infirmity insofar as Section 157 lodged final adjudicatory authority in the bankruptcy court over a counterclaim based on a tortious interference claim under state law. Stern did not deal with a fraudulent transfer counterclaim.

So, the question is: Given the 5/4 ruling in Stern that Section 157(b)(2)(C) was unconstitutionally applied to the facts of the case before the Supreme court, does it follow ineluctably that Section 157(b)(2)(H) is also unconstitutional when the defendant has not filed a claim or consented to final adjudication in bankruptcy court?

In this writer's view, Stern does imply that Section 157(b)(2)(H) is also unconstitutional on the facts of a case like that before Judge Sontchi. However, keep in mind that Stern was a 5/4 decision. Also recall that none of the opinions in Marathon Pipe Line commanded a majority of the justices.

It is therefore not a foregone conclusion that the Supreme Court will assuredly rule that Section 157(b)(2)(H) is unconstitutional when and if the question is squarely presented. It is possible that the high court will draw a line and say that the Court has gone far enough in eroding the powers of bankruptcy judges. However, don't hold your breath.

Fifth Circuit Joins Sister Circuits in Bestowing Qualified Immunity on Trustees

Qualified immunity kicks in when a trustee's actions don't qualify for absolute immunity.

The Fifth Circuit joined three other circuits by endowing bankruptcy trustees and their attorneys with broad immunities.

The owner of a corporation placed his company in chapter 11, but the bankruptcy judge soon supplanted the owners' control by appointing a chapter 11 trustee. Later, the owner sued the trustee and the trustee's counsel for breach of contract, fraud and malicious prosecution, among other claims.

Bankruptcy Judge Stacey G.C. Jernigan of Dallas issued a 55-page report, recommending that the district court dismiss the suit. The district judge adopted the report and recommendation, prompting the owner to appeal.

Relying on the principles of absolute and qualified immunity, the Fifth Circuit upheld dismissal in a per curiam opinion on February 4, observing that the district court had adopted Judge Jernigan's "meticulous and well-reasoned" report and recommendation.

The Fifth Circuit had ruled almost 40 years ago that trustees have "absolute immunity for all actions taken pursuant to court order."

While the Fifth Circuit did not have controlling precedent, the appeals court said that the Third, Fourth and Sixth Circuits afford "qualified immunity for personal harms caused by actions taken within the scope of their official duties." Those circuits do not provide immunity only for ultra vires actions, meaning those "that fall outside the scope of their duties as trustees."

Finding "no compelling reason to depart from our sister circuits' sensible approach," the appeals court held "that bankruptcy trustees in the Fifth Circuit are entitled to qualified immunity for personal harms caused by actions that, while not pursuant to court order, fall within the scope of their official duties."

The appeals court also upheld dismissal of the claims against counsel for the trustee, holding that "this immunity extends to [the trustee's] attorneys under both a derivative theory of judicial immunity and under the separate doctrine of attorney immunity for essentially the same reasons articulated by the district court."

Fifth Circuit Differentiates Between Derivative Claims and Claims Belonging to a Creditor

Sometimes, a third party's action can harm the debtor, but a creditor can still prosecute an independent claim against the third party.

Even if a third party's actions harm both the debtor and a creditor, the creditor can sometimes sue the third party, according to the Fifth Circuit.

The January 4 opinion by Circuit Judge Gregg Costa explained the difference between a derivative claim belonging only to the debtor and an independent claim that a creditor can pursue.

Shortly before filing chapter 11, a corporation fired its chief executive officer, allegedly breaching the CEO's long-term employment agreement and failing to pay severance benefits. The CEO contended he was fired at the insistence of the dominant secured creditor, who held a lien on all assets. The CEO filed a claim against the debtor but later withdrew the claim.

In chapter 11, the debtor released all claims it held against the lender in return for $10 million.

The former CEO then sued the lender in state court, alleging tortious interference with contract. The lender removed the suit to federal court, contending that the tortious interference claim belonged to the debtor and was released in return for the $10 million.

Ruling that the claim belonged to the former CEO and that the CEO's claim was not released, the bankruptcy court remanded the suit to state court. The district court affirmed, prompting the lender to appeal to the Fifth Circuit.

Whether a creditor or the bankruptcy estate can pursue a claim against a third party "is a recurring issue in bankruptcy law," Judge Costa said. Citing the leading Fifth Circuit authority, In re Seven Seas Petroleum Inc., 522 F.3d 575 (5th Cir. 2008), he said that a claim is "derivative" and is property of the estate if "harm to the creditor comes about only because of harm to the debtor." In those circumstances, only the trustee can sue.

On the other hand, claims "cannot be part of the estate" if "the claim does not involve any harm to the debtor," Judge Costa said.

The third category involves claims where there was harm to the debtor and the creditor, both emanating from the same conduct by the third party.

"But even when the conduct harms the debtor," Judge Costa said, "the creditor may also have a claim if its asserted injury does not flow from the injury to the debtor." This means, he said, "that the estate and a creditor may have separate claims against a third party arising out of the same events," citing opinions from the Second, Seventh and Eleventh Circuits.

To pursue a claim, Judge Costa said, the "creditor must show this direct injury is not dependent on injury to the estate."

Judge Costa upheld the lower courts because, he said, "the harm to [the former CEO] from any improper firing without required severance does not depend on any harm to the debtor." The injury to the CEO "flowed through" the lender's actions "but not through injury to the debtor." Indeed, he said, firing the CEO may have benefitted the debtor.

Even if the lender's action also harmed the debtor, Judge Costa said that "a debtor and creditor can have separate claims arising from the same conduct."

For a similar but more complicated case involving the Bernard Madoff Ponzi scheme, see A&G Goldman Partnership v. Picard (In re Bernard L. Madoff Investment Securities LLC), 739 Fed. Appx. 679 (2d Cir. June 27, 2018). In Madoff, the claims brought by creditors belonged to the trustee because the creditors were alleging the same harm that befell the estate. For ABI's discussion of Madoff, click here.

