CONSUMER LAW UPDATE

Cases reported from September 1, 2008 through May 20, 2009

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United States Bankruptcy Judge Retired

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Prefiling Issues

Empirical Study of BAPCPA. The first report of the effects of BAPCPA, based on data from a random national sampling of debtors, has been published. R.M. Lawless, et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors,* 82 AM. BANKR. L. J. 349 (2008). A summary of the article is found in Melanie Sonnenborn & John A.E. Pottow, *2009 Consumer Bankruptcy Project—Empirical Analysis Suggests Initial Failure of BAPCPA to Produce Intended Results,* NORTON BANKR. LAW ADVISER (Feb. 2009).

Credit Briefing

Briefing on same calendar day as filing case satisfies § 109(h). Reversing the bankruptcy court and acknowledging split of authority, the BAP holds that briefing may occur on the same calendar day as the filing; "a debtor qualifies as a debtor under § 109(h) so long as he or she completes the required credit counseling at any time between 180 days before, and the moment of, filing of the petition." *In re Francisco,* 386 B.R. 700, 705 (B.A.P. 10th Cir. 2008).

Prebankruptcy credit briefing doesn't apply in involuntary case. After filing of an involuntary Chapter 7, which was not contested, the debtor moved for an extension of time to obtain the § 109(h) credit briefing. The motion was moot, concluding that § 109(h) doesn't apply to involuntary debtors. *In re Sims,* 2009 WL 161343 (Bankr. D. Kan. Jan. 7, 2009).

Debtor's inability to pay for briefing is no excuse. Recognizing that counseling agencies are statutorily required to provide services without regard to ability to pay, financial difficulty is not an exigent circumstance justifying waiver. *In re Sherry,* 2008 WL 3876595 (Bankr. N.D. Ohio Aug. 20, 2008); *see also In re Palacios,* 2008 WL 700968 (Bankr. E.D. Va. Mar. 13, 2008).

Debt Relief Agency

Section 527(b)'s application of "debt relief agency" status to attorneys is constitutional, reversing district court's holding that § 526(a)(4) is facially unconstitutional. In appeal from *Hersh v. United States*, 347 B.R. 19 (N.D. Tex. 2006), the Fifth Circuit held on Dec. 18, 2008, that bankruptcy attorneys do qualify as debt relief agencies under § 101(12A) and for the application of that agency status under § 526(b), agreeing with *Milavetz, Gallop & Milavetz, P.A., et al. v. United States*, 541 F.3d 785, 792 (8th Cir. 2008), that "attorneys that provide 'bankruptcy assistance' to 'assisted persons' are 'debt relief agencies.'" Section 101(12A) does not specifically include attorneys but neither does it exclude them. As to § 526(a)(4)'s prohibition against advising an "assisted person" to "incur more debt in contemplation of such person filing a case under" Title 11, the Fifth Circuit holds that the provision is not facially unconstitutional, here disagreeing with the *Milavetz* panel. Applying the "doctrine of constitutional avoidance," the Fifth Circuit "construes the statute to prevent only a debt relief agency's advice to a debtor to incur debt in contemplation of bankruptcy when doing so would be an abuse of the bankruptcy system[,]" basing its conclusion on numerous portions of BAPCPA that discourage bankruptcy abuse, including expanded case dismissal and means testing provisions; "placement of section 526(a)(4) among three provisions meant to curb abuse of the bankruptcy system by debt relief agencies likewise suggests that the statute was only intended to curb abuse." By reversing the district court's holding that § 526(a)(4) was facially unconstitutional, the panel also dissolved the injunction against enforcement. Finally, § 526(b) does not violate the bankruptcy attorney's "First Amendment rights because it does not unduly burden her or her clients, and is narrowly tailored to promote the government's compelling interest in ensuring that consumer debtors are aware of basic bankruptcy information." *Hersh v. United States,* 553 F.3d 743 (5th Cir. 2008).

Automatic Stay

Creditor's state court suit exceeds relief from stay order. Affirming the BAP, the Ninth Circuit restates that actions taken by state court in violation of the stay are void ab initio, with the bankruptcy court not obligated to give full faith and credit to such orders. The motion seeking stay relief was directed toward the creditor's pursuit of the debtor's bonding company, and the BAP and Circuit noted that the stay relief order could be no broader than the relief sought in the motion. If in the course of a state court proceeding after stay relief is granted, it is found that broader relief is needed, the creditor should move for such relief from the bankruptcy court. Another remedy may be to seek retroactive stay relief. But, proceeding to a state court order that exceeds the relief granted by the bankruptcy court is not the appropriate creditor course. *Griffin v. Wardrobe (In re Wardrobe),* 559 F.3d 932 (9th Cir. 2009).

Debtor's former spouse's attorney violates stay. Attorney for debtor's former spouse willfully violated the stay by collection efforts, aggravated by attorney's refusal to release debtor from jail, adopting "egregious conduct" as an element of circumstances that may justify punitive damages under § 362(k). *Young v. Repine (In re Repine),* 536 F.3d 512 (5th Cir. 2008).

IRS is entitled to stay relief for setoff. The bankruptcy court denied a motion by IRS for stay relief to permit setoff against prepetition tax refunds, and by administrative mistake IRS paid the refunds to the debtor, but the BAP holds that this payment did not make IRS's appeal constitutionally or equitably moot. **See discussion under Appeal.** IRS established that it had right of setoff under 26 U.S.C. § 6402(a), which permits credit of any overpayment by the taxpayer against any liability owed by the taxpayer, with "overpayment" being a different concept from "refund" under authority of *IRS v. Luongo (In re Luongo),* 259 F.3d 323 (5th Cir. 2001). When it filed its motion for stay relief to permit setoff, IRS made a prima facie showing of its right to setoff, shifting the burden to the debtor to demonstrate that stay relief was inappropriate. Under its prior authority, *Pieri v. Lysenko (In re Pieri),* 86 B.R. 208 (B.A.P. 9th Cir. 1988), the BAP held that if any conflict existed, § 553 would control over § 522(c). Since the debtor presented no evidence that the tax refunds at issue were necessary for effective reorganization in Chapter 13, it was error to deny IRS stay relief under § 362(d)(2). *United States v. Gould (In re Gould),* 401 B.R. 415 (B.A.P. 9th Cir. 2009).

Award of debtor's attorney fees for stay violation should be under lodestar method. The Chapter 13 debtor who prevailed on a complaint for willful violation of the automatic stay was awarded attorney fees, but the bankruptcy court reduced the requested fee by 2/3. The First Circuit BAP remanded, holding that under former §362(h) [now (k)] the lodestar method is the first step in determination of an appropriate fee. Although the bankruptcy court may make adjustments to the lodestar amount, any reduction must be adequately supported. The bankruptcy court's reduction of the $26,680 requested fee to $7,500 based only on the request being "extremely high in view of the minimal damages" awarded to the debtor for emotional distress was an abuse of discretion. Deference must be given to the § 330(a) (3) and (4) factors. *Lopez v. Consejo de Titulares del Condominio Carolina Court Apartments (In re Lopez),* ___ B.R. ___, 2009 WL 1259377 (B.A.P. 1st Cir. May 7, 2009).

Criminal prosecution exception from stay is absolute. Recognizing §362(b)(1)'s exception from the automatic stay as an absolute exception, the good or bad faith of the law enforcement authority's criminal prosecution is not an issue, and the search warrant and seizure of the debtor's financial records as part of the prosecution did not violate the stay. Upon finding that the criminal prosecution exception applied, the debtor could not argue in the bankruptcy court any violation of property of the estate, civil rights or abuse of process. The court also noted that §105(a) gives no basis for enjoining the criminal prosecution. *Bartel v. Walsh (In re Bartel),* ___ B.R. ___, 2009 WL 1219941 (B.A.P. 1st Cir. May 4, 2009).

Presentment and honoring prepetition check don't violate the stay. Reversing the bankruptcy court's determination that a check cashing entity willfully violated the stay by presenting the debtor's prepetition check for payment, the BAP held that the presentment of the check after receiving notice of the bankruptcy filing didn't violate the stay; also, when the check was honored the stay wasn't violated by retention of the funds. The transfer is avoidable as a postpetition transfer under § 549, but the debtor's complaint for willful violation damages fails. The debtor had received a "payday" loan prepetition, giving his postdated check for $460 to the check cashing entity. A few days later, Chapter 13 was filed, with notice of filing served on the holder of the check; despite this notice, the check was presented for payment and payment was made. The recipient of the funds refused to turn over the $460 to the debtor unless it received a general release and withdrawal of the debtor's stay violation motion. Although the BAP concedes that the funds in the debtor's checking account became property of the bankruptcy estate upon filing, presentment is permitted under § 362(b)(11), and when the bank honored the check, the transfer of funds took them out of the bankruptcy estate. The next step in the analysis is that upon the transfer, albeit unauthorized, the recipient could not have violated the stay by retaining the funds. "It would be illogical to interpret § 362(b)(11) to mean that the holder of a check can hand the check to a bank teller but cannot take the cash the teller hands over the counter without violating the stay, or that the holder of a check may accept the funds but must immediately return them to the drawer. Such an interpretation would render the exception essentially meaningless, because the purpose of presenting a check is to receive payment." *Buckeye Check Cashing, Inc. v. Meadows (In re Meadows),* 396 B.R. 485, 495 (B.A.P. 6th Cir. 2008). The panel then points out that Buckeye had resisted the turnover simply because of its fight over stay violation and resistance to paying the debtor's attorney fees, all the time willing to return the funds since they were obviously subject to recovery under § 549. The concurring judge points out that while the parties were willing for the money to be turned over to the debtor, had that result been contested, it would have been necessary for the debtor to show that the original giving of the check was an involuntary act, in order to satisfy the debtor's standing to pursue avoidance under § 522(h). *Buckeye Check Cashing, Inc. v. Meadows (In re Meadows),* 396 B.R. 485 (B.A.P. 6th Cir. 2008).

Stay doesn't arise under § 362(c)(4). Distinguishing § 363(c)(3) and (4), no stay comes into effect in third case filed within one year; creditor's actions postpetition could not violate stay. *Nelson v. Wong Pension Trust (In re Nelson),* 319 B.R. 437 (B.A.P. 9th Cir. 2008).

Limited "ride through" option survives BAPCPA, at least for pro se debtors attempting reaffirmation. Affirming the bankruptcy court's opinion, the district court for the Eastern District of North Carolina interpreted BAPCPA's amendments to reaffirmation and stay relief, concluding that when the pro se debtors' attempts to reaffirm a car loan were denied by the bankruptcy court, the debtors were permitted to retain the car and maintain payments. At the reaffirmation hearing, the bankruptcy judge found that the debtors had negative income over expenses, that the vehicle was worth far less than the loan balance, and that the proposed reaffirmation must be rejected as undue hardship. The debtors testified of their family's need for the vehicle, and the bankruptcy court held that the automatic stay still applied, so long as the debtors remained current on payments and other contractual obligations. Under §§ 362(h)(1) and 521(a)(2), approval of the reaffirmation is not an element for maintaining the stay, and the debtors fulfilled their statutory duty of timely filing their intention to reaffirm; under a plain meaning of those statutes, the bankruptcy court held that the stay remained in effect, and the district court agreed, concluding that the "absurdity" and "drafters' intent" exceptions to plain meaning did not apply. The district court opinion reviews the history of "ride through" and the legislative efforts to restrict it, as well as judicial interpretations of pre-BAPCPA § 521(a)(2). As a result of BAPCPA amendments, "termination of the automatic stay may occur through either of two independent provisions: section 521(a)(6) or the combination of section 521(a)(2)(C) and 362(h)….Section 521(a)(6) makes three things clear. First, it applied when the creditor has an 'allowed claim' for the 'purchase price' of an individual debtor's personal property. Second, if it applies, and if the debtor does not redeem the encumbered personal property, but desires to retain the encumbered personal property, the debtor must timely 'enter[ ] into an agreement…pursuant to section 524(c)'….Finally, if section 521(a)(6) applies and the debtor does not obey it, the automatic stay is terminated, [and] the property is no longer part of the estate." *Coastal Federal Credit Union v. Hardiman*, 398 B.R. 161 (E.D. N.C. 2008). Under a combination of §§ 521(a)(2)(C) and 362(h), "three things [are] clear. First the debtor must timely enter into an agreement 'of the kind specified in section 524(c)….Second, the debtor must timely take the action that the debtor specified in the required statement of intentions. Third, if the debtor does not obey these provisions, then the automatic stay is terminated with respect to the encumbered personal property and the property is no longer part of the estate." *Id.* at * 8. Since this case involved debtors not represented by counsel for the reaffirmation process, the bankruptcy court was required to hold a hearing and determine if the reaffirmation agreement is approved.

Although § 521(d), added by BAPCPA, makes ipso facto clauses enforceable, that is only true upon a debtor's failure to take the action required by §§ 521(a)(6) and 362(h). The district court then looked at § 521(a)(6)'s requirement that the creditor have an "allowed claim for the purchase price…," noting that this creditor did not have an "allowed claim"; to read the statute literally is not absurd, with the court finding plausible reasons why Congress may have included "allowed claim" in the statute. The same is true for the inclusion of "for the purchase price" in the statute. Even though the bankruptcy court didn't approve the reaffirmation, it was nevertheless an "agreement" entered into by the pro se debtors. The fact that §§ 521(a) and 362(h) don't give the creditor relief does not leave it without potential relief for "cause" under § 362(d). "[U]nder the governing principles of statutory construction, this court must analyze whether it is plausible that Congress could have chosen to spare uncounseled debtors whose reaffirmation agreements were not approved by the bankruptcy court from automatically losing the protection of the automatic stay, becoming subject to any applicable ipso facto clause, and becoming subject to both repossession and a personal deficiency judgment….Congress could plausibly have chosen the result that flows from BAPCPA's plain language."

The results are that the stay remains in place for the pro se debtors whose reaffirmation agreement was not approved by the bankruptcy court, the car remains property of the estate, and the debtors may maintain possession so long as they stay current on payments and other contractual obligations; the creditor retains only in rem rights and remedies in the event of default. *Coastal Federal Credit Union v. Hardiman*, 398 B.R. 161 (E.D. N.C. 2008).

Another district court in the Fourth Circuit concludes "ride through" no longer available and ipso facto clauses are valid. Reversing the bankruptcy court's finding that the car lender violated the automatic stay by repossession without giving notice of cure opportunity, the district court for the Southern District of West Virginia held that BAPCPA abolished the "ride through" option. The debtor filed a statement of intention to "continue payments" on a vehicle jointly owned with his nondebtor spouse, and the parties were current on installment payments and insurance maintenance. The statement did not indicate whether the debtor intended to redeem or reaffirm, and DaimlerChrysler moved to confirm termination of the stay, which motion was granted by the bankruptcy court; however, after DaimlerChrysler repossessed without giving notice of an opportunity to cure, the spouses filed a motion for injunctive relief, which was also granted by the bankruptcy court, and the creditor returned possession to the debtor and spouse. After reviewing pre-BAPCPA split of authority on the ride through option, the district court held that the option was eliminated by BAPCPA's amendments and additions of §§ 521(a)(2), 521(a)(6) and 362(h), "at least insofar as applied to this debtor who failed to redeem, reaffirm, or surrender….The BAPCPA changes to the Code require the debtor to redeem, reaffirm or surrender the property, or the automatic stay will be lifted and the property will not be part of the estate….The cases holding that the 'ride through' option is still viable after BAPCPA are limited in their applicability." *DaimlerChrysler Financial Services Americas LLC v. Jones (In re Jones),* 397 B.R. 775 (S.D. W.Va. 2008) (citing and distinguishing cases). Since the "ride through" option doesn't exist, for a debtor who doesn't comply with § 521(a)(6) and 362(h), ipso facto clauses in contracts are valid; the filing of bankruptcy in itself may be a contractual default permitting repossession even when the debtor is current. Moreover, the creditor's acceptance of payments while the dispute was ongoing did not act as waiver or estoppel, since § 521(f) gives the debtor a right to make voluntary payments, while § 521(*l*) permits the creditor to accept payments before and after the filing of a reaffirmation agreement. Under West Virginia law, the creditor was not required to give notice of a right to cure default, since the bankruptcy filing triggered the default, with the district court holding that a cure opportunity applies only to default in payments under the contract. *DaimlerChrysler Financial Services Americas LLC v. Jones (In re Jones),* 397 B.R. 775 (S.D. W.Va. 2008)

1994 addition of exception for creation or perfection of statutory lien for ad valorem taxes doesn't apply retroactively. Concerning property with a long history of bankruptcies, alleged by the tax authority to have been designed to avoid property tax sales, the district court affirms the bankruptcy court's holding that § 362(b)(18)'s exception, which was added in the Bankruptcy Reform Act of 1994, doesn't contain a clear expression of retroactive application. As a result, the exception doesn't apply to a case filed in 1992 and terminated in 1997, and the tax lien imposed during the pendency of that case is void under authority of *In re Meyers*, 491 F.3d 120 (3d Cir. 2007) ("actions in violation of the stay are void but retroactively ratifiable if the stay is annulled."). *Keuller v. Monroe County Tax Claim Bureau (In re Keuller),* 399 B.R. 782 (M.D. Pa. 2009).

