

# CBAR

## Consumer Bankruptcy Abstracts & Research:

November 30, 2010

## **About *Consumer Bankruptcy Abstracts & Research***

*Consumer Bankruptcy Abstracts & Research (CBAR)* (previously *Bankruptcy Abstracts*) provides comprehensive coverage of written opinions released in Chapter 7 and 13 consumer bankruptcy cases. While the newsletter has a focus on issues that arise under BAPCPA, the newsletter also collects cases on a wide range of other issues important to consumer bankruptcy practitioners. Because the editor retrieves opinions directly from each court's website, the newsletter discusses both published and unpublished opinions, including many not available on commercial databases.

*CBAR* is published twice monthly, on the 15<sup>th</sup> and the 30<sup>th</sup>, in electronic form only. Each issue abstracts recent consumer bankruptcy cases from across the country. The publisher is Robin Miller LLC, P.O. Box 660796, Birmingham, AL 35266-0796. Phone: (205) 445-0758. E-mail: [robin@cbar.pro](mailto:robin@cbar.pro) Website: <http://www.cbar.pro/>

The subscription rate for *CBAR* is \$350 for one year, commencing with the current issue. The six-month rate has been discontinued. This rate is for a license permitting a law firm to provide copies of the newsletter to up to three members or employees. For pricing for more than three copies, or subscribers other than law firms, please contact the publisher. Subscriptions are free to courts upon request.

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Subscribers to *CBAR* receive free access to back issues of the newsletter, as well as collections of previous abstracts by circuit and by topic, all of which may be accessed at any time on the newsletter's website.

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## How to Use This Newsletter

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

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

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

### The Monthly Newsletter

#### *The Table of Contents*

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



(A particularly long section may have these boxed "R"s, called "returns," located throughout the section.) While it's not possible to jump between sections, you can return to the table of contents and then jump out again.

This "How to Use This Newsletter" section follows the Table of Contents. After this are found the substantive divisions of the newsletter:

- This Issue's New Cases: Summary
- This Issue's New Cases: Full Abstracts
- Permanent Resources

### *This Issue's New Cases: Summary*

The "This Issue's New Cases: Summary" division of the newsletter has two sections:

- "This Issue's Highlights" describes cases abstracted in the issue that appear to be particularly significant or interesting. The cases are listed approximately in the order in which their abstracts appear in the newsletter, along with the page number(s) on which the abstract is to be found. A link is also given to the full text of the opinion. (Occasionally, an entry in "This Issue's Highlights" will be an entire topic, rather than an individual case. In this situation, a link to the topic will be given, with a return to the highlights section found at the end of the topic.)
- The "Case Summaries Arranged by Circuit" section lists all the cases abstracted in the issue, gives the main holdings of each case, and provides a link to the full text of the opinion. Within each circuit, cases are grouped by level of court, and, within each of those groupings, alphabetically.

### *This Issue's New Cases: Full Abstracts*

The "This Issue's New Cases: Full Abstracts" division of the newsletter contains the full abstracts of the cases discussed in the issue. The first three sections of this division of the newsletter have abstracts of new bankruptcy cases, while the fourth section, "Cases under Related Federal Statutes," has abstracts of selected new cases that discuss issues arising under one or more of five federal statutes: the Fair Credit Reporting Act (FCRA), Fair Debt Collection Practices Act (FDCPA), Home Ownership and Equity Protection Act (HOEPA), Real Estate Settlement Procedures Act (RESPA), and Truth in Lending Act (TILA).

The abstracts of the new bankruptcy cases found in the first three sections are classified to one or more of the 70 different topics in the newsletter's organizational scheme. At the top of the page for each new topic you will find links to various resources located on the newsletter website, including a collection of the abstracts classified to that topic in earlier issues of the newsletter. (For more information on the resources found on the newsletter website, see later in this "how to" section.)

### *Permanent Resources*

The "Permanent Resources" division of the newsletter includes several sections whose content may change only slightly from issue to issue:

- "Internet Resources" provides access to various documents available on the Web. This section is cumulative.
- "Supreme Court Case Status" describes the consumer bankruptcy cases that the U.S. Supreme Court has accepted for review as well as those for which a petition for certiorari is pending.
- "BAPCPA Circuit Court Decisions" lists the decisions by the various Courts of Appeals on principal issues arising under BAPCPA. This section is cumulative.

### **Using the Website Resources**

The website resources for subscribers are a significant part of the value provided by the Consumer Bankruptcy Abstracts & Research newsletter project. My vision is for these resources to become, over time, an online consumer bankruptcy legal reference library.

The [subscribers-only area](#) of the newsletter's website may be accessed by clicking on "Subscribers' Entrance" in the upper left corner of the newsletter's home page. To access this area, you must log in using the case-sensitive user name and password that were contained in the e-mail confirming your subscription to the newsletter. The first page you reach is the main subscribers' page.

This area offers a number of types of resources, in both Word 2003 and PDF formats:

- All published issues of the newsletter.
- A list of [pending appeals](#) in consumer bankruptcy cases, updated periodically.
- [Compilations](#), for each circuit, of all the cases abstracted in the newsletter since its inception.
- [Compilations](#), for each of the 74 topics in the [newsletter's topical scheme](#), of all the cases abstracted in the newsletter since its inception, plus additional original research. This scheme creates a systematic organization of consumer bankruptcy cases.

### *The Circuit Compilations*

Within each circuit compilation, the cases are grouped by level of court. Within each group, the cases are ordered from newest to oldest.

Each case entry includes a summary of the holdings in the case. Beginning with cases abstracted in the July 2008 issue of the newsletter, the case entries also include the date of the newsletter issue in which the abstract appeared, as well as the page number(s) on which the abstract may be found within that issue.

The main circuit compilations page states, at the top, the most recent newsletter issue whose cases have been added to the circuit compilations. Case citations in the circuit compilations are periodically, although not comprehensively, updated, as time allows.

### *The Topical Compilations*

Each topical compilation includes all cases abstracted in the newsletter since its inception relevant to that topic. The topical compilations include the full case abstract, rather than the summary of the case's holdings that is included in the circuit compilations. The main topical compilations page states, at the top, the most recent newsletter issue whose cases have been added to the topical compilations.

The amount of material within each topic varies widely. The newsletter has aggressively followed BAPCPA issues from its first issue. Other areas were gradually added, and now the newsletter covers most consumer Chapter 7 and 13 issues under the Bankruptcy Code. As of June 2010, the topical compilations taken together comprise more than 4000 pages. The main topical compilation page lists the number of pages in each compilation.

Many of the topical compilations have introductory information. The "Scope note" clarifies the coverage of that compilation, while the "Organization" is a table of contents for the compilation.

### *Search Capabilities*

The CBAR website does not have a search function; the topical compilations are intended as an alternative. Note, however, that both Adobe Acrobat and Microsoft Word have built-in search functions capable of searching multiple files in a single operation, although the searches must be quite simple. [Instructions](#) for multiple-file searches are available on the newsletter's website.



# This Issue's New Cases: Summary

## This Issue's Highlights

Some of the most significant holdings from the cases discussed in this issue of *Consumer Bankruptcy Abstracts & Research* are the following:

**Violation of stay:** On December 10, the Ninth Circuit Court of Appeals dismissed, on the ground of lack of jurisdiction, Wells Fargo's appeal from *In re Mwangi*, 432 B.R. 812 (9th Cir. B.A.P., June 30, 2010), which held that Wells Fargo's national policy of placing an administrative freeze on Chapter 7 debtors' bank accounts violates the automatic stay. The Court of Appeals remanded the case to the bankruptcy court, where it is docketed as *In re Mwangi*, Case No. 2:09-bk-24057 (Bankr. D. Nev.). A status conference is scheduled for January 25. *In re Mwangi*, Case No. 10-60035 (9th Cir., filed July 28, 2010), page 75.

**Means test—Housing expense:** Where the Chapter 13 debtors demonstrated to the court that their actual rental expense was greater than the allowable standard because appropriate housing was difficult to find, the court allowed the expense, which the debtors claimed on line 26 of Form 22C (which allows the debtor to claim an adjustment for housing and utilities costs) on the ground that the rental expense was necessary for the health and well-being of the debtors' three children. *In re Steele*, 2010 WL 4791837 (Bankr. D. Wyo., Nov. 18, 2010) ([text of opinion](#)), pages 86-87.

**Proof of claim—Secured claim—Ownership of claim:** Sustaining the Chapter 13 debtor's objection to a mortgage claim filed by Countrywide Home Loans, Inc. as servicer for the Bank of New York, which was the trustee under a securitization trust, the court said that, since the Bank of New York never had actual possession of the note, the bank could not enforce the note, either as a holder or as a nonholder in possession of the note, since, in either case, the bank was required to have actual possession of the note. Constructive possession is not enough; actual possession is required. And, while a servicer has standing to file a proof of claim on behalf of a creditor, an agent has no greater right to enforce the instrument than does its principal. *In re Kemp*, — B.R. —, 2010 WL 4777625 (Bankr. D. N.J., Nov. 16, 2010) ([text of opinion](#)), page 97.

**Property of the estate—Avoidance of lien impairing exemption:** Although a majority of courts hold that lien avoidance under Code § 522(f) is not effective until the debtor obtains a discharge, and these courts therefore condition § 522(f) orders on the issuance of a discharge (and the present court followed that procedure prior to being challenged by the debtor in this case), the avoidance of a judicial lien under Code § 522(f) is not subject to the entry of a discharge. While, under Code § 349(b)(1)(B), a judicial lien avoided under § 522(f) is reinstated if the case is subsequently dismissed, a debtor's failure to receive a discharge is not the same as the dismissal of the debtor's case. *In re Mulder*, 2010 WL 4286174 (Bankr. E.D. N.Y., Oct. 26, 2010) ([text of opinion](#)), page 106.

**Property of the estate—Avoidance of lien impairing exemption:** Code § 522(f)(2)(C) precludes the avoidance of a mortgage foreclosure judgment, but it does not preclude the avoidance of a mortgage deficiency judgment lien. *In re McMorris*, 436 B.R. 359 (Bankr. M.D. La., Sept. 16, 2010) ([text of opinion](#)); *In re Maxwell*, 2010 WL 4736206 (Bankr. E.D. Tenn., Nov. 16, 2010) ([text of opinion](#)). See page 108 for a collection of cases.

**Violation of discharge injunction:** In an important case, the bankruptcy court awarded the Chapter 11 debtors \$63,000 in compensatory damages from the mortgage creditor (Countrywide Home Loans, and Bank of America as its successor in interest), and assessed punitive damages in the same amount against the creditor, as a sanction for the creditor's attempting to collect on two discharged mortgage debts from the debtors for two years. Insofar as the court awarded damages for the debtors having legal proceedings brought against them due to their continued ownership of the properties, as to which the creditor did not commence the expected foreclosure proceedings, the court's order effectively required the creditor to accept the debtors' surrender of the properties, although the consent order did not explicitly provide for surrender. *In re Kirkbride*, 2010 WL 4809334 (Bankr. E.D. N.C., Nov. 19, 2010) ([text of opinion](#)), page 132-133.

**Violation of discharge injunction:** Awarding sanctions against the Chapter 13 debtors' mortgage servicer, Litton Loan Servicing LP, in the amount of \$2,593.35, representing the debtors' attorney's fees incurred in remedying the servicer's violation of the discharge injunction, the court said that this was the second time the servicer had caused grief to these debtors by asserting erroneous fees and expenses. The first time, after evidence was presented at a hearing that it was all a big mistake and the servicer's representatives apologized, the court determined that no sanction should be imposed. This time was different. And, if similar problems arose again, the sanctions against the servicer would be much greater. *In re Gude*, 2010 WL 3834560 (Bankr. D. Neb., Sept. 27, 2010) ([text of opinion](#)), page 134.

**Bankruptcy discrimination:** The Third Circuit Court of Appeals held, in accordance with most courts that have addressed the issue, that Code § 525(b) does not prohibit a private employer from refusing to hire an individual because that individual has filed bankruptcy. Observing that § 525(a), which applies to governmental employers, explicitly prohibits discrimination in hiring, while § 525(b) does not, the court found it "abundantly clear that Congress modeled § 525(b) off of § 525(a) and that any differences between the two are a result of Congress acting intentionally and purposefully." *Rea v. Federated Investors*, Case No. 10-1440 (3rd Cir., Dec. 15, 2010) ([text of opinion](#)), page 136.

This issue is also being litigated in *Burnett v. Stewart Title, Inc.*, Case No. 10-20250 (5th Cir., filed April 19, 2010), in which oral argument is set for January 31, 2011, and *Myers v. Toojay's Management Corp.*, Case No. 10-10774 (11<sup>th</sup> Cir., filed Feb. 22, 2010), in which oral argument is set for January 27, 2011.

**Chapter 7—Reaffirmation agreements:** Two courts held that it should be considered a basic part of Chapter 7 debtor representation that an attorney advise his client as to something as fundamental and significant as a reaffirmation agreement and assist him in the negotiation of the agreement. *In re Grisham*, 436 B.R. 896 (Bankr. N.D. Tex., Sept. 7, 2010) ([text of opinion](#)), pages 146-147; *In re Barron*, — B.R. —, 2010 WL 5168889 (Bankr. D. Ariz., Dec. 14, 2010) ([text of opinion](#)), page 151.

**Chapter 13—Secured claims—910-day car claims—Equitable tolling:** In what appears to be the first case taking this position, the court held that equitable tolling applied in determining whether the 910-day period of the hanging paragraph in Code § 1325(a)(5) had expired, where the debtors filed their first Chapter 13 case within the 910-day period and, after that case was dismissed, the debtors filed a second Chapter 13 case more than 910 days after the purchase of the vehicle. *In re Hingiss*, 2010 WL 4941622 (Bankr. E.D. Wis., Dec. 2, 2010) ([text of opinion](#)), page 158.

**Chapter 13—Secured claims—Combination of cramdown and maintenance of payments:** In a case involving a Chapter 13 debtor who resided in a multi-family residence, which the court apparently held was not protected by the anti-modification clause of Code §1322(b)(2), the court followed the “hybrid” approach, which allows a Chapter 13 debtor to cram down a secured claim to the value of the collateral and then maintain contractual payments on that reduced principal amount. *In re Jones*, Case No. 1:07-bk-15662 (Bankr. D. Mass., Nov. 18, 2010) ([debtor's plan](#)), page 162.

**Chapter 13—Secured claims—Modification of claim:** Agreeing that the real property that secures a mortgage must consist of only the debtor's principal residence in order for the anti-modification provision of § 1322(b)(2) to apply, the court held that the Chapter 13 debtors’ plan could modify a mortgage that encumbered a single parcel of real property on which both the debtors' primary residence and a stand-alone apartment building were located. *In re Moore*, 2010 WL 4791833 (Bankr. N.D. N.Y., Nov. 18, 2010) ([text of opinion](#)), page 164.

**Chapter 13—Secured claims—Stripping of unsecured lien:** In a brief per curiam opinion, the Fourth Circuit Court of Appeals said it agreed with the reasoning of the district court, which held that the anti-modification provision of Code § 1322(b)(2) does not bar the stripping off of a wholly unsecured lien from a Chapter 13 debtor’s principal residence. Prior to this ruling, the Fourth Circuit was one of the circuits in which there is no circuit-level authority on the issue, although there remains no published opinion. *In re Millard*, Case No. 09-2266 (4th Cir., Dec. 15, 2010) ([text of opinion](#)), page 165.

**Chapter 13—Secured claims—Stripping of unsecured lien:** Two courts held that a Chapter 13 debtor who is ineligible for a discharge may strip a wholly unsecured lien. *In re Grignon*, 2010 WL 5067440 (Bankr. D. Or., Dec. 7, 2010) ([text of opinion](#)) and *In re Hill*, --- B.R. ---, 2010 WL 4873054 (Bankr. S.D. Cal., Nov. 29, 2010) ([text of opinion](#)), page 167.

**Chapter 13—Projected disposable income:** In a comprehensive opinion, the court said that a Chapter 13 debtor’s Social Security income is expressly excluded from the calculation of the debtor’s projected disposable income. The court also held that the Chapter 13 debtors’ plan was proposed in good faith, although the plan would pay only 8.5% of unsecured claims, while the debtors continued to make payments on claims secured by an “Airstream” trailer, two ATVs and three automobiles. *In re Welsh*, --- B.R. ---, 2010 WL 4735994 (Bankr. D. Mont., Nov 16, 2010) ([text of opinion](#)), page 172.

**Chapter 13—Effect of plan confirmation—On 910-day car claim:** The mere fact that the motor vehicle lender was allegedly able to produce evidence that it was a “910 creditor” protected by the hanging paragraph of Code § 1325(a)(5) from having its claim bifurcated did not entitle the creditor to relief from a bankruptcy court order confirming the debtors’ Chapter 13 plan that provided for bifurcation of the claim, in the absence of a showing that the evidence was unavailable for presentation at the confirmation hearing. *In re Castleberry*, 437 B.R. 705 (Bankr. M.D. Ga., Sept. 29, 2010) ([text of opinion](#)), page 177.

**Chapter 13—Attorney’s fees:** Where the Chapter 13 debtor consulted with an attorney at a law firm on November 17, 2009, to discuss her bankruptcy options but did not retain the firm at that time, and she then met with the firm again and signed a fee agreement on December 15, 2009, the firm failed to comply with Code § 528(a)(1), which requires an attorney to execute a written fee agreement within five days of providing any bankruptcy assistance services. The record clearly established that, at the meeting on November 17, the firm was a “debt relief agency” and that it provided “bankruptcy assistance” to the debtor, who was then an “assisted person.” Accordingly, the firm’s contract with the debtor was unenforceable, and the firm was not entitled to receive any fees in the case. Congress could have chosen to set the deadline within five days after the debtor decided to retain the firm. But it did not. Instead the deadline Congress chose was five days after counsel provided any bankruptcy assistance to the debtor. *In re Humphries*, 2010 WL 5101036 (Bankr. E.D. Mich., Dec. 8, 2010) ([text of opinion](#)), page 184.



## Case Summaries Arranged by Circuit

*Key to page number usage in these case summaries:*

If there is only one page reference, the case abstract appears in a single topic within the "This Issue's New Cases: Full Abstracts" division of the newsletter.

*In re Figueroa Padilla*, Case No. 07-07495 (Bankr. D. P.R., June 25, 2009), page 102

(Bankruptcy Judge Enrique S. Lamoutte) ([Read opinion](#))

- Following the forward-looking approach of *In re Kibbe*, 361 B.R. 302 (1st Cir. B.A.P. 2007) as to both above- and below-median debtors, the court said that courts should look to schedules I and J (rather than Form 22C) where the debtor's "current monthly income" is not true to the debtor's actual income. The "means test" governs which expenses an above-median debtor may deduct in calculating disposable income.
- Future tax refunds are income that must be devoted to the plan as part of the projected disposable income during the commitment period.

If the case abstract has multiple holdings that are classified to different topics within the "This Issue's New Cases: Full Abstracts" division of the newsletter, a page reference is given for each separately-stated holding in the case:

*In re Rudler*, --- F.3d ---, 2009 WL 2385469 (1st Cir., Aug. 5, 2009), pages 56, 59

(case no. 08-9007) ([Read opinion](#))

- At least where the dispute at issue turns on a question of law, it is appropriate to treat as final orders declining to dismiss a Chapter 7 case under the amended version of Code § 707(b)(2). (page 56)
- In the means test, a Chapter 7 debtor is permitted to deduct payments on a secured debt for which the debtor intends to surrender the collateral. (page 59)

Finally, if the holding or holdings for a case are duplicated in multiple topics, the listing looks like this:

In re Stadler, 2009 WL 2385897 (1st Cir., Aug. 5, 2009), pages 101, 259

(case no. 08-9007) ([Read opinion](#))

- At least where the dispute at issue turns on a question of law, it is appropriate to treat as final orders declining to dismiss a Chapter 7 case under the amended version of Code § 707(b)(2).