Texas Law Has Fraudulent Transfer Liability When the Bankruptcy Code Doesn't

Fifth Circuit rules that the Texas UFTA doesn't have a 'futility defense' when a transferee is on inquiry notice regarding receipt of a fraudulent transfer.

The Fifth Circuit found fraudulent transfer liability under Texas law even though the same facts would give the transferee a complete defense under Section 548(c) of the Bankruptcy Code.

According to the January 9 opinion by Chief Circuit Judge Carl E. Stewart, the so-called futility exception to the good faith defense is not available under Texas law, although a defendant in an identical case under the Bankruptcy Code would have a valid defense under Section 548.

The appeal arose from the $7 billion Ponzi scheme orchestrated by R. Allen Stanford, now serving a 110-year prison sentence. The Securities and Exchange Commission initiated a receivership and tasked the receiver with bringing lawsuits to aid defrauded investors.

Under the Texas Uniform Fraudulent Transfer Act, or TUFTA, the receiver sued an investor who took out $79 in principal shortly before the fraud was exposed. The district court ruled that the investor was the recipient of a transfer made with actual intent to hinder, delay or defraud. The only issue was the investor's good faith defense under TUFTA.

The defendant escapes liability under TUFTA by proving it received the property "in good faith and for reasonably equivalent value." Good faith alone was at issue because repayment of the investor's principal established reasonably equivalent value.

The district court committed two questions for the jury to decide. First, the jury decided that the defendant was on inquiry notice regarding the question of good faith. The charge to the jury said that inquiry notice was "knowledge of facts . . . that would have excited the suspicions of a reasonable person and led that person to investigate."

However, the jury also decided that an investigation would have been futile. In the jury charge, a futile investigation was defined as "a diligent inquiry that would not have revealed to a reasonable person that Stanford was running a Ponzi scheme."

Although the defendant was on inquiry notice and thus ordinarily could not raise the good faith defense, the district court ruled that the defendant was nonetheless entitled to the defense by having proven that an investigation would have been futile.

The receiver appealed, contending that the trial court improperly engrafted a futility exception onto the good faith defense under TUFTA. Siding with the receiver, the Fifth Circuit reversed.

Judge Stewart in substance said that the district court erred by "analyzing bankruptcy good faith rather than TUFTA good faith."

Judge Stewart explained that Section 548(c) of the Bankruptcy Code "mirrors TUFTA's good faith defense." Section 548(c) provides that a transferee who "takes for value and in good faith" may retain the transfer to the extent it gave value to the transferor in return for the transfer. He went on to explain that courts interpreting the Section 548(c) "good faith defense permit transferees to 'rebut' a finding of inquiry notice by demonstrating that they conducted a 'diligent investigation' into their suspicions."

If the defendant did not conduct an investigation, Judge Stewart added that "some courts" still permit the defendant "to rebut inquiry notice" by proving that "the fraudulent scheme's complexity would have rendered any investigations futile."

Judge Stewart said that the Texas Supreme Court has not ruled on whether "good faith" under TUFTA "requires a diligent investigation or a corresponding futility exception." He therefore made an "Erie" guess on how the state's high court would rule were it confronted with the question.

Following a decision by an intermediate appellate court in Texas, Judge Stewart said that "no court has considered extending TUFTA good faith to a transferee on inquiry notice who later shows an investigation would have been futile." Indeed, he said that the trial court in the case on appeal was "the first to supplement [the Texas intermediate appellate court's] good faith analysis with interpretations of Bankruptcy Code good faith."

Judge Stewart said that the Fifth Circuit has previously "declined to rely on Section 548(c) to interpret TUFTA good faith." Those decisions, he said, are "reinforced by the fact that neither Section 548(c)'s text nor its legislative history defines good faith."

To the contrary, Judge Stewart said that the Fifth Circuit "has agreed with others that a transferee on inquiry notice 'must satisfy a "diligent investigation" requirement' to succeed on a Section 548(c) good faith defense." He said that courts "also disagree as to whether Section 548(c) permits a futility exception."

"This lack of conformity," Judge Stewart said, counsels against relying on Section 548(c) interpretations to construe TUFTA good faith.

In sum, Judge Stewart held, "Regardless of the intricate nature of a fraud or scheme, failing to inquire when on inquiry notice does not indicate good faith." He therefore declined "to hold that the Supreme Court of Texas would" apply a futility exception to the good faith requirement when no other court had done so.

For some of ABI's discussions of divergent law in cases involving inquiry notice, click here and here.

Sixth Circuit Enforces a 'Carveout' for Professionals after Conversion to Chapter 7

The appeals court barred the secured lenders from renegotiating a carveout when a chapter 11 reorganization failed.

The Sixth Circuit nixed a plethora of arguments advanced by secured lenders aiming to nullify a cash collateral carveout to which the lender had agreed on several occasions before conversion to chapter 7.

In his December 28 opinion, Circuit Judge Gilbert S. Merritt, Jr. explained that the appeal was an effort by the lenders "to renegotiate the terms of the cash collateral order because payment of the $2.5 million in professional fees substantially impacts what they will recover under their already-diminished-in-value prepetition liens."

In a final cash collateral order in the chapter 11 case, the lenders agreed to a carveout allowing the use of some of their cash collateral to pay fees earned by counsel for the debtor and the official creditors' committee. When it became clear that confirming a plan was impossible, the lenders filed a conversion motion but agreed to the selling of assets in chapter 11. They also confirmed that cash collateral budgets would be modified to ensure payment to professionals working on the sales.

After conversion to chapter 7, counsel for the debtor and the committee filed fee applications seeking payment from the $2.5 million carveout. Over the lenders' objection, Chief Bankruptcy Judge Tracey N. Wise of Ashland, Ky., allowed the fees and directed payment from the lenders' cash collateral. The lenders appealed to the district court and lost.

