

Individual Chapter 11 – Absolute Priority

In re Roedemeier, 374 B.R. 264 (Bankr. D. Kan. 2007) (Somers, J.). Interpreting the poorly worded BAPCPA provisions relating to individual Chapter 11 cases, the Court holds that the “absolute priority rule” no longer applies to individual Chapter 11 debtors. The Court reaches that conclusion by adopting a broad reading of new §1115 to include both property that the debtor brings into the bankruptcy estate and property acquired post-petition. Thus leaves the new “disposable income” requirement of §1129(a)(15) as the primary confirmation hurdle for an individual Chapter 11 debtor. In order for that section to be triggered, an unsecured creditor must object to confirmation, which was not done in this case. In *dicta* the Court adopts the view that the disposable income test under §1129(a)(15) does not incorporate the rigid expense allowances of the Chapter 7 “means test”, but rather involves a judicial determination of reasonable expenses.

In *In re Tegeder*, 369 B.R. 477 (Bankr. D. Neb. 2007), the Bankruptcy Court of the District of Nebraska held “that the absolute priority rule of 11 U.S.C. § 1129(b)(2)(B)(ii) does not prevent confirmation of a plan where the individual debtors are retaining pre- and post-petition assets.” *Id.* at 478. In this case, the individual Chapter 11 debtors filed an amended plan in which they were to retain both pre- and post-petition property and the only objecting class, general unsecured creditors, was impaired. *Id.* 478–79. The court then turned to the question of whether the plan could still be confirmed under the cram down provisions of § 1129(b). *Id.* at 479. In order for a plan to be confirmed by cram down, “the plan must not discriminate unfairly and be fair and equitable with respect to each impaired class rejecting the plan,” which in turn requires that “the unsecured claims be paid in full or the absolute priority rule of 11 U.S.C. § 1129(b)(2)(B)(ii) must be followed.” *Id.* However, BAPCPA created an exception to the absolute priority rule for individual debtor who is now permitted to “retain property included in the estate under section 1115.” *Id.* at 479–80 (quoting 11 U.S.C. § 1115 (2006)). According to § 1115, such property “includes the property described in § 541 (which includes, but is not limited to, all legal and equitable interests of the debtor in property as of the commencement of the case), as well as post-petition property and earnings.” *Id.* at 480. The district court thus reasoned that “the absolute priority rule no longer applies to individual debtors who retain property of the estate under § 1115.” *Id.* And, because the proposed plan was “fair and equitable as to the unsecured creditor class,” it was confirmed. *Id.* at 481.

Chapter 13 - Hanging Paragraph of § 1325(a)

An issue that has split the courts is “whether the hanging paragraph eliminates an under-secured creditor’s deficiency claim when, in a Chapter 13 plan, the debtors propose to surrender a car purchased within 910 days before filing for bankruptcy.” *Capital One Auto Finance v. Osborn*, 515 F.3d 817, 819 (8th Cir. 2008). In each of the following cases, a chapter 13 debtor purchased a vehicle for their own personal use with financing obtained within 910 days of the debtor’s petition date, at which point the value of the vehicle was less than the outstanding debt. The debtor filed a plan providing for surrender of the vehicle in full satisfaction of the secured claim, relying on the hanging paragraph. In each instance the creditor objected, asserting a deficiency claim. The majority of courts have ruled that the under-secured creditor has no deficiency claim, but there is a growing trend toward allowing such a claim.

The growing minority holds that because § 506(a) does not apply, state law applies, and the surrender does not fully satisfy the claim. *Id.* at 821. In *Capital One Auto Finance*, the Eighth Circuit Court of Appeals rejected debtors' contention that "because the claim [was] fully secured, they may surrender the vehicle in full satisfaction of the claim." *Id.* According to the Eighth Circuit, this would essentially turn "a recourse loan into a non-recourse loan, . . ." *Id.* The court reasoned that while the retention option of § 1325(a)(5)(B) explicitly addresses satisfaction of a claim, the surrender option of § 1325(a)(5)(C) does not. *Id.* at 821–22. The court further pointed out that "the hanging paragraph simply removes the bankruptcy code's method of bifurcation . . . [and] has no effect on state-law rights." *Id.* at 822. Here, the contract between the debtors and Capital One, the vehicle's secured creditor, expressly permitted Capital One to repossess the vehicle, sell it, and sue for any deficiency. And, Missouri law permits an unsecured deficiency judgment where a creditor has complied with the state law governing disposition of collateral after default. Thus, the Eighth Circuit concluded that because Capital One had a right to an unsecured deficiency claim pursuant to state law, it was entitled to such a claim. *Id.* at 822–23.

The Eighth Circuit reaffirmed this holding on the same day in *AmeriCredit Financial Services, Inc. v. Moore*, 517 F.3d 987 (8th Cir. 2008). There, the court reasoned that, "[a]s nothing in 1325(a)(5)(C) states that a claim is considered paid in full when the debtor surrenders the vehicle, the creditor is entitled to an unsecured deficiency claim if there is a right to a deficiency judgment under state law." *Id.* at 989. The court concluded that because the contract between the debtor and creditor permitted repossession, sale, and payment of any deficiency, and Arkansas state law permits deficiency judgments, the creditor here was "entitled to an unsecured deficiency claim in the amount of the difference between the debt owed at the time of the filing and the amount received from liquidation (minus reasonable sales expenses)." *Id.*

The Tenth Circuit Court of Appeals also recently joined the ranks of the growing minority in *DaimlerChrysler Financial Services Americas LLC v. Ballard (In re Ballard)*, 526 F.3d 634 (10th Cir. 2008). The Tenth Circuit looked to the plain language of the statute and held that, "by making § 506(a) inapplicable to 910 car claims, the hanging paragraph does not abrogate a creditor's right to assert a deficiency claim authorized by state law." *Id.* at 638. The court began with the presumption "that claims under applicable state law will be allowed in bankruptcy unless they are expressly disallowed." *Id.* at 638–39 (quoting *Travelers Casualty & Surety Co. v. Pacific Gas & Elec. Co.*, 549 U.S. ___, 127 S. Ct. 1199, 1206 (2007)). The court then pointed out that no provision of the bankruptcy code expressly disallowed state law deficiency claims. *Id.* at 639. The Tenth Circuit rejected the lower courts' conclusion that § 506(a) is the only means by which "an undersecured creditor may assert an unsecured deficiency claim," and held that "the hanging paragraph does not prohibit the bifurcation of 910 car claims into secured and unsecured claims . . ." *Id.* at 639–40. The court concluded that "[a] creditor is therefore free to pursue an unsecured deficiency claim based on its contract with the debtor and state law." *Id.* at 640.

Other circuits upholding this minority view include the Sixth, Seventh, and Ninth Circuits. See *AmeriCredit Fin. Servs., Inc. v. Long (In re Long)*, 519 F.3d 288, 291 (6th Cir. 2008) (adopting minority view by asserting that "[w]iping out the deficiency altogether undermines reasonable obligations created by the contract between parties" and arguing for adoption of a "uniform national rule" to take the place of "the widely varying procedural and substantive foreclosure, repossession and deficiency judgment rules provided by the 50 states"); *In re Wright*, 492 F.3d 829, 830–32 (7th Cir. 2007) (applying minority view which holds "that

Article 9 of the Uniform Commercial Code plus the law of contracts entitle the creditor to an unsecured deficiency judgment after surrender of the collateral” as “state law determines rights and obligations when the Code does not supply a federal rule”) (citing *Butner v. United States*, 440 U.S. 48 (1979)); *Wells Fargo Fin. Acceptance v. Rodriguez (In re Rodriguez)*, 375 B.R. 535, 548–49 (9th Cir. B.A.P. 2007) (adding themselves “to the growing list of courts that have found the hanging paragraph to have no effect on the deficiency claims of 910 creditors who are recipients of section 1325(a)(5)(C) surrenders”).

The majority position is that, since § 506(a) does not apply, the entire claim is secured, and therefore, under § 1325(a)(5)(C), the surrender of the vehicle fully satisfies the claim. *Capital One Auto Finance*, 515 F.3d at 821. Interestingly, any circuit court to address the issue has not sided with the majority, indicating that the majority will likely soon be the minority. The only courts adopting the majority position appear to be bankruptcy courts. See *In re Kenney*, 2007 WL 1412921, at *9 (Bankr. E.D. Va. May 10, 2007) (adopting majority view by looking to the plain language of the hanging paragraph and holding, *inter alia*, § 506(a) is the only means of bifurcating claim and it was within Congress’ right to remove 910 claims from its purview); *In re Moon*, 359 B.R. 329, 333 (Bankr. N.D. Ala. 2007) (applying majority view to hold “a 910 creditor has no statutory basis to assert an unsecured claim after surrender of it collateral”); *In re Pool*, 351 B.R. 747, 752 (Bankr. D. Or. 2006) (finding “language of the hanging paragraph [to be] clear and unambiguous,” and concluding that surrender of vehicle fully satisfies debt); *In re Brown*, 346 B.R. 868, 876–77 (Bankr. N.D. Fla. 2006) (determining that “a creditor who holds a secured claim that is within the scope of the Hanging Paragraph is fully secured up to the entire amount owed to it,” and that because the hanging paragraph applies to the surrender option of § 1325(a)(5)(C), “surrender would therefore satisfy the creditor’s allowed secured claim in full and the creditor would not be entitled to an unsecured deficiency claim”).

Another issue arising out of the hanging paragraph occurs where the debtor seeks to retain the 910-vehicle and pay the creditor the full amount of loan balance. The issue is whether the hanging paragraph “relieves the Debtor of the obligation to pay post-petition interest to the secured creditor” *DaimlerChrysler Financial Servs. North America v. Griffin (In re Wilson)*, 374 B.R. 251, 252 (B.A.P. 10th Cir. 2007). The majority view holds that where the debtor elects to retain their “910 vehicle,” “the debtor must pay the full amount of the claim, plus interest at the ‘prime-plus’ rate prescribed by *Till v. SCS Credit Corp.*” *Id.* at 254–55 (citing *Till v. SCS Credit Corp.*, 541 U.S. 465, 479–80 (2004)). Meanwhile, the minority view reasons that “§ 506(a) is the only section of the Bankruptcy Code by which a creditor may obtain an ‘allowed secured claim,’” and since that section is inapplicable to 910-claims *per* § 1325(a)(5), they need not be treated as such. *Id.* at 255.

Recently, in *DaimlerChrysler Financial* the Bankruptcy Appellate Panel for the Tenth Circuit joined the majority. First, the court agreed with the “majority view that § 506(a) is not a definitional section dictating the only method of obtaining an ‘allowed secured claim,’” thus the hanging paragraph “does not prevent the 910-claim from being considered an allowed secured claim for purposes of the required treatment in § 1325(a)(5).” *Id.* at 255–56. The panel reasoned that this view was “most consistent with the Supreme Court’s direction that the ‘basic federal rule in bankruptcy is that state law governs the substance of claims,’” *Id.* at 256 (quoting *Travelers Casualty & Surety Co. of America v. Pacific Gas & Elec., Co.*, 127 S. Ct. 1199, 1205 (2007)). As “[t]he existence of a claim is usually determined by non-bankruptcy substantive law,” the panel declined to interpret the hanging paragraph as voiding “otherwise valid liens.” *Id.* (quoting *In re Montoya*, 342 B.R. 41, 44 (Bankr. D. Utah 2006)). The court then turned to

the language of the hanging paragraph and concluded that, although imprecise, it was “intended only to prevent bifurcation of secured claims—not prevent the claims it governs from being considered ‘allowed secured claims.’” *Id.* at 257. Accordingly, the panel held that the creditor’s claim ought to have been “treated as secured for the full amount of its loan balance on the petition date,” thus requiring payment of interest at the *Till* rate over the life of the plan. *Id.*

Many other courts have adopted the majority approach, including the Bankruptcy Appellate Panel for the Sixth Circuit and a number of bankruptcy courts. See *Daimler Chrysler Servs. North America LLC v. Taranto* (*In re Taranto*), 365 B.R. 85, 90 (B.A.P. 6th Cir. 2007) (adopting majority view and holding that “when a chapter 13 plan proposes to pay a secured claim in periodic payments, interest *must* be paid to achieve the present value of the claim”) (emphasis in original) (citation omitted); *In re Henry*, 353 B.R. 261, 263 (Bankr. D. Or. 2006) (electing majority approach and holding creditor to have an allowed secured claim with a value “*as of the effective date of the plan*” and an applicable interest rate to be governed by *Till v. SCS Credit Corp.*) (emphasis in original) (citing *Till*); *In re Soards*, 344 B.R. 829, 832 (Bankr. W.D. Ken. 2006) (joining majority and holding that “where the plan proposes to pay the secured claim in installments over time, the *Till* rate of interest must be added to the payment to arrive at the present value of the claim and the contract rate of interest is irrelevant to the analysis”); *In re Scruggs*, 342 B.R. 571, 575 (Bankr. E.D. Ark. 2006) (concluding that “if the plan proposes to pay the [910-]claim in installments over time, interest must be added to the payment to arrive at the present value of the claim”); *DaimlerChrysler Fin. Servs. Americas, LLC v. Brown* (*In re Brown*), 339 B.R. 818, 820, 822 (Bankr. S.D. Ga. 2006) (holding hanging paragraph “does not alter the claims described in the paragraph as secured and does not exempt such claims from present value requirement in § 1325(a)(5)(B)(ii)” which requires interest rate described in *Till v. SCS Credit Corp.*) (citing *Till*); *In re Fleming*, 339 B.R. 716, 724 (Bankr. E.D. Mo. 2006) (determining that where chapter 13 debtor retains 910-vehicle the creditor “is entitled to receive post-petition interest at a current rate determined by an adjustment from the prime rate based on the risk of nonpayment under *Till*”).