If an adversary proceeding docket number is listed, the opinion is from the adversary. If only a main case docket number is listed, the opinion is from the main case.

## First Circuit (8) R

In re Bottcher, 2010 WL 4882516 (Bankr. D. Mass., Nov. 24, 2010), pages 84, 153

(case no. 4:09-bk-45519; adv. proc. no. 4:10-ap-4119) (Bankruptcy Judge Melvin S. Hoffman) [Text of opinion](#)

- **Jurisdiction over Chapter 7 debtor's claims against mortgage lender:** The court had jurisdiction over the Chapter 7 debtor's state-law causes of action against the debtor's home mortgage lender. The debtor's allegations that he validly rescinded his mortgage loan had a direct impact on the validity and secured treatment of the defendant's claim and thus constituted objections pursuant to Bankruptcy Code § 502, while another count of the debtor's complaint sought a determination of the extent to which the creditor's claim was secured. These claims, therefore, fell foursquare within the court's core jurisdiction over the claims allowance process under 28 U.S.C. 157(b)(2)(B) and to determine the validity, extent or priority of liens under 28 U.S.C. § 157(b)(2)(K). The debtor's remaining claims, for damages under various state consumer protection statutes, were the functional equivalent of counterclaims to the creditor's proof of claim. While Congress included counterclaims to proofs of claim within the definition of core proceedings in 28 U.S.C. § 157(b)(2)(C), courts had limited this definition to counterclaims that are factually and legally related to the claim being asserted in a proof of claim. In this case, the debtor's claims arose from the same loan as, and were factually and legally related to, the loan that gave rise to the creditor's proof of claim. (page 84)
- **Chapter 7—Standing to asset prepetition cause of action:** If a Chapter 7 debtor can show that a prepetition cause of action is exempt from the bankruptcy estate, then the debtor has standing to assert that cause of action to the extent of the exemption even if the trustee has not abandoned the estate's interest in the claim. (page 153)

In re Darosa, 2010 WL 4777548 (Bankr. D. Mass., Nov. 17, 2010), page 71

(case no. 4:10-bk-44471) (Bankruptcy Judge Melvin S. Hoffman) [Text of opinion](#)

- **Relief from stay—Merits—Evidence sufficient to establish debtor's lack of equity:** Describing the types of valuation evidence supporting a motion for relief from stay that the court would consider reliable, the court said that a written property valuation performed by a local real estate agent opining, based on supporting facts, that the debtor's property was worth a specified amount was sufficient to carry the creditor's burden of proving that the property had no equity for the debtor or the estate. The court would also accept a lender's unopposed allegation that a property lacked equity based on the value of that property set forth in a debtor's schedules, as the scheduled value was an admission by the debtor under oath. However, tax assessors' valuations in Massachusetts were an unreliable index of current value, as, by statute, the valuation could be anywhere from 6 to 42 months removed from the transactions forming the basis of the valuation. Zillow.com "zestimates" were also inherently unreliable, as Zillow was a participatory site almost like Wikipedia, and a homeowner with no technical skill beyond the ability to surf the web could log in to Zillow and add or subtract data that would change the value of the homeowner's property.

In re Jones, Case No. 1:07-bk-15662 (Bankr. D. Mass., Nov. 18, 2010), page 162

(Bankruptcy Judge Joan N. Feeney)

[Debtor's plan](#)

[Mortgage creditor's objection to confirmation of plan](#)

- **Chapter 13—Secured claims—“Hybrid” approach combining cramdown and maintenance and cure:** Following the “hybrid” approach approved in *In re Brown*, 175 B.R. 129 (Bankr. D. Mass. 1994), which allows a Chapter 13 debtor to cram down a secured claim to the value of the collateral and then maintain contractual payments on that reduced principal amount, the court approved a plan treating a mortgage creditor’s claim as follows: (1) the claim was bifurcated under Code § 506(a) into a secured claim of \$310,000 and an unsecured claim of \$109,399.05, with the total of these two amounts representing the amount stated in the creditor’s proof of claim; (2) the debtor would acquire a reverse mortgage on the residence in the estimated amount of \$168,555.44; (3) the proceeds of the reverse mortgage would be paid to the creditor in a lump sum, thereby paying all prepetition and postpetition arrears, with the remaining balance treated as an advance payment of principal; (4) a secured debt in the amount of \$141,444.56 would remain after this prepayment, and the debtor would pay this amount in equal monthly payments over the remaining 25 years of the mortgage note, at the interest rate provided for in the note; currently, that rate was 7.1% annually, requiring monthly payments of \$1,008; (5) under Code § 364(d), the mortgage creditor’s lien would be subordinated to the lien that would be granted by the debtor in acquiring the reverse mortgage; (6) the creditor’s unsecured claim of \$109,399.05 would be separately classified under Code § 1322(b)(1), because a deficiency claim is unlike other unsecured claims; and (7) because the amount available to unsecured creditors in a Chapter 7 case would be \$6,975, and the plan paid the debtor’s other unsecured creditors \$4,194.28, which was 100% of their claims, the mortgage creditor would receive \$2,780.72 (a dividend of 2.54%) in payment of its separately-classified unsecured claim, so that the plan complied with the best interests of the creditors test in Code § 1325(a)(4). The creditor’s claim was secured by a lien on a multi-family residence that was also the debtor’s residence, and the court apparently held that the claim was not protected by the anti-modification clause of Code §1322(b)(2).

In re Koufos, 2010 WL 4638408 (Bankr. D. Mass., Nov. 8, 2010), pages 145, 152

(case no. 4:09-bk-44158) (Bankruptcy Judge Melvin S. Hoffman) [Text of opinion](#)

- **Chapter 7—Reaffirmation agreement—Deferral of discharge:** Denying the Chapter 7 debtors’ third motion for a deferral of their discharge, which the debtors sought in order to rebut the presumption of undue hardship that had arisen with respect to their agreement to reaffirm an automobile loan, the court said that (1) a reaffirmation agreement needed only to be made, not approved, before a debtor’s discharge in order to be effective; (2) because the debtors did not sign the reaffirmation agreement until 49 days after the first meeting of creditors, the debtors’ car ceased to be property of the estate before the agreement was even signed, and the creditor had had the right to enforce its *ipso facto* clause since that time; and (3) in any event, the creditor’s remedies were limited to those available under state law, and, under Massachusetts law, the lender of a consumer auto loan may repossess its collateral without a hearing only if the “default is material and

consists of the debtors [sic] failure to make one or more payments as required by the agreement or the occurrence of an event which substantially impairs the value of the collateral.” The debtors' bankruptcy filing was, therefore, not a material default under state law and, so long as the debtors remained current on the loan, the creditor could not repossess the car without notice and a hearing. The court said that it was confident that no judge in Massachusetts would permit a car loan lender to repossess its collateral based on a default triggered by a prior bankruptcy filing where payments were current.

In re McDermott, 2010 WL 4638867 (Bankr. D. Mass., Nov. 8, 2010), page 81

(case no. 4:09-bk-43858; adv. proc. no. 4:10-ap-4085) (Bankruptcy Judge Melvin S. Hoffman) [Text of opinion](#)

- **Nondischargeable debts—Fraud—Award of attorney’s fees to debtor:** A creditor’s alleged strategy of filing a nondischargeability complaint under Code § 523(a)(2) with no intention of prosecuting the complaint does not support an award of attorney’s fees to the debtor under Code § 523(d) where the complaint is objectively supportable. A common thread running through cases dealing with “substantial justification” under § 523(d) is that the court’s analysis focuses on the objective criteria upon which the § 523(a)(2)(A) action is based, not on the subjective motives of the creditor in bringing the action.

In re Mounelaphom, — B.R. —, 2010 WL 4484618 (Bankr. D. Mass., Oct. 29, 2010), pages 161, 163

(case no. 4:08-bk-41324) (Bankruptcy Judge Melvin S. Hoffman) [Text of opinion](#)

- **Proof of claim—Binding in absence of objection:** Where the mortgage creditor filed a proof of claim asserting a claim in the amount of \$413,910, and the Chapter 13 debtors did not object to the proof of claim, which therefore was allowed, the debtors’ plan could not treat the creditor’s claim as one for \$393,741, which was the amount the debtors asserted was owed to the creditor. (page 161)
- **Chapter 13—Secured claims—“Hybrid” approach combining cramdown and maintenance and cure:** Where the Chapter 13 debtors proposed a “hybrid” plan under which a secured claim would be crammed down to the value of the collateral, and the debtors would then maintain contractual payments on that reduced principal amount, but the debtors had not made any postpetition payments to the mortgage creditor, the debtors’ proposed plan, which provided for the payment of the prepetition arrearage over the term of the plan, but folded the postpetition arrearage into the crammed down value to be paid over the life of the original note, could not be confirmed. There was nothing in the plan that dealt with the substantial unpaid postpetition amount owed the creditor, the court emphasized, and Code § 1322(b)(5) is written in the conjunctive; a “cure and maintenance” plan must provide for both “the curing of any defaults within a reasonable time and the maintenance of payments.” (page 163)

In re Roy, 2010 WL 4916576 (Bankr. D. N.H., Nov. 30, 2010), pages 130, 163

(case no. 1:10-bk-10086) (Bankruptcy Judge J. Michael Deasy) [Text of opinion](#)

- **Valuation of property:** Valuing a 2.49-acre parcel of land in Exeter, New Hampshire, that was improved for commercial use but was in below-average condition and required possible removal and disposal of asbestos, lead paint, and certain hydrocarbons, the court found the value of the property to be \$265,500 whether it was valued as raw land or as improved property. In arriving at a valuation as raw land, the court deducted \$25,000 from the appraisals for asbestos remediation, but did not include costs for lead paint removal, as it was unnecessary in a raw land valuation, or for hydrocarbon remediation, as it was speculative and uncertain on the record before the court. (page 130)
- **Chapter 13—Valuation of property for purpose of claim modification—Standard for valuation:** Where a debtor proposes to retain property under a plan of reorganization, the court must value the property in light of the proposed post-bankruptcy use of the property. As a general rule, that value will be the replacement, or fair market value, of the property valued in a manner consistent with the debtor's use of the property. *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 117 S.Ct. 1879, 138 L.Ed.2d 148 (1997). (page 163)
- **Chapter 13—Valuation of property for purpose of claim modification—Time of valuation:** It is generally agreed that the property should be valued as it stands at the time of the proceeding. (page 163)

In re Shapoval, 2010 WL 4811786 (Bankr. D. Mass., Nov. 19, 2010), page 71

(case no. 3:10-bk-30175) (Chief Bankruptcy Judge Henry J. Boroff) [Text of opinion](#)

- **Relief from stay—Standing—Transfer of note via allonge:** Under UCC § 3-204, an allonge is effective only if it is affixed to the original instrument. Therefore, a creditor seeking relief from stay on the basis of a note transferred via an endorsement on an allonge must show that the allonge is affixed to the debtor's original note.

## Second Circuit (10) R

In re Howe, — F.Supp.2d —, 2010 WL 3283372 (N.D. N.Y., August 18, 2010), page 119

(case no. 1:09-cv-873) (District Judge David N. Hurd) [Text of opinion](#)

- **Exemptions—Procedure—Amendment—Prejudice to creditors:** Affirming *In re Howe*, 2009 WL 2914229 (Bankr. N.D. N.Y. 2009), the district court found no error in the bankruptcy court's conclusion that permitting the Chapter 7 debtors to amend their exemptions, so as to claim a cash exemption rather than a homestead exemption, would cause prejudice to creditors, where the debtors' original homestead exemption permitted them to shield some \$55,000 in equity from creditors, and, after the time for an objection to the homestead exemption had expired, the debtors sought to amend their exemptions to now claim a cash exemption. New York law permitted debtors to claim either a homestead exemption or a cash exemption, but not both.

In re Moreo, 437 B.R. 40 (E.D. N.Y., Sept. 3, 2010), page 142

(case no. 2:09-cv-4740) (District Judge Joseph F. Bianco) [Text of opinion](#)

- **Chapter 7—Denial of discharge—Failure to retain records:** Affirming *In re Moreo*, 2009 WL 2929949 (Bankr. E.D. N.Y. 2009), the district court found no error in the denial of the Chapter 7 debtor wife's discharge under Code § 727(a)(3) for having failed to keep or preserve accurate records in connection with the operation of the wife's bagel store, where the store was small and its complexity and volume should have been manageable because the wife had employees and accountant to assist her in running the store.
- **Chapter 7—Denial of discharge—Making of false oath:** Nor was there error in denying both debtors a discharge under Code § 727(a)(4)(A) for having made a false oath or account, where the debtors failed to disclose (1) three lawsuits by one or both debtors that may have had value to the estate, and (2) the debtor husband's 100% shareholder ownership of the bagel store, and there was other evidence suggesting that the debtors misrepresented their assets in their bankruptcy filings.

In re Traversa, 2010 WL 4683920 (D. Conn., Nov. 5, 2010), page 78

(case no. 3:10-cv-876) (District Judge Janet C. Hall) [Text of opinion](#)

- **Nondischargeable debts—Student loans—Persistence of inability to pay:** Affirming *In re Traversa*, 2010 WL 1541443 (Bankr. D. Conn., April 15, 2010), the district court found no error in the bankruptcy court's conclusion that the debtor failed to establish the second prong of the *Brunner* test, namely, that additional circumstances existed indicating that the debtor's present state of affairs was likely to persist for a significant portion of the repayment period of the student loans. While the debtor testified that he was affected by certain medical conditions, including depression, attention deficit hyperactivity disorder, bipolar disorder, sleep apnea and narcolepsy, the debtor did not present the testimony of a doctor or medical expert, and the bankruptcy court found the evidence inadequate on the issue of the prognosis of the debtor's various medical conditions.

In re Yerushalmi, — F.Supp.2d —, 2010 WL 4703776 (E.D. N.Y., Nov. 20, 2010), page 127

(case no. 2:10-cv-1078) (Senior District Judge Arthur D. Spatt) [Text of opinion](#)

- **Avoidable transfer—Fraudulent conveyance—Under state law:** In an adversary proceeding by the Chapter 7 trustee to recover property transferred by the debtor to his wife and daughter some 10 years prepetition, the bankruptcy court properly granted summary judgment for the wife and daughter, as the adversary proceeding was based on Code § 544(b)(1), which permitted the trustee to assert the rights of creditors under N.Y. Debt. & Cred. Law § 273-a, and, under § 273-a, a transfer was avoidable where the defendant (1) transferred property to a third party for less than fair consideration while the defendant was being sued, (2) the suit against the defendant was one “for money damages,” and (3) the defendant failed to satisfy a “final judgment” against him. Here, the first two elements may have been satisfied, as the debtor’s former law partner sued him in 1998 and the challenged transfer occurred in 2000, while the case was pending. However, the third element was not satisfied, as no “final judgment” had yet been entered against the debtor. While the trial court had rendered a judgment for the law partner, the debtor had appealed, the appellate court had remanded the case to the trial court for a recalculation of damages, and that recalculation had not yet taken place.

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In re Allen, 2010 WL 4687827 (Bankr. D. Conn., Nov. 10, 2010), pages 105, 130

(case no. 2:10-bk-22923) (Bankruptcy Judge Albert S. Dabrowski) [Text of opinion](#)

- **Exemptions—Avoidance of judicial lien—Determination of impairment:** In determining whether a judicial lien impaired the Chapter 7 debtor’s homestead exemption, the mortgage on the homestead was taken into account because the mortgage lien was not extinguished in the judicial lienholder’s prepetition action to foreclose his lien. While the mortgage holder did not appear in that action, and a default was entered against it, a judgment of foreclosure was not entered before the debtor filed her bankruptcy petition. (page 105)
- **Value of asset—Real property:** In valuing the Chapter 7 debtor’s homestead in Niantic, Connecticut, where the court found the respective appraisers to be qualified and credible witnesses with their respective valuations based upon an appropriate comparable sales approach, the court averaged the appraisers’ valuations of \$325,000 and \$370,000 to arrive at \$347,500. (page 130)

In re Cady, — B.R. —, 2010 WL 4723355 (Bankr. N.D. N.Y., Nov. 22, 2010), page 91

(case no. 5:10-bk-30737) (Bankruptcy Judge Margaret M. Cangilos-Ruiz) [Text of opinion](#)

- **Existence of “claim” against debtor:** A lender that held a security interest in property of the Chapter 12 debtor’s estate was a “creditor” with a “claim” against the debtor that could be provided for in the debtor’s Chapter 12 plan, even though the debtor was not personally liable on the debt owed to the lender.

*In re Malewicz*, 2010 WL 4613119 (Bankr. E.D. N.Y., Nov. 4, 2010), page 171

(case no. 8:09-bk-74807) (Bankruptcy Judge Robert E. Grossman) [Text of opinion](#)

- **Chapter 13—Projected disposable income—Nonfiling spouse’s tax refund:** A Chapter 13 debtor’s nonfiling spouse is not required to turn over to the Chapter 13 trustee the spouse’s share of a joint tax refund received after the confirmation of a Chapter 13 plan providing for the debtor’s turning over of tax refunds received while the case is pending, at least where neither the plan nor the plan confirmation order contains a specific provision requiring such turnover.

*In re McKinney*, 2010 WL 4505958 (Bankr. D. Conn., Nov. 2, 2010), page 149

(case no. 2:10-bk-22116) (Bankruptcy Judge Albert S. Dabrowski) [Text of opinion](#)

- **Chapter 7—Reaffirmation agreement—Approval—Effect of debtor’s discharge:** Where the Chapter 7 debtor entered into a reaffirmation agreement before receiving a discharge, but the court disapproved the agreement after the debtor failed to appear at the hearing on approval of the agreement, the court would vacate its order disapproving the agreement, and would approve the agreement upon the debtor’s motion, as there was no question that the debtor was advantaged by the agreement. It was not necessary for the court to set aside the debtor’s discharge in order to approve the agreement.