Ruling on the lenders' second appeal to the Sixth Circuit, Judge Merritt upheld the lower courts, describing the cash collateral order as containing a typically comprehensive cash collateral carveout for professionals to remain binding in chapter 7 by its terms.

On appeal, the lenders argued that conversion to chapter 7 meant that the carveout could only be paid from post-petition, adequate-protection collateral, not from prepetition collateral. Judge Merritt said that the "plain language" of the cash collateral order allowed payment of counsel fees from prepetition collateral. Were it otherwise, he said, requiring payment only from post-petition, adequate-protection collateral "would render the carveout meaningless in the case of a chapter 7 conversion . . . ."

Ruling that the cash collateral order itself allowed payment of the fees, Judge Merritt said the lenders "may not now unilaterally renegotiate the terms of the cash collateral order to avoid paying the professionals." Citing case law, he said that "courts routinely enforce carveout provisions in chapter 7 cases."

Next, Judge Merritt addressed the lenders' arguments based on Section 363(b) and (c). He interpreted the lenders as contending that the authority to use cash collateral terminated automatically when the debtor ceased operating. According to the lenders, they were entitled to "new" adequate protection before the professionals could be paid.

The lenders premised their argument on the idea that the funds carved out from the collateral became estate property on conversion, to be distributed in the order of priorities, with secured lenders coming ahead of professionals.

Judge Merritt said the "theory goes beyond anything appearing expressly or by implication in the Code." The Code, he said, only governs distributions of estate property.

In substance, Judge Merritt said the cash collateral order was an agreement by the lenders to pay professionals from their own property, not from estate property. "Nothing in the Code," he said, "prohibits the lenders from agreeing to use their collateral to pay the professionals."

Tuition Payments for Adult Children Squarely Held to Be Constructively Fraudulent

New York judge allows insolvent parents to pay for a minor child's expensive education.

On an issue dividing the lower courts, Bankruptcy Judge Martin Glenn of New York squarely held that educational expenses paid for a child over the age of majority are constructively fraudulent transfers, assuming the debtor-parent was insolvent.

Conversely, Judge Glenn found no fraudulent transfer in his December 4 opinion when parents paid educational expenses for a minor child, because parents receive reasonably equivalent value by satisfying their obligations to educate their children.

Judge Glenn said the case presented "culturally and socially charged issues." Citing a "developing body of case law," he listed decisions holding that tuition payments for adult children are or are not constructively fraudulent transfers.

Judge Glenn said he was "constrained" by the Bankruptcy Code and New York's fraudulent transfer law to determine whether the bankrupt parents received "reasonably equivalent value" or "fair consideration" for educational expenses they paid.

Stipulated facts presented the issues starkly. Within six years before their joint bankruptcies, the parents paid tuition and related expenses for their two children. Some payments came before the children were 21, and others were after. The trustee sued the children, the college they attended and student loan lenders.

In New York, majority occurs at age 21, not 18. State law requires parents to pay for their minor children's housing, food, education, and health care, Judge Glenn said.

The parents contended they received sufficient value because educating their children helped to ensure that the kids would be financially independent. Indeed, Judge Glenn cited studies showing that an education decreases the odds that a child will live with his or her parents.

Nonetheless, Judge Glenn said that "the economic 'benefit' identified by the [parent-debtors] does not constitute 'value' under [New York law] or the Bankruptcy Code." He therefore held that expenses paid for the children after majority were constructively fraudulent, assuming the trustee could later prove that the parents were insolvent at the time of the transfers.

The trustee contended that expenses paid before majority were also constructively fraudulent because the children attended an expensive private college.

Judge Glenn framed the question as whether "the parents receive reasonably equivalent value when they do pay for" a minor child's more expensive education.

Judge Glenn followed a decision by Chief Bankruptcy Judge Carla E. Craig of the Eastern District of New York, who said that paying tuition satisfies the parents' "'legal obligation to educate their children. . . . It is irrelevant to this determination whether the Debtors could have spent less.'" In re Akanmu, 502 B.R. 124, 132 (Bankr. E.D.N.Y. 2013).

Absent "egregious conduct," Judge Glenn granted summary judgment and dismissed claims based on expenses paid before majority.

Given the procedural posture of the case, Judge Glenn did not reach the question of whether the children, the college or the student loan lenders were the initial or subsequent transferees. Likely as not, only the initial transferee would be liable, because subsequent transferees would be entitled to the good faith defense under Section 550(b)(2).

Question: The age of majority varies among the states. With regard to constructively fraudulent transfers under Section 548(a)(1)(B), should federal courts borrow the age of majority in the forum, and if so, on what theory? Or, should the age of majority depend on the residence of the

defendant or the residence of the debtor? Or, is there separate federal law for the age of majority in cases under Section 548(a)(1)(B)?

Final Orders Allowed in Preference Suits Against Defendants Who Didn't File Claims

Following dicta in Bellingham, Judge Collins finds no power to enter a final order in a fraudulent transfer suit against a defendant who did not consent.

Constrained by the logic of In re Bellingham Ins. Agency Inc., 702 F.3d 553, 565 (9th Cir. 2012), although not by its holding, Bankruptcy Judge Daniel P. Collins of Phoenix went as far as he could toward holding that bankruptcy courts have constitutional authority to issue final orders in preference and fraudulent transfer suits.

The March 15 opinion by Judge Collins is strikingly similar to a decision four days earlier by Chief Bankruptcy Judge Christopher S. Sontchi of Delaware in Paragon Litigation Trust v. Noble Corp. PLC (In re Paragon Offshore PLC), 17-51882, 2019 BL 81418, 2019 WL 1112298 (Bankr. D. Del. March 11, 2019).

Judge Sontchi held in Paragon that a bankruptcy court has constitutional authority to enter a final judgment in a fraudulent transfer suit against a defendant who neither filed a claim nor consented to final adjudication in the bankruptcy court. To read ABI's discussion of Paragon, click here.