Section 362(c) (3)'s "with respect to the debtor" interpreted as referring to spousal filings. In a Chapter 7 case where the debtor was a repeat filer, after the 30 days expired, the mortgage creditor moved for an order confirming that the stay had terminated under §362(c)(3). The debtor argued that the statute's language "with respect to the debtor" meant that the stay terminated only with respect to him personally but that the stay remained in effect as to property of the estate. The court concluded that §362(c) (3) applied to both the debtor and property of the estate, construing the "with respect to the debtor" phrase in the context of the entire §362(c) as "referring to the serially-filing spouse, making the debtor subject to collection actions, both *in personam* and *in rem* (against estate and non-estate property) while leaving the stay in effect as to the newly-filing spouse's person and property." In reaching this conclusion, the court reviews three other interpretations of the phrase. *In re Daniel,* 404 B.R. 318 (Bankr. N.D. Ill. 2009).

Section 362(*l*) not applied when residential eviction is based on nonmonetary default. When the landlord had obtained a prebankruptcy eviction based on excessive accumulated debris that endangered the property, the Chapter 13 debtor's certification and tender of rent to the clerk under §362(*l*) didn't reinstate the automatic stay because the default was not monetary. The nonmonetary default could not be cured under §362(*l*), and the debtor's motion to reinstate the stay was denied. *In re Griggsby,* 404 B.R. 83 (Bankr. S.D. N.Y. 2009).

Mortgage refinancing scam violates stay. Finding that the Chapter 13 debtor was tricked into signing deeds that she believed were part of mortgage refinancing, the scam violated the automatic stay as attempts to exercise control over property of the estate, and the deeds were void. *Walker v. Creative Loans, LLC (In re Walker),* ___B.R.____, 2009 WL 1064355 (Bankr. E.D. Wis. Apr. 16, 2009).

Stay relief denied when servicer fails to demonstrate standing. The motion for stay relief was supported by a declaration of "bankruptcy specialist" that movant had "possession" of original note, but the motion failed to show that movant had authority to act for note holder beyond merely stating it was servicer. The servicer doesn't assert a beneficial interest in the note nor does it establish a right to enforce the note. "The real party in interest in relief from stay is whoever is entitled to enforce the obligation sought to be enforced. Even if a servicer or agent has authority to bring the motion on behalf of the holder, it is the holder, rather than the servicer, which must be the moving party, and so identified in the papers and in the electronic docketing done by the moving party's counsel.…To have standing, [the servicer] must establish its authority to act for the holder of the Debtors' note." No business records were offered to support that authority, and the declaration of the bankruptcy specialist was unclear about authority. *In re Jacobson,* 2009 WL 567188 (Bankr. W.D. Wash. Mar. 6, 2009).

Assignee of mortgage fails to have standing for stay relief. Discussing the "serial assignments" of mortgages that have "complicated what was previously a generally straight-forward standing analysis," the Chapter 7 trustee's objection to stay relief was sustained, when the motion was filed by MERS as "nominee" for the mortgagee, and the motion provided no documentation or evidence that the party for whom MERS was acting had any interest in the note or mortgage. *In re Sheridan,* 2009 WL ________, Case No. 08-20381-TLM (Bankr. D. Idaho, March 12, 2009).

Creditor seeking in rem relief and ban against future filings must proceed in adversary proceeding. A creditor's motion seeking in rem relief outside what is authorized under § 362(d) and seeking a ban against future bankruptcy filings is treated by the court as a complaint for which the creditor must pay the adversary proceeding fee, and the creditor's "election to combine injunctive relief with stay relief operates to waive the automatic termination provision of § 362(e)." Section 362(d)(4), added by the 2005 Act, requires a finding that the petition was filed as part of a scheme to delay, hinder and defraud creditors, and the order making such a finding must be recorded as to the property at issue. The present motion doesn't contend that the Chapter 7 case is a part of the necessary scheme; therefore, § 362(d) (4) is not applicable. The request for in rem relief as to particular property seeks injunctive relief, going to the court's equitable authority, thus triggering a due process requirement of an adversary proceeding. Rather than denying the motion as seeking relief beyond what may be granted in a contested matter, the court treats the motion as one triggering an adversary proceeding, for which the creditor must pay the difference between a stay relief motion and a complaint. *In re Van Ness,* 399 B.R. 897 (Bankr. E.D. Cal. 2009).

Debtors must exhaust administrative remedy before seeking sanctions against IRS. Section 362(d) (9) provides an exception from stay for IRS investigation, audit and assessment, and 26 U.S.C. § 7433(e) (1) requires debtors to exhaust administrative remedies before seeking stay violation sanctions. *In re Douglas,* 2009 WL 168703 (Bankr. D. Kan. Jan. 23, 2009).

Reinstatement of Chapter 13 case doesn't retroactively reinstate stay. Section 362(c)(2)(B) is unambiguous, terminating the automatic stay upon dismissal of a case, and reinstatement of the dismissed case doesn't retroactively put the stay back into effect during the gap period. When the debtor moved to reinstate the case after the sheriff's sale, no stay was in effect to void the sale. *Gargani v. Wells Fargo Bank, N.A. (In re Gargani),* 398 B.R. 839 (Bankr. W.D. Pa. 2009); *accord Smith v. Oak Grove Utility Co. (In re Smith),* 2009 WL 115293 (Bankr. D. Md. Jan. 16, 2009).

Contrasting views of trustee as individual for recovery under § 362(k). In cases reported in late 2008, involving attempted recovery by the Chapter 7 trustee for stay violations, the court in *Campbell v. Ledyard Nat'l Bank (In re Ledyard),* 398 B.R. 799 (Bankr. D. Vt. 2008), held that the trustee, although a natural person, represented the estate, which is not an individual, and the trustee had not personally been harmed by a stay violation. Although the trustee could not recover under § 362(k), the trustee could seek sanctions under § 105(a). In *Moser v. Mullican (In re Mullican),* 2008 WL 5191196 (Bankr. E.D. Tex. Sept. 30, 2008), the court discusses the split of authority on whether a trustee for a corporate debtor could recover under former § 362(h), concluding that a Chapter 7 trustee for individual consumer debtors had standing to pursue stay violation damages, here against the debtors.

Cause of action filed by unscheduled creditor is void while stay in effect, but after entry of discharge action may be pursued. Although the Chapter 7 debtor did not schedule the creditor who filed a state court suit for violations of the Fair Debt Collections Practices Act, the filing of the suit was a violation of the automatic stay and commencement of that suit is void ab initio; however, the plaintiff may proceed with the suit once the stay was terminated by entry of discharge. *See* discussion of the case concerning determination of discharge under **Jurisdiction**. *Johnson v. JP Morgan Chase Bank, et al.,* 395 B.R. 442 (E.D. Cal. 2008).

Motion to extend stay not necessary for debtor who received prior Chapter 7 discharge. Section 363(c)(3)'s limitation on the stay applies only to debtors with cases pending with the prior 1-year period and whose cases were dismissed; for a Chapter 13 debtor who received a discharge in a prior Chapter 7 case within the 1-year of filing the Chapter 13, no motion to extend the stay under § 363(c)(3)(B) is needed. *In re Forletta,* 397 B.R. 242 (Bankr. E.D. N.Y. 2008).

Avoiding Powers

Standing of Debtor

Necessary elements for Chapter 13 debtor's standing. In a concurring opinion, one judge on the Sixth Circuit BAP has reviewed the necessary elements for the debtor's bringing an avoidance action under § 522(h), citing *DeMarah v. United States (In re DeMarah),* 62 F.3d 1248, 1250 (9th Cir. 1995). The case involves the issue of whether the automatic stay was violated by a check cashing entity presenting the debtor's prepetition check, receiving the funds and refusing to turn them over to the debtor. *See* discussion of the case for that issue under **Automatic Stay**. In the concurring opinion, the issue of standing is discussed, had the debtor filed an avoidance action under § 549, with the focus being on whether the presentment was a voluntary transfer for purposes of § 522(g) and (h); the giving of the check originally was voluntary, but the presentment was "a creditor-initiated involuntary transfer under § 101(54)(D)." *Buckeye Check Cashing, Inc. v. Meadows (In re Meadows),* 396 B.R. 485, 495 (B.A.P. 6th Cir. 2008).

Value for avoidance

Value of debtors' interests determined when they obtained fee simple interests. Debtors, who held remainder interests in residence when Chapter 13 filed but then obtained and recorded fee simple interests, moved to avoid judgment lien two years after confirmation of their plan. In that interval, Indiana's homestead exemption had increased to $15,000, but with the increase in value for fee simple interests, the value exceeded the total liens plus exemptions. The Seventh Circuit held that under § 541(a)(7), the bankruptcy estate included the estate's interest acquired after commencement of the case, and that § 1306(a)(1) includes the interests the debtors acquired, while § 522 requires value for property acquired by the estate to be determined "as of the date such property becomes property of the estate." Increase in value of the residential interest, under the after-acquired statutes, is included in the calculation of value for lien avoidance purposes under § 522(f), and the value here is determined when the debtors acquired and recorded their fee simple interests. *(In re Willett,* 544 F.3d 787 (7th Cir. 2008).

Fraudulent transfer

Mortgage fails to provide constructive notice due to defective acknowledgement. Affirming the BAP in one of a series of avoidance attacks by Chapter 7 and 13 trustees, based on failure of the mortgage acknowledgement to properly follow applicable state law, the Sixth Circuit provides an examination of when the trustee may successfully avoid such mortgages under § 544. There is a dissent taking the position that the alleged discrepancy does not amount to a failure to comply with state law. *Burden v. CIT Group/Consumer Fin., Inc. (In re Wilson),* 2009 WL 723197 (6th Cir. Mar. 19, 2009).

Debtor, victim of mortgage refinancing scam, did not voluntarily transfer. When the Chapter 13 debtor had been tricked into signing deeds, thinking they were mortgage refinancing, the executions of deeds were not voluntary transfers, and the debtor was able to use §§522(g) and 549 to avoid postpetition transfers. *Walker v. Creative Loans, LLC (In re Walker),* ___B.R.____, 2009 WL 1064355 (Bankr. E.D. Wis. Apr. 16, 2009).

Postpetition transfers

California's protection of bona fide purchasers from debtor is not preempted by Bankruptcy Code. Affirming the BAP, the Ninth Circuit held that when the Chapter 7 debtors sold their residence postpetition without authorization from the court, when the petition had not been recorded to give notice, and when the trustee had not abandoned the estate's interest in the residence, California's statute protecting bona fide purchasers from unrecorded conveyances was effective to protect those purchasers from the trustee's avoidance attack, which was based not on § 549(a) but on the transfer being void (§ 549(c) provides a defense to the purchasers if the attack was under § 549(a)). The panel also held that under *Schwartz v. United States (In re Schwartz,* 954 F.2d 569 (9th Cir. 1992), the automatic stay of § 362 protects the debtor from creditors, and a postpetition transfer by the debtor is not void as in violation of the stay. *Burkart v. Coleman (In re Tippett),* 542 F.3d 684 (9th Cir. 2008).

Preference

Debtors' use of credit card to transfer balances is preferential transfer of interest. When the debtors used one credit card within preference period to pay off balances on other cards, a transfer of the "interest of the debtors in property" occurred for § 547 purposes, with the Tenth Circuit agreeing with the majority view that the debtors had control over the disposition of the new funds and reversing the lower courts. Earmarking doctrine does not protect the transfer. *Parks v. FIA Card Servs. (In re Marshall),* 550 F.3d 1251 (10th Cir. 2008).

<u>Property of estate</u>

Chapter 7 property of estate

Section 363(o) interpreted by Eleventh Circuit. In a Chapter 7 case, after conversion from 13, the debtor attempted to exempt claims raised in an adversary proceeding against his mortgage company under the Truth in Lending Act, but the bankruptcy court held that the TILA claims were "independent rights under federal law," not subject to homestead exemption. The claims were property of the bankruptcy estate, and the Chapter 7 trustee settled the adversary proceeding by selling the claims to the mortgagee. The Circuit court held that § 363(o), added by BAPCPA, did not apply; the sale was of the debtor's claims under the TILA rather than of an underlying credit transaction. The debtor and counsel were also sanctioned by the bankruptcy court for discovery violations, in the amount of the mortgagee's attorney fees and costs, and the sanction was affirmed. *MacNeal v. Equinamics, Corp. (In re MacNeal),* 2009 WL 97559 (11th Cir. Jan. 15, 2009) (unpublished).

Under New York law, spouse's beneficiary interest in life insurance not property of estate. In Chapter 7 trustee's objection to debtor's exemption claim for cash surrender value of life insurance, spouses in jointly-filed case had two separate bankruptcy estates, unless substantively consolidated, and trustee could not reach cash surrender values of reciprocal life insurance policies that each debtor had, with the other spouse named as beneficiary. Under New York law, the beneficiary has no vested interest in the policy subject to trustee's administration. The court discusses effect of § 302 joint filings on separate estates. *Wornick v. Gaffney,* 544 F.3d 486 (2d Cir. 2008).

Debtor's beneficial interest in self-settled spendthrift trust reachable by trustee. Under California law, Chapter 7 debtor's beneficial interest in self-settled spendthrift trust was not protected from the trustee or hypothetical lien creditors; since the debtor had power to invade the trust corpus, under state law, "any spendthrift provisions are invalid when the settler is a beneficiary." *Cutter v. Vujic (In re Cutter),* 398 B.R. 6 (B.A.P. 9th Cir. 2008).

Economic stimulus payment is property of estate. Economic stimulus payment received by the Chapter 7 debtor postpetition is property of the estate without need for proration between pre- and postpetition periods. Since stimulus payment is federal, court looks to federal rather than state law. The trustee argued that the stimulus was tied to a prebankruptcy tax filing, which triggered the debtors' eligibility for stimulus, while the debtors argued that the payment was an advance on their postpetition tax refund. Without specifically deciding that issue, the court holds that the estate is entitled to the entire stimulus, noting that after the debtors filed their prebankruptcy 2007 tax return they had a contingent interest as of the bankruptcy filing in the entire stimulus payment. The court doesn't apply the typical proration theory for a tax refund to see how much of the refund is related to the tax year that expired before the bankruptcy filing, since the stimulus payment has no relationship to the timing of the bankruptcy filing. *In re Schwinn,* 400 B.R. 295 (Bankr. D. Kan. 2009).

Settlement of prepetition cause of action by attorney not employed by trustee is void. The Chapter 7 debtor had been injured prepetition in an automobile accident, and the attorney representing the debtor in that action settled the cause of action without moving to be employed to represent the trustee. The bankruptcy estate was never that attorney's client. Under Rule 9019, court approval of a settlement involving property of the estate is necessary, and no approval was sought. The Chapter 7 trustee was not a party to the settlement. The settlement by the attorney acting without authority and employment is void ab initio. Since the settlement funds had been paid, they must be turned over to the trustee, who must then return the funds to the party that paid. *Nickless v. McGrail & McGrail (In re Dooley),* 399 B.R. 340 (Bankr. D. Mass. 2009).

Disability credit insurance is not property of estate. Until entire balance of debt is paid by credit insurance payable on disability, that insurance doesn't vest in debtor and debtor's estate has no claim to insurance on theory that debt is bifurcated. *In re Gladwell,* 2009 WL 140098 (Bankr. C.D. Ill. Jan. 21, 2009).

Chapter 13 property of estate

Assets acquired postconfirmation and before termination of case are property of estate. Under confirmed plan, debtors chose option that upon confirmation all property of estate vested in them, and after confirmation, debtors inherited two parcels of real estate. Judgment was taken against debtors for postconfirmation business debt, and judgment was recorded as lien. Debtors moved to avoid lien. Court reviews three basic approaches to reconciliation of §§ 1306(a) and 1327(b), adopting "growing majority" view that all postpetition acquired property is property of estate. Under this plan's revesting provision, the only property that vested in the debtors upon confirmation was the property in existence at confirmation. The parcels inherited by the debtors postconfirmation could not revest in them; therefore, while the postpetition creditor did not violate the stay by suing the debtors, there was a violation of § 362(a)(4) in the creditor's judgment lien against the inherited property of the estate. As to the debtors' home that did revest at confirmation, the judgment lien could properly attach without violating the stay. *In re Jackson,* ___ B.R. ___, 2009 WL 562621 (Bankr. D. Idaho Mar. 5, 2009).

Judicial estoppel applies without regard to harm to creditors. Rejecting argument that application of judicial estoppel would harm creditors, district court applies doctrine to bar debtor's pursuit of undisclosed cause of action, finding that nondisclosure was intentional. Blaming bankruptcy counsel also doesn't prevent application. *Coppedge v. Suntrust Bank, Inc.,* 2009 WL 111639 (M.D. Ga. Jan. 14, 2009). *Compare Melton v. Nat'l Dairy Holdings, L.P.,* 2009 WL 653024 (M.D. Ala. Mar. 10, 2009), where court declines to apply judicial estoppel to Chapter 13 debtor's failure to amend schedules to disclose employment discrimination claim; while there is evidence to support inference that debtor intended to manipulate the system, court cites prior authority that "failure to amend is not the same as affirmatively misrepresenting the nonexistence of claims that are being pursued in another proceeding."

Debtor implicitly has right to use estate property preconfirmation. In a dispute over whether the Chapter 7 trustee could recover assets used by the Chapter 13 debtor prior to conversion, if the debtor uses estate property in good faith while awaiting confirmation of a plan, the Code implicitly grants that right to debtors. *In re Laflamme,* 397 B.R. 194 (Bankr. D. N.H. 2008).

<u>Exemptions</u>

First Circuit interprets §522(g). In the first circuit to address the question of whether § 522(g) permits the denial of a debtor's homestead exemption when the Chapter 7 debtor had fraudulently transferred residential property to a spouse but then voluntarily reconveyed that property prepetition, the First Circuit concluded that the language of the statute did not permit denial of an exemption. "The second transfer—the reconveyance—was curative, not fraudulent. The ensuing declaration of homestead was, therefore, unexceptional." Since the case had been filed before the effective BAPCPA date, §522(p) didn't apply, according to the previous BAP decision. *Stornawaye Fin. Corp. v. Hill (In re Hill),* 562 F.3d 29 (1st Cir. 2009).