*In re Moore*, 2010 WL 4791833 (Bankr. N.D. N.Y., Nov. 18, 2010), pages 83, 164

(case no. 6:09-bk-61990) (Bankruptcy Judge Diane Davis) [Text of opinion](#)

- **Procedure—Binding effect of district court decision:** A bankruptcy court is not bound by a decision by a single judge of a multi-judge district court. (page 83)
- **Chapter 13—Secured claim—Modification—Permissibility—Burden of proof:** While the debtor bears the ultimate burden of persuasion to convince the court that the secured creditor’s claim may be modified, the secured creditor bears the initial burden of proof to show by a preponderance of the evidence that its claim falls within the anti-modification provision of Code § 1322(b)(2). (page 164)
- **Chapter 13—Secured claim—Modification—Permissibility—Under circumstances:** Agreeing with the reasoning in *In re Scarborough*, 461 F.3d 406 (3rd Cir. 2006) that the real property that secures a mortgage must consist of only the debtor’s principal residence in order for the anti-modification provision of § 1322(b)(2) to apply, the court held that the Chapter 13 debtors’ plan could modify a mortgage that encumbered a single parcel of real property on which both the debtors’ primary residence and a stand-alone apartment building were located. The court declined to follow *In re Macaluso*, 254 B.R. 799 (Bankr. W.D. N.Y. 2000), which held that § 1322(b)(2) precludes modification where a mortgage attaches to a single parcel of real property holding the debtor’s primary residence, even if other structures are also located on the property. The court also declined to follow the approach taken in *Litton Loan Servicing, LP v. Beamon*, 298 B.R. 508 (N.D. N.Y. 2003) and *In re Brunson*, 201 B.R. 351 (Bankr. W.D. N.Y. 1996), in which the courts looked to the parties’ intention to ascertain whether homeownership was the predominant purpose of the transaction. (page 164)

In re Mulder, 2010 WL 4286174 (Bankr. E.D. N.Y., Oct. 26, 2010), page 106

(case no. 8:10-bk-74217) (Bankruptcy Judge Robert E. Grossman) [Text of opinion](#)

- **Exemptions—Avoidance of judicial lien—Necessity of discharge:** Although a majority of courts hold that lien avoidance under Code § 522(f) is not effective until the debtor obtains a discharge, and these courts therefore condition § 522(f) orders on the issuance of a discharge (and the present court followed that procedure prior to being challenged by the debtor in this case), the avoidance of a judicial lien under Code § 522(f) is not subject to the entry of a discharge. While, under Code § 349(b)(1)(B), a judicial lien avoided under § 522(f) is reinstated if the case is subsequently dismissed, a debtor's failure to receive a discharge is not the same as the dismissal of the debtor's case. There are circumstances under which a case may be closed without a discharge but not "dismissed." For example, a Chapter 13 debtor may be ineligible to receive a discharge if the debtor has received a Chapter 7 discharge within the previous 4 years, yet the debtor may nevertheless file a plan under Chapter 13 and fully perform the plan in order to cure mortgage arrears. Such a debtor would be ineligible to receive a discharge, but if the debtor successfully completed the plan, the case would be closed without a discharge or a dismissal. Therefore, § 349 would not be triggered and any liens avoided during such a case would not be restored. Another example would be a debtor who does not obtain a personal financial management certificate, which would preclude the entry of a discharge but would not result in a dismissal. See Code § 727(a)(11). Conditioning lien avoidance on a discharge in a case is contrary to the language of § 349, which only comes into play when a case is dismissed, irrespective of whether or not a discharge is ultimately attained.

## Third Circuit (13) R

In re Beers, 2010 WL 4263292 (3rd Cir., Oct. 29, 2010), pages 93, 126

(case no. 10-1105) [Text of opinion](#)

- **Authority of the court—Imposition of sanctions—Under 28 U.S.C. § 1927—Elements:** Affirming *In re Beers*, 2009 WL 4282270 (D. N.J. 2009), which had affirmed *In re Beers*, 2009 WL 1025402 (Bankr. D. N.J. 2009), the Third Circuit Court of Appeals held that 28 U.S.C. § 1927 requires a finding of four elements for the imposition of sanctions, one of which is bad faith: (1) multiplied proceedings; (2) unreasonably and vexatiously; (3) thereby increasing the cost of the proceedings; (4) with bad faith or with intentional misconduct. *LaSalle Nat'l Bank v. First Connecticut Holding Group*, 287 F.3d 279 (3d Cir. 2002). (page 126)
- **Authority of the court—Imposition of sanctions—Under 28 U.S.C. § 1927—Propriety under circumstances:** The Court of Appeals also held that the bankruptcy court properly applied this standard in declining to impose sanctions on the mortgage creditor. The bankruptcy court held that, while the manner in which the creditor's law firm handled the case had been "terribly inefficient and burdensome for all of the parties involved in the case," in that it took the firm months in order to file documentation for its claim, the firm's conduct did not rise to the level of bad faith. (page 93)

In re Nixon, Case No. 09-3135 (3rd Cir., Dec. 15, 2010), pages 95, 123

[Text of opinion](#)

- **Proof of claim—Secured claim—Tolling of interest:** Affirming *In re Nixon*, 2009 WL 1845229 (E.D. Pa. 2009), the Third Circuit Court of Appeals found no error in the bankruptcy court's decision to toll the running of postpetition interest on a secured creditor's claim, where the bankruptcy court had found that the creditor was purposefully delaying the proceedings. The action was well within a bankruptcy court's authority under Code § 105(a), and, while Code § 506(b) places no explicit limits on an oversecured creditor's recovery of interest, that provision does not specify, however, that an oversecured creditor must receive interest indefinitely or at the contract rate. (pages 95, 123)
- **Proof of claim—Secured claim—Unreasonable attorney's fees:** The Court of Appeals also summarily affirmed the district court insofar as it held that an oversecured creditor's claim for contractually-permitted attorney's fees must be allowable under Code § 502(b)(1) before the question of whether, under Code § 506(b), the fees are included in the creditor's secured claim is addressed. Thus, because Pennsylvania law permitted the recovery of contractually-permitted attorney's fees only if the fees were reasonable, the bankruptcy court properly disallowed the creditor's claim insofar as it included attorney's fees that were unreasonable. (page 95)

Rea v. Federated Investors, Case No. 10-1440 (3rd Cir., Dec. 15, 2010), page 136

[Text of opinion](#)

- **Hiring discrimination based on bankruptcy:** Affirming *Rea v. Federated Investors*, 431 B.R. 18 (W.D. Pa., Jan. 29, 2010), the Third Circuit Court of Appeals held, in accordance with most courts that have addressed the issue, that Code § 525(b) does not prohibit a private employer from refusing to hire an individual because that individual has filed bankruptcy. Observing that § 525(a), which applies to governmental employers, explicitly prohibits discrimination in hiring, while § 525(b) does not, the court found it “abundantly clear that Congress modeled § 525(b) off of § 525(a) and that any differences between the two are a result of Congress acting intentionally and purposefully.” The court said that *Leary v. Warnaco, Inc.*, 251 B.R. 656 (S.D. N.Y. 2000) appeared to be the only decision reaching the contrary position.
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Cleveland v. O'Brien, 2010 WL 4703781 (D. N.J., Nov. 12, 2010), pages 186, 187

(case no. 3:10-cv-3169) (Chief District Judge Garrett E. Brown Jr.) [Text of opinion](#)

- **Judgment against foreclosure rescue operation:** Affirming *In re O'Brien*, 423 B.R. 477 (Bankr. D. N.J., Jan. 22, 2010), the district court held that, in an adversary proceeding by Chapter 13 debtors against the operator of a foreclosure rescue operation, the bankruptcy court did not err in rendering judgment in favor of the debtors on theories of common law fraud and violation of the New Jersey Consumer Fraud Act (CFA), the New Jersey Home Ownership Security Act of 2002 (HOSA), the Truth in Lending Act (TILA), and the Home Ownership and Equity Protection Act. Nor did the bankruptcy court err in determining that the transaction involved, although nominally structured as a sale/leaseback transaction, was in actuality an equitable mortgage; in concluding that the debtors did not act with unclean hands; and in awarding the debtors attorney’s fees of \$33,932.50 for violation of the CFA, TILA, and HOSA.

In re Rim, 2010 WL 4615174 (D. N.J., Nov. 3, 2010), pages 128, 153

(case no. 2:10-cv-1066) (District Judge Dennis M. Cavanaugh) [Text of opinion](#)

- **Avoidable transfer—Standing:** The bankruptcy court did not err in according the Chapter 7 debtor’s creditor derivative standing to commence a fraudulent transfer action for the purpose of recovering the allegedly fraudulently-transferred assets for the debtor’s bankruptcy estate. (page 128)
  - **Chapter 7—Reopening of case:** A creditor of the Chapter 7 debtor was a “party in interest” entitled to reopen the debtor’s bankruptcy case under Bankruptcy Rule 5010. (page 153)
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In re Butler, 2010 WL 4736205 (Bankr. E.D. Pa., Nov. 15, 2010), pages 131, 165

(case no. 2:10-bk-12776; adv. proc. no. 2:10-ap-317) (Bankruptcy Judge Bruce Fox)

[Text of opinion](#)

- **Valuation of residence:** The court concluded that the Chapter 13 debtors' 47-year-old colonial style home, on about a 1/2 acre lot, located in West Chester, Pennsylvania, with the residence consisting of nine rooms, including four bedrooms, totaling about 1,900 sq. ft of livable space, in slightly-below-average condition, was no greater than \$290,000, where the average adjusted sales price of the six West Chester homes, all sold in the fall of 2009, employed as comparable by the parties' appraisers was \$289,941.67. (page 131)
- **Chapter 13—Secured claims—Lien strip:** While courts are divided as to the relevant valuation date for determining whether a debt is secured by value in the collateral, the court did not need to resolve the issue where the parties agreed that home values in the Chapter 13 debtors' residential area were "stable." (page 165)

In re Flickinger, 2010 WL 4923933 (Bankr. M.D. Pa., Nov. 24, 2010), page 164

(case no. 1:09-bk-08739; adv. proc. no. 1:10-ap-00147) (Chief Bankruptcy Judge Mary D. France) [Text of opinion](#)

- **Chapter 13—Secured claims—Modification:** The existence of additional co-signers on the debtors' mortgage note did not, in itself, render the mortgage holder's claim outside the protection of the anti-modification provision of Code § 1322(b)(2), where the additional co-signers did not pledge any additional collateral.

In re Gearhart, 2010 WL 4866179 (Bankr. M.D. Pa., Nov. 23, 2010), page 139

(case no. 1:10-bk-00741) (Chief Bankruptcy Judge Mary D. France) [Text of opinion](#)

- **Chapter 7—Abuse under totality of circumstances:** Granting the debtors a Chapter 7 discharge would be an abuse, under the totality of the circumstances, where (1) the debtors' mortgage payments of \$3695 per month, which constituted 64% of their monthly income, were unreasonable and excessive, even though the court had little evidence before it to determine what would constitute a reasonable housing expense; (2) the debtors' \$540 monthly expense to send two of their children to a private elementary school was unreasonable in the absence of evidence that the schooling was anything more than a personal preference; and (3) the debtors budgeted \$663 per month for recreation but testified that their spending for recreation was "virtually nil at this point." If the court assumed that the debtors could obtain housing at twice the IRS standard of \$985, or \$1960, the debtors would have monthly disposable income of \$911, which would give them the ability to pay a meaningful amount to satisfy the claims of their unsecured creditors.

*In re Hill*, --- B.R. ---, 2010 WL 4868005 (Bankr. W.D. Pa., Nov. 24, 2010), page 123

(case no. 2:01-bk-22574) (Chief Bankruptcy Judge Thomas P. Agresti) [Text of opinion](#)

- **Authority of the court—Imposition of sanctions on attorney:** Following up *In re Hill*, 437 B.R. 503 (Bankr. W.D. Pa., Oct. 5, 2010), the court issued a public reprimand to both an attorney who had been dishonest to the court during her representation of Countrywide Home Loans and the attorney's law firm. Observing that it had found that the attorney had lied, and that it had not made that finding lightly, the court said it found the attorney's lack of acceptance of responsibility to be troubling, as the attorney continued to insist that she had not lied.

*In re Kemp*, --- B.R. ---, 2010 WL 4777625 (Bankr. D. N.J., Nov. 16, 2010), page 97

(case no. 1:08-bk-18700; adv. proc. no. 1:08-ap-2448) (Chief Bankruptcy Judge Judith H. Wizmur) [Text of opinion](#)

- **Proof of claim—Secured claim—Ownership of claim:** Sustaining the Chapter 13 debtor's objection to a mortgage claim filed by Countrywide Home Loans, Inc. as servicer for the Bank of New York, which was the trustee under a securitization trust, the court said that, since the Bank of New York never had actual possession of the note, the bank could not enforce the note, either as a holder or as a nonholder in possession of the note, since, in either case, the bank was required to have actual possession of the note. Constructive possession is not enough; actual possession is required. And, while a servicer has standing to file a proof of claim on behalf of a creditor, an agent has no greater right to enforce the instrument than does its principal.

*In re Liversidge*, 2010 WL 4941654 (Bankr. D. N.J., Dec. 3, 2010), page 70

(case no. 2:10-bk-16342) (Bankruptcy Judge Donald H. Steckroth) [Text of opinion](#)

- **Existence of stay—Exceptions:** Code § 523(a)(16) permits the collection, from a Chapter 7 debtor, of condominium association dues and other homeowners' fees that accrue following the filing of the debtor's bankruptcy petition; it is not limited to fees that accrue after the closing of the debtor's bankruptcy case.

*In re Rincan*, 2010 WL 4777628 (Bankr. D. N.J., Nov. 17, 2010), page 120

(case no. 2:10-bk-13561) (Bankruptcy Judge Donald H. Steckroth) [Text of opinion](#)

- **Exemptions—Status as property of estate:** Although the funds the debtor received in settlement of her personal injury claim would have been exempt under Code § 522(d)(11)(D) as payments "on account of personal bodily injury," the debtor was not able to exempt the funds where she had voluntarily paid them to creditors prepetition. A debtor may claim an exemption only in property of the estate, and property is property of the estate only if the debtor holds an interest in the property on the petition date.

- **Exemptions—In recovered property:** If the Chapter 7 trustee was able to recover the payments from the creditors as preferences, the debtor would not then be able to claim an exemption in the recovered payments, as Code § 522(g) permits a debtor to claim an exemption only in property that was transferred involuntarily, even where, as there, the debtor did not conceal the transfer.

In re Segen, 2010 WL 4453315 (Bankr. E.D. Pa., Nov. 3, 2010), page 110

(case no. 2:10-bk-14574) (Chief Bankruptcy Judge Stephen Raslavich) [Text of opinion](#)

- **Exemptions—Federal exemptions—Entireties property:** A debtor may exempt property owned by the entireties under the federal exemptions even if the debtor's spouse does not join in the bankruptcy petition, and the debtor may exempt this property even if there are joint creditors of the debtor and the debtor's spouse, which would defeat an exemption claimed under Code § 522(b)(3)(B). See generally *In re Brannon*, 476 F.3d 170 (3rd Cir. 2007) (under the federal exemptions, a debtor may exempt the full value of property owned by the entireties, up to the exemption limit; the debtor is not limited to exempting 50% of the value of the property as the value of the debtor's interest in the property).

## Fourth Circuit (18) R

In re Millard, Case No. 09-2266 (4th Cir., Dec. 15, 2010), page 165

[Text of opinion](#)

- **Chapter 13—Secured claim—Strip off of unsecured lien:** Affirming *In re Millard*, 414 B.R. 73 (D. Md., Sept. 28, 2009) in a brief per curiam opinion, the Fourth Circuit Court of Appeals said it agreed with the reasoning of the district court, which held that the anti-modification provision of Code § 1322(b)(2) does not bar the stripping off of a wholly unsecured lien from a Chapter 13 debtor's principal residence. Prior to this ruling, the Fourth Circuit was one of the circuits in which there is no circuit-level authority on the issue, although there remains no published opinion.
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Thomas v. Litton Loan Servicing, LP, 2010 WL 4788563 (D. Md., Nov. 17, 2010), page 165

(case no. 8:10-cv-373) (District Judge Alexander Williams Jr.) [Text of opinion](#)

- **Chapter 13—Secured claim—Strip off of unsecured lien:** Reversing the bankruptcy court, which had denied the Chapter 13 debtor's motion to strip an allegedly wholly unsecured lien from the debtor's residence, apparently on the ground that Md. Code Ann., Real Prop. § 7-102(a) limited the amount due under the debtor's note given for the first mortgage on the property, thereby rendering the appraised value of the residence greater than the amount due, the district court held that the statute did not have that effect. While the statute provides that "[n]o mortgage or deed of trust may be a lien or charge on any property for any principal sum of money in excess of the aggregate principal sum appearing on the face of the mortgage or deed of trust and expressed to be secured by it, without regard to whether or when advanced or readvanced," the district court held that the costs of interest and late charges were part and parcel of the amount owed on the mortgage.
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In re Boyette, 2010 WL 4777631 (Bankr. E.D. N.C., Nov 17, 2010), page 91

(case no. 8:09-bk-4573) (Chief Bankruptcy Judge Randy D. Doub) [Text of opinion](#)

- **Status of claim as prepetition—Generally:** The Fourth Circuit uses the "conduct test" to determine whether a claim arises prepetition or postpetition. Under the "conduct test" the court focuses on the definition of "claim" under Code § 101(5) to determine when a right of payment arises. The "conduct test" focuses on the "actual act that gives rise to a state or federal claim ... not the contingency that gives rise to the right of payment."

- **Status of claim as prepetition—Under circumstances:** The Chapter 13 debtor's obligation to his wife under the parties' premarital agreement was a prepetition claim under the conduct test, where the parties entered into the agreement prepetition, although under the agreement the debtor was not obligated to make a payment to his wife until the parties obtained a divorce, and this had not yet occurred.

In re Brown, 436 B.R. 822 (Bankr. W.D. Va., Sept. 14, 2010), page 107

(case no. 7:10-bk-70974) (Chief Bankruptcy Judge Ross W. Krumm) [Text of opinion](#)

- **Property of estate—Lien impairing exemption—Avoidance of multiple liens:** Agreeing with *In re White*, 337 B.R. 686 (Bankr. N.D. Cal. 2005), the court held that, where a debtor seeks to avoid multiple judgment liens under Code § 522(f), the liens must be avoided in order of lower priority, and avoided liens are excluded in the calculation of impairment by higher-priority liens.

In re Cook, 2010 WL 4687953 (Bankr. E.D. Va., Nov. 10, 2010), page 166

(case no. 1:10-bk-10113; adv. proc. No. 1:10-ap-1300) (Bankruptcy Judge Stephen S. Mitchell) [Text of opinion](#)

- **Chapter 13—Secured claim—Strip off of unsecured lien:** Granting the Chapter 13 debtors' motion to strip, as wholly unsecured by value in the collateral, liens on the debtors' principal residence securing prepetition homeowner association assessments, the court said that "[p]ut simply, the Bankruptcy Code provides no special status, even in the area of dischargeability, for unpaid pre-petition assessments."

In re Frye, — B.R. —, 2010 WL 5030795 (Bankr. W.D. Va., Oct. 7, 2010), page 153

(case no. 5:10-bk-51285) (Chief Bankruptcy Judge Ross W Krumm) [Text of opinion](#)

- **Chapter 7—Waiver of filing fee:** Agreeing with the Chapter 7 debtor that the IRS test for dependency should be employed to determine whether the debtor's two adult daughters would be considered part of the debtor's "family" for the purpose of 28 U.S.C. § 1930(f)(1), which permits the waiver of the Chapter 7 filing fee if the debtor "has income less than 150 percent of the income official poverty line ... applicable to a family of the size involved and is unable to pay that fee in installments," the court found that the daughters were dependents of the debtor and thus were properly considered to be part of the debtor's "family." While the debtor also claimed that one daughter's husband part of her family, the court did not need to resolve that issue, as, in Virginia, 150 percent of the 2010 DHHS Guideline for a family of three is \$2,288.75 per month, and the debtor's monthly income was \$1,801. The IRS dependency test is stated in [IRS Publication 501](#).

In re Glover, 2010 WL 3603470 (Bankr. M.D. N.C., Sept. 14, 2010), page 133

(case no. 2:08-bk-10505) (Chief Bankruptcy Judge William L. Stocks) [Text of opinion](#)

- **Effect of discharge of debts:** Where a judgment against the Chapter 7 debtor husband individually was included in the joint debtors' discharge, and under North Carolina law the judgment did not attach to real property owned by the debtors as tenants by the entirety on the bankruptcy petition date, the judgment could not thereafter attach to the husband's interest in the real property following his and his wife's divorce.