There are only a couple recorded cases siding with the minority on this issue. See *In re Green*, 348 B.R. 601, 611 (Bankr. M.D. Ga. 2006) (reaffirming holding in *Carver* and suggesting that, “[i]n a Chapter 13 plan, a 910 claim must receive the greater of (1) the full amount of the claim *without* interest; or (2) the amount the creditor would receive if the claim were bifurcated and crammed down with *Till* interest paid on the value of the collateral”) (emphasis added); *In re Carver*, 338 B.R. 521, 526–27 (Bankr. S.D. Ga. 2006) (interpreting hanging paragraph to “plainly prevent[] 910 claims from being treated as secured under a Chapter 13 plan” and finding no basis for creditors’ argument that they be “paid in full with interest”).

Purchase Money

In *In re Vega*, 344 B.R. 616 (Bankr. D. Kan. 2006), the Bankruptcy Court for the District of Kansas applied the language of the hanging paragraph to find that the secured creditor’s secured claim was limited to that portion of the car loan actually used to purchase the 910 vehicle and not to the portion advanced to pay off a previous car loan. *Id.* at 623. In this case, the debtors executed the first loan and security agreement for the purchase of a 2001 Kia. *Id.* at 617. “About 20 months later, . . . , Debtors executed a second loan and security agreement,” for the purchase of a 1996 Dodge Intrepid. *Id.* The parties agreed that the secured creditor would release its lien on the Kia and roll the amount remaining due on the first note into the new note. *Id.* at 618. About two weeks later the Debtors filed for Chapter 13 protection. *Id.* With regard to the second loan, the Debtors proposed to pay only that portion of the loan used to purchase the

Dodge, “the agreed purchase price of the Intrepid, . . . , plus ‘the discount rate of interest.’” *Id.* The creditor raised issue as to the amount of their allowed secured claim, arguing that must be paid the full value of the loan, not just that portion used to purchase the Dodge. *Id.* at 620. The district court began its analysis by looking to the relevant statutory language and noted that “BAPCPA made no changes to the language requiring that the secured creditor receive the present value of its claims in § 1325(a)(5)(B)(ii).” *Id.* What BAPCPA did change, however, was how such claim was valued. *Id.* “Before the enactment of BAPCPA, secured creditors’ claims could be bifurcated into secured and unsecured portions, depending on the value of the collateral securing the debt. But, language added via the hanging paragraph of § 1325(a)(5) “makes the value of the collateral irrelevant in determining the allowed amount of a claim secured by a purchase money security interest in a vehicle acquired within 910 days of the bankruptcy filing.” *Id.* Taking this language, the creditor “argues that its entire claim must be treated as if it were secured by a PMSI in the Intrepid, when in fact only [a portion] of the loan was used to purchase new collateral.” *Id.* at 622. The court rejected this argument. *Id.* Rather, the district court looked to the language of the hanging paragraph and reasoned that “[w]hether a creditor has a purchase money security interest securing a debt is a matter of state law.” *Id.* And, to have a PMSI under Kansas law, the secured party must prove two elements: “1) that they money loaned or credit extended made it possible for the debtor to obtain the collateral, and 2) that debtor used the funds supplied to acquire rights in the collateral.” *Id.* The court then found that the creditor could neither establish that entire loan “made it possible for the debtor to purchase the Intrepid,” nor that the entire loan was used to “acquire rights in the Intrepid.” *Id.* Rather, “the extent of [the creditor]’s purchase money security interest in the Intrepid is limited to the purchase price of that vehicle.” *Id.* And, because the creditor’s “security interest in the Kia was extinguished pre-petition,” the portion of the first loan for the Kia that was rolled into the “second note is an unsecured antecedent debt, which is not entitled to purchase-money treatment under § 1325(a).” *Id.* at 623. The court thus concluded that “because the Debtors’ plan proposes to pay the full PMSI-portion of the second note, it does not run afoul of the anti-bifurcation provision contained in the hanging paragraph.” *Id.*

Chapter 13 – Plan Confirmation

In *Coop v. Frederickson (In re Frederickson)*, 375 B.R. 829 (B.A.P. 8th Cir. 2007), the Bankruptcy Appellate Panel for the Eighth Circuit held that “applicable commitment period” is period of time that Chapter 13 debtor must pay his or her disposable income to trustee for payment to unsecured creditor, and if debtor has no disposable income, then there is no applicable commitment period, and debtor may obtain confirmation of a plan that, in a case involving above-median-income debtor, is shorter than five years. *Id.* at 830. In this case, the Chapter 13 debtor was an “above-median debtor” but his “monthly expenses exceed[ed] his current monthly income by \$95.49, resulting in negative disposable income.” *Id.* at 831. Despite the negative disposable income, the debtor proposed a plan that required \$600 monthly payments to unsecured creditors for 48 months. *Id.* In shifting its attention to the applicable statute, the panel held that “[t]he ‘applicable commitment period’ for payment of projected disposable income to unsecured creditors . . . is defined as five years for an above-median debtor.” *Id.* at 832 (citing 11 U.S.C. § 1325(b)(4) (2006)). And, “‘projected disposable income’ is the disposable income calculated on Form 22C extrapolated over the applicable commitment period.” *Id.* at 835. However, the panel clarified that it did not “find that the definition of

‘applicable commitment period’ in § 1325(b)(4) as five years for an above-median debtor does not refer to median plan duration. It refers, instead, to the time during which the debtor must pay projected disposable income.” *Id.* Thus, “[i]f the disposable income is negative, there is no applicable commitment period and a debtor is not required to propose a plan that calculates payments to unsecured creditors in the same manner as plan payments to all creditors were calculated pre-BAPCPA.” *Id.* Here, because the debtor’s projected disposable income is negative, there is no applicable commitment period, and his 48 month plan was confirmed. *Id.*

In a case presenting similar facts, the Ninth Circuit Court of Appeals applied similar reasoning to hold “projected disposable income” is determined by multiplying “‘disposable income’ over the ‘applicable commitment period,’” and “five-year ‘applicable commitment period’ [is] inapplicable” where “projected disposable income” is a negative number. *Maney v. Kagenveama (In re Kagenveama)*, 2008 WL 2485570, at *1 (9th Cir. June 5, 2008). The Ninth Circuit first interpreted “projected disposable income” and rejected the Trustee’s interpretation that “projected disposable income” is a forward-looking concept and not directly linked with “disposable income” and permits the consideration of other evidence. *Id.* at *2. The court went on to hold that “[r]eading [§ 1325(b)] as requiring ‘disposable income,’ as defined in subsection (b)(2), to be projected out over the ‘applicable commitment period’ to derive the ‘projected disposable income’ amount is the most natural reading of the statute.” *Id.* It was further reasoned that while this interpretation “may produce less favorable results for unsecured creditors when applied to above-median income Chapter 13 debtors, it is far from absurd.” *Id.* at *5. In turning to the “applicable commitment period,” the Ninth Circuit agreed with the Trustee that such period denotes a temporal measurement, but held that such period “is inapplicable to a plan submitted voluntarily by a debtor with no ‘projected disposable income.’” *Id.* The court stressed “that nothing in [its] opinion prevents the debtor, the trustee, or the holder of an allowed unsecured claim to request modification of the plan after confirmation pursuant to § 1329.” *Id.* at *7.

Meanwhile, in a case heard by the Bankruptcy Appellate Panel of the Ninth Circuit, a different interpretation of “projected disposable income” was applied. *Pak v. eCast Settlement Corp. (In re Pak)*, 378 B.R. 257 (B.A.P. 9th Cir. 2007). In that case, the panel held that while “[t]he standards for determining ‘disposable income’ initially anchor the term ‘projected disposable income’ . . . ‘disposable income’ must be subject to the presentation of contrary evidence.” *Id.* at 627. Applying this interpretation, the appellate panel permitted adjustment of the debtor’s “projected disposable income” as his “disposable income” had been “skewed by four months of unemployment.” *Id.* at 628.

The implications of *Frederickson* in the converse factual situation are reflected in Judge Federman’s opinion in *In re Riding*, 377 B.R. 239 (Bankr. W.D. Mo. 2007). In that case, the Chapter 13 trustee objected to confirmation of the debtor’s Chapter 13 plan on the ground that she proposed to pay less than the Form 22C indicated should be paid to unsecured creditors. The debtor responded by arguing that the Form 22C did not accurately reflect her actual income during the six-month period prior to the filing of the petition as it was unusually high and that the Court should consider her actual income going forward. The debtor’s plan proposed a payment of \$736.00 per month for 55 months. From that sum, the plan would pay the debtor’s counsel and an automobile lender, with the balance to be disbursed to unsecured creditors. The debtor’s Form 22C reflected monthly disposable income of \$659.19 which would result in payment to unsecured creditors of approximately twice what the debtor’s plan proposed. Debtor’s plan payment would have to be almost double that proposed, at least initially, in order to provide that

return to unsecured creditors. The debtor asked for an opportunity to demonstrate that her income had change since the six-month period prior to the filing because of the unusual amount of overtime she had during that period. The Court granted the trustee's motion for confirmation and denied the debtor the opportunity to present evidence on income change based on its interpretation of the Bankruptcy Appellate Panel decision in *Frederickson*. The Court held that if the Form 22C calculation is dispositive, then the plan cannot be confirmed unless the debtor is able to pay to unsecured creditors the amount shown on that form. A plan proposing a lesser payment could not be confirmed even if it was all the debtor could commit to the plan as indicated by Schedules I and J. Because her schedules indicated that she lacked net income with which to make the payment required to make the plan confirmable, any amendment would not be feasible. The Court noted in a footnote that the debtor could not rely on the special circumstances doctrine in § 707(b)(2)(B) to modify the disposable income requirement because that standard was incorporated into Chapter 13 solely by § 1325(b)(3) which provides for an adjustment of expenses rather than income.

The holding in *Frederickson* was applied to below-median debtors in Judge Dow's opinion in *In re Rush*, 387 B.R. 26 (Bankr. W.D. Mo. 2008). The case involved objections by the Chapter 13 trustee to confirmation of plans in two separate cases of debtors below the applicable state median income. In one case, the debtors' schedules of income and expenses showed a modest surplus although a portion of the income derived from Social Security benefits. The Form 22C showed a lower current monthly income, as it excluded the social security benefits. Because the debtors were below median, they did not complete the expense portion of the form. They proposed a plan with a payment of \$150.00 per month to the trustee offering no recovery to non-priority unsecured creditors. The trustee objected because the plan would run for a period of only 18 months. The schedules of the other debtors also showed a modest surplus with a substantial amount of the monthly income derived from Social Security benefits. The Form 22C actually showed no current monthly income as nothing had been received in the six-month period prior to the filing of the petition. Once again, the debtors did not complete the expense portion of the Form 22C. Debtors' plan proposed to pay only \$100 per month to the trustee with no recovery to unsecured creditors. Because the plan would run for only approximately 12 months, the Chapter 13 trustee filed a similar objection arguing that the plan did not commit the requisite sum of money to the payment of unsecured creditors for the applicable commitment period. The Court held, based on the holding in *Frederickson*, that the statutory formula required that disposable income for below-median debtors be determined by subtracting the debtors' reasonable and necessary expenses from the current monthly income, not beginning with income shown on Schedule I. Because the Code does not make the objective standards set forth in § 707(b)(2) applicable to below-median debtors, the court must determine the debtors' reasonable and necessary expenses, beginning with the recurring household expenses shown on Schedule J. Because, however, Schedule J does not list certain expenses, adjustments are required. Specifically, the court must deduct from current monthly income, in addition to the Schedule J expenses, the amount of the debtors' anticipated tax liability (as reflected by the withholdings shown on Schedule I) and the proposed payments to secured creditors, subject to the court's determination that they are necessary and reasonable. The Court also holds that even were it to apply the approach that disposable income is determined by the Schedule I income minus the Schedule J expenses, it would nonetheless hold in these cases that the debtors lacked disposable income because it would exclude the income derived from social security benefits as required by the definition of current monthly income. Finally, the court

determines that because the debtors lacked disposable income, no commitment period is applicable to them and they were not required, based on the holding in *Frederickson*, to make any particular payment to their unsecured creditors under the plan.