Debtor has no homestead after conveying property with contingent life possession. When the debtor conveyed her home to her child to enable the child to mortgage property, receiving in return a contingent right to possess the property for her life if the bank became the owner, the debtor had no life estate under South Dakota law and had no right to homestead exemption. She merely had a contractual personal property interest, which became property of the Chapter 7 bankruptcy estate. *Fix v. First State Bank of Roscoe,* 559 F.3d 803 (8th Cir. 2009).

Amendment of exemption permits only objection to amended and not to original exemption claim. Questioning "whether the Supreme Court would, in fact, permit a trustee to use § 105 to object to exemptions to which he declined or failed to properly object pursuant to the Rules," when the Chapter 7 trustee did not timely object to the debtor's original homestead exemption claim, the debtor's amendment of exemptions only opened the door to the trustee objecting to the amended claim. The original exemption claim was to two parcels of real estate, neither of which was actually the debtor's homestead, under § 522(d) (1). The amended exemptions didn't change the homestead claim, but changed the debtor's exemption claim in stock. The trustee was unable to bootstrap an objection to the erroneous homestead claim in his objection to the amended stock exemption. *Grueneich v. Doeling (In re Grueneich),* 400 B.R. 680 (B.A.P. 8th Cir. Mar. 11, 2009).

Iowa homestead given extraterritorial effect. Section 522(b) (2)'s choice of exemption law doesn't preempt state law which prohibits application of that state's exemption to property located outside the state; instead, the fall back to federal bankruptcy exemptions becomes effective. However, the BAP interprets Iowa law and concludes that its homestead exemption applied to a Chapter 7 debtor who filed in Oklahoma but had not lived there the 730 days before filing. Since Iowa's homestead law is silent as to its extraterritorial effect, the BAP looked to Iowa case law. Iowa's personal property exemption specifies that it is available only to residents of the state, but the homestead contains no such restriction. The old case law in the state did not interpret the current homestead statute, and the BAP applies the principle that the "legislature's inclusion of a residency requirement in its personal property exemption statute, while making no reference to residency in its homestead statute, is presumed to be intentional." *Stephens v. Holbrook (In re Stephens),* 402 B.R. 1 (B.A.P. 10th Cir. Mar. 9, 2009). *Compare In re Gosnick,* 400 B.R. 582 (Bankr. W.D. Mich. Dec. 17, 2008) ("Michigan courts, for almost one hundred years, have held that its laws do not have extraterritorial application to real estate located in another state." Debtor may not claim exemption under Michigan law on real estate located in Alabama.).

Under Texas law, debtor's annuity purchase on eve of bankruptcy is in fraud of creditors for purposes of exemption. Debtors transferred $30,000 into an annuity on the day before filing Chapter 7 (pre-BAPCPA case), and the trustee objected to the claim of exemption under Texas Insurance Code, with the trustee arguing that the transfer was "a premium payment made in fraud of a creditor," excepted from the insurance exemption under Tex. Ins. Code Ann. § 1108.053. In contrast to scheduling the $30,000 as their property, the debtors testified at the objections hearing that the money was an inheritance from one debtor's father, and that the inheritance was held by the debtors in safekeeping pending division with siblings. The circuit court construes the Texas insurance exemption and its fraud exception, as well as Texas's Uniform Fraudulent Transfer Act, as including not only actual intentional fraud but conduct less than intentional fraud: "Ultimately, Texas courts will have to determine how much less than actual intent to defraud suffices to deny exemptions for insurance policies and annuities under § 1108.053….[However, traditional 'badges of fraud' may be] used to infer actual intent to defraud [as well as] to determine 'constructive' fraud. Factors relevant to determining actual intent to defraud, a higher culpability standard, should be equally probative where something less than actual intent will suffice." *Soza v. Hill (In re Soza),* 542 F.3d 1060, 1067 (5th Cir. 2008). Finding that sufficient badges of fraud existed to deny the claimed exemption as a "premium payment made in fraud of a creditor,…[the debtors] purchased the annuity on the eve of bankruptcy. Assuming the payment came from their non-exempt property, the annuity was in an amount that would have covered all of the debtors' listed debts, and the purchase deprived the creditors of all but $340 in non-exempt assets." *Id.* at 1068. On remand, the bankruptcy court must determine how much of the $30,000 was property of the debtors and how much would be property of other heirs. *Soza v. Hill (In re Soza),* 542 F.3d 1060 (5th Cir. 2008).

Overpayment of taxes on exempt retirement fund remains exempt. After certification to the Utah Supreme Court and its answer, the BAP holds that under Utah law when the debtor overpays taxes due from an exempt retirement fund, the refund is exempt, because it is traceable to the exempt property. *Smith v. Mosier (In re Smith),* 401 B.R. 487 (B.A.P. 10th Cir. Feb. 24, 2009).

Filing declaration of homestead in violation of state court order is invalid exemption. As part of state court judgment, creditor was entitled to attachment lien, and transfer of property from joint tenancy to spouse was in contempt of judgment order. Attempted spouse's declaration of homestead also violated judgment. Although the spouse removed her homestead, the debtor then filed his homestead declaration eight days before filing Chapter 7. In a complaint objecting to discharge under § 727(a)(2)(A) and to the debtor's claimed homestead, the bankruptcy court found the homestead declaration invalid as in contempt of the state court's order and also found under a "continuous concealment" theory that the debtor had transferred his interest in the property within one year of bankruptcy filing with intent to hinder, delay or defraud creditors. The BAP reversed the objection to discharge (see discussion under **Chapter 7 Discharge**), but affirmed the denial of the homestead exemption, finding that the state court clearly intended to require both the debtor and spouse to remove their homestead claims and not refile them. *Antongnoni v. Basso (In re Basso),* 397 B.R. 556 (B.A.P. 1st Cir. Dec. 9, 2008).

Debtor who did not contribute to tax withholdings has no exemption claim. Under Minnesota law, even though a joint tax return was filed, a spouse who did not contribute to the tax withholdings has no ownership in tax refund and no exemption claim to the refund. BAP discusses three approaches that courts have taken to allocation of tax returns between spouses: (1) majority approach of allocating based on proportion of respective tax withholdings; (2) dividing refund according to income generated by each; and (3) splitting refund evenly. *Carlson v. Moratzka (In re Carlson),* 394 B.R. 491 (B.A.P. 8th Cir. 2008).

Traditional badges of fraud used for § 522(o) analysis. Although the BAP applies traditional badges of fraud for purposes of whether § 522(o)'s intent to defraud element is found, there must be extrinsic evidence of fraud before the homestead exemption is limited, and mere conversion of nonexempt assets to exempt on the eve of bankruptcy is not enough. The addition of § 522(o) by BAPCPA did not change the evidentiary standard for fraudulent conversion in the 8th Circuit; rather, it "marks out a look-back period of ten years….It also extends what was the law in the Eighth Circuit and made it uniform national law." *Clark v. Wilmoth (In re Wilmoth),* 397 B.R. 447 (B.A.P. 8th Cir. 2008) (quoting *Addison v. Seaver (In re Addison),* 540 F.3d 805 (8th Cir. 2008)).

Homestead is surcharged for trustee's expenses arising from debtor's fraud. Notwithstanding the BAP's prior reversal of an order surcharging the debtor's homestead, the BAP left open potential surcharge upon appropriate findings and conclusions, and the bankruptcy court makes such findings. Under *Latman v. Burdette,* 366 F.3d 774, 786 (9th Cir. 2004), the bankruptcy court has authority to surcharge an exemption "when reasonably necessary both to protect the integrity of the bankruptcy process and to ensure that a debtor exempts an amount no greater than what is permitted by the exemption scheme of the

Bankruptcy Code." The Ninth Circuit BAP had held that a surcharge is permitted in instances of debtor misconduct amounting to fraud on the court and creditors. *In re Onubah,* 375 B.R. 549, 554 (B.A.P. 9th Cir. 2007). In a summary of findings, the bankruptcy court found that the debtor fabricated a second-mortgage loan "in an attempt to preserve equity in his residence and defeat the collection efforts of his judgment creditors." The Chapter 7 trustee expended 1,500 hours contesting this fictitious loan, with the trustee claiming $500,000 in attorney fees. Absent the trustee's expense, the estate would have paid the creditors and trustee in full. Without yet deciding an amount of the trustee's attorney fees, the court found "reasonable costs of coping with the Debtor's deception far exceed $75,000, the exemption to which Debtor otherwise would be entitled." If surcharge of $75,000 is not made against the homestead, the "financial consequences of Debtor's misconduct would fall most heavily upon Debtor's creditors, including Trustee and his attorneys." *In re Law,* 401 B.R. 447 (Bankr. C.D. Cal. 2009). C*ompare Scrivner v. Mashburn (In re Scrivner),* 535 F.3d 1258 (10th Cir. 2008), *cert. denied,* 2009 WL 735673 (Mar. 23, 2009) (Surcharge or debtor's exempt property is not authorized under the Code; other remedies such as sanctions or revocation of discharge are available.).

Workers' compensation benefit is exempt under § 522(d) (10) (C). Postpetition settlement of workers' compensation benefit is covered by § 522(d) (10) (C)'s "right to receive" a disability benefit, rejecting the trustee's attempt to distinguish the postpetition settlement from a prepetition right to receive. The exemption is determined as of filing date and debtor had suffered injury prepetition. *In re Nielsen,* 401 B.R. 149 (Bankr. M.D. Pa. 2009).

Section 522(o) doesn't apply to tenancy by entirety. In an individual's Chapter 11 case, the court held that § 522(o) applies to an exemption claimed under homestead laws and not to a tenancy by entirety exemption, adopting *Dillworth v. Hinton (In re Hinton),* 378 B.R. 371, 389-81 (Bankr. M.D. Fla. 2007). *In re Davis,* 403 B.R. 914 (Bankr. M.D. Fla. 2009).

Section 522(o) not triggered by debtors' move and surrender of prior home. When the Chapter 7 debtors moved from larger home to smaller one on another lot prior to bankruptcy and surrendered first home for foreclosure, § 522(o) was not triggered; this is not the type of transfer the section addresses and has no effect on the value of the new home for exemption purposes; moreover, there is no evidence of transfer with the intent described in § 522(o). *In re Jones,* 397 B.R. 765 (Bankr. D. S.C. 2008).

<u>Chapter 7 Issues</u>

Chapter 7 eligibility, means testing, and dismissal for abuse--§ 707(b)

National Guard and Reservists Debt Relief Act of 2008. Enacted on October 20, 2008, Pub. L. No. 110-438 provides temporary exclusion from the means test for reservists and members of the Guard who are called for no less than 90 days for active service or homeland defense, with an amendment to § 707(b)(2)(D) effective on December 19, 2008, for those cases commenced within the 3-year period beginning on that effective date. Official Form B22A is amended to include a new Part 1C for qualifying debtors.

Disability insurance benefit included in CMI. Granting direct appeal of dismissal of a Chapter 7 case for abuse, the Ninth Circuit holds that the definition of current monthly income in § 101(10A), including the phrase "without regard to whether such income is taxable income," and the statutory exclusion of certain types of payments, indicates that Congress intended to broadly include income such as disability insurance benefits within CMI. Although such income may not be taxable, it is still subject to debt repayment under CMI. *Blausey v. U.S. Trustee,* 552 F.3d 1124 (9th Cir. 2009).

Deduction of vehicle ownership expenses when vehicle has no debt continues to divide courts. The Seventh Circuit held that an above-median income debtor owning a vehicle free of debt may still deduct the IRS Local Standard for ownership expenses, reversing the district court at *Neary v. Ross-Tousey (In re Ross-Tousey),* 368 B.R. 762 (E.D. Wis. 2007). After deduction of those expenses, as well as operating expenses, the debtors had no disposable income and were eligible for Chapter 7 relief, with the panel concluding that § 707(b)(2)(A)(ii)(I)'s use of the term "'applicable monthly expense amount' cannot mean the same thing as 'actual monthly expenses.' Under the statute, a debtor's 'actual monthly expenses' are only relevant with regard to the IRS's 'Other Necessary Expenses;' they are not relevant to deductions taken under the Local Standards, including the transportation ownership deduction….We conclude that the better interpretation of 'applicable' is that it references the selection of the debtor's geographic region and number of cars." The case was remanded for the district court to consider the U.S. Trustee's alternate argument that totality of circumstances supported a finding of abuse under § 707(b)(3)(B). *Ross-Tousey v. Neary,* 549 F.3d 1148 (7th Cir. 2008).

As *Ross-Tousey* points out in its discussion, the appellate courts are divided on this issue, which typically arises in Chapter 13 cases involving disposable income issues. See, e.g.: **Debtor may take the ownership deduction even when the vehicle is free and clear**-- *Ross-Tousey; Hildebrand* *v. Kimbro (In re Kimbro),* 389 B.R. 518 (B.A.P. 6th Cir. 2008); *Pearson v. Stewart (In re Pearson),* 390 B.R. 706 (B.A.P. 10th Cir. 2008). **Debtor may not take the ownership deduction**—*Ransom v. MBNA America Bank N.A. (In re Ransom),* 380 B.R. 799 (B.A.P. 9th Cir. 2007); *Babin v. Wilson (In re Wilson),* 383 B.R. 729 (B.A.P. 8th Cir. 2008); *see also, In re Coffin,* 396 B.R. 804 (Bankr. D. Me. 2008); *In re Hunt,* 2008 WL 5142183 (Bankr. S.D. Ind. Dec. 5, 2008).

Debtor may deduct mortgage on home being surrendered, but § 707(b) (3) abuse still requires dismissal. Although agreeing that the debtor could deduct the mortgage "amount scheduled as contractually due" on a home being surrendered, as well as the amount that would be required to cure the mortgage in a Chapter 13 plan, the Chapter 7 debtor was caught by the totality-of-circumstances test. The surrender of the home before hearing the U.S. Trustee's motion to dismiss caught the debtor who had passed the means test in an abuse finding under § 707(b)(3). The debtor had a stable income and had improved her financial picture by moving back in with her mother—bottom line, the debtor had ability to repay a substantial portion of her debt. *In re Goble,* 401 B.R. 201 (Bankr. S.D. Ohio 2009). *See also In re Castellaw,* 401 B.R. 223 (Bankr. N.D. Tex. 2009) (Debtors would realize an "unconscionable advantage" amounting to abuse if permitted to remain in Chapter 7, when they had a substantial income and were retaining multiple luxury items, transferring "the cost of an unnecessarily extravagant lifestyle to creditors."); *In re Baker,* 400 B.R. 594 (Bankr. N.D. Ohio 2009) (Debtor budgeting for college expenses for adult child had ability to repay 50% of unsecured debt and Chapter 7 would be abuse under totality of circumstances.); *In re Booker,* 399 B.R. 662 (Bankr. W.D. Mo. 2009) (Debtors' ability to pay may be considered under totality of circumstances; although Social Security income is excluded from means test, it may be considered in ability to pay test. If unnecessary and unreasonable expenses are eliminated, debtors are able to pay significant dividend to unsecured creditors.).

Same sex couple didn't abuse system when filing separate cases. When same sex couple filed separate Chapter 7 petitions and didn't include other person's income in means test, dismissal for abuse is denied. Only married couples may file jointly. *In re Roll,* 400 B.R. 674 (Bankr. W.D. Wis. 2008).

<u>**Dismissal under §707**</u>

Lack of timely U.S. Trustee statement of abuse presumption didn't bar motion to dismiss. Although the U.S. Trustee didn't file the § 707(b)(2) statement of presumption of abuse, a motion was later filed to dismiss the case under § 707(b)(3)'s totality of circumstances, and the BAP held that the § 707(b)(2) requirement of a timely statement only affects whether the U.S. Trustee may filed a § 707(b)(2) motion; its failure does not prevent a § 707(b)(3) motion. *Fokkena v. Draisey (In re Draisey),* 395 B.R. 79 (B.A.P. 8th Cir. 2008). *See also, e.g., In re Violanti,* 397 B.R. 852(Bankr. N.D. Ohio 2008), for dismissal based on totality or circumstances.

Dismissal under §521

Debtors' motion to dismiss for their failure to comply with § 521 requirements is denied. In the Chapter 13 phase of case, debtors failed to comply with § 521(a)(1)(B) filing requirements, and after conversion to Chapter 7, the trustee sought approval of settlement of discrimination cause of action for sufficient amount to pay all claims and return money to debtors. The debtors, who had not scheduled the cause of action originally, were unhappy with settlement and moved to dismiss, arguing that their failure to comply with § 521(a) within 45 days required automatic dismissal pursuant to § 521(i). The bankruptcy court exercised authority to deny dismissal based on waiver of the § 521(a) requirement. The First Circuit agreed, holding that the bankruptcy court had discretionary authority to waive the § 521(a) requirements after the fact, since § 521(a) (1) (B) begins with "the debtor shall file…unless the court orders otherwise." However, the ruling is not unlimited: "We do not decide today whether bankruptcy courts possess unfettered discretion to waive the disclosure requirements ex post. Where, however, there is no continuing need for the information or a waiver is needed to prevent automatic dismissal from furthering a debtor's abusive conduct, the court has discretion to take such an action.…To sum up, the great divide in section 521 is between information that is required and information that is not. The Act allows courts to do the sifting suggested by that divide without rigid adherence to the forty-five-day deadline." *Segarra-Miranda v. Acosta-Rivera (In re Acosta-Rivera),* 557 F.3d 8 (1st Cir. 2009).