The Fiduciary Duty Claims

The case before Judge Collins involved an adversary proceeding against multiple defendants asserting claims for breach of fiduciary duty, preference, and intentionally fraudulent transfer. Some of the defendants had filed proofs of claim, but others had not.

In what it described as a "narrow" holding, the Supreme Court ruled in Stern v. Marshall, 564 U.S. 462 (2011), that the bankruptcy court lacks constitutional authority to issue a final judgment on a state law counterclaim for tortious interference that would not be resolved in ruling on the creditor's proof of claim. In view of Stern, the plaintiff in the case before Judge Collins conceded that the bankruptcy court could not enter a final judgment on the fiduciary duty claims.

The Preference Claims

The defendants argued that the bankruptcy court could not enter final orders on preference claims against those who had not filed proofs of claim.

Judge Collins disagreed. He said that preference claims only exist as a matter of bankruptcy law and are "not independent of federal bankruptcy law." He cited Paragon approvingly for the proposition that fraudulent transfer defendants are subject to the bankruptcy court's final adjudicatory power, even if the defendant has not filed a proof of claim.

The "narrow scope of Stern," together with the nature of preference claims as a "creature of the Bankruptcy Code," led Judge Collins "to determine that preferential transfer avoidance claims are the type of 'core proceedings' over which this Court has the authority to enter final orders, regardless of whether a given Defendant has filed a proof of claim in this case."

Fraudulent Transfer Claims

On his final authority regarding fraudulent transfer claims, Judge Collins was constrained by Bellingham, whereas Judge Sontchi was not. Bellingham is generally understood to mean that the bankruptcy court has no final adjudicatory power over a fraudulent transfer defendant who did not file a claim or otherwise submit to the bankruptcy court's power.

However, Judge Collins parsed Bellingham further. He said the case was "entirely resolved" by the determination that the defendant has "implicitly consented to the bankruptcy court's authority by failing to challenge the court's authority until the bankruptcy court's decision was appealed." Bellingham was dicta, he said, for the idea that defendants who had not filed proofs of claim are not subject to the bankruptcy court's final adjudicatory power.

Finding Bellingham's logic nonetheless "compelling," Judge Collins held that a bankruptcy court cannot enter a final order against a fraudulent transfer defendant absent consent or the filing of a claim.

Judge Collins devoted the remainder of his opinion to describing what is or is not consent.

Consent

One defendant had made a setoff argument to counter a fraudulent transfer claim. By raising setoff, Judge Collins said that the defendant had waived objections to the court's power by invoking the claims-allowance process, even though he had found there was no valid setoff.

None of the defendants had demanded a jury trial. Consent did not result, Judge Collins said, because "failing to request a jury trial . . . is not indicative of Defendants' consent to entry of final orders by a non-Article III Court."

The plaintiff argued that some of the defendants consented to the bankruptcy court's power by having participated in administrative aspects of the bankruptcy case before they were sued. Judge Collins found no waiver.

While not having filed a claim, participating in "the administrative portion" of the case "does not waive the participant's right to adjudication by an Article III court in a subsequent adversary proceeding brought against them."

Supreme Court Decision on Arbitration Has Ominous Implications for Bankruptcy

Justice Brett M. Kavanaugh wrote his first opinion for the Supreme Court in what *The New York Times* called a "minor arbitration case."

If Justice Kavanaugh's ruling in *Henry Schein Inc. v. Archer & White Sales Inc.* is applied rigorously in bankruptcy, it's a "really big deal," because bankruptcy judges will not be able to bar creditors from initiating arbitrations over "core" issues such as allowance of claims, objections to dischargeability of debts, and even adequate protection.

Indeed, *Schein* could be interpreted to mean that the bankruptcy court cannot bar a creditor from initiating arbitration against an individual or corporate debtor, even if the call for arbitration was frivolous.

'Wholly Groundless'

Schein was argued on October 29 and decided for the unanimous Court by Justice Kavanaugh on January 8. By contract, the parties agreed to arbitrate before the American Arbitration Association and according to AAA rules.

Later, the plaintiff filed suit under federal and state antitrust laws, seeking damages and an injunction. The contract called for arbitration "except for actions seeking injunctive relief . . . ." The rules of the AAA call for the arbitrator to decide issues of arbitrability.

Invoking the Federal Arbitration Act, 9 U.S.C. § 2, the defendant responded to the complaint by asking the district judge to refer the case to arbitration. Adopted in 1925, the FAA provides that a contract calling for arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Following Fifth Circuit authority, the district court refused to compel arbitration, finding that the demand for arbitration was "wholly groundless" because the plaintiff was seeking an injunction. The Fifth Circuit affirmed.

The Circuit Split

The circuits were split. The Fourth, Fifth, Sixth and Federal Circuits have held that a federal court could refuse to compel arbitration if the demand was "wholly groundless."

The Tenth and Eleventh Circuits ruled to the contrary, holding that the arbitrator alone is entitled to rule on the arbitrability of the dispute, if the contract so provides.

To resolve the split, the Court granted *certiorari* on June 25.

Justice Kavanaugh's Rationale

In substance, Justice Kavanaugh said the Court had already decided the question. In 2010, the high court ruled that the parties may agree by contract that an arbitrator, not the court, will resolve threshold arbitrability questions, not just the merits of the dispute. *Rent-A-Center West Inc. v. Jackson*, 561 U. S. 63, 68−70 (2010).

Justice Kavanaugh said that "some federal courts nonetheless will short-circuit the process" by deciding the arbitrability question if the demand for arbitration is "wholly groundless." Those courts, he said, adopted the "wholly groundless" exception to *Rent-A-Center* "to block frivolous attempts to transfer disputes from the court system to arbitration."

Reversing the Fifth Circuit, Justice Kavanaugh held that the "court possesses no power to decide the arbitrability issue" if "the parties' contract delegates the arbitrability question to an arbitrator."