Disposable Income

***In re Lanning*, 380 B.R. 17 (10th Cir. BAP 2007)**

Chapter 13 trustee objected to confirmation of above-median income debtor's plan as not paying all of her projected disposable income under § 1325(b)(1)(B). The case was submitted to the bankruptcy court on stipulated facts. The issue presented is whether an above-median income may deviate from the disposable income calculation provided by Form B22C where a change in circumstances does not accurately project a debtor's future ability to pay creditors. It required the BAP to determine how "projected disposable income" in § 1325(b)(1)(B) should be determined.

In the 6 month period prior to filing bankruptcy, debtor received a buyout from her employer and her employment was terminated. The buyout resulted in a temporary bump in her income in two of the months for which current monthly income (CMI) is calculated – \$11,900 in April, 2006 and \$15,356 in May, 2006. As a result of these temporary increases, debtor's CMI was calculated on Form B22C as \$5,344, or \$64,124 annualized. Debtor's actual monthly income (as shown on Schedule I) at the time of filing was \$1,922 and \$23,604 annualized. Debtor's actual monthly expenses (as shown on Schedule J) were \$1,773. Actual disposable income calculated by reference to Schedule I less Schedule J was \$149 per month. Debtor's monthly expenses and standardized deductions permitted on Form B22C were \$4,228 resulting in disposable income calculated from Form B22C of \$1,114.

The trustee advocated a "multiplier" or "mechanical" approach for calculating projected disposable income: the disposable income figure from Form B22C multiplied by the number of plan payments required. The BAP rejected this approach for calculating projected disposable income. Instead, the BAP adopted a "projected view" of disposable income. These courts hold that "projected" in § 1325(b)(1)(B) modifies "disposable income." Under this approach, the bankruptcy court should start from debtor's disposable income calculation on Form B22C. If, however, it does not accurately project the debtor's future ability to pay, the bankruptcy court may deviate from Form B22C and may consider a debtor's substantial change in circumstances - debtor's actual income at confirmation or reasonably anticipated income over the life of the plan – to arrive at projected disposable income. As a result, the trustee's objection to confirmation of debtor's plan was overruled and the BAP affirmed the bankruptcy court.

***In re Kagenveama*, __ F.3d __, 2008 WL 2485570 (9th Cir. 2008)**

Chapter 13 trustee's direct appeal of the bankruptcy court's order confirming debtor's chapter 13 plan over his objection. Debtor was an above-median income debtor. The calculation of her disposable income on Form B22C, utilizing the calculation of expenses pursuant to § 707(b)(2), resulted in negative disposable income. Debtor's disposable income calculated by Schedule I and Schedule J was \$1,523 per month. Notwithstanding the negative disposable income derived from Form B22C, debtor proposed a plan that would provide \$1,000 per month for a commitment period of 3 years. The bankruptcy court concluded that the 5 year applicable commitment period was inapplicable because debtor had no projected disposable income. It interpreted "projected disposable income" under § 1325(b)(1)(B) as meaning debtor's disposable income on Form B22C times the applicable commitment period. Because the

disposable income number was negative, there was no projected disposable income and debtor was not required to propose a plan with a 5 year applicable commitment period. The Ninth Circuit Court of Appeals affirmed.

The Ninth Circuit adopted the “multiplier” view of calculating projected disposable income, concluding that it is “the most natural reading of [§ 1325(b)(1)(B)].” This view calculates projected disposable income by multiplying the disposable income figure derived from Form B22C by the applicable commitment period. In other words, it “projects” disposable income over the applicable commitment period. The word “projected” modifies the defined term “disposable income” in § 1325(b)(2). If the disposable income is a negative figure on Form B22C, there is no projected disposable income figure. The Ninth Circuit rejected the “forward-looking” view that uses the Form B22C disposable income calculation as a rebuttable presumption of disposable income, or as a starting point for the calculation of “projected disposable income,” and permits a court to depart from the disposable income calculation on Form B22C due to substantial changes in income or expenses.

To date, *Kagenveama* is the only Circuit level authority interpreting projected disposable income in § 1325(b)(1)(B).

***In re DeThamplé*, 390 B.R. 716 (Bankr. D. Kan. 2008)**

Chapter 13 case where trustee objected to confirmation, contending that debtors were not paying all of their projected disposable income during the applicable commitment period to payment of unsecured creditors under § 1325(b)(1)(B). This case interprets “projected disposable income” under § 1325(b)(1)(B). Judge Nugent adopts the “projected view” of *In re Lanning*, 380 B.R. 17 (10th Cir. BAP 2007) holding that Form B22C’s disposable income computation is a starting point for determining projected disposable income, rather than the mechanical view or mathematical computation of projected disposable income (B22C disposable income x applicable commitment period).

The case was submitted to the Court on stipulated facts and briefs. An above- median debtor took a \$4,000 withdrawal (not a loan) from her 401(k) plan pre-petition during the 6 month CMI (current monthly income) period. Debtor did not include the \$4,000 in the calculation of CMI. Parties stipulated that the 401(k) distribution was a “singular event” not anticipated to be repeated during the life of the chapter 13 plan. Parties further stipulated that debtors were above-median, regardless of whether the 401(k) distribution was included in current monthly income (CMI) calculation.

The Court held that the 401(k) distribution was included in CMI as defined in § 101(10A) and required to be included in CMI calculation on Form B22C. However, because debtors disposable income on B22C did not accurately reflect debtors disposable income at confirmation and going forward, the 401(k) distribution would be disregarded in the calculation of projected disposable income for purposes of confirmation under § 1325(b)(1)(B) and the Court would determine debtors’ income by Schedule I. Trustee’s objection to confirmation was therefore overruled.

***In re Arroyo and In re Hoss*, ___ B.R. ___, 2008 WL 3854448 (Bankr. D. Kan. Aug. 20, 2008).**

In these companion chapter 13 cases, the trustee objects to confirmation of debtors’ plans under § 1325(b)(1)(B) as not devoting all of their projected disposable income to payment of unsecured creditors. Specifically, the trustee challenged the debtors’ deductions for future secured debt payments on Line 47 of Form B22C. The issue presented is whether an above-median income debtor who seeks to cram-down or strip off a secured creditor in chapter 13 can

deduct from current monthly income on Line 47 of Form B22C, the average future monthly payments to the secured creditor based upon the original, unmodified contract or only the amount equal to what debtor intends to actually pay under the plan. The cases required the Court to interpret § 1325 provisions and the “scheduled as contractually due” language in § 707(b)(2)(A)(iii) in a chapter 13 setting.

Under debtors’ plan in *Arroyo*, the debtors crammed down Wells Fargo’s loan on a non-910 vehicle to the value of the collateral but claimed as a deduction the full amount of the secured debt payments according to the original contract. In *Hoss*, the debtors stripped off the second, third, and fourth mortgages on their homestead. These debtors claimed a deduction for secured debt payments for all four mortgages.

The Court disallowed the claimed deductions. It adopted the majority view (in chapter 13 cases) that projected disposable income is determined as of the effective date of the plan and that the confirmed chapter 13 plan constitutes a new contract between the debtor and the secured creditors. Thus, secured debt payments that a debtor will no longer be obligated to make under the plan may not be deducted. The Court concluded that this view better comports with the forward-looking view expressed in *In re Lanning*, 380 B.R. 17 (10th Cir. BAP 2007) and function of chapter 13 to require debtors to pay what they are able. This decision disagrees with Judge Karlin’s contrary decision in *In re Allen*, 2008 WL 451053, No. 07-41327 (Bankr. D. Kan. Feb. 15, 2008).

Automatic Stay – BAPCPA

***Miller v. Cameron (In re Miller)*, 383 B.R. 767 (10th Cir. BAP 2008)**

Issues presented were whether debtor complied with new BAPCPA filing requirement of § 521(a)(1)(B)(iv) – copies of all payment advices or other evidence of payment received by debtor within 60 days of filing - and whether bankruptcy case was subject to dismissal. Reversing the bankruptcy court, which raised the issue *sua sponte*, the BAP ruled year-to-date income totals that debtor’s employer included on fourth pay stub provided sufficient “other evidence” of payment received by debtor that would have been included on the missing third pay stub to satisfy § 521(a)(1)(B)(iv). Thus, debtor’s case was not subject to automatic dismissal on the 46th day following the petition date, by operation of new § 521(i)(1).

***Holcomb v. Hardeman (In re Holcomb)*, 380 B.R. 813 (10th Cir. BAP 2008)**

This appeal considered a new BAPCPA provision limiting the automatic stay for repeat filers, § 362(c)(3)(A). Under this new provision, the automatic stay terminates 30 days after filing “with respect to the debtor” if the debtor had a prior bankruptcy case pending within one year that was dismissed. Chapter 13 debtors filed a motion for determination that the stay remained in effect as to property of the estate which the bankruptcy court denied. Reversing the bankruptcy court, the BAP, siding with the majority view, ruled that § 362(c)(3)(A) is plain and unambiguous, and terminates the stay with respect to the debtor and the debtor’s property, but not with respect to property of the estate.

Taxes – Stamp Tax Exemption

In *Florida Dep’t of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. ___, 128 S. Ct. 2326 (2008), the Supreme Court settled the conflict among circuit courts by holding “that § 1146(a)’s stamp-tax exemption does not apply to transfers made before a plan is confirmed under Chapter

11.” *Id.* at 2330. In this case, the Debtor, a formerly successful cafeteria chain, filed for Chapter 11 relief and “requested authorization to sell substantially all of its assets outside the ordinary course of business,” and was permitted to do so. *Id.* Debtor also “sought an exemption from any stamp taxes on the eventual transfer under § 1146(a) of the Code,” which the bankruptcy court granted. *Id.* “The sale closed on March 16, 2004,” while the Debtor’s plan was not confirmed until October 21, 2004. *Id.* On appeal, both the District Court and the Eleventh Circuit affirmed the stamp-tax exemption, and the Supreme Court granted certiorari “to resolve the conflict among the Courts of Appeals as to whether § 1146(a) applies to preconfirmation transfers.” *Id.* at 2331.