In re Helms, 438 B.R. 95 (Bankr. W.D. N.C., Oct. 18, 2010), page 107

(case no. 3:10-bk-31612) (Chief Bankruptcy Judge J. Craig Whitley) [Text of opinion](#)

- **Property of estate—Lien impairing exemption—Mechanic's lien:** While a mechanic's lien must be judicially enforced in North Carolina, it arises by force of statute and is a statutory, rather than a judicial, lien. Accordingly, a debtor may not avoid a mechanic's lien under Code § 522(f).

In re Johnson, Case No. 1:10-bk-16789 (Bankr. E.D. Va., Dec. 2, 2010), pages 168-169

(Bankruptcy Judge Robert G. Mayer) [Chapter 13 plan](#) [Plan confirmation order](#)

- **Chapter 13—Secured claims—Mortgage creditor plan provisions:** Although a different judge, in *In re Russell*, 2010 WL 2671496 (Bankr. E.D. Va., June 30, 2010) (Bankruptcy Judge Stephen S. Mitchell), denied confirmation of a Chapter 13 plan that included several provisions directing the mortgage creditor's application of payments made under the plan, the court confirmed a plan including several such provisions.

In re Johnson, 2010 WL 4809104 (Bankr. D. S.C., Nov. 19, 2010), page 94

(case no. 3:10-bk-1239) (Bankruptcy Judge David R. Duncan) [Text of opinion](#)

- **Proof of claim—Secured claim—Amount of claim:** The automobile creditor provided sufficient documentation to be entitled to a presumption of validity as to its claim, where the creditor attached to its proof of claim a certificate of title for the vehicle and the sales contract between creditor and the Chapter 13 debtor. These documents established the purchaser of the vehicle and the terms of the purchase, including the purchase price and interest rate. Therefore, the burden of proof shifted to the debtor to rebut the presumption of validity of the creditor's claim. The debtor's testimony that, in her previous Chapter 13 case, which had been dismissed two weeks earlier, the creditor filed a proof of claim indicating the amount due was \$14,679.96, whereas the creditor's proof of claim in the current case stated that \$17,053.16 was due, was sufficient to require the creditor to provide additional information supporting the amount of its claim.

In re Kirkbride, 2010 WL 4809334 (Bankr. E.D. N.C., Nov. 19, 2010), pages 124, 132-133

(case no. 8:08-bk-120) (Bankruptcy Judge J. Rich Leonard) [Text of opinion](#)

- **Authority of the court—Imposition of sanctions—Against mortgage creditor—Generally:** In an important case, the bankruptcy court awarded the Chapter 11 debtors \$63,000 in compensatory damages from the mortgage creditor (Countrywide Home Loans, and Bank of America as its successor in interest), and assessed punitive damages in the same amount against the creditor, as a sanction for the creditor’s attempting to collect on two discharged mortgage debts from the debtors for two years. The parties negotiated a consent order (1) granting relief from the automatic stay, (2) permitting the creditor to foreclose on two mortgaged properties, and (3) providing that the lifting of the stay served as full payment and satisfaction of the creditor’s claims secured by the properties. However, the creditor then proceeded to ignore the consent order, and the debtor wife testified that she answered approximately 100 calls over the two years thereafter, while the debtors received an additional 300 calls that they did not answer, as well as 20 written communications.
- **Authority of the court—Imposition of sanctions—Against mortgage creditor—Compensatory damages:** The court analyzed the matter as civil contempt arising from the creditor’s violation of both the consent order and the discharge injunction. The latter arose because confirmation of the debtors’ plan served to discharge the debtors’ debts. The court awarded compensatory damages consisting of (1) \$5,000 in attorney’s fees; (2) \$1,000.00 for the time expended at the hearing on the motion; (3) \$50 per call for the approximately 300 unanswered calls; (4) \$200 per call for the approximately 100 answered calls; (5) \$2,000 for the 20 inappropriate written demands sent to the debtors; (6) \$10,000 for the embarrassment and humiliation suffered by the debtors in having actual and threatened legal proceedings brought against them by their local government and homeowner’s association; and (7) \$10,000 because the reporting of this extinguished debt to credit reporting agencies as seriously in default impacted the debtors’ credit rating and impeded the debtors’ fresh start.
- **Authority of the court—Imposition of sanctions—Against mortgage creditor—Punitive damages:** Declaring that the standard by which courts in the Fourth Circuit awarded punitive damages for violation of an order or discharge injunction required a demonstration of “egregious conduct,” “malevolent intent,” or “clear disregard of the bankruptcy laws,” the court found it “appallingly clear” that the creditor flagrantly disregarded the court’s order and discharge injunction. It was “beyond egregious,” the court said, that, after almost two years of facing such harassment on their own, the debtors finally caught the creditor’s attention only when they retained counsel and filed the present sanctions motion. A sophisticated creditor could not be excused for flagrantly ignoring the terms of an order to which it consented, and even more seriously, having no internal procedures in place to correct the error when it was clearly called to its attention.

**Comment:** Insofar as the court awarded damages for the debtors having legal proceedings brought against them due to their continued ownership of the properties, as to which the creditor did not commence the expected foreclosure proceedings, the court’s order effectively required the creditor to accept the debtors’ surrender of the properties, although the consent order did not explicitly provide for surrender.

In re Nelson, 2010 WL 3911387 (Bankr. E.D. N.C., Oct. 1, 2010), page 106

(case no. 8:09-bk-3593) (Bankruptcy Judge Stephani W. Humrickhouse) [Text of opinion](#)

- **Property of estate—Lien impairing exemption—Valuation of asset:** Although exemptions are valued as of the petition date, the value of an asset scheduled by the debtor is not binding in the presence of more reliable evidence, and here, the price at which the Chapter 7 trustee sold the debtors' homestead property, \$157,000, was more reliable evidence of its value than the \$300,000 scheduled by the debtors.

In re Norton, Case No. 3:09-bk-1951 (Bankr. D. S.C., Oct. 26, 2010), page 101

(Bankruptcy Judge David R. Duncan) [Text of opinion](#)

- **Proof of claim—For discharged debt—Sanctions:** Although the Chapter 13 debtor's attorney spent additional time responding to two proofs of claim filed by a creditor for debts discharged in the debtor's prior Chapter 7 bankruptcy case, there was no legal authority for the court to award the debtor attorney's fees to compensate for this expenditure of time.

In re Saeed, 2010 WL 3745641 (Bankr. M.D. N.C., Sept. 17, 2010), page 94

(case no. 2:10-bk-10303) (Bankruptcy Judge Thomas W. Waldrep Jr.) [Text of opinion](#)

- **Proof of claim—Secured claim—Amount of claim—Violation of state statute:** Where the mortgage creditor failed to comply with N.C. Gen. Stat. § 45-91 insofar as the creditor asserted that the debtor owed the creditor \$8,101.50 in attorneys' fees incurred in connection with a prepetition foreclosure of the debtor's mortgage, the creditor was not permitted to include the fees in its proof of claim. The statute required the creditor to "[e]xplain[] clearly and conspicuously" any fees assessed within 30 days of the assessment, and provided that the fees were waived if the creditor failed to do so. While the creditor's inclusion of the fees in its proof of claim may have been sufficient to inform the debtor of the assessment, the proof of claim did not "explain" the fees.

In re Seymour, Case No. 3:10-bk-377 (Bankr. D. S.C., August 16, 2010), page 117

(Chief Bankruptcy Judge John E. Waites) [Text of opinion](#)

- **Property of estate—Exemptions—Limitations:** The debtor husband's conveyance of a truck, solely owned by him, to his debtor wife five days before the debtors filed a joint bankruptcy petition, for no consideration and for the purpose of maximizing the debtors' exemptions, was made with the intent to hinder, delay, or defraud creditors and therefore was a fraudulent conveyance under Code § 548(a)(1). Accordingly, the court sustained the Chapter 7 trustee's objection to the wife's claimed exemption in the truck. The court distinguished cases holding that a debtor's prepetition conversion of nonexempt property to exempt property, in itself, is permissible prebankruptcy planning on the ground that no conveyance is involved in that situation, although the court did not explain why this factual distinction warranted a different outcome.

In re Short, 2010 WL 4962935 (Bankr. D. Md., Nov. 29, 2010), page 113

(case no. 1:09-bk-30235) (Chief Bankruptcy Judge Duncan W. Keir) [Text of opinion](#)

- **Property of the estate—Exemptions—Under state law:** Amending its earlier opinion, which is found at *In re Short*, 2010 WL 4736209 (Bankr. D. Md., Nov. 16, 2010), the bankruptcy court reaffirmed *In re Hurst*, 239 B.R. 89 (Bankr. D. Md. 1999) and *In re Hernandez*, 272 B.R. 178 (Bankr. D. Md. 2001), which held that an exemption of a personal injury claim under Md. Code Ann., Cts. & Jud. Pro. § 11-504(b)(2), which permits the exemption of “[m]oney payable in the event of sickness, accident, injury, or death of any person, including compensation for loss of future earnings,” is limited to money received as compensation for injuries to the person. Thus, a personal injury claim is not exempt to the extent the claim is for prepetition unpaid medical bills, prepetition lost wages, and special damages.

In re Smith, 2010 WL 3564837 (Bankr. D. Md., Sept. 13, 2010), page 118

(case no. 0:10-bk-21614) (Bankruptcy Judge Paul Mannes) [Text of opinion](#)

- **Property of estate—Exemptions—Limitations:** The Chapter 13 trustee’s objection to the joint debtors’ claimed exemption in their homestead property, based on the debtors’ prepetition conversion of the property from tenancy in common to tenancy by the entirety, was a fraudulent transfer claim that needed to be asserted as an adversary proceeding rather than as an objection to the debtors’ exemptions.

In re White, 2010 WL 3927485 (Bankr. D. Md., Sept. 30, 2010), page 128

(case no. 1:09-bk-13663) (Bankruptcy Judge Nancy V. Alquist) [Text of opinion](#)

- **Avoidable transfers—Spendthrift trust:** A Chapter 7 trustee may not use his strong-arm powers under Code § 544(a)(1) to invade a spendthrift trust excluded from the bankruptcy estate by Code § 541(c)(2).

## Fifth Circuit (13) R

Curtis v. Friendly Finance Service - Eastgate Inc., Case No. 3:10-cv-00415-JTT-KLH (W.D. La., Dec. 13, 2010), page 143

(District Judge James T. Trimble, Jr.)

- **Chapter 7—Denial of discharge:** A letter from the Chapter 7 debtors' attorney, stating that the debtors had disposed of the collateral for the creditor's loan, did not, in itself, establish a basis for denying the debtors a discharge under Code §§727(a)(2), (4)(A), (5), although it appeared that the debtors had disposed of the collateral prior to entering into the loan, where the creditor presented no evidence that it investigated the value of the collateral, or even verified its existence, before making the loan. While the creditor was free to continue to conduct business in this manner, it should not expect, in the event of a bankruptcy filing by any of its loan recipients, to be granted leave to file adversary complaints on the basis of evidence that the court could only describe as "sparing."

Rapid Settlements, Ltd. v. Shcolnik, 2010 WL 4639070 (S.D. Tex., Nov. 8, 2010), pages 80, 143

(case no. 4:10-cv-1366) (District Judge Nancy F. Atlas) [Text of opinion](#)

- **Nondischargeable debts—Fraud by fiduciary:** For purposes of Code § 523(a)(4), the concept of a fiduciary is more narrow than under general common law. Indeed, a "fiduciary capacity" under § 523(a)(4) exists only in those instances involving express or technical trusts; the fact that the parties are involved in a relationship of trust and confidence is insufficient to establish a fiduciary capacity. See *In re Gupta*, 394 F.3d 347 (5th Cir. 2004); *In re Hickman*, 260 F.3d 400 (5th Cir. 2001); *In re Miller*, 156 F.3d 598 (5th Cir. 1998); *Matter of Angelle*, 610 F.2d 1334 (5th Cir. 1980). (page 80)
  - **Chapter 7—Denial of discharge:** The bankruptcy court's factual finding, that the Chapter 7 debtor's failure to disclose his \$1,000 prepetition check to his fiancé was inadvertent, was not clearly erroneous, so that the debtor's failure to disclose the check did not warrant denial of the debtor's discharge under either Code § 727(a)(2)(A) as a transfer of estate property with intent to hinder, delay, or defraud a creditor, or under § 727(a)(4)(A) as the making of a false oath. (page 143)
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In re Bohannon, 2010 WL 3957477 (Bankr. S.D. Tex., Oct. 7, 2010), page 154

(case no. 4:10-bk-33291) (Bankruptcy Judge Wesley W. Steen) [Text of opinion](#)

- **Chapter 7—Debtor’s duty to cooperate with trustee:** Denying the Chapter 7 trustee’s motion to convey to the debtor a 15% interest in any recovery in litigation of the debtor’s prepetition wrongful termination claim, which was property of the estate, in order to encourage the debtor to fully cooperate with the trustee in the prosecution of the litigation, the court found the conveyance unnecessary and unwise, as (1) under Code § 521(a)(3), the debtor had a duty to cooperate with the trustee; (2) the court could order the debtor to cooperate with the trustee, and the debtor’s discharge could be revoked under Code § 727(d)(3) if he failed to comply with that order; (3) while the litigation was in Nevada, there was no need to provide the debtor with funds to travel to that state; (4) the debtor’s full cooperation was in his own best financial interests even without the conveyance of the 15% interest; and (5) it was simply not good policy to let a debtor demand a quid pro quo, in addition to a discharge and an opportunity for a fresh start, every time the trustee needed the debtor’s reasonable cooperation.

In re Clayton, 2010 WL 4482810 (Bankr. S.D. Tex., Oct. 29, 2010), page 73

(case no. 4:08-bk-37108; adv. proc. no. 4:09-ap-3024) (Bankruptcy Judge Marvin Isgur)

[Text of opinion](#)

- **Violation of stay—By mortgage creditor—Determination of damages:** In determining damages sustained by the Chapter 13 debtors, now proceeding pro se, due to the mortgage creditor’s violation of the automatic stay in the debtors’ prior Chapter 13 case by attempting to foreclose on their home mortgage, the court awarded the debtors \$829.41 in costs, \$2,231 in attorney’s fees, and \$25 in parking expenses. However, the court denied an award of emotional distress damages, which the debtors sought in the amount of \$359.46 for medical expenses allegedly resulting from the stress caused by the stay violation, where the debtors did not establish that the aggravation of the debtor wife’s diabetes resulted from the stay violation.

In re Fernandez, — B.R. —, 2010 WL 3943932 (Bankr. S.D. Tex., Oct. 6, 2010), pages 160, 182

(case no. 4:07-bk-35173) (Bankruptcy Judge Jeff Bohm) [Text of opinion](#)

- **Chapter 13—Adequate protection payments—Generally:** The Bankruptcy Code does not specifically define “adequate protection payments.” Various provisions within Code § 363 circumscribe the debtor’s right to use property in which a secured creditor has an interest, but § 363(e) states that, upon request of a lienholder, the court “shall prohibit or condition such use ... as is necessary to provide adequate protection of such interest.” Section 361 recognizes three nonexclusive forms of adequate protection applicable to the debtor’s continue use of a secured creditor’s collateral: cash payments to the extent the collateral has declined in value, additional collateral to compensate the secured creditor for such a decline, or other relief “as will result in the realization by [the secured creditor] of the indubitable equivalent of such entity’s interest in such property.” (page 160)

- **Chapter 13—Adequate protection payments—Claims secured by real property collateral:** The only way for a Chapter 13 debtor to supply adequate protection to real estate lienholders is to provide them with the “indubitable equivalent” of their interest in the real estate, which is the full amount of the contractual monthly payment due to the mortgagee. *In re Perez*, 339 B.R. 385 (Bankr. S.D. Tex. 2006), aff’d *Perez v. Peake*, 373 B.R. 468 (S.D. Tex. 2007). (page 160)
- **Chapter 13—Funds held by trustee—Distribution upon dismissal of case—Without plan confirmation:** As amended by BAPCPA, Code § 1326(a)(2) states that, “[a] payment made under paragraph (1)(A)” —that is, a payment made under the plan— “shall be retained by the trustee until confirmation or denial of confirmation.... If a plan is not confirmed, the trustee shall return any such payments not previously paid and not yet due and owing to creditors pursuant to paragraph (3) to the debtor, after deducting any unpaid claim allowed under section 503(b).” The reference to “paragraph 3” apparently relates to § 1326(a)(3), which authorizes the court to “upon notice and a hearing, modify, increase, or reduce the payments required under this subsection pending confirmation of a plan.” Read literally, § 1326(a)(2) conditions the disbursement to creditors on whether the court has entered an order modifying payments otherwise required by Section 1326(a). However, in deciphering § 1326(a)(2), some courts—including the present court—have concluded that the reference to § 1326(a)(3) is intended to refer to adequate protection payments generally. Accordingly, upon dismissal of a Chapter 13 case in which no plan is confirmed, funds held by the Chapter 13 trustee will be distributed first to the recipients of unsatisfied adequate protection payments, then to administrative claimants, and finally to the debtor. (page 182)

*In re Gonzales*, 2010 WL 4340936 (Bankr. N.D. Tex., Oct. 27, 2010), page 154

(case no. 3:10-bk-35766) (Bankruptcy Judge Stacey G.C. Jernigan) [Text of opinion](#)

- **Chapter 7—Court authorization of debtor’s sale of property:** Denying the Chapter 7 debtor’s “emergency” motion for a court order authorizing the debtor to see her exempt homestead property, the court explained that (1) Code § 363 permits the Chapter 7 trustee, not the debtor, to sell property of the estate, and the debtor had not obtained the trustee’s concurrence in the motion; and (2) while the time for objections to the debtor’s claimed exemption of the equity in the homestead had passed, there was still time for someone to file a motion under Code § 522(q) to limit the debtor’s homestead exemption to \$146,450, as under Bankruptcy Rule 4003(b)(3) a party in interest had until the “closing of a case” to assert an objection to a homestead exemption under § 522(q). Observing that the debtor filed her bankruptcy petition almost immediately after signing the sale contract on her house, and that she apparently was not facing a foreclosure, repossession or other imminent harm when she filed her case, the court found it “not particularly fair or appropriate” to tax the system with an “emergency” when the debtor could have filed her case either sooner or later in order to more easily accommodate the timetable under which she wanted to sell her homestead.