Trustee is estopped from moving to dismiss for debtor's failure to file payment advices. When the Chapter 7 debtor had provided payment advices to the trustee at the §341 meeting, which occurred within the 45-day period after commencement of the case, the trustee returned those to the debtor at the meeting without informing the debtor of the need to file them with the clerk. The trustee later moved for dismissal for the debtor's failure to timely file the advices with the clerk, but the court held that the trustee was equitably estopped. Although equitable estoppels can't be imposed against a governmental unit, the case trustee is not protected from the doctrine, and the trustee's discretionary decision to move to dismiss is subject to “common law rights of estoppel.” *In re Gilbert,* 403 B.R. 297 (Bankr. W.D. N.Y. 2009).

Discharge and Reaffirmation

Discharge exceptions

Bankruptcy Rule 4007(c) permits more than one extension. Holding that deadline in Rule 4007(c) for filing dischargeability complaints is not jurisdictional, the Rule does not limit a creditor to only one extension. *United States v. Horras (In re Horras),* 399 B.R. 885 (Bankr. S.D. Iowa 2009).

Tax matter partner’s contesting of IRS tax adjustments suspended limitations period for individual debtor/partner. Recognizing that there may be circumstances where a tax matter partner acts in such a way as to benefit him contrary to the interests of the other partners or partnership, here the tax matter partner invoked tax court proceedings to contest adjustments made by IRS to the partnership’s tax obligation, and that action was not in conflict with the partnership. As such, the partner’s actions suspended the assessment limitations period, resulting in a suspension affecting the individual debtor who had been a partner, for purposes of §523(a) (1). *United States v. Martinez (In re Martinez,* 564 F.3d 719 (5th Cir. 2009).

Reckless disregard for truth of financial statements supports § 523(a) (2) (B) exception and bankruptcy court may enter monetary judgment. The bankruptcy judge may look at totality of circumstances to infer debtor’s intent to deceive when there is evidence of reckless disregard for truth and the “sheer magnitude” of the misrepresentation supports the inference. The bankruptcy court has jurisdiction not only to find the debt nondischargeable but to also enter a monetary award. Although questioning why other circuits had not examined the issue of jurisdiction in light of the “jurisdictional dichotomy of core and related-to jurisdiction,” the panel nevertheless adopts the “arguments of tradition and pragmatism” from the other circuits and agrees that the bankruptcy court has jurisdiction to enter a monetary judgment against the debtor. *Morrison v. Western Builders of Amarillo, Inc. (In re Morrison),* 555 F.3d 473 (5th Cir. 2009).

Reasonable reliance only required by original creditor under §523(a) (2) (B). Considering §523(a)(2)(B)(iii) as it intersects with assignment, the Ninth Circuit looked at the meaning of the word “is” in that subsection, with the debtor arguing that “is” required the creditor who held the claim at the time of bankruptcy to exercise independent reasonable reliance. Agreeing with the Seventh Circuit in *McClellan v. Cantrell,* 217 F.3d 890, 896 (7th Cir. 2000), the statute's "obtained by" language indicates that the reliance must have been at the time of the debt's inception. The Ninth Circuit agreed with its BAP's decision, at 367 B.R. 138, that the assignee does not have to show that it reasonably relied—that reliance is only required by the original creditor. *Boyajian v. New Falls Corp. (In re Boyajian),* 564F.3d 1088 (9th Cir. 2009).

Prebankruptcy judgment under state unfair and deceptive practices act litigated same issues as in §523(a) (2) (A). Construing Massachusetts's law on effect of default judgment, substantial participation by the defendant in the state court proceedings justified application of "already litigated" principle of that state's collateral estoppel law. The litigation in state court included the same elements required for §523(a) (2) (A)'s fraud-based exception, with the state court making findings of fraudulent conduct and false representations by the debtor. *Backlund v. Stanley-Snow (In re Stanley-Snow),* ___B.R. ___, 2009 WL 1219943 (B.A.P. 1st Cir. May 6, 2009).

Reliance on financial statement with inaccuracies on its face is not reasonable. Reversing the bankruptcy court, the BAP found from the evidence that a financial statement was "inaccurate on its face in numerous areas….Any reliance…placed upon the financial statement was unreasonable." The BAP also found nothing in the record to support justifiable reliance under § 523(a) (2) A) on the debtor's representations. *R & R Ready Mix, Inc. v. Freier (In re Freier),* 402 B.R. 891 (B.A.P. 8th Cir. 2009).

Default judgment against pro se defendant given preclusive effect in § 523(a)(2) proceeding. Affirming the bankruptcy court's giving of preclusive effect to fraud-based judgment in federal district court action, the BAP applied federal preclusion law to the judgment, with the defendant having had a full and fair opportunity to litigate the fraud issue in the prior district court action, even though the defendant was financially distressed, allegedly forced to dismiss his attorney and proceeding pro se. *Melnor v. Corey (In re Corey),* 394 B.R. 519 (B.A.P. 10th Cir. 2008).

Discretion abused in denial of creditor's motion to amend § 523(a)(2) complaint. Five days before trial, the creditor moved to amend her § 523(a)(2) complaint to add § 523(a)(14) count, alleging the debtor incurred a debt to pay a tax to the United States that would be nondischargeable, with the motion asserting that facts stated in the original complaint related to the § 523(a)(14) count and that the creditor had just received information from IRS to support the amended count. The motion was denied, with trial proceeding and the debtor being granted a judgment on the § 523(a)(2)(A) and (B) counts. The BAP affirmed the § 523(a)(2) rulings but remanded, holding that the bankruptcy court should have granted the motion to amend to add § 523(a)(14): "[T] fact that the proposed amendment was based in part on an allegation made in the original complaint weighs in favor of—not against—granting Peterson leave to amend the complaint. Peterson's entire complaint was premised on a belief that the Debtor had misrepresented to her that he intended to use the loan proceeds to pay a tax debt….Amendments to state a new legal theory based on allegations known to a defendant should be liberally allowed when statutes of limitation are not involved." *Peterson v. Weber (In re Weber),* 392 B.R. 760, 764-65 (B.A.P. 8th Cir. 2008).

Debtor's failure to schedule creditor bars discharge in no asset case, §523(a)(3). Agreeing with the Seventh Circuit, the First Circuit has held that even in a no asset case, the debtor must list a creditor in order to discharge that debt under §523(a)(3). That section does not distinguish between asset and no asset cases in its requirement that the claim be listed or scheduled in time to permit the creditor to file a timely proof of claim. The creditor had sued the debtor as a surety after the principal defaulted after the debtor's discharge, but the Circuit held that the debt arose out of the prebankruptcy surety agreement. Although the debt could have been subject to discharge if listed, the First Circuit disagreed with the Third, Fifth, Sixth and Ninth Circuits, holding that listing a creditor, or that creditor's actual knowledge of the bankruptcy filing, is a condition to obtaining a discharge. *Colonial Surety Co. v. Weizman,* 564 F.3d 526 (1st Cir. 2009).

Medical bills incurred prior to conversion to Chapter 7 are dischargeable under § 523(a) (3). While in Chapter 13, the debtors' minor child was injured, resulting in medical bills of $29,000 for which the debtors agreed to be responsible. When the debtors converted to Chapter 7, they failed to schedule the medical provider but the case was administered as a no asset. While unscheduled debts are nondischargeable in Chapter 13, in Chapter 7, the debt is dischargeable unless § 523(a) (3) applies: § 523(a) (3) (A) is not applicable since the Chapter 7 is a no asset, with no proofs of claim required; the preconversion creditor was unable to prove under § 523(a) (3) (B) that the debt would be excepted from discharge. *OSF Healthcare Systems, Inc. v. Davis (In re Davis),* 2009 WL 302221 (Bankr. C.D. Ill. Feb. 5, 2009).

Past-due contributions to ERISA employee benefit plan are dischargeable under §523(a) (4). Holding that contributions from the debtor's wholly-owned corporation to the ERISA-qualified employee benefit plan did not become "plan assets" until actually paid, the Chapter 7 debtor had not become a fiduciary over any contributions that had not been paid by the corporation. *Rahm v. Halpin (In re Halpin),* ___F.3d ___, 2009 WL 1272632 (2d Cir. May 11, 2009).

Granting of power of attorney puts debtor in fiduciary capacity for purposes of § 523(a) (4). The debtor's motion to dismiss complaint is denied, finding that the complaint sufficiently alleged fiduciary capacity when the creditor gave the debtor a power of attorney and entrusted money in the debtor's care while the creditor underwent cancer treatment. The debtor allegedly used those funds for her own benefit, and a § 523(a) (4) cause of action is stated. *Eveland v. Kishbaugh (In re Kishbaugh),* 399 B.R. 419 (Bankr. M.D. Pa. 2009). *Compare Harrold v. Raeder (In re Raeder),* 399 B.R. 432 (Bankr. N.D. W.Va. 2009) (Debtor was not in fiduciary capacity for purposes of § 523(a) (4) simply because he had check writing authority for his mother, but sufficient facts are at issue to retain cause of action for § 727(a) (4) (A) false oath.).

Punitive sanction to force payment of alimony is not domestic support obligation. When the state court imposed on the debtor $50 for each day that his separate alimony obligation was late, that was a sanction and was not a part of the alimony for purpose of § 101(14A)'s definition of "domestic support obligation," and the sanction is not a priority claim under § 507(a)(1) for purposes of the debtor's Chapter 13 plan. Although the case does not involve discharge, its application of § 101(14A) may arise in a discharge scenario. *Smith v. Pritchett (In re Smith),* 398 B.R. 715 (B.A.P. 1st Cir. 2008).

Services by child's representative are in nature of support but not included within definition of domestic support obligation payee for § 523(a)(5). Denying a motion for default judgment by the state-court appointed representative for the debtor's child, the bankruptcy court analyzed whether the representative was a payee eligible for inclusion within § 523(a)(5)'s domestic support obligation exception from discharge. Looking at § 101(14A)'s definition of domestic support obligation, subsection (14A)(i) and (ii) provide who may be a payee "owed to or recoverable by"; while the services of the court-appointed representative are support in nature and arise under a divorce decree, the representative is not included within the designated parties who may recover a domestic support obligation from the debtor. Following the analysis of *Simon, Schindler & Sandberg, LLP v. Gentilini (In re Gentilini),* 365 B.R. 251 (Bankr. S.D. Fla. 2007), the bankruptcy court held that "[u]nder BAPCPA, the payee requirement is even more clearly set out [than in pre-BAPCPA § 523(a)(5)], as separate paragraph (A) in the § 101(14A) definition of domestic support obligation. The requirement of that paragraph that an obligation be 'owed to or recoverable by' a specified payee must be honored as a matter of basic statutory construction….Contrary to [the representative's] argument, then, his right to payment from the debtor is not within the scope of §§ 101(14A) and 523(a)(5) simply because it is a court-ordered payment in the nature of support." In addition, the representative's claim was not one that was recoverable by the debtor's former spouse, since the state court did not place any obligation on the former spouse to pay the debtor's portion of the representative's fee. Finally, the court distinguished the court-appointed child representative from a "legal guardian," with the latter being one of the payee's designated within § 101(14A)(i), and the representative is not a "governmental unit" as that term in used in § 101(14A)(ii). *Levin v. Greco (In re Greco),* 397 B.R. 102 (Bankr. N.D. Ill. 2008).

Separate analysis of "willful" and "malicious" prongs required under § 523(a)(6). Reversing partial summary judgment, the Ninth Circuit held that precedent in that Circuit requires separate determination of the two elements of § 523(a)(6). The debtors had been found liable in a prebankruptcy jury trial for willful copyright infringement, and the bankruptcy court determined on summary judgment that the infringement constituted a willful injury; the BAP implied maliciousness from the trial court's finding of willfulness, since there was proof that the debtors were aware of the plaintiff's copyright at the time of infringement. The Circuit panel found that insufficient, seeing an unresolved issue of fact as to whether the infringement was actually willful; an issue existed whether the debtors ordered the infringement or whether an employee of their company did so. "Although there may be some overlap between the test for 'willfulness' and the test for 'malice,'…the overlap does not mean that the Bankruptcy Court can ignore entirely the malice inquiry." *Barboza v. New Form, Inc. (In re Barboza),* 545 F.3d 702, 711 (9th Cir. 2008).

Intentional breach of contract also requires tortious conduct for § 523(a)(6) exception. Holding that an intentional breach of contract is covered by § 523(a)(6)'s exception only if it also meets the applicable state-law standard for tortious conduct, the Ninth Circuit may have a different standard from the Fifth Circuit. *Compare Lockerby v. Sierra,* 535 F.3d 1038 (9th Cir. 2008), with *In re Williams,* 337 F.3d 504 (5th Cir. 2003), and *see* Hon. Paulette Delk, *Lockerby v. Sierra: The Ninth Circuit Takes a Look at the Dischargeability of Breach of Contract Claims under § 523(a)(6),* NORTON BANKR. LAW ADVISER (Jan. 2009).

Attorney fees and costs awarded against debtor are excepted under § 523(a) (6) in absence of compensatory judgment. Chapter 7 debtor had $11,573 judgment against her for contempt in violating state court order enjoining her from contacting new wife of debtor's former husband, but no compensatory judgment had been entered. The BAP affirmed that the judgment for fees and costs arose from willful and malicious acts—the debtor intentionally violated the state court order and her actions were substantially certain to lead to injury. Finding no specific Ninth Circuit authority, the BAP found the award to be similar to sanctions, and used the rationale of *Cohen v. de la Cruz,* 523 U.S. 213 (1998), a § 523(a)(2)(A) case involving attorney fees and costs, to conclude that the judgment here was the result of the debtor's willful and malicious violation of the injunction. *In re Suarez,* 400 B.R. 732 (B.A.P. 9th Cir. 2009).

Issue of material fact prevents § 523(a)(6) summary judgment on debtor's use of secured receivables to pay trust fund taxes. In adversary proceeding brought by creditor secured by receivables against individuals in Chapter 7 who were corporate officers and used receivables to pay delinquent trust fund taxes, the BAP holds that secured creditor held interest in funds that was superior to IRS's, but issues of material fact exist on whether the injury to secured creditor was willful and malicious. The debtors argued that any payment to IRS of trust fund taxes could not have been from corporate funds; rather, payment would have been from trust funds. The bankruptcy court had granted the creditor's summary judgment motion after finding that its interest was superior to that of IRS; however, the fact that the debtors used the creditor's funds did not necessarily establish the willful and malicious elements. *JP Morgan Chase Bank, N.A. v. Zwosta, et al. (In re Zwosta),* 395 B.R. 378 (B.A.P. 6th Cir. 2008).

Standard for § 523(a) (6) damages for conversion is market value. Affirming a determination that the debtor willfully and maliciously stopped feeding ex-wife's horses, the district court holds that the proper standard for determination of "damages for conversion, the common-law tort for wrongful possession or disposition of another's property, is the market value of the property at the time and place of its conversion, not the diminution in value as suggested by [the debtor]." *Hamilton v. Hamilton (In re Hamilton),* 400 B.R. 696 (E.D. Ark. 2009).

Criminal guilty plea given same preclusive effect in § 523(a)(6) as trial verdict. Under New York law, guilty plea to second degree assault for stabbing the victim in a fight is given same preclusive effect as a trial conviction, with that state's penal code for the offense requiring that the defendant acted intentionally, without excuse or justification. The bankruptcy court also considered whether self defense could be considered under New York law. *Hernandez v. Greene (In re Greene),* 397 B.R. 688 (Bankr. S.D. N.Y. 2008).

Cost assessment by New Hampshire Supreme Court Committee on Professional Conduct is nondischargeable fine or penalty under § 523(a)(7). After two disciplinary actions against the debtor/attorney, the state's Committee on Professional Conduct assessed costs for bringing the disciplinary proceedings against the attorney, who then filed Chapter 7. Under state Supreme Court's rules, assessment of costs is discretionary, a factor supporting it being a penalty rather than mere fee or cost shifting; the cost assessment is akin to a sanction, which is in the nature of a penalty. Applying the rationale of *Kelly v. Robinson,* 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986), "[w]hile noting that attorney disciplinary proceedings are not criminal, [cases subsequent to *Kelly*] have found that the goals of these sanctions—deterrence, rehabilitation and protection of the public interest—are sufficiently analogous to *Kelly* to support an extension of its rule." *Richmond v. New Hampshire Supreme Court Committee on Professional Conduct,* 542 F.3d 913, 920 (1st Cir. 2008).

Debtor's obligation to indemnify bail bondsman is dischargeable under § 523(a)(7). The debtor had agreed to indemnify a bail bondsman if another individual did not appear for trial; the criminal defendant did not appear, and the bond was forfeited. The bondsman paid $16,000 to the State and sued the debtor on the indemnity agreement, obtaining a default judgment for $20,150. After filing of Chapter 7, the bondsman filed an adversary proceeding to determine that the debt was excepted from discharge under § 523(a)(7). Finding no obligation from the indemnitor to the State and that the bail bondsman was not a governmental entity, the Circuit Court held that the bondsman is not subrogated to the rights of the state for nondischargeability purposes; under plain language of § 523(a)(7), the debt to the bondsman is dischargeable. *Affordable Bail Bonds, Inc. v. Sandoval (In re Sandoval),* 541 F.3d 997 (10th Cir. 2008).

Government claims under False Claims Act are within § 523(a) (7) exception. Although the government's claims for treble damages assessed under the False Claims Act were penal in nature and not compensatory, and were within § 523(a) (7)'s exception, there was no evidence that the debtor knowingly presented a false or fraudulent claim; therefore, the penalties were discharged. *McFarland v. United States (In re McFarland),* 399 B.R. 549 (Bankr. M.D. Fla. 2009).