The Court first looked to the language of the statute at issue which states: “The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer *under a plan confirmed under section 1129 of this title*, may not be taxed under any law imposing a stamp tax or similar tax.” *Id.* (quoting 11 U.S.C. § 1146(a) (2006) (emphasis added)). In assessing the statute, the Court “agree[d] with Florida that the more natural reading of § 1146(a) is that the exemption applies only to postconfirmation transfers.” *Id.* at 2333. The Court noted that “[e]ven assuming, *arguendo*, that the language of § 1146(a) is facially ambiguous, the ambiguity must be resolved in Florida’s favor.” *Id.* The Court rejected Piccadilly’s assertion that when in the context of other sections of the Code, § 1146 is ambiguous with regard to temporal requirement, as “[i]t was unnecessary for Congress to include in § 1146(a) a phrase such as ‘at any time after confirmation of such plan’ because the phrase ‘under a plan confirmed’ is most naturally read to require that there be a confirmed plan at the time of the transfer.” *Id.* at 2333, 2335. The better contextual reference was asserted by Florida who “observe[d] that the subchapter in which § 1146(a) appears is entitled, ‘POSTCONFIRMATION MATTERS.’” *Id.* at 2334. The Court reasoned that “[t]he placement of § 1146(a) within a subchapter expressly limited to postconfirmation matters undermines Piccadilly’s view that § 1146(a) covers preconfirmation transfers.” *Id.* at 2336. In looking to substantive canons of statutory interpretation, the Court found Florida’s assertions more persuasive. One key canon is “that courts ‘proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly expressed.’” *Id.* at 2336–37. Florida asserted that this canon compels the interpretation “that § 1146(a)’s language must be construed strictly in favor of the State’s to prevent unwarranted displacement of their tax laws.” *Id.* at 2337. The Court rejected Piccadilly’s argument that “a remedial statute such as the Bankruptcy Code should be liberally construed.” *Id.* at 2337–38. The Court downplayed the remedial nature of the Code and reasoned that “[t]he Code [] accommodates the interests of the interests of the States in regulating property transfers by ‘generally [leaving] the determination of property rights in the assets of a bankruptcy’s estate to state law.’” *Id.* at 2339 (quoting *Travelers Casualty & Surety Co. of America v. Pacific Gas & Elec. Co.*, 549 U.S. ___, 127 S. Ct. 1199 (2007)). Thus, the Court “decline[d] to construe the exemption granted by § 1146(a) to the detriment of the State.” *Id.* The court therefore concluded that “Section 1146(a) affords a stamp-tax exemption only to transfers made pursuant to a Chapter 11 plan that has been confirmed. [And b]ecause Piccadilly transferred its assets before its Chapter 11 plan was confirmed by the Bankruptcy Court, it may not rely on § 1146(a) to avoid Florida’s stamp taxes.” *Id.*

Exempt Property – Missouri Opt Out

In a consolidated case, the Eighth Circuit Court of Appeals held Missouri's opt-out statute did not create an exemption for tax refund, and thus would not permit the debtors to exempt anticipated tax refunds, to the extent they were attributable to pre-petition events, from property of the estate. *Benn v. Cole (In re Benn)*, 491 F.3d 811 (8th Cir. 2007). The court began its analysis by discussing the creation of the bankruptcy estate under § 541(a) and what may be exempted from that estate under § 522(d). *Id.* at 813 (citing 11 U.S.C. §§ 541(a), 522(d) (2006)). The Eighth Circuit pointed out that “[a] debtor’s anticipated tax refund, to the extent it is attributable to events occurring prior to the filing of the petition for bankruptcy, is part of the bankruptcy estate.” *Id.* The Code permits a state to “opt-out” of the exemptions set forth in § 522(d), in which case a “debtor may exempt only property that is exempt under federal law other than § 522(d), or state or local law that is applicable . . .” *Id.* Missouri joined a majority of states by opting-out through Section 513.427 of the Missouri Revised Code which provides:

Every person by or against whom an order is sought for relief under Title 11, United States Code, shall be permitted to exempt from property of the estate any property that is exempt from attachment and execution under the law of the state Missouri or under federal law, other than Title 11, United States Code, Section 522(d), and no such person is authorized to claim as exempt the property that is specified under Title 11, United States Code, Section 522(d).

Id. (citing MO. REV. STAT. § 513.427 (2006)). It was this section of Missouri code that was disputed – the debtors argued that this section was “not merely an ‘opt-out’ statute, but that it also defined additional forms of property that a debtor may exempt from his estate in bankruptcy,” *i.e.*, anything “*not subject to* attachment and execution under Missouri law.” *Id.* at 814 (emphasis in original).

The Eighth Circuit soundly rejected debtors’ interpretation of the statute. *Id.* The court applied a textual analysis and reasoned that in the context of § 522, “exemption” “refers to laws enacted by the legislative branch which explicitly identify property . . .” *Id.* (quoting *Benn v. Cole (In re Benn)*, 340 B.R. 905, 914 (8th Cir. B.A.P. 2006) (Kressel, J., dissenting)). “On this understanding of the term ‘exempt,’ section 513.427 opts out of the federal exemptions listed in 11 U.S.C. § 522(d), but announces no new exemptions under Missouri law.” *Id.* The Eighth Circuit also found the statutory construction of the Missouri statute to support their conclusion. *Id.* at 814–15. The court further noted that Missouri’s principal exemption statute, which lists property “exempt from attachment and execution,” indicates that “section 513.247 is an opt-out statute, and the statute’s reference to property ‘exempt from attachment and execution’ under Missouri law means property that is declared exempt in one of the Missouri exemption statutes . . .” *Id.* at 815. The court then concluded that, as “Section 513.427 does not create an exemption for tax refunds, and no other Missouri statute or non-bankruptcy federal exemption statute permits a debtor to exempt tax refunds from the bankruptcy estate,” “the Debtors’ anticipated tax refunds, to the extent they are attributable to events occurring prior to the filing of the petition for bankruptcy, are part of the bankruptcy estate.” *Id.* at 816.

In re Mahony, 374 B.R. 717 (Bankr. W.D. Mo. 2007) (Federman, J.). Certain assets, such as unliquidated personal injury tort claims cannot be reached by attachment or execution even though they do not fall within any specifically listed Missouri exemption. Rejecting a line of Missouri bankruptcy cases holding that the Missouri “opt out” provision, Mo.R.S. 513.427, operates to exempt such assets, the Court holds that the section cannot be used to claim an exemption. This is required by *In re Benn*, 491 F.3d 811 (8th Cir. 2007), which disallowed a claimed tax refund exemption that was based on the opt out provision’s language.

Exempt Property – Kansas Homestead

In re Kester, 493 F.3d 1208 (10th Cir. 2007) from certified question to Kansas Supreme Court, *Redmond v. Kester*, 284 Kan. 209, 159 P.3d 1004 (2007). In debtors' chapter 7 bankruptcy case, the trustee objected to debtors' claimed Kansas homestead exemption of real property that debtors had placed pre-petition in a self-settled living revocable trust where debtors were both settlors and beneficiaries of the trust. The bankruptcy court overruled the trustee's objection to the homestead exemption. The Tenth Circuit BAP affirmed and the trustee appealed to the Tenth Circuit Court of Appeals. The Court of Appeals certified a question of law to the Kansas Supreme Court: May a chapter 7 bankruptcy debtor claim the homestead exemption allowed by K.S.A. § 60-2301 for real property placed in a self-settled living revocable trust prior to the bankruptcy, where the settlor and the beneficiary, as well as the bankruptcy debtor, are the same person?

The bankruptcy trustee argued that because the property was owned by a trust, rather than the debtors, they did not have an interest in the real estate after they transferred their interest in the property to the trust and could not claim the homestead exemption. The Kansas Supreme Court examined the type of interest necessary to claim a homestead exemption. The Kansas Court concluded that fee simple title to real estate was not required to claim the homestead exemption, citing to Kansas precedent that holds alienation of fee title is insufficient to invalidate the homestead exemption when the occupant intends to continue occupancy of the property after the alienation. The Kansas Court held that bankruptcy debtors may claim a homestead exemption under K.S.A. 60-2301 based on any interest in real estate, legal or equitable, so long as they have not abandoned their occupancy or intent to occupy the property. The Kansas Supreme Court further held that a trust beneficiary has an equitable interest in property held by the trust and that this equitable interest was sufficient to claim the homestead exemption in the property, even where the beneficiary is also the settlor and trustee of the trust. It found support for its conclusion in K.S.A. 58a-1107(c), part of the Kansas Uniform Trust Code, that recognizes that a transfer into an inter vivos trust by the settlor (who is also a beneficiary of the trust) does not affect any homestead exemption. In answering the certified question in the affirmative, the Kansas Supreme Court interprets the Kansas homestead exemption to include occupants of real estate who hold any type of interest in the property, including an equitable interest.

Trustee Rights – Crime Victim Compensation

In *United States v. Holthaus*, 486 F.3d 451(8th Cir. 2007), the Eighth Circuit Court of Appeals upheld a trustee's right to restitution through the Mandatory Victim Restitution Act (MVRA) for legal work expended as a direct result of concealment of assets by the debtor. *Id.* at 453 (citing Mandatory Victim Restitution Act, 18 U.S.C. § 3663A (2000)). In this instance, the Chapter 7 debtor had his case discharged for failing to disclose \$54,478.57 worth of assets. *Id.* Subsequently, the debtor was "indicted from knowingly and fraudulently making a false declaration . . . in his bankruptcy petition," for which he pled guilty. *Id.* In addition to being sentenced to a short stint in prison, the debtor was ordered to pay the trustee "mandatory restitution of \$8,093.02, pursuant to the [MVRA], for uncompensated legal services and out-of-pocket expenses." *Id.* The debtor appealed the order for restitution, arguing the trustee was not a "victim" under MVRA. *Id.* at 457. Relying on the reasoning of the Seventh Circuit in a similar

case, the Eighth Circuit rejected debtor's contention and "held bankruptcy trustees qualify as victims under the statute if their compensation is negatively impacted by a debtor's misrepresentation, . . ." *Id.* 457–58 (citing *United States v. Lowell*, 256 F.3d 462, 465–66 (7th Cir. 2001)). The court went on to point out that "[t]he district court correctly determined [debtor]'s violation . . . directly and proximately harmed the bankruptcy trustee because the trustee worked more than fifty uncompensated hours as a result of [debtor]'s fraud. Thus, restitution was appropriate." *Id.* 458.

Trustee Rights - *in pari delicto*

In *Moratzka v. Morris (In re Senior Cottages of America, LLC)*, 482 F.3d 997 (8th Cir. 2007), the Eighth Circuit aligned itself with the First, Third, Fifth, and Eleventh Circuits in holding that a corporate insider's collusion with third parties to injure the corporation does not deprive corporation, or subsequently appointed bankruptcy trustee, of standing to sue third parties. *Id.* at 1007. In this case, the trustee for the bankruptcy estate of Senior Cottages appealed his denial of standing to sue the debtor company's attorneys on behalf of company for committing malpractice, and aiding and abetting the breach of fiduciary duty by the "governor, manager, and majority interest owner of Senior Cottages." *Id.* at 999. The Eighth Circuit reversed both of the lower courts' denial of standing, beginning their analysis with a brief examination of "law governing claims on behalf of corporations." *Id.* at 1001. The court noted, "[i]t is generally recognized that a bankruptcy trustee has authority 'to bring an action for damages on behalf of a debtor corporation against corporate principals for alleged misconduct, mismanagement, or breach of a fiduciary duty, because these claims could have been asserted by the debtor corporation, or by its stockholders in a derivative action.'" *Id.* at 1001–02 (quoting *Mixon v. Anderson (In re Ozark Rest. Equip. Co.)*, 816 F.2d 1222, 1225 (8th Cir. 1987)). It was further reasoned that "[i]f the corporation owned a cause of action against the principal who breached a duty, it follows that it also owns the cause of action for aiding and abetting the principal's breach." *Id.* at 1002.

In this respect, the Eighth Circuit departed from the Second Circuit's conclusion that "there is a special rule that corporation does not have standing to bring a claim against outsiders for defrauding a corporation with the cooperation of an insider of the corporation." *Id.* at 1002 (citing *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114 (2d Cir. 1991)). In that case, the Second Circuit denied the bankruptcy trustee of a corporation whose sole shareholder, director and president has dissipated the company's assets, standing to sue the corporation's stockholder for fraud. *Id.* (citing *Shearson*, 944 F.2d at 117). It has been argued by numerous subsequent courts and commentators that this rule conflates the constitutional standing doctrine with the *in pari delicto* defense. *Id.* at 1003 (citations omitted). The Eighth Circuit agreed with this criticism of the Second Circuit's rationale, and in particular, agreed "with the First, Third, Fifth, and Eleventh Circuits that the collusion of corporate insiders with third parties to injure the corporation does not deprive the corporation of standing to sue the third parties, though it may well give rise to a defense that will be fatal to the action," *i.e.*, *in pari delicto*. *Id.* 1003–04 (citing *Baena v. KPMG LLP*, 453 F.3d 1, 6–10 (1st Cir. 2006) (noting that although trustee's case was barred by *in pari delicto*, that doctrine "has nothing to do with Article III requirements"); *Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1149–50 (11th Cir. 2006) (holding trustee had standing, but federal claim was barred by *in pari delicto*); *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 346 (3d

Cir. 2001) (“An analysis of standing does not include an analysis of equitable defense, such as *in pari delicto*. Whether a party has standing to bring claims and whether a party’s claims are barred by an equitable defense are two separate questions, to be addressed on their own terms.”); Schertz-Cibola-Universal City, Indep. School. Dist. v. Wright (*In re* Educators Group Health Trust), 25 F.3d 1281, 1286 (5th Cir. 1992) (“That the defendant may have a valid defense on the merits of a claim brought by the debtor goes to the resolution of the claim, and not to the ability of the debtor to assert the claim.”)).