Justice Kavanaugh reaffirmed the principle that a court can decide whether there was a valid arbitration agreement before referring a dispute to arbitration. "But," he said, "the court may not decide the arbitrability issue" if "a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator."

Justice Kavanaugh rejected the policy argument that the "wholly groundless" exception is "necessary to deter frivolous motions to compel arbitration." He said that arbitrators can quickly and efficiently dispose of frivolous cases, imposing costs and attorneys' fees on the movant "under certain circumstances."

Because the lower courts had not considered the issue, Justice Kavanaugh remanded the case for the Fifth Circuit to rule on whether the agreement "in fact delegated the arbitrability question to an arbitrator." He said the judge "'should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so,'" quoting *First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

Fewer and Fewer Exceptions to Arbitration

The implications of Justice Kavanaugh's opinion for bankruptcy cases are better understood in the context of the progression of recent Supreme Court authority.

In 1987, the Supreme Court ruled that a court could decline to enforce an arbitration agreement if there was an inherent conflict between arbitration and the statute's underlying purpose. *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987).

Building on *McMahon*, the Second, Fourth, Fifth and Ninth Circuits have held in bankruptcy cases that the court may decline to compel arbitration if the issue is "core" and arbitration would represent a "severe conflict" with the Bankruptcy Code.

Last year, the Second Circuit utilized that concept to override an arbitration agreement when a debtor mounted a class action contending that the creditor had violated the discharge injunction. *One Bank NA v. Anderson (In re Anderson)*, 884 F.3d 382 (2d Cir. March 7, 2018), *cert*. denied Oct. 1, 2018.

Anderson and the other circuit decisions overriding arbitration agreements in bankruptcy cases were all decided before *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (May 21, 2018), where the Supreme Court held last term that the language of a statute must be "clear and manifest" before a court can disregard an arbitration agreement. In *Epic*, the Supreme Court nixed a class action and required individual arbitration of a former employee's claim that the employer's failure to pay overtime violated the Fair Labor Standards Act.

Epic was a 5/4 decision, with the justices divided on ideological grounds.

Applying *Epic* and *Schein* to Bankruptcy Cases

Assume that a debtor and a creditor had a prebankruptcy agreement to arbitrate all disputes, including any arising in bankruptcy, such as the allowance of claims, counterclaims, preferences, and adequate protection. Further assume that the agreement called for the arbitrator to decide whether the dispute was arbitrable, even following bankruptcy.

If *Epic* and *Schein* were applied rigorously, the bankruptcy judge arguably would have no right to bar the creditor from initiating arbitration. If the dispute raised a core issue — such as the allowance of a claim, dischargeability or adequate protection — the bankruptcy judge might have no power to bar arbitration even if there was a "severe conflict" with bankruptcy law.

A chapter 11 debtor could find itself defending dozens of arbitrations, giving the bankruptcy judge little ability to confirm a plan or avoid liquidation. Or, an individual debtor might be fighting dischargeability in several arbitrations.

The prospect of arbitrating dischargeability is not fanciful. *See Williams v. Navient Solutions LLC (In re Williams)*, 564 B.R. 770 (Bankr. S.D. Fla. 2017) (debtor compelled to arbitrate student loan dischargeability); *but see Golden v. JP Morgan Chase Bank NA (In re Golden)*, 587 B.R. 414 (Bankr. E.D.N.Y. 2018), and *Roth v. Butler University (In re Roth)*, 18-50097, 2018 BL 427188 (Bankr. S.D. Ind. Nov. 16, 2018) (arbitration of dischargeability of student loan not permitted). For ABI's discussion, click here.

Supreme Court authority on arbitration seems headed to a pivotal case for the justices to decide whether bankruptcy represents a general exception to the enforceability of arbitration agreements.

In that regard, bankruptcy cases have an element not present in *Epic* and *Schein*. The underpinning of the Bankruptcy Code is centrality of administration. Bankruptcy law has always recognized that an individual cannot win a fresh start and a company cannot reorganize if issues related to bankruptcy must be litigated in several forums. Bankruptcy is designed so one judge decides all core disputes. Even if there is a *Stern* problem, the case goes to a district judge in the same courthouse.

Epic's requirement of a statute's "clear and manifest" exception to arbitration may be found in the centrality of administration of bankruptcy cases. And if that's not enough, the most conspicuous feature of bankruptcy is the automatic stay.

Surely, a creditor cannot continue or initiate arbitration without relief from the automatic stay. If the automatic stay is not a "clear and manifest" exception to arbitration, it's hard to imagine what is.

Justice's Kavanaugh's opinion reaffirms the power of courts to determine in the first instance whether an arbitration agreement is valid. An arbitration clause purportedly enforceable in

bankruptcy could be viewed as an invalid agreement, just like an agreement is invalid if it waives the automatic stay or precludes the filing of bankruptcy.

But the question remains: Is a contract calling for arbitration of bankruptcy issues an invalid contract that the bankruptcy court can override, or does *Schein* require the bankruptcy court to refer the dispute to an arbitrator who will decide whether bankruptcy questions are arbitrable?

To read ABI's discussion of *Anderson*, click here, here and here.

The Supreme Court opinion is *Henry Schein Inc. v. Archer & White Sales Inc.*, 17-1272 (Sup. Ct. Jan. 8, 2019).

Executory Contracts Are Automatically Rejected Even if Unscheduled, Fifth Circuit Holds

On a topic where there is scant appellate authority, the Fifth Circuit held that a trustee cannot assume and assign an executory contract after the deadline for assumption has passed, even if the contract had not been scheduled and was unknown to the trustee.

The case involved a corporate debtor who knew it owned a patent license but failed to list the license in its schedules. However, there was no effort to conceal the license, Circuit Judge Patrick E. Higginbotham said in his October 29 opinion.