Student account and deferment agreement with private university are in nature of loan for purposes of § 523(a) (8). Adopting reasoning of *In re Johnson,* 218 B.R. 449 (B.A.P. 8th Cir. 1998), the Ninth Circuit holds that the debtor's agreement with Vanderbilt University, establishing an account and deferment, amounted to a "loan" under that term's ordinary meaning, and the loan was within the reach of § 523(a)(8). *McKay v. Ingleson,* 558 F.3d 888 (9th Cir. 2009).

Strain on marriage is factor in § 523(a) (8) undue hardship. Applying 3-part test of *Long v. Educ. Credit Mgmt. Corp. (In re Long),* 322 F.3d 549, 554 (8th Cir. 2003), under the third element of "other relevant facts and circumstances surrounding each particular bankruptcy case," the 65-year old debtor who had been an educator for 30 years and had no probability of obtaining increased income demonstrated undue hardship in paying $300,000 student loan debt. One factor in the court's determination was evidence of strain on the debtor, his spouse and their marriage from the financial stress of the student loan debt. *Halverson v. U.S. Dept. of Educ. (In re Halverson),* 401 B.R. 378 (Bankr. D. Minn. 2009).

Under § 523(a) (19), bankruptcy court lacks authority to determine liability for securities violations or fraud. Section 523(a) (19), added under the Sarbanes-Oxley Act of 2002, has two elements: "the debt is for violation of securities laws or fraud in connection with the purchase or sale of a security, [and]…the debt must be memorialized in a judicial or administrative order or settlement agreement." The exception originally "required a *pre*-bankruptcy judgment, order or settlement agreement," but BAPCPA added to the second element that the judgment or agreement "results, before, on, or after the date on which the petition was filed," leading to "debate as to whether § 523(a) (19) now allows a bankruptcy court to render its own determination of liability…or whether the liability determination must still be made outside of the bankruptcy court." Agreeing that the BAPCPA change gave the bankruptcy court concurrent jurisdiction to determine dischargeability, this court concluded that § 523(a) (19) (B) still requires that "*the liability determination* occur outside of the bankruptcy forum, whether it occurs pre- or post-bankruptcy. Once liability has been imposed, then either a bankruptcy court or a non-bankruptcy court may determine the application of this nondischargeability statute." *Nusse v. Jafari (In re Jafari),* 401 B.R. 494 (Bankr. D. Colo. 2009).

Discharge objections

Filing declaration of homestead in violation of state court order is invalid exemption but not grounds for § 727(a)(2)(A) discharge objection. As part of state court judgment, creditor was entitled to attachment lien, and transfer of property from joint tenancy to spouse was in contempt of judgment order. Spouse's attempted declaration of homestead also violated judgment; although spouse removed her homestead, the debtor then filed homestead declaration eight days before filing Chapter 7. In complaint objecting to discharge under § 727(a)(2)(A) and to the debtor's claimed homestead, the bankruptcy court found the declaration invalid as in contempt of the state court's order and also found "continuous concealment" of the debtor's transfer of his interest in the property within one year of bankruptcy filing with intent to hinder, delay or defraud creditors. The BAP reversed the objection to discharge but affirmed the denial of the homestead exemption (see discussion under **Exemptions**), finding that the state court clearly intended to require both the debtor and spouse to remove their homestead claims and not refile them. As to the discharge objection, the transfer of the debtor's interest to his spouse took place more than one year before bankruptcy filing, and the continuous concealment doctrine did not apply even though the debtor retained a beneficial interest after the transfer. The wife had transferred the property to a trust, with herself as trustee and her husband as sole beneficiary; despite the retention of beneficial interest, the BAP found that the debtor did not conceal his beneficial interest within the one year before bankruptcy, since no steps were taken within that year to hide his interest. In fact, the debtor's declaration of homestead was the opposite of concealment. *Antongnoni v. Basso (In re Basso),* 397 B.R. 556 (B.A.P. 1st Cir. 2008).

Burden of § 727(a)(2)(A) proof remains on creditor. Although there is a presumption of fraud for a debtor's transfer of property without receiving payment, the debtors rebutted that presumption by evidence that they had "a non-fraudulent reason for the transfer of the property; namely, they created the trusts to hold property until the property increased in value to create enough equity to make a profit on the sale of the property[, with the debtors testifying they had] learned this business model in the real estate seminars they attended." The bankruptcy court had determined the evidence on fraudulent intent to be "equally split between the parties," meaning that the creditor did not carry its burden of proof, and the BAP affirmed, holding that the bankruptcy court properly applied the presumptions and burdens. *Cadlerock Joint Venture II, L.P. v. Sandiford (In re Sandiford),* 394 B.R. 487, 490 (B.A.P. 8th Cir. 2008).

U.S. Trustee fails to show "property of estate" requirement for § 727(a) (2) (B). U.S. Trustee objected to debtor's discharge after conversion from Chapter

13 to 7, on basis that debtor had won lottery after filing Chapter 13 and spent those funds. What is included in property of estate for purposes of § 727(a) (2) (B) must be examined in light of § 348(f) (1) (A). Although the lottery winnings were included in the Chapter 13 property of the estate pursuant to § 1306, the effect of § 348(f) (1) (A) is to put the debtor in the same economic position as if the case had originally been filed as a Chapter 7. Had the case been filed under Chapter 7, the debtor's postpetition lottery winning and the dissipation of that winning would not have been a basis to deny discharge under § 727(a) (2) (B), even though it might have formed basis for case dismissal under § 707. Section 348(f) (2) doesn't help the U.S. Trustee, since that section's bad faith conversion only applies if the debtor converts the case; here the case was involuntarily converted to Chapter 7. *Adams v. Bostick (In re Bostick),* 400 B.R. 348 (Bankr. D. Conn. 2009).

Collateral estoppel not given in § 727(a)(2) and (a)(4) proceeding in debtor's case to judgment against debtor's closely held corporation. When the Chapter 7 debtor had been severed from a state court trial upon his bankruptcy filing, awarding of a fraud-based judgment against his closely held corporation and a finding that the corporation was his alter ego were not given preclusive effect against the debtor. The debtor did not participate in that trial and the automatic stay prevented any judgment against him individually. A separate determination of fraud must be made in the adversary proceeding. *Adler v. Lisa Ng (In re Adler),* 395 B.R. 827 (E.D. N.Y. 2008).

Failure to justify lack of records denies discharge under § 727(a)(3). Debtor who owned and/or controlled various business entities is denied discharge on summary judgment under § 727(a)(3) and standard of *Lansdowne v. Cox (In re Cox),* 41 F.3d 1294 (9th Cir. 1994), when the creditor made prima facie case and debtor failed to demonstrate justification for failure to keep or preserve records. In *Cox*, the circuit court "stated that the purpose of § 727(a)(3) is to make discharge dependent on the debtor's true presentation of his financial affairs." When a creditor makes a prima facie case "by showing '(1) that the debtor failed to maintain and preserve adequate records, and (2) that such failure makes it impossible to ascertain the debtor's financial condition and material business transaction,…the burden of proof then shifts to the debtor to justify the inadequacy or nonexistence of the records.'" *Caneva v. Sun Communities Operating Limited Partnership (In re Caneva),* 547 F.3d 1082, 1087 (9th Cir. 2008) (quoting *In re Cox,* 41 F.3d at 1296). "[W]hen a debtor owns and controls numerous business entities and engages in substantial financial transactions, the complete absence of recorded information related to those entities and transactions establishes a prima facie violation of 11 U.S.C. § 727(a)(3). Likewise, we hold that when a debtor transfers a substantial amount of money to a third party [$500,000], the failure to keep any documentation evidencing the terms of the transfer or the fact that the payment actually took place establishes a prima facie violation of 11 U.S.C. § 727(a)(3)." *In re Caneva,* 547 F.3d at 1088-89. Debtor's "conclusory statement tracking the language of § 727(a)(3) in his affidavit in opposing summary judgment" did not carry his burden of showing justification for lack of records. *Id.* at 1089. The "statute imposes an affirmative duty of the debtor to keep and preserve recorded information that will allow his creditors to ascertain his financial condition and business transactions." *In re Caneva,* 547 F.3d at 1090. *Caneva v. Sun Communities Operating Limited Partnership (In re Caneva),* 547 F.3d 1082, 1087 (9th Cir. 2008), *opin. amended* 2008 WL 5205899 (9th Cir. Dec. 15, 2008).

Relief from denial of discharge

Section 727(e)(2) not available to debtor. Three years after the bankruptcy court had denied discharge for the debtor's transfer of assets with intent to hinder, delay or defraud creditors, the debtor moved to "revoke denial of discharge," relying on § 727(e)(2). Finding this section applied only to provide relief when a discharge had been granted, no relief from a denial of discharge is available to the debtor. Neither did Fed. R. Civ. P. 60(b) provide relief: the debtor showed no fraud upon the court to satisfy Rule 60(b)(3), and the delay of three years in seeking relief was not reasonable for Rule 60(b)(6) purposes. The bankruptcy court did not abuse its discretion in awarding $3,825.40 sanctions against the debtor for the trustee's legal fees and expenses in defending the motion, and an order restricting the effect of future pleadings filed by this debtor was reasonable in light of the debtor's litigious history and the notice given to the debtor of the sanctions hearing. The restriction provided that future pleadings would not be effective nor require response by other parties until the bankruptcy court had conducted a hearing and given an objection deadline. *Turner v. Kristan (In re Kristan),* 395 B.R. 500 (B.A.P. 1st Cir. 2008).

Revocation of Discharge

Discharge revoked for debtor's failure to disclose settlement. Under §727(d), the discharge was properly revoked when the debtor did not disclose $25,000 postpetiton settlement of prebankruptcy cause of action, made false statements at the creditor's meeting, and failed to turn over settlement proceeds to Chapter 7 trustee. *Yules v. Gillis (In re Gillis), 403* B.R. 137 (B.A.P. 1st Cir. 2009).

Discharge injunction

Refusal to provide transcripts violates discharge injunction. Affirming the bankruptcy and district courts, the Seventh Circuit held that a private university's refusal to provide a student's transcripts was an action to collect a debt for unpaid tuition and a violation of the discharge injunction. Distinguishing the debtor's property right in the transcripts from a student loan debt that would not be dischargeable, the Circuit found a state-law property interest in the record of grades and the university's violation of that right was an attempt to collect unpaid tuition, violating both the automatic stay and discharge injunction. *In re Kuehn,* 563 F.3d 289 (7th Cit. 2009).

Rooker-Feldman* Doctrine limited*. Notwithstanding *Rooker-Feldman* Doctrine, discharge injunction makes state-court judgment void ab initio if entered against a debtor as to debts that have been discharged. *Hamilton v. Herr (In re Hamilton),* 40 F.3d 367 (6th Cir. 2008).

Chapter 7 debtor states cause of action for violation of discharge injunction when creditor sued nondebtor spouse. The creditor's action in state court against the debtor's nondebtor spouse was found to be without merit, and the debtor's complaint alleged that this suit was an attempt to force the debtor to pay a discharged debt. The wife incurred $50,000 defending the suit in state court, proving that she had nothing to do with the transaction between the debtor and creditor. The discharge injunction complaint states a valid cause of action. *In re Lumb,* 401 B.R. 1 (B.A.P. 1st Cir. 2009).

Monetary damages for discharge injunction violation can be sought through motion. The debtors may seek recovery of damages for alleged violation of the discharge injunction through a motion rather than being required to file an adversary proceeding. No due process concerns were presented, when the motion adequately protected the creditor. *In re Englund,* 401 B.R. 377 (B.A.P. 8th Cir. 2009).

Reaffirmation

Debtor fails to rebut presumption of undue hardship for reaffirmation, but the creditor's right to repossess is questioned. When the debtor filed a reaffirmation agreement for a vehicle more than 45 days after the meeting of creditors, notwithstanding the unsupported allegation that the debtor's mother was willing to help make car payments, the debtor failed to rebut the § 524(m)(1) presumption of undue hardship when there is a $3,000 shortfall of scheduled expenses over income. The debtor offered no proof that his mother was willing and able to assist with payments. After denying approval of the reaffirmation, the court confirmed that the automatic stay had terminated after expiration of the 45 day deadline for filing the reaffirmation agreement, but the creditor's motion to repossess the car was denied, with the creditor being required to proceed in a Rhode Island court to determine if repossession is authorized under state law. The court discusses the impact under Rhode Island's adoption of the Uniform Consumer Credit Code of the lack of payment default on the car creditor's right to repossess, citing other bankruptcy court opinions, including *In re Riggs,* 2006 WL 2990218 (Bankr. W.D. Mo. 2006). *In re Visnicky,* 401 B.R. 61 (Bankr. D. R.I. 2009).

Fourth option was not eliminated by BAPCPA. When the Chapter 7 debtors moved to reaffirm mortgage and personal property debt on farm but could not overcome presumption of undue hardship, court does not approve reaffirmation, but under those circumstances the debtors could retain the real and personal property so long as they were current and remained current in monthly payments. BAPCPA's changes to § 521(a)(6) require the debtor to enter into a reaffirmation agreement in order to retain personal property, but if the court does not approve the agreement, the debtors have still met the statutory requirement to retain personal property. The Code does not require entry into a reaffirmation agreement to retain real property--§§ 521(a) (6) and 362(h) apply only to personalty. *In re Hart,* 402 B.R. 78 (Bankr. D. Del. 2009).

Ride through permitted on real estate debt. Although court did not approve debtors' proposed reaffirmation of mortgage debt on which the debtors were current, finding reaffirmation not in the debtors' best interest, the court held that debts secured by real estate are not affected by §§ 362(h) and 521(a)(2)(C), which are limited to personal property interest; therefore, the "ride through" option remains for debtors who are current on real estate debt. *In re Waller,* 394 B.R. 111 (Bankr. D. S.C. 2008); *see also* "ride through" cases under **Automatic Stay**.

Attorney may not limit representation by excluding reaffirmation. Chapter 7 debtor's attorney attempted to limit representation by excluding negotiations or representation concerning reaffirmation agreements in the contract with debtor. The court found that limitation impermissible, first because entry into a reaffirmation is so important to debtors and assistance from an attorney is part of the necessary services "that make up competent representation of a Chapter 7 debtor. Second, the Code [§ 524(c)] lays the responsibility for advising a debtor about the reaffirmation process and evaluating the effect of each agreement at the feet of debtor's counsel." *In re Minardi,* 399 B.R. 841 (Bankr. N.D. Okla. 2009).

Mortgage servicer lacks legal authority to reaffirm. At hearing on approval of a reaffirmation agreement, it became clear that mortgage servicer lacked legal interest in the underlying note and had no authority in its own right to enter into reaffirmation. *In re Waring,* 401 B.R. 906 (Bankr. N.D. Ohio 2009).

Section 524(m) doesn't apply when attorney certification is filed and no presumption of undue hardship arises. The statutory deadline in § 524(m) doesn't apply when the debtor's attorney files a certification with the reaffirmation agreement, and the agreement indicates a positive cash flow, or when other conditions of the Code are met. If no court action is required, then § 524(m) is irrelevant. *In re Clark,* 401 B.R. 75 (Bankr. D. Conn. 2009).

Excusable neglect not established for relief from approved reaffirmation. After the court had approved the debtors' reaffirmation agreement, which had been entered into against the debtors' attorney's advice, the debtors moved to rescind after the statutory time for rescission; the motion was motivated by the debtors' default in payments and by the Chapter 7 trustee's questioning whether the creditor was properly perfected. The court found that the debtors understood the consequences of reaffirmation and failed to establish cause for relief from the approval. *In re Mahannah,* 2008 WL 4951590 (Bankr. W.D. Mo. 2008).

<u>Chapter 13 Issues</u>

Eligibility and Means Testing

Means test is constitutional. Section 1325(b)(3)'s means testing use of state and local median income standards does not render the provision nonuniform under Art. I, § 8 of the Constitution, with the Sixth Circuit applying the same analysis used by the Supreme Court in holding the exemption opt-out constitutional. *Schultz v. United States,* 528 F.3d 343 (6th Cir. 2008), *cert. denied,* 2008 WL 4819925 (Dec. 8, 2008). *See also In re Cox,* 393 B.R. 681 (Bankr. W.D. Mo. 2008), holding that § 1325(b)'s objective standards for determination of expense deductions, rather than using the debtor's actual expenses, was rationally related to congressional limitations on judicial discretion and establishment of a floor for recovery by unsecured creditors from above-median income debtors; § 1325(b) doesn't violate a debtor's equal protection rights.

Deduction of mortgage and vehicle ownership when surrendered is permitted. Construing the phrase "scheduled as contractually due" for secured debts under § 707(b) (2) (A) (iii), the court found the statute not to be ambiguous, giving the phrase its ordinary meaning. A secured payment is contractually due on the date of the petition filing, even though the debtor may intend to surrender the collateral, and the liability on the debt may not be eliminated until discharge. The debtor may deduct the "average monthly payments on account of secured debt" payable over the 60 months, without regard to whether the debtor intends to surrender the home. As to vehicle expense, the court also holds that the debtor may deduct ownership costs for a vehicle even though there is no outstanding debt on the vehicle, following the Seventh Circuit decision, *In re Ross-Tousey,* 549 F.3d 1148 (7th Cir. 2008). The court notes that passing the means test by such deductions does not insulate the case from dismissal under § 707(b) (3). *In re Ralston,* 400 B.R. 854 (Bankr. M.D. Fla. 2009). *See, however, In re Rahman,* 400 B.R. 362 Bankr. E.D. N.Y. 2009) (In context of projected disposable income, debtor may not deduct secured debt payments on collateral proposed for surrender.).