In maintaining that the trustee is the proper party to bring this action, the Eighth Circuit relied on the reasoning of both the Third and Ninth Circuits in concluding that although creditors will eventually get the benefit of an action against the corporate debtor, it is the corporation itself, and in this case the trustee in the shoes of the corporation, that is the proper party to assert the claim. *Id.* 1006 (citing *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 1004 (9th Cir. 2005); *R.F. Lafferty & Co.*, 267 F.3d at 348–49). The Eighth Circuit went on to determine that the trustee had alleged an “injury traceable to the lawyers’ conduct and injury of the sort remediable by an award of damages.” *Id.* at 1005. But, the court declined to determine whether the trustee’s complaint would fail on the ground of *in pari delicto* as the defendant law firm had not argued such a defense. *Id.*

Claims

In *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*, 549 U.S. ___, 127 S. Ct. 1199 (2007), the Supreme Court concluded that the Bankruptcy Code does not “disallow[] contract-based claims for attorney’s fees based solely on the fact that the fees at issue were incurred litigating issues of bankruptcy law.” *Id.* at 1204. Here, Pacific Gas and Electric (PG & E) filed a voluntary Chapter 11 petition which caught the attention of Travelers Casualty & Surety Company (Travelers) “which had previously issues a \$100 million surety bond on PG & E’s behalf . . . , guaranteeing PG & E’s payment of state workers’ compensation benefits to injured employees.” *Id.* at 1202. This bond was subject to a “series of indemnity agreements in favor of Travelers. . . . including any attorney’s fees incurred in pursuing, protecting, or litigating Travelers’ rights in connection with those bonds.” *Id.* Over the course of the bankruptcy proceedings, the parties litigated over changes PG & E made to their agreement, and “Travelers subsequently filed an amended proof of claim seeking to recover attorney’s fees it incurred in connection with PG & E’s bankruptcy proceedings,” to which PG & E objected. *Id.* at 1202–03. The Bankruptcy rejected the claim on the basis of PG & E’s objection and the Ninth Circuit Court of Appeals affirmed; the Supreme Court granted certiorari. *Id.* at 1203.

Before getting into its analysis, the Court began by noting that, “under the terms of the current Bankruptcy Code, it remains true that an otherwise enforceable contract allocating attorney’s fees is allowable in bankruptcy except where the Bankruptcy Code provides otherwise.” *Id.* at 1203–04. In turning to analysis of claims, the Court stated “even where a party in interest objects, the court ‘shall allow’ the claim ‘except to the extent that’ the claim implicates any of the nine exceptions enumerated in § 502(b).” *Id.* at 1204 (quoting 11 U.S.C. § 502(b) (2006)). It was then reasoned that the only possible exception applicable here was § 502(b)(1) which “disallows any claim that is ‘unenforceable against the debtor and property of the debtor, under any agreement or applicable law.’” *Id.* (quoting 11 U.S.C. § 502(b)(1)). This exception is generally understood to “provide that, . . . , any defense to a claim that is available outside of the bankruptcy context is also available in bankruptcy.” *Id.* This follows the “the

‘basic federal rule’ in bankruptcy [] that state law governs the substance of claims.” *Id.* at 1205 (quoting *Raleigh v. Illinois Dep’t of Revenue*, 530 U.S. 15, 20 (2000)). And because there is nothing in state contract law preventing the payment of attorney’s fees, the Court turned to the Bankruptcy Code to determine if there was any provision barring contractual attorney’s fees for bankruptcy litigation. *Id.* The Court noted that despite rejecting Travelers’ claim for attorney’s fees, the Ninth Circuit did not find that the claim “was rendered unenforceable by any provision of the Bankruptcy Code.” *Id.* Rather, the Court of Appeals relied on the *Fobian* rule “which dictates that ‘attorney fees are not recoverable in bankruptcy for litigating issues peculiar to federal bankruptcy law.’” *Id.* (quoting *Travelers Casualty & Surety Co. v. Pacific Gas & Elec. Co.*, 167 Fed. Appx. 593, 594 (9th Cir. 2006) (quoting *Fobian v. Western Farm Credit Bank (In re Fobian)*, 951 F.2d 1149, 1153 (9th Cir. 1991))) (internal quotations omitted). However, because “[t]he *Fobian* rule finds no support in the Bankruptcy Code,” the Court rejected the rule as they “generally presume that claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed.” *Id.* at 1205–06. The Court thus concluded that “the Court of Appeals erred in disallowing [Travelers’ claim for attorney’s fees] based on the fact that the fees at issue were incurred litigating issue of bankruptcy law.” *Id.* at 1208.

In *In re SNTL Corp.*, 380 B.R. 204 (9th Cir. B.A.P. 2007), the Ninth Circuit Bankruptcy Appellate Panel tackled the question left unresolved in *Travelers*. Without waiting for the Ninth Circuit to determine the issue on remand, the Bankruptcy Appellate Panel held that unsecured creditors may recover attorney’s fees for post-petition work based upon a provision authorizing such recovery in a pre-petition contract with the debtor. In this case, the debtor had guaranteed certain obligation of its affiliates and entered into a settlement agreement to pay a certain portion of them after the affiliates defaulted. Shortly thereafter, the California insurance commissioner placed some of the affiliates into conservation and subsequently liquidation and the debtor filed a Chapter 11 proceeding. The insurance commissioner filed a complaint in state court against a creditor resulting in the return of a portion of the settlement payment made. The creditor then amended its proof of claim seeking recovery of the amounts repaid to the commissioner, which included certain attorney’s fees incurred by the creditor subsequent to the filing of the Chapter 11 proceeding. After grappling with the question of whether the guaranty liability was revived after the recovery of the payment, the Bankruptcy Appellate Panel considered the debtor’s objection to the claim for attorney’s fees incurred post-petition. The court dealt with what it discerned to be, based on its review of the cases, the four principal objections made to the recovery of post-petition attorney’s fees incurred by unsecured creditors. First, the debtor had argued that they should be disallowed based on a negative inference from § 506(b), which allows post-petition additions to claims for fees incurred by secured creditors but contains no similar provision allowing post-petition fees to unsecured creditors. The court responded by observing that § 506(b) deals only with secured claims and it is therefore unsurprising that it says nothing about the right of unsecured creditors to recover attorney’s fees incurred post-petition in that it relates only to determining what portion of an allowed claim is secured. Disallowance is effectuated by § 502(b) which contains no provision subjecting a post-petition claim for attorney’s fees by unsecured creditors to disallowance. Second, the debtor argued that claims are to be determined as of the date of the filing of the petition according to § 502(b), that these fees were not incurred as of the date of the filing of the petition and there was no statutory provision authorizing their recovery. The court dispatched this argument by observing that contingent claims based upon a pre-petition relationship are nonetheless allowable even if the contingency occurs post-petition, based upon the broad definition of “claim.” Here, the claim was based upon

a provision in a pre-petition contractual agreement with the debtor which matured when the fees were incurred subsequent to the filing of the petition. Third, the court rejected the debtor's argument that language in the Supreme Court's opinion in *Timbers* mandated disallowance of claims for post-petition attorney's fees of unsecured creditors. The court observes that the statement in *Timbers* (arguably dicta) was consistent with an express provision of the Bankruptcy Code, § 502(b)(2), which specifically disallows claims for unmatured interest. No similar prohibition is contained in the Code with regard to attorney's fees incurred post-petition. Finally, the court rejects a policy-based argument that allowance of post-petition attorney's fees to unsecured creditors would violate the goal of equality of distribution among similarly situated creditors. The court responds by declaring that it is trumped by what it believes to be the clear language of the Code which contains no provision disallowing such claims and observes that mandating a different result based on policy considerations is the function of Congress.

In *Roberts v. Pierce (In re Pierce)*, 435 F.3d 891 (8th Cir. 2006), the Eighth Circuit upheld the bankruptcy court's reduction of a claim without an evidentiary hearing where the debtor had filed an objection to the claim and attached a "negative notice," to which the creditor failed to timely respond. *Id.* at 891–92. Upon receiving the creditor's proof of claim, the debtor objected and served a "negative notice" on the creditor "by attaching to the objection a document . . . which advised [the creditor] that if [he] did not respond and request a hearing within thirty days, the bankruptcy court could enter an order without further hearing." *Id.* at 891. The creditor admitted receipt of the notice, but failed to respond. *Id.* The Eighth Circuit noted that while § 502 of the Code "provides that if a debtor objects to a proof of claim, 'the court, after notice and a hearing, shall determine the amount of such claim,'" such notice and hearing is authorized "without an actual hearing if such notice is given properly and if . . . such a hearing is not requested timely by a party in interest." *Id.* at 892 (quoting 11 U.S.C. §§ 502(b), 102(1)(B)(i) (2006)). The court reasoned that "[n]egative notices are therefore authorized by the Code" and serve to "shift the burden to an interested party, such as [the creditor], to evaluate his claim and the debtor's objections, and then make his own decision whether an evidentiary hearing would be helpful, and request a hearing, if desired." *Id.* Here, the creditor "received adequate notice and an opportunity to be heard," thus there was no error in reducing his claim without an evidentiary hearing. *Id.*

In *B-Line, L.L.C. v. Kirkland (In re Kirkland)*, 379 B.R. 341 (B.A.P. 10th Cir. 2007), the Bankruptcy Appellate Panel for the Tenth Circuit held that "11 U.S.C. § 502(b) provides the exclusive grounds for disallowance of a claim and that the [Federal] Rules [of Bankruptcy Procedure] may not modify substantive rights." *Id.* at 342. In this case, one of the creditors listed in the debtor's schedule of unsecured creditors filed a proof of claim, but failed to attach supporting documentation. *Id.* The panel noted that § 502(b) "mandates that the court 'shall allow' the claim, except to the extent it falls within one of nine enumerated categories of prohibited claims," failure to comply with the Rules not being one of them. *Id.* at 343–44. Rule 3001, meanwhile, requires attachment of supporting documents to proofs of claim. *Id.* at 344 (citing FED. R. BANKR. P. 3001). The panel went on to point out that there is currently disagreement as to whether objection to a claim based solely on nonconformity with the Rules "constitutes a ground for disallowance of the claim." *Id.* Some courts have adopted the "Exclusive View" to hold "that § 502(b) provides the exclusive basis for disallowance of claims." *Id.* Courts adopting the "Nonexclusive View" "find the failure to attach documents to be a valid ground for claim objection," thus once an objection is made, "if the creditor fails to remedy the defect or to otherwise prove its claim at hearing, then the claim must be disallowed."

Id. The panel, based on subsequent reasoning, then adopted the Exclusive View. *Id.* The court reasoned that the Exclusive View “gives effect to the plain language of the statute;” it “recognizes objections to a claim based on lack of documentation, but only when the lack of documentation may render the claim unenforceable as a matter of law;” it “supports the overall purpose of the Rules” by fostering “the speedy and inexpensive determination of claims;” it is unnecessary for discouragement of false claims as “Congress has already provided a disincentive by establishing criminal penalties to punish offenders;” it “does not limit the ability of a trustee to conduct either formal or informal discovery on a particular claim;” and, unlike the Nonexclusive View, the Exclusive View does not “open a Pandora’s box of issues as to when a proof of claim is deemed to substantially comply with the Rules.” *Id.* at 345, 347–49, 351–52.

According to the panel, only three appellate courts have addressed the issue, two of which explicitly adopted the Exclusive View. *See* *Heath v. American Express Travel Related Servs. Co. (In re Heath)*, 331 B.R. 424, 426 (B.A.P. 9th Cir. 2005) (affirming allowance of creditors’ claims as “Section 502(b) sets forth the exclusive grounds for disallowance of claims, and Debtors have” alleged only failure to “attach sufficient documentation to [] proofs of claim to comply with Rule 3001(c)”); *Dove-Nation v. eCast Settlement Corp. (In re Dove-Nation)*, 318 B.R. 147, 153 (B.A.P. 8th Cir. 2004) (denying debtor’s objection to a claim “based solely on grounds not recognized by Section 502 of the Code,” as that section exclusively governs “allowance and disallowance of claims”); *see also In re Stoecker*, 5 F.3d 1022, 1028 (7th Cir. 1993) (permitting creditor to “amend his incomplete proof of claim to comply with Rule 3001, provided that other creditors are not harmed by the belated completion of filing”).