After the case converted from chapter 11 to chapter 7, the trustee sold all of the estate's property. The sale occurred more than 60 days after conversion. Section 365(d)(1) provides in effect that an executory contract not assumed within 60 days of conversion "is deemed rejected."

The sale agreement transferred all of the debtor's property and listed the assets by category. Although the license fell within a category of transferred property, the license was not specifically listed because the trustee was unaware of the existence of the license. The sale-approval order provided that all executory contracts were assumed and assigned to the purchaser.

A year after the sale, a lawsuit ended up in bankruptcy court where the licensor of the patent license contended that the license was rejected and had not been sold to the purchaser. The bankruptcy judge agreed with the licensor and held that the license had been rejected automatically and could not have been sold. The district court agreed.

The Fifth Circuit affirmed, first holding that the license was an executory contract because material, reciprocal obligations remained outstanding on both sides. The erstwhile purchaser argued that there is an implicit exception to automatic rejection under Section 365(d)(1) when an executory contract is not scheduled and the trustee is unaware of the existence of the asset.

With one exception, there is no authority at the circuit level about exceptions to automatic rejection. In the lower courts, Judge Higginbotham said there is "sparse authority" and "no clear consensus." He said some lower courts hold that a contract is not deemed rejected if the debtor has intentionally concealed the existence of the asset. That was not the state of facts in the case on appeal, he said.

When there has been no intentional concealment, Judge Higginbotham said that "some courts" have held that failure to schedule a contract does not prevent its automatic rejection. However, he cited a district court for holding that failure to schedule a contract tolls the deadline for assumption.

Judge Higginbotham followed a 1985 Ninth Circuit opinion decided under the former Bankruptcy Act: *Cheadle v. Appleatchee Riders Association* (*In re Lovitt*), 757 F.2d 1035 (9th Cir. 1985).

In *Cheadle*, the Ninth Circuit said that a trustee has an affirmative duty to investigate for unscheduled assets. Therefore, the appeals court found a conclusive presumption that unscheduled contracts are rejected in 60 days.

Because the Bankruptcy Code likewise imposes a duty on a trustee to investigate the debtor's affairs, Judge Higginbotham decided that the reasoning of *Cheadle* "still applies." "More to the point," he said, Section 365(d)(1) "does not impose an actual or constructive notice requirement for when the sixty-day deadline applies." He declined to "read such a requirement into the statute."

"At a minimum," Judge Higginbotham therefore held that "the statutory presumption of rejection after sixty days is conclusive where there is no suggestion that the debtor intentionally concealed a contract from the estate's trustee."

The purchaser argued that setting aside the sale amounted to a collateral attack on the sale-approval order.

On rejection, Judge Higginbotham said, the license ceased to be property of the estate, and there was nothing in the purchase contract or sale-approval order to suggest that the trustee was selling anything other than estate property. Therefore, the decision by the bankruptcy court was not a collateral attack on the prior sale-approval order but was "merely an interpretation of the bankruptcy court's orders."

The opinion is *RPD Holdings LLC v. Tech Pharmacy Services (In re Provider Meds LLC)*, 17-11113 (5th Cir. Oct. 29, 2018).

(a) Do free and clear sales confer interests that are entitled to adequate protection?

<u>Seventh Circuit Opens a Can of Worms on Bankruptcy Sales and Adequate Protection</u>

In a highly theoretical opinion, the Seventh Circuit said that an out-of-the-money creditor in a free and clear bankruptcy sale *might* be entitled to some sale proceeds, thus reducing the recovery by the senior lender even if the lender is not being paid in full.

How's that possible? The Chicago-based appeals court *theorized* that the ability to sell free and clear *might* create an interest in property for which a subordinate creditor *could* be entitled to an adequate protection payment.

Before you panic and conclude that everything you know about bankruptcy sales is about to change, keep in mind that the Seventh Circuit based its July 9 opinion on an assumption that may prove to be wrong when the question arises again.

The Underwater Sales

The circuit court decided two consolidated appeals, both involving an Illinois bulk sale law designed to aid the state in collecting taxes. If state taxes are not paid, the bulk purchaser of a business becomes liable for the taxes under state law.

In parallel bankruptcies, the debtors owed $1.4 million and $600,000, respectively, in state taxes. In sales free and clear of liens and claims under Section 363(f), the properties fetched $5.2 million and $2 million, respectively. However, banks held first liens on the properties for $14 million and $4 million, respectively.

In other words, the first lien lenders would recover only a fraction of their secured claims even if they received all sale proceeds.

The state opposed distribution of the sale proceeds to the senior lenders, contending the state was entitled to be paid in full because the bulk sale law permits collection of the tax debts from purchasers. More cogently, the state argued that its successor liability claims under the bulk sale law amounted to an "interest" in property that was entitled to adequate protection under Section 363(e).

Because the senior lenders were underwater, the bankruptcy judges in Chicago both ruled that the state was entitled to no recovery from the sales.

On appeal, two different district judges remanded for the bankruptcy judges to develop the record by making two findings: (1) what the state would have recovered if the property had not been sold free and clear, and (2) how the state could be compensated for its "interest" given that the lenders had senior liens.

On remand, both bankruptcy judges again denied the state any recovery, ruling that the state's realizable interest was effectively zero. The appeals court allowed direct appeals on both cases.

The Circuit Opinion, Based on an Assumption

Circuit Judge Ilana K. Rovner authored a 29-page opinion upholding the results in the bankruptcy courts, albeit on different grounds that some in the bankruptcy community may find unsettling.

Judge Rovner explained that the Illinois bulk sale law does not affect lien priorities. Indeed, the law does not apply in foreclosure, where the state cannot assert a successor liability claim against a purchaser.

In bankruptcy, however, the state contends that the ability to hold purchasers personally liable has "real value" that is entitled to adequate protection. More specifically, the state claims that a purchaser will pay a higher price because a bankruptcy sale relieves the purchaser of liability for state taxes. Developing the theory further, the state postulates that the purchaser would pay more to avoid the expense and loss of value to the business that would result from foreclosure, where the tax liability would disappear.