In re Grisham, 436 B.R. 896 (Bankr. N.D. Tex., Sept. 7, 2010), pages 146-147

(case no. 3:10-bk-32524) (Bankruptcy Judge Stacey G.C. Jernigan) [Text of opinion](#)

- In an opinion that the court described as having been circulated among, and having received the concurrence of, the other bankruptcy judges in the district, the court stated that:
  - Under Code § 524(c)(1), a reaffirmation agreement is only “enforceable” if “such agreement was made before the granting of the discharge.” Under Bankruptcy Rule 4004(c)(1), a discharge order is typically issued by the clerk's office promptly after the expiration of the time fixed for filing objections to the debtor's discharge. However, under Rule 4004(c)(2), a debtor may file a motion asking the court to “defer the entry of an order granting a discharge for 30 days and, on a motion within that [subsequent 30-day] period, the court may defer entry of the order to a [still-later] date certain.” It was critical that debtors file a motion to defer entry of a discharge order when they were having delays in finalizing a reaffirmation agreement, as it was generally not appropriate for the bankruptcy court to set aside a discharge order for the sole purpose of considering a reaffirmation agreement, and then thereafter re-enter a discharge order.
  - While Bankruptcy Rule 4008(a) provides that “[a] reaffirmation agreement shall be filed no later than 60 days after the first date set for the meeting of creditors,” that rule also allows the court to “enlarge the time to file a reaffirmation agreement.” Thus, a debtor or creditor may, at any time, file a motion to enlarge the time to file a reaffirmation agreement. Technically, the court has the power to enlarge the time to file a reaffirmation agreement without a motion even being made.
  - A court hearing on a reaffirmation agreement is required (1) under Code § 524(c)(6), where the debtor “was not represented by an attorney during the course of negotiating” the reaffirmation agreement, and the debt is not a consumer debt secured by real property; and (2) under Code § 524(m), where the presumption of undue hardship is triggered and the reaffirmation agreement is not with a credit union. However, due to frequent errors involving the checking of the wrong box with respect to undue hardship, or the failure to check any box at all, the court was going to scrutinize the math and set a reaffirmation agreement for a hearing whenever the math was “negative.” The court might also set the reaffirmation agreement for hearing when the math was positive when the agreement was filed but was negative when the debtor filed his Schedules I and J.
  - Where the presumption of undue hardship is triggered, a hearing must be held within 60 days of when the reaffirmation agreement is filed because § 524(m)(1) requires that the presumption “shall be reviewed by the court” and also provides that the presumption expires after 60 days. While, in theory, the court could be satisfied that the debtor has rebutted the presumption of undue hardship with a good written explanation and not set a hearing, in reality the court was rarely satisfied with the debtor’s written explanation and would hold a hearing.
  - It should be considered a basic part of Chapter 7 debtor representation that an attorney advise his client as to something as fundamental and significant as a reaffirmation agreement and assist him in the negotiation of the agreement.

- If a presumption of undue hardship arises in the case of a represented debtor, the debtor's attorney must check the box stating that such a presumption arises. The court, not the attorney, has the discretion to determine otherwise.
- Here, the court could not find that the presumption of undue hardship had been overcome, and the reaffirmation agreement would be disapproved, where the agreement pertained to a 2007 Dodge truck in which the debtor had no equity, the interest rate on the debt was 17.5%, the debtor had 71 more months of payments on the vehicle, and the debtor's only current source of income was government assistance, a major portion of which would soon expire.

In re Guidry, 2010 WL 4052173 (Bankr. S.D. Tex., Oct. 14, 2010), page 129

(case no. 4:10-bk-37113) (Bankruptcy Judge Wesley W. Steen) [Text of opinion](#)

- **Debtor's provision of required information:** The court lacks the authority to reinstate a case dismissed under Code § 521(i) for failure to provide the required information.

In re Kinds, 2010 WL 4386929 (Bankr. N.D. Miss., Oct. 29, 2010), page 183

(case no. 1:10-bk-12502) (Chief Bankruptcy Judge David W. Houston, III) [Text of opinion](#)

- **Chapter 13—Assumption of executory lease:** Because an agreement under which the Chapter 13 debtor obtained possession of a mobile home was a true lease agreement, rather than a secured purchase agreement, the debtor needed to assume the lease under Code § 365 in order to retain possession of the mobile home. Assumption of the lease required the debtor, under § 365(b)(1), to promptly cure any existing defaults as well as to provide adequate assurance of future performance. In determining that the agreement was a lease, the court applied the factors stated in UCC § 1-203.

In re Locascio, 2010 WL 4973624 (Bankr. S.D. Tex., Dec. 2, 2010), page 107

(case no. 4:10-bk-37406) (Bankruptcy Judge Letitia Z. Paul)

[Text of opinion](#)

[Debtors' motion for reconsideration](#)

- **Property of the estate—Avoidance of lien impairing exemption:** Where the Chapter 7 debtors introduced no evidence as to the nature of the debt secured by a judicial lien, so that it was possible that the lien was of a type that could attach to the debtors' homestead, the court denied the debtors' motion to avoid the lien under Code § 522(f) as impairing the debtors' homestead exemption. The court's reasoning is unclear; the debtors' motion for reconsideration interprets the decision as holding that a lien that attaches to homestead property may not be avoided and argues that this is an erroneous reading of § 522(f).

In re McMorris, 436 B.R. 359 (Bankr. M.D. La., Sept. 16, 2010), page 108

(case no. 3:09-bk-11881) (Bankruptcy Judge Douglas D. Dodd) [Text of opinion](#)

- **Property of the estate—Avoidance of lien impairing exemption—Mortgage deficiency judgment lien:** Code § 522(f)(2)(C) precludes the avoidance of a mortgage foreclosure judgment, but it does not preclude the avoidance of a mortgage deficiency judgment lien. This result was consistent with Louisiana law, under which a mortgage creditor's deficiency judgment is merely incidental to the mortgage foreclosure and not a "judgment arising out of a mortgage foreclosure" within the meaning of § 522(f)(2)(C).

In re McPhedran, 2010 WL 3909856 (Bankr. W.D. La., Sept. 30, 2010), page 134

(case no. 4:08-bk-51453) (Chief Bankruptcy Judge Robert R. Summerhays) [Text of opinion](#)

- **Violation of discharge injunction—Debts included in discharge:** The creditors' collection from the Chapter 7 debtor, following his discharge, of sums due on a prepetition debt that was included in the debtor's discharge violated the discharge injunction. While the creditors, following the debtor's discharge, obtained a judgment against both the debtor and his corporation, the debt collected by the creditors was not based solely on the debtor's alleged postdischarge personal guarantee of the corporation's liability; rather, the debt was predicated at least in part on the debtor's prepetition liability to the creditors.

In re Tinsley, 2010 WL 4823208 (Bankr. N.D. Tex., Nov. 16, 2010), page 116

(case no. 3:09-bk-36036) (Bankruptcy Judge Stacey G.C. Jernigan) [Text of opinion](#)

- **Property of the estate—Exemptions—Under state law:** The debtor was entitled to claim certain property as his homestead, although he did not hold legal title to the property, and he slept at his new wife's home at nights while being on his claimed homestead property during the days to run his cattle grazing business. Although title to the property was held by the debtor's father's estate, the father's will devised the property to the debtor, and the debtor had been living on the property since 2004 (other than sleeping at his new wife's residence since mid-2008), so he had a present possessory interest in the property. As to the debtor's spending the days at his claimed homestead property and the nights at his new wife's house, the court followed the line of Texas cases holding that a court should honor a debtor's subjective intent, when more than one property was actually used as a residence, under circumstances sufficiently ambiguous so that determining which property was the debtor's homestead was impossible merely from observing how it was used.

## Sixth Circuit (11) R

In re Hart, 438 B.R. 406 (E.D. Mich., Nov. 1, 2010), page 79

(case no. 2:10-cv-12350) (District Judge George Caram Steeh) [Text of opinion](#)

- **Nondischargeable debts—Student loan—Undue hardship not established:** The Chapter 13 debtor, a 62-year-old, unemployed woman who received only Social Security income and whose husband was permanently and totally disabled and confined to the family residence, did not establish any of the three elements of the *Brunner* test in attempting to discharge the \$40,866.85 “Parent-Plus” student loan debt she incurred on behalf of her daughter. The debtor had not minimized her expenses, as she spent \$115 on telephone services (including \$65 on telephone and \$50 on cell phone), \$65 on cable/Internet and \$75 on recreation monthly. Nor had the debtor maximized her income; her argument that she needed to be at home to care for her husband was speculative. Moreover, the debtor did not make a good-faith effort to repay the loan, although she had paid \$6,390.61 over the years, as she did not apply for the Income-Contingent Repayment Program, under which her monthly payment would be \$120.

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In re Anderson, 2010 WL 4959948 (Bankr. E.D. Tenn., Dec. 1, 2010), page 128

(case no. 2:10-bk-50757; adv. proc. no. 2:10-ap-5081) (Bankruptcy Judge Marcia Phillips Parsons) [Text of opinion](#)

- **Avoidable transfers—Fraudulent transfer—Pleading constructive fraud:** Although the Sixth Circuit Court of Appeals has not yet addressed this issue, most courts conclude that the heightened pleading requirements of Federal Rule of Civil Procedure 9(b), which is applicable to adversary proceedings through Bankruptcy Rule 7009 and demands that allegations of fraud or mistake be pled with “particularity,” are inapplicable to fraudulent transfer actions based on constructive fraud under Code § 548(a)(1)(B).

In re Blanton, 2010 WL 4503188 (Bankr. N.D. Ohio, Oct. 29, 2010), page 161

(case no. 6:10-bk-60160) (Bankruptcy Judge Russ Kendig) [Text of opinion](#)

- **Chapter 13—Secured claims—Appropriate rate of interest:** The present court argued in *In re Cook*, 322 B.R. 336 (Bankr. N.D. Ohio 2005) that courts had rushed headlong to embrace the decision in *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S.Ct. 1951, 158 L.Ed.2d 787 (2004) as precedential when it is not based upon traditional American jurisprudence. However, the Sixth Circuit Court of Appeals has indicated in dicta that bankruptcy courts should follow *Till* when determining interest rates in Chapter 13 plans. See *In re American HomePatient, Inc.*, 420 F.3d 559 (6th Cir. 2005). In addition, the Bankruptcy Appellate Panel for the Sixth Circuit has endorsed *Till*'s prime-plus approach in the context of Code § 1325(a)(5). See *In re Taranto*, 365 B.R. 85 (6th Cir. B.A.P. 2007). In light of these developments, the court believed that the Sixth Circuit Court of Appeals would adopt *Till* in the Chapter 13

context if presented directly with the question. Accordingly, the court would apply the prime-plus approach in this case. The current national prime rate was 3.5%, and the 5.25% interest rate suggested by the debtors fell in the middle of the 1% to 3% range suggested by *Till* and would be approved.

In re Greer, 2010 WL 4817993 (Bankr. M.D. Tenn., Nov. 22, 2010), page 104

(case no. 3:09-bk-13366; adv. proc. no. 3:09-ap-476) (Bankruptcy Judge Marian F. Harrison) [Text of opinion](#)

- **Property of estate—Effect of prepetition foreclosure:** Where a foreclosure sale of the debtor’s real property was held on October 22, 2009, the purchaser paid consideration, the Substitute Trustee's Deed was then duly recorded on November 9, and the debtor's Chapter 11 petition was not filed until November 20, the foreclosure had been completed and the real property was not property of the debtor’s bankruptcy estate. In Tennessee, a foreclosure is effective upon payment of the consideration and satisfaction of the statute of frauds.

In re Harwell, 439 B.R. 455 (Bankr. W.D. Mich., Nov 23, 2010), page 155

(case no. 1:09-bk-9528) (Bankruptcy Judge Scott W. Dales) [Text of opinion](#)

- **Chapter 7—Attorney’s fees—Disgorgement:** Ordering the law firm that represented a Chapter 7 debtor to disgorge \$500 of the \$1200 fee paid by the debtor, the court said that the law firm (1) did not provide the services the debtor expected when the firm contracted with an unaffiliated attorney whom the debtor had never met to attend the debtor’s meeting of creditors, and then failed to disclose this fee sharing in its fee disclosure statement prepared to comply with Bankruptcy Rule 2016; and (2) charged the debtor a \$150 “service fee” for arranging credit counseling and other related services, and also did not disclose this fee in its Rule 2016 statement.

In re Humphries, 2010 WL 5101036 (Bankr. E.D. Mich., Dec. 8, 2010), page 184

(case no. 2:10-bk-41299) (Bankruptcy Judge Steven Rhodes) [Text of opinion](#)

- **Chapter 13—Attorney’s fees—Effect of BAPCPA:** Where the Chapter 13 debtor consulted with an attorney at a law firm on November 17, 2009, to discuss her bankruptcy options but did not retain the firm at that time, and she then met with the firm again and signed a fee agreement on December 15, 2009, the firm failed to comply with Code § 528(a)(1), which requires an attorney to execute a written fee agreement within five days of providing any bankruptcy assistance services. The record clearly established that, at the meeting on November 17, the firm was a “debt relief agency” and that it provided “bankruptcy assistance” to the debtor, who was then an “assisted person.” Accordingly, the firm’s contract with the debtor was unenforceable, and the firm was not entitled to receive any fees in the case. Congress could have chosen to set the deadline within five days after the debtor decided to retain the firm. But it did not. Instead the deadline Congress chose was five days after counsel provided any bankruptcy assistance to the debtor.

In re Maxwell, 2010 WL 4736206 (Bankr. E.D. Tenn., Nov. 16, 2010), page 108

(case no. 3:09-bk-35713) (Bankruptcy Judge Richard S. Stair Jr.) [Text of opinion](#)

- **Property of estate—Avoidance of lien impairing exemption—Exception for foreclosure:** The purpose of Code § 522(f)(2)(C) was “to remove from the application of § 522(f) any judgment for a foreclosure in states requiring judicial foreclosures or wherein the deficiency judgment is a portion of the foreclosure judgment and not a separate action to collect a deficiency balance on a previously secured but, post-foreclosure unsecured, debt.”

In re Morgan, 2010 WL 4922581 (Bankr. E.D. Tenn., Nov. 29, 2010), pages 118, 121

(case no. 1:10-bk-13804) (Chief Bankruptcy Judge John C. Cook) [Text of opinion](#)

- **Property of estate—Exemptions—Effect of fraud upon creditor:** A debtor’s exemption may not be denied on the basis of a single creditor’s assertion that the exempted property was purchased with funds conveyed by another person in fraud upon the objecting creditor. Thus, here, where the father of the debtor’s child gave the debtor \$225,000 that the father acquired in a Ponzi scheme; although the debtor used the money to buy the property she claimed as her exempt homestead, there was no showing that she participated in the father’s Ponzi scheme; and, after an involuntary bankruptcy petition was filed against the father, the trustee of the father’s bankruptcy estate avoided the \$225,000 conveyance, the existence of a claim by the trustee of the father’s bankruptcy estate against the debtor’s bankruptcy estate did not warrant denial of the debtor’s exemption. (page 118)
- **Property of estate—Exemptions—Effect of Code §522(g):** Even if the trustee of the debtor’s bankruptcy estate could set aside a garnishment of funds from the debtor, the debtor would be able to claim an exemption in the funds under Code § 522(g), as the garnishment was an involuntary transfer that the debtor did not attempt to conceal. (page 121)

In re Rahim, --- B.R. ---, 2010 WL 5128944 (Bankr. E.D. Mich., Dec. 16, 2010), page 141

(case no. 2:10-bk-57577) (Bankruptcy Judge Steven Rhodes) [Text of opinion](#)

- **Chapter 7—Dismissal for cause—Application to debtors with primarily business debt:** The fact that the Chapter 7 debtors’ debt was primarily business debt did not prevent the dismissal of their case under Code § 707(a) for “cause.”
- **Chapter 7—Dismissal for cause—Effect of ability to pay:** “Cause” existed to dismiss a Chapter 7 case filed by debtors with monthly income of at least \$42,446, and annual income of more than \$500,000, from their joint medical practice, on the debtors’ lack of good faith in making no attempts whatever at tightening their belts; the debtors budgeted, as monthly expenses, \$15,714 as mortgage payment on primary residence, nearly \$5,000 as mortgage payment on vacation home, more than \$2,000 as payments on three luxury motor vehicles, \$1,500 as food expenses for themselves and their two children, \$320 for recreation, and \$4,575 for private school tuition. In the Sixth Circuit, ability to pay unsecured creditors is a sufficient basis for dismissal or conversion of a case under § 707(a). See *In re Zick*, 931 F.2d 1124 (6th Cir. 1991). The rule is different in the Third Circuit; see *Perlin v. Hitachi Capital America Corp.*, 497 F.3d 364 (3rd Cir. 2007).

In re Scott, 2010 WL 4809340 (Bankr. W.D. Ky., Nov. 19, 2010), pages 99, 176

(case no. 1:09-bk-12198) (Chief Bankruptcy Judge Joan A. Lloyd) [Text of opinion](#)

- **Proof of claim—Secured claim—Status as secured:** A reference to “MOBIL” under the Schedule of Real Estate owned by the Debtors in the Chapter 13 debtors’ loan application was insufficient to establish the intent of the debtors to grant a lien on their mobile home. (page 99)
- **Chapter 13—Vacation of confirmed plan:** A creditor was bound by a confirmed Chapter 13 plan that treated the creditor’s claim as secured in the amount of \$1,000 and unsecured in the amount of \$49,565.23, where the debtors served the petition and the plan on the creditor, and the creditor did not assert that it lacked notice of either document. Accordingly, the creditor received due process and could not now, two years later, seek to vacate the order confirming the plan. (page 176)

In re Ward, 2010 WL 4922713 (Bankr. E.D. Mich., Nov. 29, 2010), page 144

(case no. 2:10-bk-68727) (Bankruptcy Judge Thomas J. Tucker) [Text of opinion](#)

- **Chapter 7—Denial of discharge—Due to prior Chapter 13 discharge:** The debtor, who had received a Chapter 13 discharge within six years of filing his current Chapter 7 petition, was not eligible to receive a Chapter 7 discharge, although he had paid 76.5% of the allowed unsecured claims in the Chapter 13 case, because the debtor’s plan in that case did not represent his “best effort” as required under Code § 727(a)(9)(B)(ii). The plan in the previous case did not represent the debtor’s best effort because he could have sought to confirm a plan with a term longer than 36 months, even though to do so would have required the debtor to establish “cause.” While courts disagreed under pre-BAPCPA law whether the desire to pay more to creditors constituted “cause” under former Code § 1322(d) to extend the plan term beyond 36 months, the best-reasoned case law held that it did.

## Seventh Circuit (8)

In re Davis, --- B.R. ---, 2010 WL 5136037 (Bankr. N.D. Ill., Dec. 16, 2010), page 180

(case no. 1:08-bk-16025) (Bankruptcy Judge Eugene R. Wedoff) [Text of opinion](#)

- **Chapter 13—Modification of plan:** Denying the Chapter 13 trustee's objection to the debtor's proposed modification of her plan, which reduced the monthly payment and shortened the plan term from 54 to 36 months following the loss of her job and her separation from her nondebtor husband, the court held that (1) the projected disposable income requirement of Code § 1325(b) does not apply to plan modifications, and (2) the proposed modification was in good faith; if the debtor's income increased in the future, the trustee was free to seek a further modification of the debtor's plan.

In re Hingiss, 2010 WL 4941622 (Bankr. E.D. Wis., Dec. 2, 2010), pages 158, 174

(case no. 2:10-bk-29145) (Bankruptcy Judge James E. Shapiro) [Text of opinion](#)

- **Chapter 13—Secured claims—910-day car claim—Equitable tolling:** In what appears to be the first case taking this position, the court held that equitable tolling applied in determining whether the 910-day period of the hanging paragraph in Code § 1325(a)(5) had expired, where the debtors filed their first Chapter 13 case within the 910-day period and, after that case was dismissed, the debtors filed a second Chapter 13 case more than 910 days after the purchase of the vehicle. Disagreeing with *In re Maas*, 416 B.R. 767 (Bankr. D. Kan. 2009) and *In re Murphy*, 375 B.R. 919 (Bankr. M.D. Ga. 2007), the court said that *Young v. U.S.*, 535 U.S. 43, 122 S.Ct. 1036, 152 L.Ed.2d 79 (2002), which applied equitable tolling in the context of the three-year lookback period for the nondischargeability of tax claims, governed. (page 158)
- **Chapter 13—Confirmation of plan—Good faith:** Mere speculation was not enough to establish that the plan in the debtors' second Chapter 13 case, which they filed three months after their earlier Chapter 13 case had been dismissed, was proposed in bad faith for the purpose of Code § 1325(a)(3), although, due to the passage of time since the filing of the earlier case, the debtors' motor vehicle was no longer a 910-day vehicle, and the plan treated it as such. (page 174)

In re Kearney, --- B.R. ---, 2010 WL 4942140 (Bankr. E.D. Wis., Dec. 3, 2010), page 180

(case no. 2:09-bk-24918) (Bankruptcy Judge Susan V. Kelley) [Text of opinion](#)

- **Chapter 13—Modification of plan:** Concluding that the Chapter 13 debtor misrepresented her income while manipulating her expense deductions so as to justify a reduced plan payment, the court said that these facts proved a lack of good faith, and the debtor's proposed plan modification could not be confirmed.
- **Chapter 13—Modification of plan:** The projected disposable income requirement of Code § 1325(b) does not apply to modification of a confirmed plan.