Collateral

In *Suggs v. Regency Fin. Corp. (In re Suggs)*, 377 B.R. 198 (B.A.P. 8th Cir. 2007), the Bankruptcy Appellate Panel for the Eighth Circuit invalidated a local bankruptcy rule that required “debtors to maintain insurance coverage on vehicles serving as collateral and permit[ed] secured creditors, prior to obtaining relief from the stay, to take possession of such vehicles pending presentation of proof of insurance.” *Id.* at 201. Here, the secured creditor of debtor’s vehicle was twice rejected in its motion to lift the stay, so the creditor relied on the local law and repossessed the vehicle as it was not insured. *Id.* at 200–01. As an initial matter, the court held that “a stay violation did occur . . . when [the creditor] repossessed the vehicle before obtaining a court order to do so.” *Id.* at 203. The panel then turned to the question of whether the local bankruptcy rule validly permitted this violation, or such rule was itself invalid as in conflict with a federal bankruptcy rule. *Id.* at 205. The court explained that “[a] local rule may be upheld if (a) it is consistent with the Bankruptcy Code in that it does not abridge, enlarge, or modify any substantive right, as required by 28 U.S.C. § 2075 and (b) it is a matter of procedure not inconsistent with the Bankruptcy Rules as required by Bankruptcy Rule 9029.” *Id.* at 205–06 (quoting *McGowan v. Ries (In re McGowan)*, 226 B.R. 13, 19 (B.A.P. 8th Cir. 1998) (internal citations omitted)). Applying this test, the appellate panel concluded that the local rule both enlarged creditors’ rights by permitting repossession “of property of the estate or of the debtor without permission from the court and without even filing a motion,” and was “inconsistent with the Code and the Federal Rules.” *Id.* at 206–07. Thus, the local rule was found to be invalid. *Id.* at 207.

In *Commercial Bank v. Hundley* (*In re Hundley*), 2007 WL 1042135 (D. Kan. Apr. 6, 2007), the District Court of Kansas held a bank's refusal to release a vehicle validly repossessed prior to bankruptcy upon receiving notice of Chapter 13 debtors' filing willfully violated the automatic stay, warranting an award of attorneys' fees to debtors. *Id.* at *1. The court began its analysis by pointing out "the split of authority regarding whether a vehicle lawfully repossessed before bankruptcy becomes part of the bankruptcy estate and whether it must be turned over to the trustee to comply with the automatic stay." *Id.* at *6. The district court relied on a straightforward reading of *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983), to find that "§ 542(a) obligates a creditor to promptly turnover repossessed property in which the debtor retains an interest and which the trustee can use under § 363, regardless of the fact that the creditor rather than the debtor had the right to possession when the case commenced." *Id.* at *7 (citing *Whiting Pools*, 462 U.S. at 203). The court relied on *Whiting Pools* apparent suggestion that creditors "must seek an order of adequate protection from the court rather than relying upon the nonbankruptcy remedy of possession." *Id.* at *8 (internal citations omitted). This view would found "likely to further Chapter 13's fundamental purpose of encouraging the debtor to obtain a fresh start through rehabilitation rather than liquidation." *Id.* at *9. Thus, the district court concluded that the vehicle was property of the estate, the "retention of the vehicle constituted an act to exercise control over the property of the estate . . . [and] the automatic stay and Section 362(a)(3) required the Bank to turnover the vehicle to the debtors even without a hearing and an order from the court." *Id.* at *11. And, because the violation was willful, which requires only that "the creditor knew of the automatic stay and that its actions which violated the stay were intentional," the award of attorneys' fees to debtors was appropriate. *Id.* at *12–13.

Chapter 7

In *In re Ellringer*, 370 B.R. 905 (Bankr. D. Minn. 2007), the Bankruptcy Court for the District of Minnesota clarified household size and "current monthly income" for purposes of the Chapter 7 "means test." At the time of filing, the debtor lived with co-habitant who "contributed \$600 a month towards shared household expenses." *Id.* at 907. Subsequently, the co-habitant moved out of the debtor's home and ceased making the \$600 monthly payments. *Id.* at 908. At issue in this case is whether the debtor satisfies the "means test" such that her Chapter 7 case ought not be dismissed for abuse. *Id.* The bankruptcy district court began its analysis of the "means test" by looking to the plain meaning of the statute, stating that "[o]nly if the result reached by the application [of] the statute is absurd" will the court depart from the plain meaning. *Id.* at 909. The court then interpreted the plain meaning of the "means test" to require that the debtor's "current monthly income," "standard expenses that the debtor may deduct," and household size be determined as of the date of filing petition for relief. *Id.* at 910. According to the court, "[t]he means test is not mean to be continually updated as debtors' circumstances change." *Id.* The court further clarified that household size is to be determined by the Census Bureau's definition of "household" which is "all of the people, related and unrelated, who occupy a housing unit." *Id.* at 911 (citation omitted). Thus, because the co-habitant moved out subsequent to filing, she is to be counted for purposes of household size. *Id.* at 910. However, only that portion of the co-habitant's \$600 a month contribution that "were used to support the debtor or the debtor's dependents" must be included in the debtor's "current monthly income." *Id.* at 911. The court went on to determine that debtor's income was below the median income

for a family of two in Minnesota and her disposable income was less than \$100 a month, allowing the debtor to pass the “means test.” *Id.* at 912–13.

Priorities

In *Bellamy’s, Inc. v. Genoa National Bank (In re Borden)*, 361 B.R. 489 (B.A.P. 8th Cir. 2007), the Bankruptcy Appellate Panel for the Eighth Circuit determined that the holder of an artisan’s lien in pieces of the debtor’s farming equipment had priority over a lender holding a blanket lien covering such equipment despite the artisan having temporarily lost possession of such equipment. *Id.* at 492. In this case, the lender had a properly perfected blanket security interest in “all of [the debtors’] personal property, including machinery and equipment then owned and thereafter acquired.” *Id.* On separate occasions, the debtors brought in two pieces of equipment to the artisan for repair; upon failing to pay for such repairs, the artisan kept the equipment. *Id.* While the artisan was still in possession of the equipment, the debtors filed for relief under Chapter 12. *Id.* Subsequent to such filing, on separate occasions the debtors surreptitiously removed both pieces of equipment from the artisan’s lot, only to later return the equipment upon request from the artisan. *Id.* at 492–93.

The panel began its analysis by examining artisan’s liens under Nebraska law. *Id.* at 493. According to the court, “Nebraska law provides a lien to any person who repairs a vehicle, machinery, or a farm equipment in such person’s possession for the reasonable or agreed charges for the work done or material furnished on or to such vehicle, machinery, or farm implement and authorizes the artisan to retain possession of the property until the charges are paid.” *Id.* (citing NEB. REV. STAT. § 52-201 (2007)). Such a lien is possessory and “has priority over a previously perfected security interest in the same goods.” *Id.* The court further explained that “[w]here the artisan loses possession involuntarily, the artisan does not necessarily lose the artisan’s lien.” *Id.* at 494. Thus, the artisan here “did not lose its artisan’s lien in the Equipment when the Debtor took the Equipment without the Artisan’s knowledge or consent.” *Id.* at 494–95. The panel then shifted its attention to the issue of priority and reasoned that because artisans enhance the value of property through their labor, they “should be entitled to payment for such services and may retain property until receipt of payment therefor.” *Id.* at 495. And, a lender “who loans money secured by existing property . . . generally assumes the owner will maintain the property.” *Id.* at 496. As such, a lender “benefits from [] repair” to the secured property. *Id.* Thus, “[r]ecognizing the superiority of the Artisan’s lien over the Lender’s security interest is consistent with the policy underlying artisan lien law.” *Id.* The panel concluded that because the artisan had an artisan’s lien on the date of petition, the “Artisan did not lose its artisan’s lien nor its priority over the Lender’s security interest when the Debtor took the Equipment from the Artisan’s possession without authority.” *Id.* at 498.

In *Peters v. Pikes Peak Musician’s Ass’n*, 462 F.3d 1265 (10th Cir. 2006), the Tenth Circuit Court of Appeals affirmed the first priority status of payment of post-petition wages and benefits to members of a musicians’ association whose collective bargaining agreement was rejected post-petition. *Id.* at 1266–67. In this case, an orchestra voluntarily filed Chapter 11. *Id.* at 1267. At the time of filing, and for just over a month thereafter, the orchestra was subject to a collective bargaining agreement with its musicians that “guaranteed compensation for a certain number of pay periods, regardless of whether the Orchestra held any rehearsals or performances during those periods.” *Id.* The orchestra eventually “obtained court approval to reject its

collective bargaining agreement with the musicians,” and converted the case to a Chapter 7 liquidation. *Id.* The Association then filed claims for payment for period between petition and rejection; “the Association sought first priority of payment” as administrative expenses under § 503(b)(1)(A). *Id.* The Tenth Circuit first turned to the relevant case law for § 503 and § 507 and found that they had “granted administrative expense priority to claims that satisfy two elements: (1) the claim resulted from a post-petition transaction, and (2) the claimant supplied consideration that was beneficial to the debtor-in-possession (or trustee) in the operation of the company’s business.” *Id.* at 1268 (citing *Isaac v. Texas Energy, Inc. (In re Amarex, Inc.)*, 853 F.2d 1526, 1530 (10th Cir. 1988)). And, the court explained that § 1113 prohibits “the debtor-in-possession or trustee from making unilateral changes to the terms or conditions of a collective bargaining agreement during reorganization.” *Id.* at 1269.

The Ninth Circuit then noted that there is a split of authority when it comes to interpreting the interaction between §§ 503 and 507 and §1113. *Id.* The minority approach holds that “the remedial purpose of § 1113 trump[s] the literal language of § 503, thus entitling parties to administrative expense priority under § 507 for claims filed pursuant to collective bargaining agreements, even where the requirements of § 503 had not been satisfied.” *Id.* (citing *United Steelworkers of America v. Unimet Corp. (In re Unimet Corp.)*, 842 F.2d 879 (6th Cir. 1988)). The majority meanwhile, holds that only those services “rendered after the commencement of the case . . . qualify for payment as administrative expense claims.” *Id.* at 1270–71 (citing *Adventure Resources, Inc. v. Holland*, 137 F.3d 786, 797 (4th Cir. 1998) (concluding “a bankruptcy claim arising from the breach of a collective bargaining agreement may be accorded priority status *only* insofar as it fits into one of the categories singled out for preferential treatment in § 507”) (emphasis added); *Eastern Airlines, Inc. v. Shugrue (In re Ionosphere Clubs, Inc.)*, 22 F.3d 403, 407 (2d Cir. 1994) (holding pre-petition claims, even under collective bargaining agreement, are not administrative expenses under § 507(a)(1)); *In re Roth American, Inc.*, 975 F.2d 949, 956 (3d Cir. 1992) (explaining that “there is no indication either from the language or legislative history of section 1113 that Congress intended to address the priority to be given claims based on a collective bargaining agreement”). The Tenth Circuit concluded that “§ 1113 does not trump the priority scheme set forth in § 503 and § 507, thus [they] reject[ed] the minority position.” *Id.* at 1271.

The court then turned to whether the Association’s post-petition claims satisfy the two elements of administrative expense priority. *Id.* It was found that “the musicians performed services under the contract” post-petition by remaining available, thus satisfying “the first element of an administrative expense priority claim.” *Id.* at 1272. And, the Tenth Circuit concluded that this availability “was necessary to the preservation of the Orchestra’s estate,” thus the second element was met. *Id.* at 1273. Thus, administrative expense priority was established under § 507. *Id.* at 1274.

Attorneys – BAPCPA Unconstitutional

Milavetz, Gallop & Milavetz, P.A. v. US, #07-2405 (8th Cir. 9/4/08). Adopting a plain language interpretation of BAPCPA, the Court holds that attorneys are included in the definition of “debt relief agency.” Turning next to the First Amendment challenges to the speech restrictions BAPCPA imposes on attorneys who are debt relief agencies, the Court holds that the §526(a)(4) prohibition on advice to incur debt in contemplation of bankruptcy is unconstitutional regardless of whether the strict scrutiny or lesser *Gentile* standard is applied. However, since the

advertising disclosure requirements of §528(a)(4) & (b)(2) are designed to prevent potentially deceptive advertising, the Court analyzes their constitutionality under the very relaxed “rational basis” standard, which they satisfy. Although the debt relief agency covers attorneys who do not help people file bankruptcy, the Court notes that the disclosure need only be “substantially similar” to the required language and those attorney could tailor the disclosure to accurately describe the bankruptcy services they provide.