Judge Rovner therefore framed the question as whether the state was entitled to adequate protection when the properties were sold free and clear in bankruptcy court.

Significantly, Judge Rovner's entire opinion rests on a critical assumption. Without deciding, she assumed that the state's ability to impose successor liability was an "interest" in the debtor's property that would invoke the concept of adequate protection under Sections 363(e) and 361(1). She made the assumption because the bankruptcy courts had made the same assumption, and the issue was litigated or decided below.

Judge Rovner's own opinion contains language undercutting the assumption. She said that a buyer's inclination to pay a premium for a sale free and clear "is attributable to [the state law] rather than any asset of the estate." If that is true, a sale free and clear would be cutting off a state law right against a purchaser, not an interest in estate property deserving of adequate protection.

Judge Rovner said she was "dubious of the notion" that the state could have recovered all outstanding taxes. She also recognized that allowing the state to recover even a portion of the taxes "would, in a real sense, permit [the state] to jump the queue of creditors and grant [the state] monetary protection for its interest at the expense of other creditors."

Judge Rovner therefore analyzed several hypotheticals to decide what the state "realistically could have recovered from the purchaser." Even if a purchaser might pay more, the bank, she said, "surely would not be indifferent" if the state were to receive some of the proceeds when the secured lender was not being paid in full. The lender could foreclose, she said, to cut off the tax claims.

Nevertheless, "foreclosure comes with significant costs and can ultimately reduce the net recovery of a bank," Judge Rovner said.

In a settlement to avoid foreclosure, a bank might accept somewhat less if the state were to take less than full payment. Judge Rovner said that compromises between the bank and the state "are more than an abstract possibility." On the other hand, she quoted one of the district judges who said that an interest otherwise entitled to adequate protection "may be worth nothing, in practical terms, in which case the interest holder is entitled to no compensation pursuant to Section[s] 363(e) and 361(1)."

Focusing adequate protection "is where the wheels come off the wagon of [the state's] argument," Judge Rovner said, because "Section 361(1) directs us to consider how much the value of [the state's] interest decreased as a result of the bankruptcy court's free and clear orders." In that regard, she said, "we are still faced with the problem of valuation."

Regardless of whether the trustee or the state bore the burden of proof, she said there was "no evidence as to what [the state] likely would have collected from the purchaser but for the bankruptcy court's Section 363(f) free-and-clear order." In the absence of evidence about how much the state's interest was diminished, Judge Rovner held that the "bankruptcy courts therefore did not err in valuing [the state's] interest at zero for purposes of its right to adequate protection."

What Does the Opinion Mean?

Judge Rovner's opinion has set the stage for the next case where the state and the trustee will present expert witnesses about the incremental value in a bankruptcy sale as opposed to foreclosure.

It has always been this writer's belief that a bankruptcy sale is more valuable than foreclosure for several reasons. Nonetheless, would the state be entitled to the incremental value, rather than the lender who is not being paid in full?

A lender's ability to liquidate collateral in bankruptcy court could be viewed as a right held by a secured creditor, not value inherent in the collateral itself to which adequate protection rights might attach. Likewise, the bulk sale laws could be seen as creating only a claim against a purchaser, not an interest in the bankrupt seller's property warranting adequate protection.

In a different context, the Ninth Circuit said in *Pinnacle Restaurant at Big Sky LLC v. CH SP Acquisitions LLC (In re Spanish Peaks Holdings II LLC)*, 862 F.3d 1148 (9th Cir. July 13, 2017), that a bankruptcy sale can be the rough equivalent of mortgage foreclosure, in which case the state's tax claims would be extinguished altogether. To read ABI's discussion of *Spanish Peaks*, click here.

In any event, courts in the Seventh Circuit are now taxed with deciding whether the Illinois bulk sale law creates an interest in property entitled to adequate protection. It is by no means clear, however, that the outcome will affect only Illinois.

Most states have laws that confer rights on creditors to pursue claims against purchasers who do not follow procedures required by bulk sale laws. It is also not evident why the issue is confined to bulk sale laws, because subordinate secured creditors could argue that sales free and clear of their liens enhance the purchase price.

The opinion is *Illinois Department of Revenue v. Hanmi Bank*, 17-1575 (7th Cir. July 9, 2018).

Delaware District Judge Upholds Horizontal 'Gifting' in a Chapter 11 Plan

To no one's surprise, a district court in Delaware held that so-called horizontal gifting does not offend the chapter 11 confirmation standards.

In his August 21 opinion, District Judge Richard G. Andrews reached the merits of gifting after ruling that the appeal from confirmation was equitably moot.

The debtor had $500 million in secured debt and a business concededly not worth more than $300 million. The prepackaged chapter 11 plan called for converting secured debt to equity. The secured creditors made what is known as a gift to unsecured creditors in the form of cash and stock to holders of unsecured notes worth no more than 6% of the claims in the class. Trade and other unsecured creditors were to be paid in full.

The noteholder class voted against the plan, but Bankruptcy Judge Kevin J. Carey confirmed the plan last year. A holder of about $500,000 in unsecured notes appealed from the confirmation order and unsuccessfully sought a stay pending appeal.

The noteholder argued that the appeal was not equitably moot because the appellate court could order payment of its claim in full without upsetting the plan as a whole.

Judge Andrews rejected the argument, saying there was no method under the Bankruptcy Code to permit paying the appellant in full without paying all other noteholders in full. Paying one creditor in the noteholder class, he said, would offend Section 1123(a)(4) and its requirement of making identical payments to all creditors in a class.

Judge Andrews declined to expand *In re Tribune Media Co.*, 799 F.3d 272 (3d Cir. Aug. 19, 2015), where the Third Circuit declined to dismiss an appeal for equitable mootness because it would not be unfair if one class were forced to pay back $30 million.