In re Lokowich, 2010 WL 4793308 (Bankr. W.D. Wis., Nov. 19, 2010), page 179

(case no. 3:09-bk-14739; adv. proc. no. 3:09-ap-317) (Chief Bankruptcy Judge Robert D. Martin) [Text of opinion](#)

- **Chapter 13—Actions against mortgage creditor—Preclusion by prior foreclosure judgment:** The Chapter 13 debtor's adversary proceeding against the mortgage creditor, asserting claims of fraud and violation of the Truth in Lending Act, was precluded by a prior state court judgment foreclosing the mortgage, even though the debtor was not a named defendant in the foreclosure action, as, when the mortgage creditor filed its foreclosure action against the record owner of the property, the creditor recorded a *lis pendens*, and under state law this had the effect of rendering the debtor, who held an unrecorded interest in the property, a subsequent purchaser who was bound by the foreclosure judgment. Accordingly, the doctrine of claim preclusion prevented the debtor from relitigating the matter in the form of her adversary proceeding. While claim preclusion does not absolutely bar a defendant, or one in privity with the defendant, from filing a subsequent suit, Wisconsin courts had adopted an exception to this rule called the common-law compulsory counterclaim rule. Under this rule, a party seeking to avoid claim preclusion is barred from bringing a subsequent action if a decision in favor of that party would either nullify the previous judgment or would impair rights established by that judgment, and, here, a favorable ruling for the debtor on her claims would nullify the rights in the property that were vested in the creditor as a result of the foreclosure judgment.

In re Mahoney, 2010 WL 4736237 (Bankr. E.D. Wis., Nov. 16, 2010), page 109

(case no. 2:09-bk-38388) (Bankruptcy Judge Susan V. Kelley) [Text of opinion](#)

- **Property of estate—Avoidance of security interest impairing exemption:** To determine whether a security interest is possessory or nonpossessory for the purpose of Code § 522(f)(1)(B), which allows a the debtor to avoid a nonpossessory, nonpurchase-money security interest to the extent the lien impairs the debtor's exemption in certain types of collateral, the critical question is how the lien attached and became enforceable against the debtor. In order to create a possessory security interest, the agreement between the parties must contemplate that the secured party will possess the collateral, and the secured party must in fact possess the collateral. In this case, the security agreement provided that the debtors would maintain possession of the collateral until default; thus the debtors granted the credit union only a nonpossessory security interest in the collateral. And the credit union's security interest did not transform into a possessory security interest when the credit union took possession of its collateral after default. The majority rule is that a security interest does not become possessory, and therefore not avoidable, when the creditor takes possession of the collateral following default.

In re May, 2010 WL 4702384 (Bankr. E.D. Wis., Nov. 12, 2010), page 171

(case no. 2:09-bk-26324) (Bankruptcy Judge Susan V. Kelley) [Text of opinion](#)

- **Chapter 13—Projected disposable income:** In calculating their projected disposable income, the above-median Chapter 13 debtors could not deduct a secured debt expense for repayment of a debt secured by a junior mortgage lien that the debtors had stripped as not secured by value in the collateral.

In re Risler, 2010 WL 4924752 (Bankr. W.D. Wis., Dec. 2, 2010), page 103

(case no. 1:08-bk-15716; adv. proc. no. 1:09-ap-132) (Bankruptcy Judge Thomas S. Utschig) [Text of opinion](#)

- **Property of the estate:** The Chapter 7 debtor's one-half interest in real property owned in joint tenancy with his son was property of his bankruptcy estate, although the son had paid the entire purchase price for the property, and the son testified that he put the debtor's name on the deed to the property only because he (the son) had medical problems and needed help in maintaining the property. Finding the case similar to *Matter of Teranis*, 128 F.3d 469 (7th Cir. 1997), the court said that, whatever the equitable interests may have been between father and son, creditors were entitled to rely on the face of the deed.

In re Walker, 2010 WL 4259274 (Bankr. C.D. Ill., Oct. 21, 2010), page 181

(case no. 3:07-bk-70358) (Bankruptcy Judge Mary P. Gorman) [Text of opinion](#)

- **Chapter 13—Modification of plan:** The purposes for modification of a confirmed plan set forth in Code § 1329 constitute an exclusive list. An increase in the "base" of the Chapter 13 debtors' plan, as proposed by the debtors in their modified plan, was not one of the permitted purposes, where the debtors did not explain how payments to creditors would change as a result of the increase in the "base."
- **Chapter 13—Modification of plan:** The projected disposable income requirement of Code § 1325(b) does not apply to modification of a confirmed plan.
- **Chapter 13—Modification of plan:** Where the Chapter 13 debtors received a settlement of a personal injury claim during the pendency of their case, the debtors' proposed modification of their plan required a liquidation analysis taking into account the settlement proceeds, although the debtors' claimed exemption of a portion of the proceeds would be allowed in the absence of any objections.

## Eighth Circuit (10) R

In re Danduran, 438 B.R. 658 (8th Cir. B.A.P., Nov. 23, 2010), page 115

(case no. 10-6042) [Text of opinion](#)

- **Property of the estate—Exemptions—Under state law:** Reversing the bankruptcy court, the BAP held that the debtor was entitled to exempt under North Dakota law, as proceeds from the sale of his homestead, the entire amount received in the sale, even though the Chapter 7 trustee claimed that \$7,700 of the \$225,000 received in the sale represented funds received from the sale of certain furnishings and other personal property that was included in the sale of the home. The debtor deposited the net proceeds of the sale, after payment of the liens on the home, in a savings account, and the BAP reasoned that the debtor's establishment of a savings account for the specific purpose of depositing the proceeds of the sale of his homestead, and his subsequent deposit into that account of the proceeds from the personal property (allegedly) sold with his homestead, constituted sufficient indicia of his intent to convert nonexempt personal property into exempt, homestead property. Because the record was devoid of any contrary evidence, or evidence that the debtor acted with fraudulent intent when he converted nonexempt property into exempt property, the debtor was entitled to exempt the entire amount in his savings account.

In re Hurd, --- B.R. ---, 2010 WL 5093664 (8th Cir. B.A.P., Dec. 15, 2010), page 114

(case no. 10-6072) [Text of opinion](#)

- **Property of the estate—Exemptions—Under state law:** Reversing the bankruptcy court, the BAP held that a horse trailer that the debtor had modified to live in after his ex-wife had "kicked [him] out" could not be exempted as a "mobile home" under Mo. Rev. Stat. § 513.430.1(6), which does not define the term, where the trailer did not meet the definition of a "manufactured home" in Mo. Rev. Stat. § 700.010, and Missouri state courts had applied the definition in § 700.010 to the term "mobile home" when it was used in other contexts.

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In re Arthur, --- B.R. ---, 2010 WL 4674450 (Bankr. S.D. Iowa, Oct. 20, 2010), page 113

(case numbers 3:09-bk-4332, 3:10-bk-463) (Bankruptcy Judge Anita L. Shodeen)

[Text of opinion](#)

- **Property of the estate—Exemptions—Under state law:** The Chapter 7 debtors' tax refunds were not "disposable earnings" within the meaning of Iowa Code § 642.21, which provides that "disposable earnings of an individual are exempt from garnishment to the extent provided by the federal Consumer Credit Protection Act." The tax refunds therefore were not exempt under Iowa Code § 627.6(10), which permits the exemption of amounts protected from garnishment under § 642.21.

- **Property of the estate—Exemptions—Under state law:** The debtors’ Making Work Pay and Hope Scholarship tax credits were not “public assistance benefits” and thus were not exempt under Iowa Code § 627.6(8)(a), which permits the exemption of Social Security benefits, unemployment compensation or “any public assistance benefit.”

In re Coleman, 2010 WL 5067429 (Bankr. D. S.D., Dec. 7, 2010), page 148

(case no. 1:10-bk-10171) (Bankruptcy Judge Charles L. Nail Jr.) [Text of opinion](#)

- **Chapter 7—Reaffirmation agreement—Presumption of undue hardship:** Code § 524(m)(1) does not distinguish between reaffirmation agreements that were negotiated with the assistance of counsel and those that were negotiated without the assistance of counsel, or between those in which the debt being reaffirmed is a consumer debt secured by real property and those in which the debt being reaffirmed is not a consumer debt secured by real property. If a presumption of undue hardship arises, the court must review the presumption, and if the presumption is not rebutted to its satisfaction, the court may disapprove the agreement. See *In re Schmidt*, 397 B.R. 481 (Bankr. W.D. Mo. 2008). The lone exception is for reaffirmation agreements with federal credit unions, with respect to which the presumption of undue hardship never arises. See Code § 524(m)(2).

In re Covington, — B.R. —, 2010 WL 4291334 (Bankr. E.D. Mo., Oct. 29, 2010), page 100

(case no. 4:09-bk-52354) (Bankruptcy Judge Kathy A. Surratt-States) [Text of opinion](#)

- **Proof of claim—Unsecured claim—Satisfaction of debt:** The debtor’s tender of a \$50 money order to the creditor in full satisfaction of the debtor’s \$60,000 debt, which the creditor apparently cashed, did not create an accord and satisfaction, where the amount due was not in dispute, and the debtor could not reasonably argue that the debt was unliquidated. To the contrary, the debtor asserted that, due to his unemployment, he could not afford to pay the entire amount due. Mo. Rev. Stat. § 400.3.311, which establishes the requirements for an accord and satisfaction, controls in disputes where parties reasonably believe that a payment made actually satisfies the amount that is owing and outstanding on a debt, while the opposing party reasonably believes that a different amount is outstanding but for whatever reason knowingly accepts lesser payment in accord and satisfaction of the debt. Such was not the case here.

In re Gude, 2010 WL 3834560 (Bankr. D. Neb., Sept. 27, 2010), page 134

(case no. 8:04-bk-82697) (Bankruptcy Judge Timothy J. Mahoney) [Text of opinion](#)

- **Discharge injunction—Sanctions imposed on mortgage servicer:** Superseding *In re Gude*, 2010 WL 3788104 (Bankr. D. Neb., Sept. 22, 2010), the court awarded sanctions against the Chapter 13 debtors' mortgage servicer, Litton Loan Servicing LP, in the amount of \$2,593.35, representing the debtors' attorney's fees incurred in remedying the servicer's violation of the discharge injunction. This was the second time the servicer had caused grief to these debtors by asserting erroneous fees and expenses, the court said. The first time, after evidence was presented at a hearing that it was all a big mistake and the servicer's representatives apologized, the court determined that no sanction should be imposed. This time was different. And, if similar problems arose again, the sanctions against the servicer would be much greater.

In re Nichols, 2010 WL 4922538 (Bankr. N.D. Iowa, Nov. 29, 2010), page 149

(case no. 6:10-bk-1323) (Chief Bankruptcy Judge Paul J. Kilburg) [Text of opinion](#)

- **Chapter 7—Reaffirmation agreement—Vacation of discharge:** It is improper to vacate a Chapter 7 debtor's discharge to allow him to enter into a valid reaffirmation agreement. The requirements of Code § 524(c)(1) must be strictly applied. Nothing in the Bankruptcy Code and Rules gives the court authority to vacate the discharge to allow the parties to avoid the statutory mandates of § 524(c)(1).

In re Passa, 436 B.R. 120 (Bankr. D. N.D., July 12, 2010), page 98

(case no. 3:10-bk-30125) (Chief Bankruptcy Judge William A. Hill) [Text of opinion](#)

- **Proof of claim—Secured claim—Inadvertent release of lien:** The North Dakota certificate of title statute, N.D. Cent. Code § 35-01-05.1, provides the exclusive method by which a security interest in a motor vehicle may be perfected; in order for a creditor to have a security interest in a motor vehicle, either the creditor's interest must be noted on the face of the certificate of title or the certificate of title must be in the possession of the creditor. Thus, here, where the creditor released its security interest in the Chapter 7 debtor wife's motor vehicle and mailed the certificate of title to the debtors, even if it did so in error, the creditor did not have a perfected security interest in the vehicle when the debtors subsequently filed a bankruptcy petition, and the creditor could be treated as an unsecured creditor. While the creditor submitted a duplicate copy of the certificate of title that reflected itself as a lienholder, N.D. Cent. Code § 39-05-09.1 only permits an application for a duplicate title when the original title had been lost, stolen, mutilated, or destroyed or had become illegible, none of which were the case here.

In re Reisdorff, 2010 WL 4852457 (Bankr. D. Neb., Nov. 23, 2010), page 114

(case no. 4:10-bk-42738) (Chief Bankruptcy Judge Thomas L. Saladino) [Text of opinion](#)

- **Property of the estate—Exemptions—Under state law:** Under the Nebraska “wild card” exemption found in Neb. Rev. Stat. § 25-1556(4), the Chapter 7 joint debtors could each exempt \$2,400 of the equity in a motor vehicle that they both employed as a tool of the trade; the statute did not limit the debtors to one \$2,400 exemption.

In re Robinson, 2010 WL 4668980 (Bankr. N.D. Iowa, Nov. 9, 2010), page 137

(case no. 2:10-bk-1610) (Chief Bankruptcy Judge Paul J. Kilburg) [Text of opinion](#)

- **Eligibility to be debtor under Code § 109(g):** The determination that a failure on the part of a debtor was willful under Code § 109(g)(1) need not be made in the order dismissing the preceding case, but can be subsequently made when a court considers a motion to dismiss. The debtor has the burden of establishing eligibility for bankruptcy and thus has the burden of showing that a failure in the preceding case was not willful. *In re Montgomery*, 37 F.3d 413 (8th Cir. 1994). Here, the Chapter 13 debtors’ case was precluded by § 109(g)(1) where their previous case had been dismissed 23 days earlier for failure to abide by a court order giving the debtors 10 days to become current on plan payments and turn over copies of 2009 tax returns.

## Ninth Circuit (12)

*In re Mwangi*, Case No. 10-60035 (9th Cir., filed July 28, 2010), page 75

- **Violation of stay—Wells Fargo’s national administrative freeze policy:** On December 10, the Ninth Circuit Court of Appeals dismissed, on the ground of lack of jurisdiction, Wells Fargo’s appeal from *In re Mwangi*, 432 B.R. 812 (9th Cir. B.A.P., June 30, 2010), which held that Wells Fargo’s national policy of placing an administrative freeze on Chapter 7 debtors’ bank accounts violates the automatic stay. The Court of Appeals remanded the case to the bankruptcy court, where it is docketed as *In re Mwangi*, Case No. 2:09-bk-24057 (Bankr. D. Nev.). A status conference is scheduled for January 25.

*Montana Dept. of Revenue v. Duncan*, 2010 WL 4903952 (9th Cir., Dec. 2, 2010), page 96

(case no. 09-36062) [Text of opinion](#)

- **Proof of claim—Secured claim—Inclusion of attorney’s fees:** In disallowing an oversecured state taxing authority’s proof of claim under Code § 506(b) insofar as the authority sought to recover attorney’s fees related to work performed by a private attorney hired by the taxing authority, the bankruptcy court did not err in concluding that the private attorney’s fees were unreasonable because the taxing authority already had three salaried attorneys, including one bankruptcy specialist, working on the debtor’s case, and the private attorney never appeared in the case except with one of these salaried attorneys.

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*In re Hummel*, — B.R. —, 2010 WL 5076421 (9th Cir. B.A.P., Nov. 19, 2010), page 111

(case no. 10-1202) [Text of opinion](#)

- **Property of the estate—Exemptions—Under state law:** Reversing the bankruptcy court, the BAP held that the cash surrender value of a life insurance policy or an annuity contract under which the debtor’s adult, nondependent child was the beneficiary was not exempt under Ariz. Rev. Stat. § 33-1126(A)(7), which permits the exemption of “[t]he cash surrender value of life insurance policies where for a continuous unexpired period of two years such policies have been owned by a debtor and have named as beneficiary the debtor’s surviving spouse, child, parent, brother or sister, or any other dependent family member.” The BAP reasoned that the phrase “any other dependent family member” indicated that the exemption applied only if the specified family member was a dependent of the debtor.

In re Barron, --- B.R. ---, 2010 WL 5168889 (Bankr. D. Ariz., Dec. 14, 2010), page 151

(case no. 4:10-bk-28871) (Bankruptcy Judge Eileen W. Hollowell) [Text of opinion](#)

- **Chapter 7—Reaffirmation agreement—Role of debtor’s attorney:** An attorney who otherwise represents a Chapter 7 debtor may not exclude negotiation of a reaffirmation agreement from the attorney’s representation. Because the Bankruptcy Code does not offer a mechanism for the court to independently approve a reaffirmation agreement under circumstances in which a debtor’s attorney has not executed the declaration required by Code § 524(c)(3), the failure of counsel to endorse Part C of the form of reaffirmation agreement provided for in § 524(k)(5) by itself renders the agreement unenforceable.

In re Grignon, 2010 WL 5067440 (Bankr. D. Or., Dec. 7, 2010), page 167

(case no. 3:10-bk-34196) (Bankruptcy Judge Trish M. Brown) [Text of opinion](#)

- **Chapter 13—Stripping unsecured lien—Effect of ineligibility for discharge:** Agreeing with *In re Tran*, 431 B.R. 230 (Bankr. N.D. Cal. 2010), the court said that nothing in the Bankruptcy Code prohibits a Chapter 13 debtor who is ineligible for a discharge from stripping off a wholly unsecured lien.

In re Hill, --- B.R. ---, 2010 WL 4873054 (Bankr. S.D. Cal., Nov. 29, 2010), page 167

(case no. 3:09-bk-19516) (Bankruptcy Judge Margaret M. Mann) [Text of opinion](#)

- **Chapter 13—Stripping unsecured lien—Effect of ineligibility for discharge:** Saying it was persuaded by *In re Tran*, 431 B.R. 230, 235 (Bankr. N.D. Cal. 2010), the court held that lien strips are permitted in Chapter 20 cases even without a discharge, if the plan otherwise complies with the requirements of the Bankruptcy Code. The statutory basis for the lien strip is Code § 1322(b)(2), not § 506(d).

In re Hooper, 2010 WL 5155828 (Bankr. D. Ariz., Dec. 14, 2010), page 104

(case no. 2:09-bk-26224) (Bankruptcy Judge Sarah Sharer Curley) [Text of opinion](#)

- **Property of the estate:** Refunds for prior tax years that were generated under a new federal law, the Worker, Homeownership and Business Assistance Act, that was effective after the Chapter 7 debtors’ bankruptcy filing were property of the estate. The act permitted the debtors to apply their 2008 and 2009 net operating losses to their income for 2004 and 2005, increasing the refunds the debtors received for those tax years.

In re Lopez, 2010 WL 4875884 (Bankr. N.D. Cal., Nov. 24, 2010), page 166

(case no. 4:10-bk-47520) (Bankruptcy Judge Edward D. Jellen) [Text of opinion](#)

- **Chapter 13—Secured claims—Propriety of modification:** A claim that was secured by the debtor's principal residence, "together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property," was "secured only by a security interest in real property that is the debtor's principal residence" and thus was protected by the anti-modification provision of Code § 1322(b)(2).