Attorney Compensation

Redmond v. Carson (In re Carson), 374 B.R. 247 (10th Cir. BAP 2007). Within the bounds of applicable Kansas law, the debtor permissibly assigned a tax refund to pay her attorney’s \$750 flat-fee retainer before she filed for bankruptcy, thus removing the attorney’s share of the refund from the reach of both the debtor and her bankruptcy estate and immediately making that share the attorney’s property. Under Kansas law, an assignment is an absolute transfer. The debtor’s subsequent bankruptcy filing did not turn the single tax refund into two funds that could be subjected to the equitable doctrine of marshaling so that the bankruptcy estate might receive more of it, and even if it did, the two funds were not owned by a single debtor because the pre-petition portion of the refund belonged to the bankruptcy estate and the post-petition portion belonged to the debtor. The bankruptcy court properly deducted the retainer from the full refund, prior to pro-rating it between the estate (the pre-petition portion of the refund) and the debtor (post-petition portion of the refund). This did not circumvent *Lamie v. United States Trustee*, 540 U.S. 526 (2004).

In *Redmond v. Lentz & Clark, P.A. (In re Wagers)*, 514 F.3d 1021 (10th Cir. 2007), the Tenth Circuit Court of Appeals formally adopted the opinion of the Bankruptcy Appellate Panel for the Tenth Circuit which held that a “firm’s retainer for post-petition legal services is estate property,” and “estate property could not be used to compensate [the debtor’s attorneys] for post-petition legal services.” *Id.* at 1022. In this case, the debtors, prior to filing their Chapter 7 petition for relief, gave both an initial \$5000 cash retainer to their Firm and “executed an assignment to the Firm, which assigned whatever tax refunds they might receive . . . as an additional retainer.” *Id.* at 1023. “Post-petition, the Debtors received tax refunds exceeding \$50,000, all of which were delivered to the Firm and were deposited into its trust account pursuant to the Debtors’ assignment.” *Id.* The Firm used the initial cash retainer to pay its pre-petition fees, and applied the remaining \$1000 to post-petition fees, leaving approximately \$13,000 left to be paid for post-petition services. *Id.* The Tenth Circuit first turned to *Lamie v. United States Trustee* whose “decision is critical to . . . resolution of the issue.” *Id.* at 1024 (citing *Lamie*, 540 U.S. 526 (2004)). In that case, the Court held that “only attorneys that are employed under § 327 may be paid from estate property for post-petition services,” but “compensation remains available to debtors’ attorneys through various permitted means, including . . . Chapter 7 cases where the attorney is engaged by the trustee.” *Id.* at 1026 (citing *Lamie*, 540 U.S. at 535–37) (internal quotations omitted). The Court in *Lamie* further clarified that “Section 330(a)(1) does not prevent a debtor from engaging counsel before a Chapter 7 conversion and paying reasonable compensation in advance to ensure that the filing is in order.” *Id.* (quoting *Lamie*, 540 U.S. at 537–38).

With these foundations laid, the Tenth Circuit then turned to the case at hand. The court first pointed out that “even a debtor’s ‘contingent interests’ are included in the estate under § 541.” *Id.* at 1028 (citing *Williamson v. Jones (In re Montgomery)*, 224 F.3d 1193, 1195 (10th

Cir. 2000)). Turning to Kansas law, the court found that “a retainer paid as an advancement for future services is not earned by the attorney until services have been performed, and ‘remains the client’s money’ until then.” *Id.* (quoting *In re Scimeca*, 962 P.2d 1080, 1091 (Kan. 1998)). The court thus concluded that the retainer was part of the debtors’ estate, and because “the Firm was not employed by the Trustee pursuant to § 327,” *Lamie* applies, and “the Firm may not use pre-petition funds to pay its post-petition fees.” *Id.* at 1029–30.

Dischargeability

***Busch v. Hancock (In re Busch)*, 369 B.R. 614 (10th Cir. BAP 2007)**

Chapter 7 debtor’s ex-wife filed an adversary complaint seeking a determination that second mortgage obligation on marital residence imposed upon debtor by state divorce court was nondischargeable support.

This case involves a protracted history. With respect to the underlying issue, debtor incurred debt during a period of separation from his then-wife. After they reconciled, they took out a second mortgage on their marital home to pay this debt. Debtor and his wife then later divorced and the state divorce court allocated the second mortgage obligation to debtor, ordering that he “assume and pay and hold [Ex-Wife] harmless from . . . the second mortgage . . .”

Debtor then filed the first of three chapter 13 cases. In the first chapter 13, the bankruptcy court orally ruled that the second mortgage obligation was in the nature of support and nondischargeable. In addition, the bankruptcy court orally ruled that attorney fees incurred by the ex-wife litigating the issue in state court were also nondischargeable. Debtor then filed a motion in state court to clarify the character of the second mortgage obligation in the divorce decree. The state court declined to rule, holding that the bankruptcy court’s oral ruling was res judicata. Debtor then dismissed the chapter 13 case and commenced the second chapter 13 and appealed the state court’s res judicata determination to the state appellate court. The bankruptcy court in the second chapter 13 ruled that the first bankruptcy court’s ruling -- that the second mortgage obligation was support -- was res judicata in the second chapter 13. Debtor dismissed his second chapter 13 and filed his third chapter 13. The third bankruptcy court lifted the stay to permit the ex-wife to enforce the second mortgage obligation against debtor in state court. Debtor appealed the lift stay order to the Tenth Circuit BAP. The third bankruptcy court confirmed a chapter 13 plan that provided for payment in full of the second mortgage obligation. Next, the state appellate court reversed the state court’s res judicata determination, determining that the first oral ruling were insufficient to establish res judicata and remanded the case to the state court to clarify the divorce decree. On remand, the state court concluded that the second mortgage obligation “was an allocation of marital debt based on the principles of equitable distribution.” Debtor then converted his third chapter 13 to a chapter 7 case and the ex-wife filed an adversary complaint objecting to discharge of the second mortgage debt under § 523(a)(5). The bankruptcy court denied debtor’s discharge due to a prior discharge in a joint chapter 7 case. Debtor then filed the current chapter 7 case and the ex-wife’s previous adversary proceeding was deemed open in the current chapter 7. Following a trial on the adversary complaint, the bankruptcy court concluded that the second mortgage obligation and the attorney fees associated with enforcing the obligation (in both state court and bankruptcy court) were support and nondischargeable. Debtor then filed a motion for relief in the bankruptcy court under Fed. R. Bankr. P 7052 (Fed. R. Civ. P. 52) and 9024 (Fed. R. Civ. P. 60). The post-trial motion was denied and the debtor appealed to the Tenth Circuit BAP.

Applying an abuse of discretion standard of review, the BAP held that the bankruptcy court did not error in concluding that the second mortgage obligation was in the nature of support, notwithstanding the designation placed upon the obligation by the state divorce court, where the obligation allowed debtor's child to remain in the marital home until the child reached 18 years of age. Thus, the bankruptcy court's determination was affirmed.

The other issue of import was the bankruptcy court's award of \$13,983 in attorney fees to the debtor's ex-wife and a determination that those were nondischargeable support. That award was comprised of fees incurred in the two chapter 13 cases, the adversary proceeding, and the debtor's motion to clarify the nature of the second mortgage obligation and related appeal in the state court matter. The bankruptcy court based its award on a Utah fee-shifting statute that allows the prevailing party to recover fees in an action to enforce obligations under a divorce decree. Following *Travelers Casualty & Surety Co. v. Pacific Gas & Electric Co.*, 127 S. Ct. 1199 (2007) the BAP held that federal bankruptcy law and § 523 did not preclude an award of attorney fees related to enforcement of the second mortgage obligation in the bankruptcy cases. However, a portion of the attorney fee award was comprised of fees incurred in connection with debtor's motion to clarify the divorce decree and the appeal thereof in the state courts. Those fees were never reduced to judgment in state court and therefore the bankruptcy court lacked authority to award those fees and declare them to be nondischargeable debts. This portion of the fee award was reversed.

In a concurring and dissenting opinion, Judge Berger disagreed with the majority's view that a bankruptcy court may award attorney fees to the prevailing party in a § 523(a)(5) dischargeability action under a state fee-shifting statute and found *Travelers* distinguishable. Judge Berger concluded that the majority view impinges upon the domestic relations exception to federal jurisdiction.

***In re Mersmann*, 505 F.3d 1033 (10th Cir. 2007)**

This appeal involves the consolidation of two chapter 13 cases involving the discharge of debtors' student loan debts by confirmation of their chapter 13 plans. Specifically, it sought to reconsider and overturn the Tenth Circuit's 1999 precedent in *Andersen v. UNIPAC-NEBHELP (In re Andersen)*, 179 F.3d 1253 (10th Cir. 1999) allowing debtors to establish the undue hardship discharge under § 523(a)(8) by "discharge-by-declaration" – proposing chapter 13 plan language, that, if not objected to by the student loan creditor, and approved by the bankruptcy court, was precluded from later challenge.

In *Mersmann* debtor included plan language that stated "completion of the plan shall result in a finding that it would be an undue hardship for the Debtor to have to pay any additional monies to the special class of school loans not otherwise dischargeable." The student loan creditor failed to object to the plan. Upon completion of the plan, the student loan creditor attempted to collect the remainder of debtor's student loan debt and the debtor objected, claiming it had been discharged through her plan. The student loan creditor then filed a motion for relief from the discharge order under Rule 60(b)(4) [a void judgment] and (b)(6) [any other reason justifying relief], claiming the discharge order violated due process because the hardship determination was obtained without adequate notice and violated the statute requiring an adversary proceeding. The bankruptcy court and the Tenth Circuit BAP denied relief to the student loan creditor, citing *Andersen*. The student loan creditor appeals.

In the other consolidated case, *Seiwert*, debtor proposed a plan including language that no interest or penalty would accrue on the student loan debt principal during the pendency of the case and that any debt other than the unpaid principal amount of the student loan would be

discharged upon completion of the plan, thus discharging any pre- and post-petition interest or penalties. The student loan creditor did not object to confirmation of Seiwert's plan. When the student loan creditor attempted to collect the unpaid interest and penalties, debtor sought to hold the creditor in contempt. In defending the contempt proceedings, the creditor argued that the discharge was void because debtor did not commence an adversary proceeding to determine undue hardship as required by the Code. The bankruptcy court, relying on *Andersen*, ruled the discharge of the student loan debt was valid. The Tenth Circuit BAP reversed on the basis of *Poland v. Educ. Credit Mgmt. Corp. (In re Poland)*, 382 F.3d 1185 (10th Cir. 2004) because the chapter 13 plan contained no finding of undue hardship. The debtor appeals contending that *Poland* conflicts with *Andersen*.

In these consolidated appeals, the Tenth Circuit overrules *Andersen*, holding that discharge of student loan debt without an adversary proceeding violates the Bankruptcy Code and the Rules and is not entitled to *res judicata* effect. It noted that an undue hardship discharge of student loan debt falls under Fed. R. Bankr. P. 7001(6)'s definition of an adversary proceeding as one to determine the dischargeability of a debt. The notice requirements for initiation of an adversary proceeding are more stringent than the notice requirements for confirmation of a chapter 13 plan. The Tenth Circuit followed the Second Circuit's decision in *In re Whelton*, 432 F.3d 150 (2d Cir. 2005) where it concluded that discharge-by-declaration does not satisfy *res judicata* requirements and that confirmed plans have no preclusive effect on issues that must be brought by an adversary proceeding. The Tenth Circuit concluded that a bankruptcy court lacks authority to confirm a plan provision that attempts to discharge a student loan debt without an adversary proceeding proving undue hardship. The Tenth Circuit ordered that its decision would have prospective application only.