Even if he could pay one noteholder and not the others, Judge Andrews said it was "unclear which party the court may order to fund such a recovery." He distinguished *Tribune* by saying it was an intercreditor dispute involving a reallocation between two classes that would not upset the overall plan. Unlike *Tribune*, he said there was no readily identifiable set of creditors against whom disgorgement could be ordered.

Judge Andrews concluded that the appeal was equitably moot because he could not give the appellant a higher recovery than other noteholders "within the confines of the Bankruptcy Code"; paying noteholders the same as trade creditors "would require undoing the plan and would necessarily harm third parties"; and there was no other "practicable relief" the court could grant.

Although finding the appeal to be equitably moot, Judge Andrews analyzed the merits and upheld confirmation.

The appealing noteholder argued that the plan unfairly discriminated and thus violated Section 1129(b)(1).

Like Delaware District Judge Gregory M. Sleet in *Law Debenture Trust Co. of New York v. Tribune Media Co. (In re Tribune Media Co.)*, 12-1072, 2018 BL 269729 (D. Del. July 30, 2018), Judge Andrews applied the so-called Markell test to determine whether there was unfair discrimination. The test raises a rebuttable presumption of unfair discrimination if a similar class

receives "a materially lower percentage recovery." To read ABI's discussion of *Tribune Media*, click here.

Although Judge Andrews noted that the Markell test says nothing about gifting, he said the bankruptcy court properly applied the test and found no improper discrimination. He said that *In re Genesis Health Ventures Inc.*, 280 B.R. 339 (D. Del. 2002), presented "virtually identical facts" involving horizontal gifting, where a senior creditor makes a gift to an inferior class.

Judge Andrews said that *Genesis I* found that gifting rebuts the presumption of unfair discrimination when senior lenders redirect a portion of the recovery to which they otherwise would have been entitled.

Judge Andrews also ruled that the appealing noteholder was not harmed as a consequence of the larger recovery by trade creditors because "all unsecured creditors did significantly better than they would have outside of chapter 11 or under a plan of liquidation."

Judge Andrews said that the case on appeal was not a prohibited form of so-called vertical class-skipping because there was no distribution to a class junior to the bondholders.

The opinion is *Hargreaves v. Nuverra Environmental Solutions Inc. (In re Nuverra Environmental Solutions Inc.)*, 17-1024 (D. Del. Aug. 21, 2018).

Disgorgement by Professionals Is Not Required in an Administrative Insolvency

A bankruptcy judge is not required as a matter of law to order disgorgement of fees to effect a *pro rata* distribution among chapter 11 administrative claimants when the estate is administratively insolvent, according to District Judge Tanya Walton Pratt of Indianapolis.

The appeal entailed a typical case of administrative insolvency, which results when the unencumbered assets of the estate are insufficient to pay administrative claims in full.

A trustee had been appointed in a chapter 11 case. Counsel who represented the debtor before appointment of the trustee had been granted and paid two interim allowances of compensation totaling about $135,000.

The debtor's counsel filed a third interim fee application seeking another $110,000. The chapter 11 trustee objected to the third application. Approving settlement of the objection, Bankruptcy Judge Basil H. Lorch, III granted the application, but his order provided that neither the trustee nor the estate would pay any of the fee allowance.

There was about $4 million in unpaid administrative claims, but the trustee was holding only $1 million to apply toward those claims. The unpaid claims included an administrative claim of $2.6 million owing to the Internal Revenue Service for unpaid trust fund taxes.

Later, the trustee proposed a so-called structured dismissal of the chapter 11 case, where the bankruptcy court would authorize distribution of the estate's remaining funds, followed by a dismissal of the chapter 11 case without incurring the expense of a conversion to chapter 7.

In connection with dismissal, the trustee and the IRS asked Judge Lorch to order the debtor's counsel to disgorge $60,000, which would evidently allow the court to close the case with a *pro rata* payment of administrative claims. Judge Lorch denied the motion, and the IRS appealed.

Judge Pratt affirmed in a 12-page opinion on September 26.

The IRS argued that the Supreme Court's decision in *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017), required the bankruptcy judge to order disgorgement to the extent necessary to result in a *pro rata* distribution among all of the chapter 11 administrative claimants, including the IRS. In *Jevic*, the Supreme Court held that a structured dismissal could not include a distribution that "deviate[s] from the basic priority rules" in Section 726(a). For ABI's discussion of *Jevic*, click here.

Judge Pratt said that *Jevic* "does not mandate disgorgement of [the debtor's counsel's] fees to achieve ultimate *pro rata* distribution among administrative claimants in this chapter 11 structured dismissal case." Similarly, she said that *Jevic* did not "concern whether a bankruptcy court can decline to order disgorgement where it has made, or makes, a final award of attorneys' fees."

Having concluded that *Jevic* did not require disgorgement, Judge Pratt asked whether the bankruptcy judge had authority to decline to order disgorgement. On that issue, she said, the case law is "relatively sparse."

In terms of statutory imperatives, Judge Pratt said that Section 330 contains "no requirement or any mention . . . that disgorgement must (or even should) be made to achieve a *pro rata* distribution among administrative claimants in a chapter 11 . . . structured dismissal . . . ."

According to Judge Pratt, the bankruptcy judge said he would not order disgorgement, even if he had power to do so, because the law firm had provided value to the estate by making the "single most important recovery" of assets.

Like the bankruptcy judge, Judge Pratt said that the value of the services was relevant to the question of disgorgement. Indeed, the bankruptcy judge had said that he would have considered a fee enhancement if the estate had sufficient assets.

Judge Pratt found "no basis" to overturn the bankruptcy judge's "weighing of the equities and his finding that [the law firm] had 'more than earned' a total fee of" $135,000.

The opinion is *U.S. v. Seiller Waterman LLC*, 17-00182 (S.D. Ind. Sept. 26, 2018).