In re Plantz, 2010 WL 4736234 (Bankr. D. Or., Nov. 16, 2010), page 116

(case no. 6:09-bk-65036) (Bankruptcy Judge Albert E. Radcliffe) [Text of opinion](#)

- **Property of the estate—Exemptions—Under state law:** Where the debtor received a federal tax refund consisting in part of an Earned Income Credit, the debtor needed to separate the two components. Exemption of the EIC was controlled by Or. Rev. Stat. § 18.345(1)(n), while exemption of the rest of the refund was permitted under Or. Rev. Stat. § 18.345(1)(o).

In re Schuhmann, 2010 WL 5125321 (Bankr. D. Or., Dec. 9, 2010), page 115

(case no. 6:10-bk-63024) (Bankruptcy Judge Albert E. Radcliffe) [Text of opinion](#)

- **Property of the estate—Exemptions—Under state law:** While *In re Casserino*, 379 F.3d 1069 (9th Cir. 2004) held that the last month's rent and a security deposit paid by a debtor for rental housing were exempt under Oregon's homestead exemption statute, the present court would not extend the reasoning to "prepaid rent" paid by the Chapter 7 debtors sometime before their bankruptcy filing.

In re Steiner, 2010 WL 4687955 (Bankr. D. Idaho, Nov. 10, 2010), page 112

(case no. 4:10-bk-40755) (Bankruptcy Judge Jim D. Pappas) [Text of opinion](#)

- **Property of the estate—Exemptions—Under state law:** Despite a suggestion to the contrary in *In re Oxford*, 274 B.R. 887 (Bankr. D. Idaho 2002), the court concluded that the cash surrender value of a life insurance policy is not exempt under Idaho Code § 11-605(9), which permits the exemption of "[a]ny unmaturing life insurance contract owned by an individual, other than a credit life insurance contract." All that is exempted by § 11-605(9) is the life insurance policy itself, and not a debtor's rights under the policy. If a debtor wishes to protect dividends or interests that have accrued under a policy, such as a policy's cash surrender value, he or she must claim exemption in that interest under Idaho Code § 11-605(10), which permits the exemption of "[a]n individual's aggregate interest, not to exceed five thousand dollars (\$5,000) in any accrued dividend or interest under, or loan value of, any unmaturing life insurance contract owned by the individual under which the insured is the individual or a person of whom the individual is a dependent."

- **Property of the estate—Exemptions—Under state law:** Certain insurance policies purchased by the debtors, under which their minor child was the insured, were not exempt under Idaho Code § 11-605(10), as that statute applies only where the debtor is either the insured or a dependent of the insured, and not where the insured is a dependant of the debtor.
- **Property of the estate—Exemptions—Under state law:** The debtor wife could not exempt her interest in one of the policies under Idaho Code § 11-605(10) because she did not own the policy. The debtor husband’s parents had purchased it for him years before the debtors were married, and, while the debtors paid the premiums on the policy with community property, that did not give the wife an ownership interest in the policy. Rather, it merely entitled the wife to reimbursement for the increase in separate property value attributable to community expenditures.

In re Welsh, --- B.R. ---, 2010 WL 4735994 (Bankr. D. Mont., Nov 16, 2010), pages 172, 175

(case no. 2:10-bk-61285) (Bankruptcy Judge Ralph B. Kirscher) [Text of opinion](#)

- **Chapter 13—Projected disposable income—Exclusion of Social Security benefits:** Rejecting *In re Timothy*, 2009 WL 1349741 (Bankr. D. Utah 2009) and *In re Cranmer*, 433 B.R. 391 (Bankr. D. Utah 2010), the court said that a Chapter 13 debtor’s Social Security income is expressly excluded from the calculation of the debtor’s projected disposable income. And here, because no showing had been made that the case was unusual or that there were any changes in the debtors' income or expenses that were known or virtually certain at the time of confirmation, *Hamilton v. Lanning*, 130 S.Ct. 2464, 177 L.Ed.2d 23 (2010) did not require the addition of the Social Security income to the calculation. (page 172)
- **Chapter 13—Confirmation of plan—Good faith:** The Chapter 13 debtors’ plan was proposed in good faith, although the plan would pay only 8.5% of unsecured claims, while the debtors continued to make payments on claims secured by an “Airstream” trailer, two ATVs and three automobiles, and the debtors did not contribute their Social Security income to the calculation of their projected disposable income. (page 175)

## Tenth Circuit (10)

In re Copeland, 2010 WL 4683941 (Bankr. N.D. Okla., Nov. 10, 2010), page 137

(case no. 4:09-bk-13443; adv. proc. no. 4:09-ap-1140) (Bankruptcy Judge Dana L. Rasure)

### [Text of opinion](#)

- **Sealing of court documents:** Denying the debtor's motion under Code § 107(b) to seal the documents filed in an adversary proceeding against the debtor, the court adopted the rule articulated in *In re Gitto Global Corp.*, 422 F.3d 1 (1st Cir. 2005) and subsequently embraced in *In re Neal*, 461 F.3d 1048 (8th Cir. 2006): "[M]aterial that would cause a reasonable person to alter his opinion of an interested party triggers the protections of § 107(b)(2) based on a showing that either (1) the material is untrue, or (2) the material is potentially untrue and irrelevant or included within a bankruptcy filing for an improper end." Here, in an adversary proceeding asserting that the debtor, an attorney, employed abusive and malicious litigation tactics in state-court litigation with the adversary plaintiff, the documents introduced by the plaintiff were not only *relevant* to his claim that the debtor owed him a nondischargeable debt, but were *essential* to plead and argue his cause of action under § 523(a)(6), while the debtor voluntarily waived his privacy rights with respect to documents he filed that contained sensitive medical information, records, and reports.

In re Eastburg, — B.R. —, 2010 WL 4623798 (Bankr. D. N.M., Nov. 4, 2010), page 125

(case no. 1:10-bk-10131; adv. proc. no. 1:10-ap-1024) (Bankruptcy Judge Robert H. Jacobvitz) [Text of opinion](#)

- **Authority of the court:** Circuit courts are split on the issue of whether a bankruptcy court is a "court of the United States," which is defined in 28 U.S.C. § 451 as "the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior." The application of both 28 U.S.C. § 1927, which authorizes the imposition of sanctions under certain circumstances, and the Anti-Injunction Act, which provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments," is limited to a "court of the United States."
- **Authority of the court:** Because the Anti-Injunction Act was inapplicable, the bankruptcy court was able to use its equitable powers under Code § 105(a) to enjoin pending state court litigation without regard to the limitations contained in that act. A stay of litigation in another forum may be "necessary or appropriate" to ensure that the state court proceeding does not hurt the bankruptcy estate, impair a debtor's reorganization efforts, or, after termination of the automatic stay, when the dischargeability of a particular debt has not yet been determined. To evaluate a request to enjoin litigation pending in a different forum under Code § 105(a), courts often used traditional preliminary injunction standards, perhaps adapted to the

bankruptcy context, and the present court would follow that approach. Under the general preliminary injunction standard as articulated by the Tenth Circuit, the movant must show: (1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) the threatened injury outweighs the harms that the preliminary injunction may cause the opposing party; and (4) the injunction, if issued, would not adversely affect the public interest.

In re Morrison, 2010 WL 4929604 (Bankr. E.D. Okla., Nov. 30, 2010), page 183

(case no. 7:08-bk-81186) (Chief Bankruptcy Judge Tom R. Cornish) [Text of opinion](#)

- **Chapter 13—Conversion to Chapter 7—Upon default under plan:** Denying the Chapter 13 trustee's motion, under Code § 1307(c), to convert the debtors' case to Chapter 7, the court said it could not agree that the debtors, who operated a liquor store, were in material default, or that it was in the best interest of creditors or the estate to convert the case. The debtors, who were 25 months into their 60-month plan, were current with plan payments and had made substantial progress in paying prepetition taxes. Although they had not lived up to an agreed order to pay all postpetition taxes, they had made an attempt to catch up. The debtors were entering the busiest time of the year for their business, the holiday season, and factors such as the store's good location, lack of competition, and sufficient inventory level indicated that the store was poised to record sizeable profits by year's end. However, because the debtors had been down this road before, without success, the court stated that the case would be converted if the debtors did not become current on all postpetition tax obligations by January 15, 2011.

In re Nulik, 2010 WL 5114734 (Bankr. D. Kan., Dec. 8, 2010), pages 74, 149

(case no. 6:08-bk-10673; adv. proc. no. 6:08-ap-5257) (Chief Bankruptcy Judge Robert E. Nugent) [Text of opinion](#)

- **Violation of the automatic stay:** The secured creditor willfully violated the automatic stay by taking possession of a mobile home surrendered by the Chapter 7 debtor without obtaining relief from stay. Surrender by the debtor is not equivalent to abandonment by the trustee, and the mobile home remained property of the estate following its surrender by the debtor.

In re Padilla, 2010 WL 4735820 (Bankr. D. N.M., Nov 16, 2010), page 150

(case no. 1:09-bk-15203; adv. proc. no. 1:10-ap-1098) (Bankruptcy Judge Robert H. Jacobvitz) [Text of opinion](#)

- **Chapter 7—Statement of intention—Necessity in converted case:** Code § 521(a)(2)(A), which requires a Chapter 7 debtor to file a statement of intention within 30 days of the filing of the Chapter 7 petition or before the date of the meeting of creditors, whichever is earlier, applies in cases converted from Chapter 13.

- **Chapter 7—Statement of intention—Timeliness in converted case:** However, under § 362(h)(1)(A), which provides that the automatic stay terminates if "if the debtor fails within the applicable time set by section 521(a)(2)" to file a required statement of intention, "the applicable time set by section 521(a)(2)" must be construed to refer only to the date of the meeting of creditors in a converted case, as there is no "filing of the Chapter 7 petition" in such a case.
- **Chapter 7—Statement of intention—Termination of automatic stay—Effect of order granting relief from stay:** The court's having granted the creditor's motion for relief from stay, under which the stay would terminate on a date later than it would under Code § 362(h), due to the automatic 14-day stay of the court's order arising under Bankruptcy Rule 4001(a)(3), did not serve to extend the automatic stay. *In re Duran*, 483 F.3d 653 (10th Cir. 2007) held that a bankruptcy rule may not modify a creditor's substantive rights, and those rights include the termination of the automatic by operation of law, as occurs under § 362(h).

*In re Steele*, 2010 WL 4791837 (Bankr. D. Wyo., Nov. 18, 2010), pages 86-87, 88

(case no. 2:09-bk-21218) (Bankruptcy Judge Peter J. McNiff) [Text of opinion](#)

- **Means test—Expenses—Adjustment for housing costs:** Where the Chapter 13 debtors demonstrated to the court that their actual rental expense was greater than the allowable standard because appropriate housing was difficult to find, the court allowed the expense, which the debtors claimed on line 26 of Form 22C (which allows the debtor to claim an adjustment for housing and utilities costs) on the ground that the rental expense was necessary for the health and well-being of the debtors' three children. The debtors had 16- and 7-year-old daughters and a 12-year-old son, and they testified that this required them to rent a four-bedroom home, as the age difference made it inappropriate for the daughters to share a bedroom. Moreover, it was difficult to find a four-bedroom apartment, necessitating the rental of a house, and they found such a rental in the neighborhood where the children attended school, lessening transportation costs. (page 86)
- **Means test—Expenses—Contribution to family member:** The debtors' deduction of their monthly \$250 contribution to help pay the rent for the debtor wife's father in Guatemala was proper under Code § 707(b)(2)(A)(ii)(II), which allows a debtor to deduct expenses for the continuation of actual expenses paid by the debtor that are reasonable and necessary for care and support of an elderly, chronically ill, or disabled household member of the debtor's immediate family who is unable to pay for such reasonable and necessary expenses. (page 86)
- **Means test—Expenses—Additional food and clothing expense:** Although Code § 707(b)(2)(ii)(I) permits the deduction of "an additional allowance for food and clothing of up to 5 percent of the food and clothing categories as specified by the National Standard issued by the Internal Revenue Service," the court disallowed the debtors' claimed deduction where the debtors did not testify or provide evidence in support of the additional food and clothing expenses. (page 87)
- **Means test—Expenses—Charitable contributions:** The debtors would be allowed a charitable contribution expense of \$58, rather than the \$100 claimed, where the debtors' evidence supported only the lower amount. (page 87)

- **Means test—Special circumstances—Student loan:** Declining to adopt a rule that student loan repayment is necessarily a special circumstance, the court disallowed the expense where the Chapter 13 debtors failed to show that the debtor wife's student loans were incurred other than in the ordinary course of acquiring the wife's education, and neither debtor testified that there was no reasonable alternative to making the payments in full under the debtors' proposed plan. (page 88)

**A few older automatic stay cases:**

In re Garner, 2010 WL 2178546 (Bankr. D. Kan., May 28, 2010), page 73

(case no. 5:09-bk-42094) (Bankruptcy Judge Janice Miller Karlin) [Text of opinion](#)

- **Violation of the automatic stay:** The Chapter 7 debtors' bank did not violate the automatic stay by assessing overdraft fees and returned check fees against the debtors' bank account based on charges that came through the account postpetition.

In re Kline, 2010 WL 760733 (Bankr. D. N.M., March 4, 2010), page 72

(case no. 1:05-bk-12174; adv. proc. no. 1:09-ap-1035) (Bankruptcy Judge Robert H. Jacobvitz) [Text of opinion](#)

- **Relief from stay—Merits:** The undermining of the debtor's claims for willful violation of the automatic stay is not a sufficient ground to annul the automatic stay.

In re Maynard, 2010 WL 725809 (Bankr. N.D. Okla., Feb. 25, 2010), page 74

(case no. 4:09-bk-13361; adv. proc. no. 4:09-ap-1124) (Chief Bankruptcy Judge Dana L. Rasure) [Text of opinion](#)

- **Violation of the automatic stay:** Summary judgment for the creditor was proper in the debtors' adversary proceeding asserting a violation of the automatic stay where the debtors failed to introduce any evidence of actual damages.

In re Wright, 2010 WL 2206669 (Bankr. D. N.M., May 27, 2010), page 74

(case no. 1:09-bk-10892; adv. proc. no. 1:09-ap-1048) (Bankruptcy Judge Robert H. Jacobvitz) [Text of opinion](#)

- **Violation of the automatic stay:** The mortgage creditor's conducting a foreclosure sale of the Chapter 7 debtor's residence two days after the debtor's bankruptcy filing was a technical violation of the automatic stay, for which the court would not award damages, where the creditor did not know of the bankruptcy filing at the time it conducted the sale. Moreover, the creditor's failure to contact the state court and prevent it from entering an order confirming the sale did not warrant an award of damages to the debtor, as the creditor treated the foreclosure sale as void once it learned of the debtor's bankruptcy filing.

## Eleventh Circuit (10) R

Maddox v. Auburn University Federal Credit Union, --- B.R. ---, 2010 WL 4867983 (M.D. Ala., Dec. 1, 2010), page 135

(case no. 3:10-cv-729) (Senior District Judge W. Harold Albritton III) [Text of opinion](#)

- **Violation of discharge injunction:** While the district court had the authority to consider and dispose of an action for contempt of the discharge injunction arising out of a case in the bankruptcy court of this district, the court also recognized its authority to refer such a claim to the bankruptcy court that entered the discharge order. In this case, the court found the latter action to be preferable.

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In re Anderson, 439 B.R. 206 (Bankr. M.D. Ala., August 17, 2010), pages 77, 135, 177

(case no. 1:06-bk-10845) (Chief Bankruptcy Judge Dwight H. Williams Jr.) [Text of opinion](#)

- **Nondischargeable debts—Domestic support obligation:** The Chapter 13 debtors' debt to the Alabama Department of Human Resources, a governmental unit, for an overpayment of food stamp benefits was a domestic support obligation. See *Wisconsin Dept. of Workforce Development v. Ratliff*, 390 B.R. 607 (E.D. Wis. 2008); *In re Wheeler*, 2010 WL 503112 (Bankr. N.D. Ala. 2009). (page 77)
- **Chapter 13—Unsecured claims—Treatment of domestic support obligation:** While the Chapter 13 debtors were permitted to pay less than the full amount of a domestic support obligation under Code § 507(a)(1)(B), the unpaid portion of the debt would not be discharged. (page 135)
- **Chapter 13—Effect of plan confirmation:** The confirmation of the debtors' Chapter 13 plan, which treated a creditor's claim as a general, unsecured claim, precluded the creditor from later asserting that its claim was a priority claim. (page 177)

In re Aranda, 2010 WL 5018320 (Bankr. S.D. Fla., Dec. 3, 2010), page 110

(case no. 9:08-bk-26059) (Chief Bankruptcy Judge Paul G. Hyman) [Text of opinion](#)

- **Property of the estate—Exemptions—Under federal law—Property owned as tenants by the entirety:** Because a deed was ambiguous, in providing that the property was conveyed to the debtors "as Husband and Wife, as joint tenants with right of survivorship and as tenants in common," a presumption that the debtors took the property as tenants by the entirety applied. The debtors were not required to file a reformation action to clarify the deed's ambiguity; Florida caselaw indicated that a court could construe a deed's ambiguous terms to determine the intent of the parties, and that this relief was not restricted to a reformation action.

In re Avendano, 2010 WL 5058390 (Bankr. S.D. Fla., Dec. 3, 2010), pages 131, 166

(case no. 1:09-bk-36558) (Bankruptcy Judge A. Jay Cristol) [Text of opinion](#)

- **Valuation of asset:** The court valued the debtor's home in Miami, Florida, at \$156,660. (page 131)
- **Chapter 13—Secured claims—Modification—time for valuation:** There are two schools of thought as to the appropriate valuation date on Chapter 13 motions to value pursuant to Code § 506(a), the petition date and the plan's effective date. However, the court did not need to resolve the issue. (page 166)

In re Castleberry, 437 B.R. 705 (Bankr. M.D. Ga., Sept. 29, 2010), page 177

(case no. 5:10-bk-51298) (Bankruptcy Judge James D. Walker Jr.) [Text of opinion](#)

- **Chapter 13—Effect of plan confirmation:** Mere fact that the motor vehicle lender was allegedly able to produce evidence that it was a "910 creditor" protected by the hanging paragraph of Code § 1325(a)(5) from having its claim bifurcated did not entitle creditor to relief from a bankruptcy court order confirming the debtors' Chapter 13 plan that provided for bifurcation of the claim, in the absence of a showing that the evidence was unavailable for presentation at the confirmation hearing.

In re Clark, 2010 WL 4669091 (Bankr. M.D. Fla., Nov. 10, 2010), page 72

(case no. 6:10-bk-09430) (Bankruptcy Judge Arthur B. Briskman) [Text of opinion](#)

- **Relief from stay—Standing:** The party moving for relief from stay had standing to do so, where the party was in possession of the debtor's note, and the note was endorsed in blank, making it enforceable by the party in possession of the note.

In re Dewberry, 2010 WL 4882016 (Bankr. N.D. Ga., Oct. 21, 2010), page 97

(case no. 1:10-bk-60155) (Bankruptcy Judge Wendy L. Hagenau) [Text of opinion](#)

- **Proof of claim—Secured claim—Ownership of claim:** The purported mortgage creditor was entitled to enforce the note, where the note was endorsed in blank by the original payee, thereby making it payable to bearer, and the creditor's servicer submitted the affidavit of an individual who stated under oath that the servicer was in physical possession of the note on behalf of the creditor. This provided prima facie evidence that the creditor had the right to file a claim based on the note, and the debtor submitted no evidence to the contrary.