As *Ross-Tousey* points out in its discussion, the appellate courts are divided on this issue, which typically arises in Chapter 13 cases involving disposable income issues, as follows: **Debtor may take the ownership deduction even when the vehicle is free and clear**-- *Ross-Tousey; Hildebrand v. Kimbro (In re Kimbro),* 389 B.R. 518 (B.A.P. 6th Cir. 2008); *Hildebrand v. Thomas (In re Thomas),* 395 B.R. 914 (B.A.P. 6th Cir. 2008) (debtors may deduct payments contractually obligated on petition date, notwithstanding later surrender); *Pearson v. Stewart (In re Pearson),* 390 B.R. 706 (B.A.P. 10th Cir. 2008); *see also, e.g., In re Hedge,* 394 B.R. 463 (Bankr. S.D. Ind. 2008); *In re Pearl,* 394 B.R. 309 (Bankr. N.D. N.Y. 2008). **Debtor may not take the ownership deduction**—*Ransom v. MBNA America Bank N.A. (In re Ransom),* 380 B.R. 799 (B.A.P. 9th Cir. 2007); *Babin v. Wilson (In re Wilson),* 383 B.R. 729 (B.A.P. 8th Cir. 2008) (suggesting that debtors owning high-mileage vehicles may be able to deduct $200 monthly operating expenses under IRS standards or may qualify for "special circumstances" deduction under § 707(b)(2)(B)); *see also, e.g., In re White,* 393 B.R. 436 (Bankr. N.D. Miss. 2008); *In re Coffin,* 396 B.R. 804 (Bankr. D. Me. 2008); *In re Hunt,* 2008 WL 5142183 (Bankr. S.D. Ind. Dec. 5, 2008).

Deduction of mortgage expense allowed when stay relief is granted. The debtor was permitted to deduct mortgage payments to which she was contractually obligated at filing for means test purposes, notwithstanding the court then granted stay relief to the creditor and the debtor's subsequent eviction. The court analyzes the effect of state law on the debtor's homestead interest at the time she filed: "This court agrees with the *Burmeister* [378 B.R. 2276 (Bankr. N.D. Ill. 2007)] line of cases that neither the Debtor's intent nor postpetition events affect the Debtor's right to include the monthly mortgage payment on the means test if the Debtor had a note in effect regarding that debt on the date she filed for bankruptcy relief." *In re Willette,* 395 B.R. 308, 326 (Bankr. D. Vt. 2008).

Preconfirmation Issues, Current Monthly Income and Disposable Income

Projected disposable income, what is the starting point? Examining "the proper way to calculate the 'projected disposable income' of an above-median Chapter 13 debtor under…BAPCPA," the Tenth Circuit adopted the "forward-looking approach" used by both the bankruptcy court and BAP, which is also the "method adopted by the majority of bankruptcy courts and bankruptcy appellate panels." *Hamilton v. Lanning (In re Lanning),* 545 F.3d 1269, 1270 (10th Cir. 2008). The debtor had an increase in income during the 6-month period prior to filing Chapter 13, showing on Form B22C monthly disposable income of $1,114.l98; however, her Schedules I and J reflected excess monthly income over expenses of only $149.03. The Circuit reviewed BAPCPA's amendments to § 1325(b) and related statutes, as well as prior court opinions construing disposable income, dividing them between the "forward-looking approach" and the "mechanical approach," with the latter primarily using Form B22C as providing presumptively correct income amounts. **Forward-looking courts include**: *Coop v. Frederickson (In re Frederickson),* 545 F.3d 652 (8th Cir. 2008) (Form B22C is starting point but actual income and expenses on Schedules I & J must be considered); *Hildebrand v. Petro (In re Petro),* 395 B.R. 369 (B.A.P. 6th Cir. 2008); *Kibbe v. Sumski (In re Kibbe),* 361 B.R. 302 (B.A.P. 1st Cir. 2007); s*ee also, In re Wilson,* 2008 WL 619196 (Bankr. M.D. N.C. March 3, 2008).

Certiorari had been sought but was denied in *Frederickson v. Coop,* 2009 WL 210498 (Mar. 23, 2009), where the Eighth Circuit held that projected disposable income is a starting point, subject to replacement by actual income, *Coop v. Frederickson (In re Frederickson),* 545 F.3d 652 (8t5h Cir. 2008), *cert. denied,* 2009 WL 2120498 (Mar. 23, 2009). The petition pointed out that circuit split exists on the issue. For a recent discussion of the "conclusive approach" found in *Maney v. Kagenveama (In re Kagenveama),* 541 F.3d 868 (9th Cir. 2008), the "presumptive approach" found in *Frederickson,* and adopting “harmonizing approach,” *see In re Johnson,* 400 B.R. 639 (Bankr. N.D. Ill. 2009). The *Johnson* court points out the conflict in definitions of “current monthly income” found in § 101(10A), the 6-month look-back, and § 1325(b), with the latter utilizing a deduction of projected expenses during an applicable commitment period, concluding that § 1325(b) is more specific and therefore governs the more general statute. “The end result is a synthesis of §§ 101(10A) and 1325(b) that measures the ‘current monthly income’ inclusions and exclusions of § 101(10A) projected to be received by the debtor during the applicable commitment period defined by § 1325(b), reduced by the necessary expenditures incurred by the debtor during that period.”

Mechanical approach courts are represented on the appellate level by *Maney v. Kagenveama (In re Kagenveama),* 541 F.3d 868 (9th Cir. 2008); *see also In re Smith,* 2008 WL 4964720 (Bankr. W.D. Wash. Nov. 14, 2008).

The *Lanning* court concludes that to make BAPCPA’s definition of “disposable income” make sense with “current monthly income” one must read “a presumption into the statute—that the defined term ‘disposable income’ is just the starting point—which can be rebutted by showing a substantial change in circumstances bearing on how much the debtor realistically can commit to repayment of unsecured creditors as of the effective date of the plan.” *Lanning*, 545 F.3d at 1278. The terms “’projected’ links ‘disposable income’ and ‘to be received in the applicable commitment period,’ requiring the debtor to commit all ‘disposable income’ (as defined by § 1325(b)(2) and its reliance on the definition of ‘current monthly income’) that is ‘projected…to be received in the applicable commitment period.’ Under this reading, the debtor’s actual circumstances at the time of plan confirmation are taken into account in order to ‘project’ (in other words, to ‘forecast’) how much income the debtor will actually receive during the commitment period, which, after deducting permitted expense, then ‘will be applied to make payments’ to the unsecured creditors, as the statute requires.” *Lanning*, 545 F.3d at 1279.

In contrast, the *Kagenveama* court reads § 1325(b)(2) to mean that “projected disposable income” is “disposable income” projected over the applicable commitment period; therefore, if projected disposable income is a negative number, there is no relevant applicable commitment period….’Projected’ is simply a modifier of the defined term ‘disposable income.’” 541 F.3d at 876.

See In re Almonte, 397 B.R. 659 (Bankr. E.D. N.Y. 2008), for a discussion of this issue and contrasting of the “starting point” views. The *Almonte* court refers to the *Lanning* decision as the “crystal ball approach,” rather than the “forward-looking" approach, using "a debtor's current monthly income as a starting point for calculating projected disposable income, subject to a showing of 'substantial change in circumstances.'…The crystal ball approach to 'projected disposable income' arguably furthers Congress's intent that a debtor commit disposable income to repayment of creditors without leading to the absurd result that a debtor be required to repay more than they can afford, or an equally unintended result that a debtor who *has* post-petition disposable income need not commit that disposable income to the repayment of unsecured creditors because they had little or no disposable income prior to the petition date." The *Almonte* court refers to the *Kagenveama* opinion as following a "rear view mirror approach," one that opens the door to a debtor with actual disposal income not having to pay anything to unsecured creditors. "The divergent views and interpretations of Section 1325(b)'s 'projected disposable income' evidenced by the 'crystal ball and 'rear view mirror' approaches are both good faith attempts to resolve this question in a manner that is consistent with the intent of the statute….[T]his court believes that the line of cases adopting the 'crystal ball' approach to projected disposable income is the correct interpretation of the statute when an objection to confirmation is filed under Section 1325(b)…."

Balloon payment of long term mortgage is not equal monthly amount. Citing other cases in agreement, the BAP holds that "by its very terms, a balloon payment is not equal to the payment that preceded it, and thus violates § 1325(a) (5) (B) (iii) (I) with respect to periodic payments on a secured claim." The debtor's plan proposed to make a balloon payment to satisfy the mortgage on nonresidential real estate near completion of the plan. The BAP also rejected the argument that prohibiting such payment nullifies § 1322(b) (2), which permits modification of mortgages other than on the debtor's principal residence (this mortgage was not protected by the anti-modification provision), with the BAP disagreeing with *In re Davis,* 343 B.R. 326 (Bankr. M.D. Fla. 2006): "[T]he idea that § 1322(b) (2) or (b) (5) is at odds with § 1325(a) (5) (B) (iii) (I) is simply wrong." *Hamilton v. Wells Fargo Bank, N.A. (In re Hamilton),* 401 B.R. 539 (B.A.P. 1st Cir. 2009). *Accord, Flynn v. Bankowski (In re Flynn),* 402 B.R. 437 (B.A.P. 1st Cir. 2009), where the BAP also noted that the Code and Rules contain no mechanism for a creditor's acceptance of a plan. While silence of a creditor that receives proper notice of a plan may constitute "implied" acceptance, such "implied consent requires, however, that the secured claim holder has received both proper and adequate notice and proper and adequate service. Proper and adequate notice is a highly factual inquiry and necessarily depends on the language in the plan and the context of the case." The record here did not permit the BAP to determine if notice and service were proper and adequate to imply acceptance.

Equal monthly payments need not begin with first plan payment. Reviewing two lines of authority, the court concludes that the position of *In re DeSardi,* 340 B.R. 790 (Bankr. S.D. Tex. 2006), is correct, that § 1325(a) (5) (B) (iii) (I) requires "payments to be equal once they begin, and to continue to be equal until they cease." This plan was not confirmed, however, because of lack of feasibility. *In re Butler,* 403 B.R. 5 (Bankr. W.D. Ark. 2009).

Debtor may not deduct payments on junior, wholly unsecured mortgage for disposable income purposes. Under Ninth Circuit authority that a wholly unsecured mortgage may be treated as unsecured in a plan, such a creditor does not fall within § 707(b) (2) (A) (iii) (I)'s term "secured creditor"; therefore, in the context of the trustee's objection to confirmation, the Chapter 13 debtor may not deduct payments for such mortgages in the determination of projected disposable income. The court declined to decide the broader issue of whether such deductions were proper for purposes of Chapter 7 eligibility. *In re Thissen,* 400 B.R. 776 (Bankr. E.D. Cal. 2009).

Debtor may deduct property taxes and insurance on residence. For projected disposable income purposes, above median debtor may deduct property taxes and homeowner's insurance that are contractually due under the mortgage; "a payment requirement in a mortgage that inures to the financial benefit of the lender is a payment 'to' that lender, as that term is used in 11 U.S.C. § 707(b)(2)(A)(iii)." *In re Bermann,* 399 B.R. 213 (Bankr. E.D. Wisc. 2009).

Relief from stay giving debtor time to sell property is not modification of mortgage. When debtor's plan proposed to give stay relief to mortgage creditor but delayed relief to permit sale of property, that provision doesn't violate § 1322(b)(2), which doesn't require maintenance of payments. The delay was for less time than state law would require for foreclosure, so creditor is not unduly delayed, distinguishing facts from *In re Proudfoot,* 144 B.R. 876 (B.A.P. 9th Cir. 1992). *In re Dunn,* 399 B.R. 909 (Bankr. W.D. Wash. 2009).

Accelerated payment of secured claims ahead of unsecured is not good faith. Confirmation is denied for lack of good faith when the plan proposed to pay secured claims before any distribution to unsecured creditors. Such preferential treatment is suspect in light of fact that debtors may convert the case after paying secured claims in full. *In re Pearson,* 398 B.R. 97 (Bankr. M.D. Ga. 2008).

Direct payment by debtor on ongoing mortgage is affirmed. Adopting the opinion of the BAP, *Cohen v. Lopez (In re Lopez),* 372 B.R. 40 (B.A.P. 9th Cir. 2007), the Ninth Circuit affirms the holding that a Chapter 13 debtor may act as disbursing agent on the long term mortgage, and BAPCPA did not alter that conclusion. Section 1326(c) provides that the trustee shall make plan payments, except as otherwise provided in the plan. The BAP had distinguished *Fulkrod v. Savage (In re Fulkrod),* 973 F.2d 801 (9th Cir. 1992), a Chapter 12 case in which dicta indicated that an impaired claim should be paid by the trustee, with the BAP stating that ongoing mortgage obligations were not modified by the plan and not impaired. *Cohen v. Lopez (In re Lopez),* 550 F.3d 1202 (9th Cir. 2008).

Under local rule, debtors fail to justify direct payment on mortgages. Under local rule, debtors who are current on mortgages at time of filing may continue paying directly, but debtors who are delinquent must make ongoing payments in the plan unless the court orders otherwise. Section 1326(c) "creates a presumption in favor of payments through the Trustee," and the trustee testified of experience demonstrating that debtors who were delinquent at filing often became delinquent postpetition, creating late charges, difficulties in record-keeping and post-discharge delinquencies when the trustee did not make the ongoing mortgage payments. These debtors failed to show that they would be able to keep the mortgage payments current, and feasibility was an issue. *In re Carey,* 2009 WL 613581 (Bankr. W.D. Mo. Mar. 9, 2009).

What is the applicable commitment period? Agreeing that the statutory language of § 1325 is "rather murky," the court concludes that the applicable commitment period is "pegged to a debtor's 'current monthly income'" but that "natural language of § 1325(b)(1)(B) sets forth only a requirement that a debtor make payments to unsecured creditors from projected disposable income received. It does not impose a required plan length….Section 1325(b)(1)(B) is a forward looking provision that does point to a temporal period of time that can be three or five years into the future. However, that temporal period is a reference to define the boundaries of the disposable income to be included in the plan. For example, the statute requires an above median debtor to provide for five years of projected disposable income in the plan. It does not require the plan to extend for any certain length of time." *In re Lopatka,* 400 B.R. 433 (Bankr. M.D. Pa. 2009).

Income of nonfiling spouse is included but deducted if not used regularly for household expenses. Although a debtor initially must include the nonfiling spouse's income in current monthly income, it is deducted if that income is not used regularly for the household expenses of the debtor or debtor's dependents. *In re Sharp,* 394 B.R. 207 (Bankr. C.D. Ill. 2008).

Current monthly income includes state unemployment compensation received in six-month look-back. When Chapter 13 debtor received unemployment compensation within the six months prepetition from the state rather than federal government, the benefit was not received under the Social Security Act; therefore, it is income used in CMI calculation. *In re Baden,* 396 B.R. 617 (Bankr. M.D. Pa. 2008).

Earned income credit portion of tax refund is current monthly income. That portion of a tax refund attributable to earned income credit and received within six-month window is income included in CMI. *In re Royal,* 2008 WL 4900527 (Bankr. N.D. Ill. Nov. 7, 2008).

"Derived" adds nothing to "received." Section 101(10A)'s definition of "current monthly income" uses both terms "derived" and "received," but "derived" adds no additional meaning to "received"; it is mere surplusage; "the court concludes that the definition of 'current monthly income'…refers to income received during the prescribed six-month period, and that no additional criterion that the income actually be earned during that period exists or was intended when BAPCPA was drafted and enacted." *In re Burrell,* 399 B.R. 620 (Bankr. C.D. Ill. 2008).

Hanging Paragraph Issues

Hanging paragraph is mandatory confirmation requirement. Bankruptcy court has no discretion to confirm a plan that proposes to bifurcate purchase money secured claim on 910 vehicle. The hanging paragraph of § 1325(a) is a mandatory requirement for confirmation. *Shaw v. Aurgroup Fin. Credit Union,* 552 F.3d 447 (6th Cir. 2009).

Surrender of 910 vehicle does not eliminate deficiency claim. The Eleventh Circuit has recently joined other circuits in holding that the debtor may not eliminate the car lender's unsecured deficiency claim by surrender of the vehicle purchased for personal use within 910 days of the bankruptcy filing. "A plain reading of the hanging paragraph makes clear that Congress intended to (and did) make Section 506(a) inapplicable to a 910 vehicle. In such a situation, we agree with the Seventh Circuit that 'by knocking out § 506, the hanging paragraph leaves the parties to their contractual entitlements." *DaimlerChrysler Fin. Servs. America LLC v. Barrett (In re Barrett),* 543 F.3d 1239, 1246 (11th Cir. 2008). The other circuits agreeing on the result, but with different rationale are:

Tidewater Fin. Co. v. Kenney, 531 F.3d 312 (4th Cir. 2008); *AmeriCredit Fin. Servs., Inc. v. Long (In re Long)*, 519 F.3d 288 (6th Cir. 2008); *In re Wright,* 492 F.3d 829 (7th Cir. 2007); *Capital One Auto Fin. V. Osborn*, 515 F.3d 817 (8th Cir. 2008); *AmeriCredit Fin. Servs., Inc. v. Moore,* 517 F.3d 987 (8th Cir. 2008); *DaimlerChrysler Fin. Servs. Ams. LLC v. Ballard (In re Ballard),* 526 F.3d 634 (10th Cir. 2008); *Wells Fargo Fin. Acceptance v. Rodriguez (In re Rodriguez),* 375 B.R. 535 (B.A.P. 9th Cir. 2007).