In *Woody v. United States Dep't of Justice (In re Woody)*, 494 F.3d 939 (10th Cir. 2007), the Tenth Circuit Court of Appeals denied discharge of Chapter 7 debtor's Health Education Assistance Loan (HEAL) based on the unconscionability standard. *Id.* at 943. Long before filing petition for relief, debtor received government-insured student loans as he pursued a degree in chiropractic medicine, one of which was a HEAL. *Id.* at 944. The debtor never completed his studies, nor did he make more than one payment toward his HEAL in the nearly twenty years leading up to his bankruptcy. *Id.* At the time of filing, debtor was earning close to \$40,000 annually which barely covered his monthly expenses and he was facing serious medical issues, including a heart attack. *Id.* at 944–45. Upon filing Chapter 7, the debtor "sought discharge of all of his student loan obligations," including the HEAL whose discharge "is governed by the unconscionability standard." *Id.* at 945. The Tenth Circuit reasoned that this standard "involves analysis of the totality of the debtor's circumstances" and is stricter than the standard for discharge of other government student loans (523 loans). *Id.* at 947. This approach is in line with what the majority of courts facing the issue have applied. *Id.* at 948. The court noted that other courts are unanimous in finding the unconscionability standard "to be significantly more stringent than the 'undue hardship' standard established for the discharge of 523 loans." *Id.* at 948 (quoting *Rice v. United States (In re Rice)*, 78 F.3d 1144, 1149 (6th Cir. 1996)). And, "the burden to show unconscionability is a heavy one and is placed squarely upon the debtor." *Id.* The court then provided an extensive list of factors to consider in the totality of circumstances analysis, but cautioned "that courts should take care to view the debtor's situation as a whole, assigning more importance to those factors the court determines to carry greater weight in a given debtor's circumstances." *Id.* at 948–49. In turning to the debtor at issue, the court first looked to his "income, earning ability, educational background, and accumulated

wealth” and found that he had an “adequate earning capacity . . . with no dependents to support,” and a degree in accounting, but few assets. *Id.* at 949–50. In looking to his age and health, the court noted that the debtor was close to 60 and suffers from a heart condition, but neither “significantly affect his present earning abilities.” *Id.* at 950. In assessing his current and future financial situation, it was pointed out that the debtor can “anticipate a stable or even increased salary in the immediate future,” and his 523 student loan, constituting three-quarters of his educational debt, was discharged by the lower court and not appealed. *Id.* at 951. It was also found that while the debtor “maintained a reasonably frugal lifestyle,” a number of his monthly expenses were unnecessary and, if eliminated, would have “permitted him to make loan payments.” *Id.* 951–54. And, the court could not “conclude that [the debtor] acted in good faith regarding his HEAL loan obligations.” *Id.* at 954. As Congress “intended to severely restrict the circumstances under which a HEAL loan could be discharged in bankruptcy,” the Tenth Circuit concluded that the debtor’s “circumstances do not satisfy the strict unconscionability standard for discharge of HEAL loan obligations.” *Id.* at 955 (quoting *In re Rice*, 78 F.3d at 1148).

Procedural Matters

In *Russell v. Tadlock (In re Tadlock)*, 338 B.R. 436 (B.A.P. 10th Cir. 2006), the Bankruptcy Appellate Panel for the Tenth Circuit reversed the bankruptcy court’s reopening of a case which resulted in the revocation of the abandonment of property. *Id.* at 438. Here, the debtors had listed their home as having a value less than the liens encumbering it. *Id.* at 437. “The Trustee undertook no steps to determine the property’s value nor did she seek to except the property from abandonment,” rather she permitted one of the lien creditors to foreclose on the home and filed a Report of No Distribution and the case was closed. *Id.* Subsequently one of the “creditors having a security interest in the property released its lien,” and “the property was sold for considerably more than the remaining liens against it,” leaving \$37,000 leftover. *Id.* The Trustee then sought to reopen the case to administer the surplus and “argued she committed ‘excusable neglect’ in not retaining the estate’s interest in the property.” *Id.* The “bankruptcy court [] found that the order of abandonment should be revoked” and “declared the surplus was property of the estate.” *Id.* at 438. This appeal followed. *Id.* The panel began its analysis by pointing out that “[t]he Trustee had two options before making the Report of No Distribution which resulted in the abandonment. She could have made an accurate determination of the property’s value by appraisal or otherwise or she could have sought to except any equity in the property from the order of abandonment.” *Id.* The court further reasoned that “[a] debtor has no duty to inform the trustee of changes in the value of the property that occur after the petition, and such a change in value is not cause for the case to be reopened to revoke abandonment.” *Id.* at 439 (quoting 5 COLLIER ON BANKRUPTCY ¶ 554.02[7], at 544-11 (Alan N. Resnick & Henry J. Somme eds., 15th ed. rev. 2002)). Here, “there [was] no suggestion that the Debtors provided false or incomplete information in their schedules,” and the Trustee “simply allowed the property to be abandoned from the estate when the case closed.” *Id.* at 438–39. In ordering the bankruptcy court’s reopening of the case be reversed, the appellate panel emphasized “the need for finality in bankruptcy cases.” *Id.* at 439–40.

Executory Contracts

In *In re Aerobox Composite Structures, LLC*, 373 B.R. 135 (Bankr. D. N.M. 2007), the Bankruptcy Court for the District of New Mexico denied a motion to compel the rejection of a patent and technology license and held that “11 U.S.C. § 365(c)(1) does not prohibit a debtor-in-possession from assuming an executory contract.” *Id.* at 137. Prior to voluntarily filing for Chapter 11 relief, the debtor manufacturer entered into a license agreement in which the debtor was granted license to use certain patent rights and confidential information. *Id.* As of the date of the hearing, “[a]ll monetary consideration due [] for use of the license and patent rights under the License Agreement ha[d] been paid in full.” *Id.* at 138. The district court began its discussion by determining whether the License Agreement was an executory contract such that § 365 comes into play. *Id.* at 139. In this regard, the court concluded that while the “monetary consideration required under the License Agreement has been paid in full, . . . the License Agreement is executory due to the continuing material duties and obligations of both parties to the License Agreement.” *Id.* In turning to the question of whether the debtor-in-possession is permitted to assume the contract pursuant to § 365, the district court considered the split of authority regarding interpretation of § 365(c)(1) which limits the DIPs ability to assume. *Id.* at 140. A majority of courts apply the “hypothetical test” which requires a court to “determine whether applicable nonbankruptcy law excuses the non-debtor from accepting performance from or rendering performance to a hypothetical third party.” *Id.* at 141. The district court rejected the notion that § 365(c)(1) compels application of the “hypothetical test” and opted for the “actual test” which requires determination of whether “the nondebtor party is *actually* being forced to accept performance under its executory contract from an entity other than the debtor.” *Id.* at 141–42 (citing *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997)) (emphasis in original). The court thus concluded that “where the debtor-in-possession has neither sought to assume nor reject the executory contract but simply continues to operate post-petition under its terms, 11 U.S.C. § 365(c)(1) does not prohibit assumption of the contract by the debtor-in-possession and cannot operate to allow the non-debtor party to the executory contract to compel the Debtor to reject the contract.” *Id.* at 142.

SAREs

In both *Kara Homes Inc. v. National City Bank (In re Kara Homes, Inc.)*, 363 B.R. 399 (Bankr. D.N.J. 2007), and *Timber Noteholders v. Pacific Lumber Co. (In re Scotia Pacific Co., LLC)*, 508 F.3d 214 (5th Cir. 2007), the respective courts addressed the issue of what constitutes a single asset real estate debtor (SARE) and is thus subject to an expedited reorganization track. *Scotia Pacific*, 508 F.3d at 216; *Kara Homes*, 363 B.R. at 403. Based on the definition of “single asset real estate” found in the Code, both courts applied a three part test for a debtor to be considered a SARE debtor: “(1) the debtor must have real property constituting a single property or project (other than residential property with fewer than 4 residential units), (2) which generates substantially all of the gross income of the debtor, and (3) on which no substantial business is conducted other than the business of operating the real property and activities incidental thereto.” *Scotia Pacific*, 508 F.3d at 220. *See Kara Homes*, 363 B.R. at 404 (listing same three requirements). While the district court in *Kara Homes* found that the consolidated debtors met each of the three requirements, the circuit court in *Scotia Pacific* found that the debtor did not meet the third criterion and stopped the inquiry there. *Kara Homes*, 363 B.R. at 404–06; *Scotia Pacific*, 508 F.3d at 220.

In *Kara Homes*, the consolidated debtors “own separate real estate development projects for the construction of single family homes and condominiums.” *Kara Homes*, 363 B.R. at 400–01. Although each debtor originally declared itself to be a SARE upon filing for Chapter 11 relief, they subsequently argued “that they are not single asset real estate entities,” but rather “that each separate affiliate operates a business sufficiently active so as to be excluded” from the SARE definition. *Id.* at 401–02. Upon applying the three SARE factors listed above, the district court rejected the debtors’ argument and held that they were SARE debtors subject to expedited reorganization. *Id.* at 404. The court easily concluded that the “Debtors are single real estate projects” and “that the real property must generate substantially all of the income of the debtor,” thus satisfying the first two requirements. *Id.* “The true point of contention in this matter rest[ed] with the third criteria . . . , whether the debtor is involved in any substantial business other than the operation of its real property and activities incidental thereto.” *Id.* at 405. The Debtors maintained “that in addition to holding the real estate, each affiliate researches and purchases developable land, conducts planning and construction of home, markets and sells the homes and maintains each development.” *Id.* The district court looked to the relevant case law and found “that a ‘single asset real estate’ case is one in which the debtor performs functions intrinsic to owning and developing the real estate and not one where the debtor generates income from other activities not incidental thereto.” *Id.* at 406. Applying this reasoning, the court found that “[a]ll of the activities identified by the Debtors as reflective of ‘business operations’ are merely incidental to [their] efforts to sell the homes,” because “no one could reasonably expect to generate income from the activities . . . if the eventual sale of the real estate were not possible” *Id.* Thus, the district court concluded that the Debtors “fall within the definition of ‘single asset real estate’ debtors.” *Id.*

Meanwhile, the circuit court in *Scotia Pacific* specifically distinguished *Kara Homes* to find that Scopac, a limited liability company owning 200,000 acres of timberlands whose “business is to derive maximum revenue from the timber grown on these lands while maintaining sustainable forests,” was not SARE debtor. *Id.* at 216–17, 223. In making this determination, the court bypassed the first two criteria of the three part test because the debtor “clearly does not qualify [as a SARE] under the third prong—it conducts substantial business other than operation of real estate.” *Id.* at 220. The court rejected the Noteholders’ argument that “the activities in *Kara Homes* was very similar to Scopac’s and thus Scopac should be deemed a SARE.” *Id.* at 223. The court reasoned that “[t]he construction and sale of homes (and the land on which they are built) is within the traditional scope of the SARE definition, and the sale of homes includes the sale of the real estate. Scopac, on the other hand, performs its business on the real estate for the purpose of selling timber—not the underlying real estate.” *Id.* It was further explained that “Scopac’s timberland is clearly more than a passive investment,” as it employs “over sixty employees” and conducts “sophisticated operations.” *Id.* at 224. The court thus concluded that Scopac was not a SARE debtor. *Id.* at 225.

Misc.

In *Neal v. Kansas City Star (In re Neal)*, 461 F.3d 1048 (8th Cir. 2006), the Eighth Circuit Court of Appeals reversed the judgment of the bankruptcy court sealing the list of creditors where some of those creditors were local attorneys and the debtor was a municipal judge with a gambling addiction. *Id.* at 1050. Upon being caught in a raid on a casino, the debtor judge’s circumstances were highly publicized by the *Kansas City Star* which “reported on loans [the

Debtor] received from attorneys, her investigation by the Missouri Judicial Commission, her resignation from the bench, and her hospitalization for mental care.” *Id.* at 1050–51. “As part of [her] Chapter 7 bankruptcy filings, she provided a list of all her creditors, including attorney creditors, to the bankruptcy court.” *Id.* at 1051. Both the Debtor and various unnamed attorney creditors sought to keep such list sealed “citing the ‘scandalous’ and ‘defamatory’ exceptions to public disclosure.” *Id.* The bankruptcy court granted the motion to seal and the Kansas City Star appealed. *Id.* Although the circuit court found that the “bankruptcy court did not err in considering the context of the filing of [the Debtor]’s list of creditors to determine whether the material contained therein [was] ‘scandalous,’” it did find that the bankruptcy court erred in finding such list “scandalous.” *Id.* at 1052–53. According to the court, because § 107 of the Code “establishes a broad right of public access, subject only to limited exceptions set forth in the statute, to all papers filed in a bankruptcy case,” “only the most compelling reasons can justify non-disclosure of judicial records.” *Id.* at 1053 (quoting *Gitto v. Worcester Telegram & Gazette Corp. (In re Gitto Global Corp.)*, 422 F.3d 1, 6–7 (1st Cir. 2005)). Thus, a court must ask “whether a reasonable person could alter their opinion of [the creditors] based on the statements therein, taking those statement in the context in which they appear.” *Id.* at 1054 (quoting *Phar-Mor, Inc. v. Defendants Named Under Seal (In re Phar-Mor, Inc.)*, 191 B.R. 675, 679 (Bankr. N.D. Ohio 1995)). Here, both parties agreed that “the creditors lists itself [was] not scandalous not [did] it contain scandalous matter,” rather it only has the potential to create scandal “when one looks ‘outside the lines’ of the bankruptcy proceeding.” *Id.* And, because the Debtor was required to file the list as part of her bankruptcy proceedings, there was no scandalous purpose in filing the list. *Id.* The circuit court acknowledged that the attorney creditors listed may be subject to negative publicity as a result of unsealing the list, but “courts have repeatedly stated that injury or potential injury to reputation in not enough to deny public access to court documents.” *Id.*