Negative Equity Issues. Christopher Frost, "Negative Equity and the Hanging Paragraph: What is a Purchase Money Security Interest and What Law Should Apply," 29 No. 3 Bankruptcy Law Letter (Thomson Reuters March 2009), available on WestLaw, concludes: **"**Regardless of one's view of the merits of these observations regarding Congress's intent, one thing seems clear--Congress enacted the hanging paragraph with bankruptcy law, not state law, in mind. An analysis that focuses on the use of the term "purchase-money security interest" in the context of the broader purposes of BAPCPA is likely to yield more satisfying results that an analysis that simply looks to the unrelated use of the term in the UCC. As the drafters of the UCC themselves recognized, their definition of the term purchase-money security interest has nothing to do with the fresh start policies underlying the Code. Even further afield are analyses that look beyond the UCC to state consumer disclosure statutes that are unrelated either to the UCC or the Code. These fragile interpretive strings cannot cover for the fact that Congress failed utterly to enact a provision that yields a clear and uncontroversial interpretation."

Negative equity: Dual status or transformation rule? Adopting a "dual status" rule, a panel of the Ninth Circuit BAP held that when the debtor trades in a vehicle, including in the new vehicle financing "negative equity" on the trade-in, the negative equity is not protected from stripping by the hanging paragraph of § 1325(a), but the remainder of the financing, the actual purchase money security interest, continues to be protected. That paragraph's use of "purchase money security interest" is construed consistently with the way that term is used in the Uniform Commercial Code, and the term "negative equity" is not equivalent to the other types of expenses incurred when a creditor acquires rights in collateral, with the panel citing UCC § 9-103, Off. Comment 3. At least as the term "price" is used in California's version of UCC § 9-103(a)(1), negative equity is not included in "price." Concluding that the creditor's financing of negative equity is not protected from modification, the panel reviews the two views that have been taken by the courts. The "transformation" rule transforms the entire financing into a non-PMSI, *see, e.g., In re Burt,* 378 B.R. 352 (Bankr. D. Utah 2007); the "dual status" rule allows the financing to be divided into its PMSI and non-PMSI portions. "Adopting the Dual Status Rule would treat debtors who contract separately to pay off a deficiency on a trade-in the same as those who roll that deficiency into the new car purchase. It would ensure that whether assumption of unsecured debt is paid in full in a chapter 13 case turns not on the form in which the debt was satisfied but on the substance of the transaction." *Americredit Fin. Servs., Inc. v. Penrod (In re Penrod),* 392 B.R. 835, 859-60 (B.A.P. 9th Cir. 2008). *See also, In re McCauley,* 2008 WL 5104235 (Bankr. D. Colo. Nov. 20, 2008) (applying dual status); *In re Hall,* 2008 WL 5102274 (Bankr. S.D. W.Va. Dec. 3, 2008) (applying dual status); *In re Hargrove,* 2008 WL 5170399 (Bankr. M.D. Tenn. Dec. 10, 2008) (applying dual status to gap insurance and negative equity); *In re Crawford,* 397 B.R. 461 (Bankr. E.D. Wis. 2008) (negative equity not PMSI). *Compare In re Carlton,* 2008 WL 5045908 (Bankr. M.D. Ala. Nov. 24, 2008) (under *In re Graupner,* 537 F.3d 1295 (11th Cir. 2008), negative equity financed in new purchase is part of PMSI). The First Circuit has certified the issue of whether negative equity is included within PMSI under New York's UCC to the New York Court of Appeals. *Reiber v. GMAC, LLC (In re Peaslee),* 547 F.3d 177 (1st Cir. Oct. 2, 2008).

Fourth Circuit holds negative equity protected by hanging paragraph. Section 1325(a)'s hanging paragraph's protection of purchase moneys security interests includes negative equity financed as part of a trade-in; negative equity financing is a crucial part of the purchase transaction. *Wells Fargo Fin. Acceptance v. Price (In re Price),* 562 F.3d 618 (4th Cir. 2009).

Negative equity and gap insurance financing are part of purchase price under state law. Looking to definition of "cash sale price" under Illinois Motor Vehicle Retail Installment Sales Act, state law includes within PMSI amounts for taxes, fees, gap insurance, service contracts and negative equity. Comment to Illinois UCC also includes those items within "price." Court cites opinions going both ways on negative equity. *In re Smith,* 401 B.R. 343 (Bankr. S.D. Ill. 2008).

Till interest applies to 910 creditor. Even though creditor is protected from cramdown by hanging paragraph, *Till* interest rate calculation still applies to such creditor. Here, contractual interest rate is less than *Till* allows. *Ford Motor Credit Co., LLC v. Robertson,* 396 B.R. 672 (S.D. W.Va. 2008).

Vehicle not purchased for personal use is not "any other thing of value." Agreeing with the majority of courts addressing the issue, when the debtor's purchase of a vehicle was not for personal use, therefore not covered by the first clause of § 1325(a)'s hanging paragraph, the court held that the vehicle does not fall with the second clause for "collateral…consist[ing] of any other thing of value….The result hinges on the meaning of 'other thing of value' as that term is used in the statute….First, since the 'hanging paragraph' creates an exception to the general right of a debtor to value secured claims under § 506, any ambiguity should be resolved in favor of limiting, not expanding the exception. Second, the scant legislative history supports the majority interpretation." *In re Horton,* 398 B.R. 73 (Bankr. S.D. Fla. 2008); *contra In re Littlefield,* 388 B.R. 1 (Bankr. D. Me. 2008).

Binding Effect of Confirmation

Disagreeing with other circuits and its own BAP, a panel of the Ninth Circuit concluded that when the student loan creditor had notice of a plan providing for discharge of a student loan, without the filing of a separate adversary proceeding, and the creditor took no action to object to confirmation or otherwise seek timely relief from confirmation, the creditor is bound by § 1327(a)'s effect of confirmation. The panel sees no reason to recommend *en banc* reconsideration of *Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee),* 193 F.3d 1083 (9th Cir. 1999). Key to the decision is the panel's distinction between what other circuits have seen as a due process problem when the debtor doesn't follow the adversary proceeding route and this panel's view that notice of a plan means what § 1327(a) says—binding effect. The opposing circuits "divine some sort of conflict between the Bankruptcy Code's finality provision, 11 U.S.C. § 1327(a), and those provisions of the Code and Rules that call for an adversary proceeding before a student loan debt may be discharged. We see no such conflict; both provisions can operate fully, within their proper spheres." *Espinosa v. United Student Aid Funds, Inc.,* 553 F.3d 1193 (9th Cir. 2008). Assuming proper notice of the plan proposing discharge, as existed here, "the creditor can objet to the plan until the debtor shows undue hardship in an adversary proceeding." *Id.* Even if the confirmed plan contains provisions that are not permitted by the Code, the finality of confirmation recognizes that such errors may be waived by creditors who have notice and opportunity to object.

Res judicata is not really the issue for this panel, since that doctrine applies to the preclusive effect of a judgment given in another case, not one in the same case. Rule 60(b)(4) or (6) may provide a remedy for setting aside a judgment, but only under the limitations of those Rules, with the panel finding that notice to the creditor of the plan was constitutionally adequate to overcome any due process argument: "The three circuits that have held that the creditor is denied due process in circumstances such as these appear to have a different view of what due process requires. As best we can follow their reasoning, it is that a creditor who is entitled to heightened notice by statute is also entitled to such heightened notice as a matter of due process….To begin with, we find it both wrong and dangerous to hold that the standard for what amounts to constitutional adequate notice can be changed by legislation.…Even if Congress could affect the constitutional standard, it didn't do so here: Congress made it quite clear that a creditor need only get ordinary notice of a Chapter 13 plan to be bound by its terms. That Congress provided heightened notice requirements for an adversary proceeding…is of no consequence….We reject the idea that a creditor who is in the business of administering student loans has a *constitutional* right to ignore a properly served notice that clearly specifies that its debt will be discharged on successful completion of the plan." *Id.* at *8-9. The panel capped its opinion by overruling those bankruptcy opinions in the Ninth Circuit that denied confirmation to plans providing for discharge by declaration, even when properly noticed, as well as those sanctioning attorneys for including such provisions in plans. In the Ninth Circuit, discharge by declaration is revived and a clear circuit split is set up. *Espinosa v. United Student Aid Funds, Inc.,* 553 F.3d 1193 (9th Cir. 2008), *amending prior opinion* at 2008 WL 4426634 (9th Cir. Oct. 2, 2008).

***Espinosa* applied by district court.** Refusing to dismiss the debtor's complaint to recover funds collected by student loan creditors on debts discharged-by-declaration in completed plan, the district court applies *Espinosa v. United Student Aid Funds, Inc.,* 553 F.3d 1193 (9th Cir. 2008), where the plan provided for discharge of student debt, notice was given of the plan and no objections were filed. *Needelman v. Penn. Higher Educ. Assistance Agency,* 399 B.R. 695 (S.D. Cal. 2009).

Confirmed plan curing mortgage could not be modified to strip down. The debtor and mortgage creditor had stipulated that the creditor was undersecured, but the debtor's confirmed plan did not rely on that status, instead providing for curing of the arrearage and maintenance of the mortgage payments "outside the plan." After confirmation, the property appreciated in value, and the debtor moved to modify the plan to adopt the stipulation and to pay only the stripped down amount of the secured claim**.** The district court held that the proposed modification violated § 1329(a) (1)'s provisions for changing the amount of payments to a "class," with this modification affecting only a single creditor. *Columbia Nat'l, Inc. v. Brown (In re Brown),* 399 B.R. 574 (D. Conn. 2008).

Section 1330 trumps Rule relief from confirmation. Relying on *Mason v. Young (In re Mason),* 237 B.R. 791 (B.A.P. 10th Cir. 1999), § 1330 is exclusive means for obtaining relief from confirmation, and Rules 9023 and 9024 are applicable only in instances where adequacy of notice of the plan is at issue. *In re Smith,* 2009 WL 243396 (Bankr. D. Kan. Jan. 27, 2009).

Modification of plan

Trustee has standing to object to debtor's reclassification of claim. Under § 1302(b) (3)'s duty to properly disburse payment of claims, the Chapter 13 trustee has standing to object to the debtor's motion to reclassify a claim; here, the debtor moved to reclassify a secured claim to unsecured, asserting that the documentation with the proof of claim did not show a properly perfected security interest in an ATV, and the trustee objected on the basis that the debtor had executed a purchase money security interest. "Because a trustee must be able to verify that secured claims are, in fact, secured, it necessarily follows that a trustee has standing to object when a debtor attempts to reclassify a secured claim as an unsecured claim." The Second Circuit cites the Fifth and Ninth Circuits as in agreement. *Overbaugh v. Household Bank N.A. (In re Overbaugh),* 559 F.3d 125 (2d Cir. 2009).

Discharge

Interpretation of § 1328(f)'s 4-year bar. Concluding "that § 1328(f) sets a date-of-filing trigger," the debtor who filed a prior Chapter 7 case more than four years before filing the current Chapter 13 case is eligible for Chapter 13 discharge, even though the Chapter 7 discharge was granted within that four-year period. The focus of the opinion is on when the clock begins to run, the date of filing the prior case or the date of discharge. The Chapter 13 trustee objected to the debtor receiving a second discharge, but the Sixth Circuit panel applied "the rule of last antecedent" to create a presumption that "qualifying phrases attach only to the nearest available target…Read with this rule in mind, § 1328(f)(1)'s pieces fit sensibly together, each phrase modifying the one that comes before it and each phrase having an independent task to do. The 'in a case filed under' phrase that begins subsection (f)(1) modifies 'received a discharge,' and the phrase that frames the four-year window—'during the 4-year period preceding [the second petition]'—modifies the 'filed under' fragment that comes immediately before it." The panel cited *Bateman v. Bateman (In re Bateman),* 515 F.3d 272 (4th Cir. 2008), as similarly interpreting § 1328(f)(2)'s two-year period between Chapter 13 discharges. *Carroll v. Sanders (In re Sanders),* 551 F.3d 397 (6th Cir. 2008).

Interpretation of § 1328(f)'s 2-year bar. Another BAP applied § 1328(f)(2)'s bar on discharge within two years of receiving a prior Chapter 13 discharge consistently with *Bateman* and *Sanders,* finding "no exceptions to the plain meaning of § 1328(f) that would cause us to apply the statute other than as written….As such, we conclude that the provisions of the statute dictate that the period between the first and second cases must be calculated as written, from the date of filing to the date of filing." *Gagne v. Fessenden (In re Gagne),* 394 B.R. 219 (B.A.P. 1st Cir. 2008).

Determination of undue hardship discharge of student loan debt is ripe prior to plan completion. Discussing the "two components of the ripeness doctrine: constitutional ripeness and prudential ripeness," the Sixth Circuit BAP held that the debtor's complaint to determine discharge of a student loan on the basis of undue hardship was ripe prior to plan completion, and "the contingency of [the debtor's] discharge does not create a constitutional ripeness impediment to the bankruptcy court's resolution of this adversary proceeding….Delay of the dischargeability determination would deprive [the debtor] of the opportunity to pay any nondischargeable student loan debt and attorneys fees related to the adversary proceeding through the chapter 13 plan as well as potential loss of the automatic stay." *Cassim v. Educ. Credit Mgmt. Corp. (In re Cassim),* 395 B.R. 907, 911-12 (B.A.P. 6th Cir. 2008). The panel distinguished *Bender v. Educ. Credit Mgmt. Corp. (In re Bender),* 368 F.3d 846 (8th Cir. 2004), as being based on prudential ripeness rather than constitutional ripeness, while this appeal was argued on the basis of constitutional ripeness alone. **See also** *Educational Credit Management Corp. v. Coleman (In re Coleman),* 560 F.3d 1000 (9th Cir. 2009). Although the Chapter 13 debtor's discharge will not occur until plan completion, that does not defeat constitutional and prudential ripeness of the debtor's complaint to determine undue hardship of student loan debt earlier in the case.

Mortgage Issues

First Circuit finds plan not specific on plan payment application. Reversing an award of damages under § 105(a) for the creditor's violation of § 1322(b) in failing to properly apply mortgage payments under the confirmed plan, the Circuit found insufficient specificity in the plan to impose on the creditor liability for failing to distinguish between and apply prepetition arrearage and postpetition ongoing mortgage payments. Section 1322(b) concerns permissive plan provisions, not mandatory ones. *Ameriquest Mortgage Co. v. Nosek (In re Nosek),* 2008 WL 4445707 (1st Cir. Oct. 3, 2008). *Compare Rodriquez v. Countrywide Home Loans, Inc. (In re Rodriguez),* 2008 WL 4371669 (Bankr S.D. Tex. Sept. 18, 2008) (discussing the binding effect of confirmation as imposing obligations on the lender to comply with "the allocation scheme provided for by the plan); and *In re Aldrich,* 2008 WL 4185958 (Bankr. N.D. Iowa Sept. 4, 2008) (some plan restrictions on mortgage creditor violate antimodification provision in Code).

Antimodification protection requires real property. The amendment to the definition of the debtor's principal residence in § 101(13A) did not change the requirement in § 1322(b) (2) that only property secured by real estate is protected from modification. Here, mobile home creditor was not protected. *In re Ennis,* 558 F.3d 343 (4th Cir. 2009).

TILA "tolerance for accuracy" defense applied. In the Chapter 13 debtor's adversary proceeding alleging failure to receive her disclosure and seeking rescission, under the Truth in Lending Act, the Third Circuit found the application of the Act's "tolerance for accuracy' defense to be a general one that may be raised by the defendant through its reliance on the TILA instead of affirmatively pleading under FED. R. CIV. P. 8(c). "Option One's general denial that it committed any disclosure violations was sufficient to preserve the tolerance issue. Given that denial, and given the absence of any real prejudice suffered by [the plaintiff], the Bankruptcy Court's sua sponte application of [15 U.S.C.] § 1605(f) was not improper." *Sterten v. Option One Mortgage Corp. (In re Sterten),* 546 F.3d 278, 288 (3d Cir. 2008).

Debtor not entitled under § 108(a) to equitably toll TILA limitation. Under § 108(a)'s language, the trustee may commence a time-barred cause of action within its two-year extension, but the debtor is not given that benefit. When the debtor alleged that the mortgagee violated Truth in Lending Act but that Act's one-year limitation had expired, bankruptcy filing didn't save the action. Section 108(a) is intended to benefit the bankruptcy estate. *Roach v. Option One Mortgage Corp.,* 598 F.Supp.2d 741 (E.D. Va. 2009).

U.S. Trustee has standing to pursue discovery from mortgage creditor. Under § 307, the U.S. Trustee has standing to discover the mortgage creditor's practices in Chapter 13 cases. The opinion adopts the reasoning of *In re Countrywide Home Loans, Inc.,* 384 B.R. 373 (Bankr. W.D. Pa. 2008), and cites the majority of opinions in accord, as well as those disagreeing on standing. *In re Wilson,* 2009 WL 304672 (Bankr. E.D. La. Feb. 6, 2009).

Notice to mortgage creditor that mortgage is current is insufficient. When the motion deeming mortgage to be current upon plan completion was not served under Rule 7004(b)(3) to the attention of an officer, managing or general agent or other authorized agent, the creditor is given relief from the order. An attorney who had appeared in the case for the creditor did not sufficiently participate in the case to justify implied authority to accept service. *In re Ochoa,* 399 B.R. 563 (Bankr. S.D. Fla. 2009).

Requiring mortgage creditor to obtain approval before assessing fees is improper modification. Disagreeing with some courts and citing others in agreement, Rule 2016 does not require the mortgage creditor to obtain court approval before assessing attorney fees postpetition, and putting such requirement in plan is a modification of the creditor's contractual right. However, plan requirement that creditor apply plan payments in allocation between prepetition arrearage and ongoing obligation is not a contractual modification; rather, that provision states the statutory cure provisions. *In re Booth,* 399 B.R. 316 (Bankr. E.D. Ark. 2009).

Plan ambiguous as to stay remaining in effect until resolution of TILA claims. Confirmed plan provided for litigation of debtor's recission claims under TILA in state court, that mortgage would be paid outside the plan after conclusion of that litigation, and that automatic stay would remain until "resolution" of that litigation. The court reviews principles for the stay to remain in effect after confirmation, and the effect of § 1327(b)'s vesting, along with § 362(c) (1)'s termination of the stay as to property revested in the debtor. Since this plan did not include any terms for payment of the mortgage, the "outside the plan" language did not provide for the mortgage claim for purposes of § 362(d) (1)'s adequate protection requirement. Since the plan did not provide for the mortgage claim and the debtor failed to make periodic payments on the mortgage or to otherwise adequately protect the creditor, the mortgage creditor is entitled to stay relief under § 362(d)(1). *In re Stuart,* 402 B.R. 111 (Bankr. E.D. Pa. 2009).

Loan servicer doesn't violate stay by filing proof of claim for increased postpetition mortgage obligations under loan contract. *See* discussion of *Campbell v. Countrywide Home Loan, Inc.,* 2008 WL 4542843 (5th Cir. Oct. 13, 2008), under **Automatic Stay.**

Debtors are bound by confirmation from seeking disgorgement of excess interest. On appeal in complaints filed by Chapter 13 debtors, the district court affirmed the holding that § 1327(a) binds the debtors, preventing them from seeking disgorgement of what they now contend was overpayment of interest to the mortgage creditors. The debtors in their confirmed plans had proposed to pay the interest now subject to attack under their argument that § 1322(e) was a mandatory provision that should have precluded interest on the curing of their mortgages. The district court did not reach the issue of whether that section was mandatory or permissive, instead holding that "nothing in § 1322(e) prevents the bankruptcy court from holding the debtors to their own proposals." *Ruhl v. HSBC Mortgage Services, Inc.,* 399 B.R. 40 (E.D. Wis. 2008).

Mortgage creditor's failure to properly apply payments violates § 1322(b)(5) cure. When the creditor incorrectly applied postpetition contractual payments to prepetition interest and to oldest installment due, plan provisions for curing prepetition default were not followed; creditor failed to recognize that confirmed plan divided debt into two claims—ongoing mortgage and prepetition arrearage. Purpose of confirmed plan is to bring mortgage current, and creditor is required to make corrections to its accounting. *Boday v. Franklin Credit Mgmt. Corp. (In re Boday),* 397 B.R. 846 (Bankr. N.D. Ohio 2008).

U.S. Trustee fails to state cause of action for monetary damages. Although the court has § 105 authority to sanction abuse of process and abusive litigation, U.S. Trustee's complaint against Countrywide Home Loans failed to state cause of action for monetary damages, when the U.S. Trustee suffered no damage; U.S. Trustee's statutory authorization doesn't include pursuing punitive sanctions on behalf of the public. *Walton v. Countrywide Home Loans, Inc. (In re Sanchez),* 2008 WL 4467207 (Bankr. S.D. Fla. Oct. 2, 2008); *rev'd and remanded,* No. 08-23337 (S.D. Fal. June 9, 2009) (concluding that U.S. Trustee could recover monetary sanctions and injunctive relief).

Dismissal

Case properly dismissed on debtor's failure to file payment advices. The bankruptcy court properly dismissed the Chapter 13 case when the debtor failed to comply with § 521(a) (1) (B) (iv)'s requirement to file payment advices within 15 days of filing the case. "The statute is clear that, if such information is not timely filed, the case is subject to dismissal, whether 'automatic' or by court order," with the Circuit finding it unnecessary to address whether automatic dismissal is required. *In re Daniel,* 2009 WL 382434 (10th Cir. Feb. 17, 2009) (unpublished).

No absolute right to voluntarily dismiss Chapter 13 case. After failing to turn over arbitration awards to the trustee, the bankruptcy court sua sponte converted the case to Chapter 7, but before the conversion order was entered, the debtor voluntarily moved to dismiss the case, with the Ninth Circuit applying the rationale of *Marrama v. Citizens Bank of Massachusetts,* 549 U.S. 365, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007), to hold “that the debtor’s right of voluntary dismissal under § 1307(b) is not absolute, but is qualified by the authority of a bankruptcy court to deny dismissal on grounds of bad-faith conduct or ‘to prevent an abuse of process.’ 11 U.S.C. § 105(a).” *Rosson v. Fitzgerald (In re Rosson),* 545 F.3d 764, 774 (9th Cir. 2008); *accord In re Letterese,* 397 B.R. 507 (Bankr. S.D. Fla. 2008).

Case is dismissed for failure to file tax returns when trustee doesn’t hold open § 341 meeting. The Chapter 13 debtor failed to file tax return for a prepetition tax year, as required by § 1308, and the U.S. Trustee moved to dismiss the case. (The debtor argued that she had obtained an IRS extension to file and that § 1308 was inapplicable.) Addressing the issue of what § 1307(e)’s dismissal provisions require and what § 1308(b) (1) means by the trustee “hold[ing] open” the § 341 meeting, the BAP reviews cases and authority construing § 1308(b), concluding that the phase “’the trustee may hold open’…requires the trustee to exercise discretion and take an affirmative step to hold the meeting open for a finite period of time.” Here, the trustee merely opined that the meeting was held open because she did not announce a conclusion of the meeting. “The trustee gave no indication that she had affirmatively exercised any discretion with respect to the meeting or that she had taken any steps to hold the meeting open.” As to the debtor’s argument concerning an IRS automatic extension to file the return, § 1308(a) controls—the return was due on or before the meeting, unless the trustee took the affirmative step of holding open the meeting. Under these circumstances, § 1307(e) mandates dismissal of the case upon the U.S. Trustee’s motion. *United States v. Cushing (In re Cushing),* 401 B.R. 528 (B.A.P. 1st Cir. 2009).

Undistributed funds are not paid to debtor after dismissal. After the confirmed-plan case was dismissed, which followed the pro se debtor’s refusal to pay a sanction awarded to a charter school as a result of the debtor’s “acrimonious” and frivolous litigation, the trustee moved to pay $1,267.21 on hand to the holder of the sanction award, and the debtor objected. Upon the debtor’s failure to appear at the hearing, the bankruptcy court ordered the funds paid, less trustee commission, to the sanction claimant. The BAP affirmed, holding that the debtor’s failure to appear was sufficient reason. *Stevenson v. Bankowski (In re Stevenson),* 399 B.R. 289 (B.A.P. 1st Cir. 2009).

Creditor with disallowed claim has standing to move for bad faith dismissal after confirmation in pre-BAPCPA case. Although the creditor's claim had been disallowed on the trustee's time-barred objection, the creditor was still a party in interest with standing to move for case dismissal, and the confirmation order in pre-BAPCPA case did not bar dismissal motion based on debtor's bad faith, with the BAP concluding that the binding effect of confirmation did not bar the motion since prior to BAPCPA amendments the bankruptcy court was not required to make a finding that the debtor filed the case in good faith as a part of its confirmation order. "The Bankruptcy Code has always contained [the provision that the plan be proposed in good faith] and dictated that it be met in order that a Chapter 13 plan be confirmed….But [the] requirement [that the case be filed in good faith] was not applicable to this pre-BAPCPA case. When confirming the Chapter 13 plan in this case, the Debtor's good faith in filing her petition was nether raised no litigated, nor was the bankruptcy court required to make that determination. Accordingly neither claim nor issue preclusion apply." *Martinez v. Arce (In re Martinez),* 397 B.R. 158 (B.A.P. 1st Cir. 2008).

<u>Claims procedure</u>

Claims allowance process trumps Fair Debt Collections Practices Act complaint. Reversing the bankruptcy court, the Ninth Circuit BAP held that claims brought by the Chapter 13 debtor under Washington's Consumer Protection Act for the creditor's filing of proofs of claim on time-barred debts were preempted by the Code's claims process, and the FDCPA has no application in the claims process. Objecting to a claim as being time-barred under state law is a simple process for debtors. The concurring judge observed that the act of filing a proof of claim is not a debt collection activity under the FDCPA. *B-Real, LLC v. Chaussee (In re Chaussee),* 399 B.R. 225 (B.A.P. 9th Cir. 2008).

When the debtors alleged violations of FDCPA related to creditor's filing of proof of claim, court holds that claims allowance process trumps the FDCPA, limiting application of that Act in bankruptcy cases to situations involving automatic stay violations or discharge issues. *Pariseau v. Asset Acceptance, LLC (In re Pariseau),* 395 B.R. 492 (Bankr. M.D. Fla. 2008).

Claims bar date reset upon reinstatement of dismissed case. Acknowledging that "Rule 9006(b) (3) appears to unambiguously preclude any equitable discretion on the part of a bankruptcy court to extend or toll [the Rule 3002(c)] deadlines," the court applied rationale from its Fifth Circuit authority under Rules 4004 and 4007, to "nullify original case deadlines and recalculate them when there has been the extenuating circumstance of disruption of a case….This court holds that *where a case is disrupted*, such as through a stay or dismissal, and a proof of claim deadline runs prior to the reinstatement of the case, a court has the power to nullify the original proof of claim deadline and recalculate it." *In re Gulley*, 400 B.R. 529 (Bankr. N.D. Tex. 2009) (citing *Coston v. Bank of Malvern*, 987 F.2d 1096 (5th Cir. 1992) (approving nullification and resetting of deadlines under Rules 4004 and 4007) and *State Bank & Trust, N.A. v. Dunlap (In re Dunlap)*, 217 F.3d 311 (5th Cir. 2000) (approving resetting of § 341 meeting and resulting Rule 4007 deadline when case was dismissed in error).

Debtor has no private right of action arising from creditor's proof of claim. The debtor objected to creditor's electronic proof of claim and moved to redact full social security number and birth date that were included in proof of claim attachments. The court ordered that all attachments to the proof of claim be removed from the ECF system, and the debtor then filed a complaint that alleged multiple violations for the creditor's failure to redact privacy-protected information. Bankruptcy Rule 9037 addresses privacy protections concerning filings made with the court, and that Rule's remedies had already been applied through the order removing the offending attachments. The court found no private right of action under § 107, which provides for public access to court records but also protects an individual's privacy in certain respects. The legal sufficiency of the proof of claim is not otherwise attacked by the debtor. No private right of action existed under the Gramm-Leach-Bliley Act or the E-Government Act of 2002. Section 105 does not create a private right of action that does not otherwise exist. The debtor's allegation of negligent infliction of emotional distress is dismissed also, for failure to sufficiently state a claim for that tort. The only action surviving dismissal is the debtor's claim for a contempt finding; the court has authority under § 105(a) for contempt if the ultimate finding is that creditor violated § 107. *French v. American General Fin. Sers. (In re French),* 401 B.R. 295 (Bankr. E.D. Tenn. 2009).

Creditors may have standing to object to other creditor's claims. The Chapter 7 debtor typically lacks standing to object to creditors' claims, but creditors have a pecuniary interest, giving standing to object as parties in interest, if there either is no trustee appointed or the trustee refuses to act. *In re Ulz,* 401 B.R. 321 (Bankr. N.D. Ill. 2009).

Debtor's objection to claim sustained when state court lacked personal jurisdiction. Although state court had entered default judgment to creditor, that court lacked personal jurisdiction when the service of process was improper, and the bankruptcy court was not required to give full faith and credit to the judgment. The debtor's objection to the claim established that the creditor never had a contractual relationship with the debtor, making the debt unenforceable under state law. *In re Hall,* 403 B.R. 224 (Bankr. D. Conn. 2009).

How much documentation is required? Citing *In re Kinkaid,* 388 B.R. 610 (Bankr. E.D. Pa. 2008), one court holds that all Bankruptcy Rule 3001 requires is writing to show the claimant acquired the claim, not that the claimant have proof beyond question that it holds the claim. *In re Cleveland,* 396 B.R. 83 (Bankr. N.D. Okla. 2008). *Compare In re Samson,* 392 B.R. 724 (Bankr. N.D. Ohio 2008) (adopting *B-Line, LLC v. Kirkland (In re Kirkland),* 379 B.R. 341 (B.A.P. 10th Cir. 2007) and finding sufficient documentation for prima facie validity); *B-Real, LLC v. Melillo (In re Melillo),* 392 B.R. 1 (B.A.P. 1st Cir. 2008) (assignee's documentation insufficient); *Stauder v. eCast Settlement Corp. (In re Stauder),* 396 B.R. 609 (Bankr. M.D. Pa. 2008) (finding documentation insufficient to establish prima facie validity); and *see In re Andrews,* 394 B.R. 384 (Bankr. E.D. N.C. 2008) (Judge Small suggests need for local and national rules addressing claim documentation).

Amending claims to add documentation comes too late. Another court rejects the assignee's amendment of its proof of claim on the day of the objection hearing, also holding that Texas law requires a creditor to produce evidence of an enforceable contract; therefore, insufficient documentation of ownership of the claim results in disallowance. *In re Gilbreath,* 395 B.R. 356 (Bankr. S.D. Tex. 2008). *Compare In re Fleming,* 2008 WL 4736269 (Bankr. E.D. Va. Oct. 15, 2008) (amended claim had sufficient documentation to show assignment).

Jurisdiction and Court Powers

Bankruptcy court has authority to suspend attorney. Bankruptcy court has inherent authority under § 105(a) to sanction an attorney, including suspension from practice in all bankruptcy courts in the district; however, remand is ordered for the bankruptcy court to consider the reasonableness of six-month suspension, using ABA standards, as required by prior Ninth Circuit BAP authority, *In re Lehtinen,* 332 B.R. 404 (B.A.P. 9th Cir. 2005) and *In re Crayton,* 192 B.R. 970 (B.A.P. 9th Cir. 1996). *In re Brooks-Hamilton,* 400 B.R. 238 (B.A.P. 9th Cir. 2009).

Debtor forfeits exclusive bankruptcy court jurisdiction by failing to schedule creditor. When the debtor failed to schedule a known creditor or to otherwise notify that creditor of the bankruptcy filing, the debtor forfeited the right to have a dischargeability determination made only by the bankruptcy court, citing *In re Franklin,* 179 B.R. 913 (B.A.P. 9th Cir. 1995). After the debtor received a discharge, the plaintiff sued him and other defendants in state court for Fair Debt Collection Practices Act violations, related to collection and garnishment on a judgment that had been set aside, and the action was removed to U.S. District Court. The debtor, a former collections manager, did not amend Chapter 7 schedules to add the plaintiff after the action was filed. *Johnson v. JP Morgan Chase Bank, et al.,* 395 B.R. 442 (E.D. Cal. 2008).

Appeals

Payment by IRS of refunds after denial of stay relief for setoff did not moot appeal. The bankruptcy court denied motion by IRS for stay relief to permit set off against repetition tax refunds, and by administrative mistake IRS paid the refunds to the debtor, but the BAP holds that this payment did not make IRS's appeal constitutionally or equitably moot. Under Ninth Circuit authority, the appellate court may still fashion an effective remedy when payment has been made to a party in the appeal. The fact that IRS did not obtain a stay pending appeal doesn't prevent hearing the appeal, when the payment was made by administrative error. The BAP rejects contrary authority from the Eighth Circuit BAP, *IRS v. Ealy (In re Ealy)*, 396 B.R. 20 (B.A.P. 8th Cir. 2008), where that court held that the payment destroyed mutuality of debt. The Ninth Circuit BAP commented that *Ealy* "summarily ignores basic principles that underlie the doctrine of constitutional mootness." *United States v. Gould (In re Gould),* 401 B.R. 415 (B.A.P. 9th Cir. 2009).

Professionals

$1,000 per motion sanction against law firm filing bad faith motions for stay relief. Finding that the law firm repeatedly filed, and then withdrew, stay relief motions with improper purpose and in bad faith, sanctions of $1,000 per motion, for a total of $21,000 were imposed. Over a five month period, the firm filed 41 stay relief motions for mortgage creditors, but withdrew the motions before scheduled hearings; a show cause order was entered as to 21 motions, asking the firm to demonstrate that it intended to pursue those to hearing, and the court found a pattern of abusive filings with no intent to proceed to hearing.

The 21 filings were in violation of Rule 9011(b) (3)'s requirement for evidentiary support. *In re Cabrera-Mejia,* 402 B.R. 335 (Bankr. C.D. Cal. 2008).

Fees

Fee application filing eliminates option of standard fee. When the bankruptcy court reduced the requested fee, making findings of excessive time, the debtor's attorney lost the opportunity to ask for "at a minimum [the] standard" or no-look fee. *Colpitts v. Eck (In re Rogers),* 401 B.R. 490 (B.A.P. 10th Cir. 2009).

Disgorgement of $17,000 fee ordered. Where the debtor's attorney had a pattern of filing false Rule 2016(b) disclosures, misrepresentation of fee justifies disgorgement of $17,000 fee. *In re Jackson,* 401 B.R. 333 (Bankr. N.D. Ill. 2009).

Chapter 7 debtors are "prevailing parties" under Equal Access to Justice Act. When the U.S. Trustee moved to dismiss under § 707(b), to which the debtors objected, with the motion withdrawn and the debtors receiving a discharge, the debtors sought attorney fees under 28 U.S.C. § 2412 for defending the dismissal motion. Applying the language of the Equal Access to Justice Act to "the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his or her official capacity in any court having jurisdiction of such action[,]" the bankruptcy court concluded that debtors may be "prevailing parties" for purposes of the Act's fee shifting; however, further hearing on whether fees are justified under the Act are set. *In re Mendez,* No. 7-07-11092 SA, 2008 WL _______ (Bankr. D. N.M. Sept. 26,2008).