In re McMillen, --- B.R. ---, 2010 WL 5115880 (Bankr. N.D. Ga., Nov. 15, 2010), page 101

(case no. 1:09-bk-74093; adv. proc. no. 1:09-ap-6611) (Chief Bankruptcy Judge Joyce Bihary)

[Text of opinion](#)

- **Proof of claim—Filing duplicate claims—Remedies:** A creditor's filing of duplicative proofs of claim in the debtor's Chapter 13 case was not an abusive debt collection practice of a kind potentially actionable under the Fair Debt Collection Practices Act.

In re Rubens, 2010 WL 4791879 (Bankr. S.D. Fla., Nov. 17, 2010), page 184

(case no. 0:10-bk-10142) (Bankruptcy Judge Raymond B. Ray) [Text of opinion](#)

- **Chapter 13—Debt limits:** While there is a split of authority concerning whether Code § 506(a) applies in the application of the debt limits under Code § 109(e), the court aligned itself with the majority of courts, which looked outside the debtor's bankruptcy schedules to determine whether the amount of a debtor's undersecured portion of debts should be included in the debtor's unsecured debt.

In re Rudmose, 2010 WL 4882059 (Bankr. N.D. Ga., Nov. 9, 2010), page 140

(case no. 1:10-bk-74514) (Bankruptcy Judge Wendy L. Hagenau) [Text of opinion](#)

- **Chapter 7—Abuse—Under totality of circumstances:** Granting the debtors a Chapter 7 discharge would not be an abuse, under the totality of the circumstances, where there was no evidence that the debtors had projected disposable income with which to make a Chapter 13 plan payment, and no evidence that the debtors could find alternative living arrangements sufficient to create monthly disposable income. In short, the court was left with nothing more than the fact that the debtors had a big house, which was more than they needed and more expensive than they could afford. However, the house was purchased 10 years ago, at a time when the debtors could afford the house, and was not purchased recently as a means of "parking" the debtors' equity.

## District of Columbia Circuit

No cases in this issue.

**This Issue's New Cases:  
Full Abstracts**

Section One:  
Nonchapter-Specific Materials

Part A  
Automatic Stay

## Existence of Stay

**Topical compilation:**

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[All circuit compilations](#)

Code § 523(a)(16) is effective on petition date:

Code § 523(a)(16) permits the collection, from a Chapter 7 debtor, of condominium association dues and other homeowners' fees that accrue following the filing of the debtor's bankruptcy petition; it is not limited to fees that accrue after the closing of the debtor's bankruptcy case.

In re Liversidge, 2010 WL 4941654 (Bankr. D. N.J., Dec. 3, 2010)

(case no. 2:10-bk-16342) (Bankruptcy Judge Donald H. Steckroth)

[Text of opinion](#)

R

## Relief from Stay

**Topical compilation:**

[PDF](#) [Word](#)

[All topical compilations](#)

[All circuit compilations](#)

Standing: Allonge must be affixed to note:

Under UCC § 3-204, an allonge is effective only if it is affixed to the original instrument. Therefore, a creditor seeking relief from stay on the basis of a note transferred via an endorsement on an allonge must show that the allonge is affixed to the debtor's original note.

In re Shapoval, 2010 WL 4811786 (Bankr. D. Mass., Nov. 19, 2010)

(case no. 3:10-bk-30175) (Chief Bankruptcy Judge Henry J. Boroff)

[Text of opinion](#)

Evidence sufficient to establish debtor's lack of equity:

Describing the types of valuation evidence supporting a motion for relief from stay that the court would consider reliable, the court said that a written property valuation performed by a local real estate agent opining, based on supporting facts, that the debtor's property was worth a specified amount was sufficient to carry the creditor's burden of proving that the property had no equity for the debtor or the estate. The court would also accept a lender's unopposed allegation that a property lacked equity based on the value of that property set forth in a debtor's schedules, as the scheduled value was an admission by the debtor under oath. However, tax assessors' valuations in Massachusetts were an unreliable index of current value, as, by statute, the valuation could be anywhere from 6 to 42 months removed from the transactions forming the basis of the valuation. Zillow.com "zestimates" were also inherently unreliable, as Zillow was a participatory site almost like Wikipedia, and a homeowner with no technical skill beyond the ability to surf the web could log in to Zillow and add or subtract data that would change the value of the homeowner's property.

In re Darosa, 2010 WL 4777548 (Bankr. D. Mass., Nov. 17, 2010)

(case no. 4:10-bk-44471) (Bankruptcy Judge Melvin S. Hoffman)

[Text of opinion](#)

Eliminating stay violation is not basis for relief from stay:

The undermining of the debtor's claims for willful violation of the automatic stay is not a sufficient ground to annul the automatic stay.

In re Kline, 2010 WL 760733 (Bankr. D. N.M., March 4, 2010)

(case no. 1:05-bk-12174; adv. proc. no. 1:09-ap-1035) (Bankruptcy Judge Robert H. Jacobvitz)

[Text of opinion](#)

Party in possession of note endorsed in blank had standing to seek relief from stay:

The party moving for relief from stay had standing to do so, where the party was in possession of the debtor's note, and the note was endorsed in blank, making it enforceable by the party in possession of the note.

In re Clark, 2010 WL 4669091 (Bankr. M.D. Fla., Nov. 10, 2010)

(case no. 6:10-bk-09430) (Bankruptcy Judge Arthur B. Briskman)

[Text of opinion](#)



## Violation of Stay

**Topical compilation:**

[PDF](#) [Word](#)

[All topical compilations](#)

[All circuit compilations](#)

Damages awarded for mortgage creditor's stay violation:

In determining damages sustained by the Chapter 13 debtors, now proceeding pro se, due to the mortgage creditor's violation of the automatic stay in the debtors' prior Chapter 13 case by attempting to foreclose on their home mortgage, the court awarded the debtors \$829.41 in costs, \$2,231 in attorney's fees, and \$25 in parking expenses. However, the court denied an award of emotional distress damages, which the debtors sought in the amount of \$359.46 for medical expenses allegedly resulting from the stress caused by the stay violation, where the debtors did not establish that the aggravation of the debtor wife's diabetes resulted from the stay violation.

In re Clayton, 2010 WL 4482810 (Bankr. S.D. Tex., Oct. 29, 2010)

(case no. 4:08-bk-37108; adv. proc. no. 4:09-ap-3024) (Bankruptcy Judge Marvin Isgur)

[Text of opinion](#)

Postpetition bank charges do not violate stay:

The Chapter 7 debtors' bank did not violate the automatic stay by assessing overdraft fees and returned check fees against the debtors' bank account based on charges that came through the account postpetition.

In re Garner, 2010 WL 2178546 (Bankr. D. Kan., May 28, 2010)

(case no. 5:09-bk-42094) (Bankruptcy Judge Janice Miller Karlin)

[Text of opinion](#)

Foreclosure sale without notice of bankruptcy filing was mere technical violation of stay:

The mortgage creditor's conducting a foreclosure sale of the Chapter 7 debtor's residence two days after the debtor's bankruptcy filing was a technical violation of the automatic stay, for which the court would not award damages, where the creditor did not know of the bankruptcy filing at the time it conducted the sale. Moreover, the creditor's failure to contact the state court and prevent it from entering an order confirming the sale did not warrant an award of damages to the debtor, as the creditor treated the foreclosure sale as void once it learned of the debtor's bankruptcy filing.

**In re Wright, 2010 WL 2206669 (Bankr. D. N.M., May 27, 2010)**

(case no. 1:09-bk-10892; adv. proc. no. 1:09-ap-1048) (Bankruptcy Judge Robert H. Jacobvitz)

[Text of opinion](#)

Debtors must show actual damages:

Summary judgment for the creditor was proper in the debtors' adversary proceeding asserting a violation of the automatic stay where the debtors failed to introduce any evidence of actual damages.

**In re Maynard, 2010 WL 725809 (Bankr. N.D. Okla., Feb. 25, 2010)**

(case no. 4:09-bk-13361; adv. proc. no. 4:09-ap-1124) (Chief Bankruptcy Judge Dana L. Rasure)

[Text of opinion](#)

Creditor violated stay by taking possession of mobile home surrendered by debtor:

The secured creditor willfully violated the automatic stay by taking possession of a mobile home surrendered by the Chapter 7 debtor without obtaining relief from stay. Surrender by the debtor is not equivalent to abandonment by the trustee, and the mobile home remained property of the estate following its surrender by the debtor.

**In re Nulik, 2010 WL 5114734 (Bankr. D. Kan., Dec. 8, 2010)**

(case no. 6:08-bk-10673; adv. proc. no. 6:08-ap-5257) (Chief Bankruptcy Judge Robert E. Nugent)

[Text of opinion](#)

Appeal dismissed in *In re Mwangi*:

On December 10, the Ninth Circuit Court of Appeals dismissed, on the ground of lack of jurisdiction, Wells Fargo's appeal from *In re Mwangi*, 432 B.R. 812 (9th Cir. B.A.P., June 30, 2010), which held that Wells Fargo's national policy of placing an administrative freeze on Chapter 7 debtors' bank accounts violates the automatic stay. The Court of Appeals remanded the case to the bankruptcy court, where it is docketed as *In re Mwangi*, Case No. 2:09-bk-24057 (Bankr. D. Nev.). A status conference is scheduled for January 25.

*In re Mwangi*, Case No. 10-60035 (9th Cir., filed July 28, 2010)

R

Part B  
Dischargeability

## Dischargeability: Marital Debts

### Topical compilation:

[PDF](#) [Word](#)

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Overpayment of food stamp benefits was domestic support obligation:

The Chapter 13 debtors' debt to the Alabama Department of Human Resources, a governmental unit, for an overpayment of food stamp benefits was a domestic support obligation. See *Wisconsin Dept. of Workforce Development v. Ratliff*, 390 B.R. 607 (E.D. Wis. 2008); *In re Wheeler*, 2010 WL 503112 (Bankr. N.D. Ala. 2009).

*In re Anderson*, 439 B.R. 206 (Bankr. M.D. Ala., August 17, 2010)

(case no. 1:06-bk-10845) (Chief Bankruptcy Judge Dwight H. Williams Jr.)

[Text of opinion](#)

R

## Dischargeability: Student Loans

Topical compilation:

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Debtor failed to establish prognosis for his disabling medical conditions:

Affirming *In re Traversa*, 2010 WL 1541443 (Bankr. D. Conn., April 15, 2010), the district court found no error in the bankruptcy court's conclusion that the debtor failed to establish the second prong of the *Brunner* test, namely, that additional circumstances existed indicating that the debtor's present state of affairs was likely to persist for a significant portion of the repayment period of the student loans. While the debtor testified that he was affected by certain medical conditions, including depression, attention deficit hyperactivity disorder, bipolar disorder, sleep apnea and narcolepsy, the debtor did not present the testimony of a doctor or medical expert, and the bankruptcy court found the evidence inadequate on the issue of the prognosis of the debtor's various medical conditions.

*In re Traversa*, 2010 WL 4683920 (D. Conn., Nov. 5, 2010)

(case no. 3:10-cv-876) (District Judge Janet C. Hall)

[Text of opinion](#)

**Note:** The pro se debtor has again appealed. See *In re Traversa*, Case No. 10-4811 (2nd Cir., filed Nov. 29, 2010).

62-year-old debt with disabled spouse did not establish undue hardship:

The Chapter 13 debtor, a 62-year-old, unemployed woman who received only Social Security income and whose husband was permanently and totally disabled and confined to the family residence, did not establish any of the three elements of the *Brunner* test in attempting to discharge the \$40,866.85 "Parent-Plus" student loan debt she incurred on behalf of her daughter. The debtor had not minimized her expenses, as she spent \$115 on telephone services (including \$65 on telephone and \$50 on cell phone), \$65 on cable/Internet and \$75 on recreation monthly. Nor had the debtor maximized her income; her argument that she needed to be at home to care for her husband was speculative. Moreover, the debtor did not make a good-faith effort to repay the loan, although she had paid \$6,390.61 over the years, as she did not apply for the Income-Contingent Repayment Program, under which her monthly payment would be \$120.

In re Hart, 438 B.R. 406 (E.D. Mich., Nov. 1, 2010)

(case no. 2:10-cv-12350) (District Judge George Caram Steeh)

[Text of opinion](#)



## Dischargeability: Other Debts

### Topical compilation:

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**Scope:** Coverage is quite selective.

Concept of “fiduciary” under Code § 523(a)(4) is limited:

For purposes of Code § 523(a)(4), the concept of a fiduciary is more narrow than under general common law. Indeed, a “fiduciary capacity” under § 523(a)(4) exists only in those instances involving express or technical trusts; the fact that the parties are involved in a relationship of trust and confidence is insufficient to establish a fiduciary capacity. See *In re Gupta*, 394 F.3d 347 (5th Cir. 2004); *In re Hickman*, 260 F.3d 400 (5th Cir. 2001); *In re Miller*, 156 F.3d 598 (5th Cir. 1998); *Matter of Angelle*, 610 F.2d 1334 (5th Cir. 1980).

[Rapid Settlements, Ltd. v. Shcolnik, 2010 WL 4639070 \(S.D. Tex., Nov. 8, 2010\)](#)

(case no. 4:10-cv-1366) (District Judge Nancy F. Atlas)

[Text of opinion](#)

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## Dischargeability: Other Issues

Topical compilation:

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Creditor's lack of intent to prosecute complaint did not entitle debtor to award of attorney's fees:

A creditor's alleged strategy of filing a nondischargeability complaint under Code § 523(a)(2) with no intention of prosecuting the complaint does not support an award of attorney's fees to the debtor under Code § 523(d) where the complaint is objectively supportable. A common thread running through cases dealing with "substantial justification" under § 523(d) is that the court's analysis focuses on the objective criteria upon which the § 523(a)(2)(A) action is based, not on the subjective motives of the creditor in bringing the action.

In re McDermott, 2010 WL 4638867 (Bankr. D. Mass., Nov. 8, 2010)

(case no. 4:09-bk-43858; adv. proc. no. 4:10-ap-4085) (Bankruptcy Judge Melvin S. Hoffman)

[Text of opinion](#)

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## Part C

### Jurisdiction and Procedure

## Other Procedural Issues

**Topical compilation:**

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Decision by single district judge is not binding:

A bankruptcy court is not bound by a decision by a single judge of a multi-judge district court.

In re Moore, 2010 WL 4791833 (Bankr. N.D. N.Y., Nov. 18, 2010)

(case no. 6:09-bk-61990) (Bankruptcy Judge Diane Davis)

[Text of opinion](#)

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## Jurisdiction

Topical compilation:

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Jurisdiction over Chapter 7 debtor's claims against mortgage lender:

The court had jurisdiction over the Chapter 7 debtor's state-law causes of action against the debtor's home mortgage lender. The debtor's allegations that he validly rescinded his mortgage loan had a direct impact on the validity and secured treatment of the defendant's claim and thus constituted objections pursuant to Bankruptcy Code § 502, while another count of the debtor's complaint sought a determination of the extent to which the creditor's claim was secured. These claims, therefore, fell foursquare within the court's core jurisdiction over the claims allowance process under 28 U.S.C. 157(b)(2)(B) and to determine the validity, extent or priority of liens under 28 U.S.C. § 157(b)(2)(K). The debtor's remaining claims, for damages under various state consumer protection statutes, were the functional equivalent of counterclaims to the creditor's proof of claim. While Congress included counterclaims to proofs of claim within the definition of core proceedings in 28 U.S.C. § 157(b)(2)(C), courts had limited this definition to counterclaims that are factually and legally related to the claim being asserted in a proof of claim. In this case, the debtor's claims arose from the same loan as, and were factually and legally related to, the loan that gave rise to the creditor's proof of claim.

In re Bottcher, 2010 WL 4882516 (Bankr. D. Mass., Nov. 24, 2010)

(case no. 4:09-bk-45519; adv. proc. no. 4:10-ap-4119) (Bankruptcy Judge Melvin S. Hoffman)

[Text of opinion](#)

R

Part D  
Means Test

**Means Test Calculations, Generally:  
Expenses:  
Basic Expenses under Code § 707(b)(2)(A)(ii)**

**Transportation Ownership Expense**

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**Other Basic Expenses**

[PDF](#) [Word](#)

**Increased housing expenses allowed:**

Where the Chapter 13 debtors demonstrated to the court that their actual rental expense was greater than the allowable standard because appropriate housing was difficult to find, the court allowed the expense, which the debtors claimed on line 26 of Form 22C (which allows the debtor to claim an adjustment for housing and utilities costs) on the ground that the rental expense was necessary for the health and well-being of the debtors' three children. The debtors had 16- and 7-year-old daughters and a 12-year-old son, and they testified that this required them to rent a four-bedroom home, as the age difference made it inappropriate for the daughters to share a bedroom. Moreover, it was difficult to find a four-bedroom apartment, necessitating the rental of a house, and they found such a rental in the neighborhood where the children attended school, lessening transportation costs. The court cited as the basis for the allowance Code § 707(B)(2)(b)(ii)(V), which permits "an allowance for housing and utilities in excess of the allowance specified by the Local Standards ... based upon the actual expense for home energy costs if the debtor provides documentation of such actual expenses and demonstrates that such actual expenses are reasonable and necessary."

**Monthly contribution to debtor's father allowed:**

The debtors' deduction of their monthly \$250 contribution to help pay the rent for the debtor wife's father in Guatemala was proper under Code § 707(b)(2)(A)(ii)(II), which allows a debtor to deduct expenses for the continuation of actual expenses paid by the debtor that are reasonable and necessary for care and support of an elderly, chronically ill, or disabled household member of the debtor's immediate family who is unable to pay for such reasonable and necessary expenses.

[continued on the following page]

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**Additional food and clothing expenses disallowed in absence of proof:**

Although Code § 707(b)(2)(ii)(I) permits the deduction of “an additional allowance for food and clothing of up to 5 percent of the food and clothing categories as specified by the National Standard issued by the Internal Revenue Service,” the court disallowed the debtors’ claimed deduction where the debtors did not testify or provide evidence in support of the additional food and clothing expenses.

**Charitable contribution allowed to extent demonstrated by evidence:**

The debtors would be allowed a charitable contribution expense of \$58, rather than the \$100 claimed, where the debtors’ evidence supported only the lower amount.

**In re Steele, 2010 WL 4791837 (Bankr. D. Wyo., Nov. 18, 2010)**

(case no. 2:09-bk-21218) (Bankruptcy Judge Peter J. McNiff)

[Text of opinion](#)



**Means Test Calculations, Generally:  
Special Circumstances Rebutting Presumption of Abuse**

**Topical compilation:**

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Student loan was not shown to be special circumstance:

Declining to adopt a rule that student loan repayment is necessarily a special circumstance, the court disallowed the expense where the Chapter 13 debtors failed to show that the debtor wife's student loans were incurred other than in the ordinary course of acquiring the wife's education, and neither debtor testified that there was no reasonable alternative to making the payments in full under the debtors' proposed plan.

**In re Steele, 2010 WL 4791837 (Bankr. D. Wyo., Nov. 18, 2010)**

(case no. 2:09-bk-21218) (Bankruptcy Judge Peter J. McNiff)

[Text of opinion](#)

**R**

Part E

Proof of Claim

## (1) Claims, Generally

## Nature of Obligation as "Claim"

**Topical compilation:**

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Lender holding security interest in estate property was "creditor" with "claim":

A lender that held a security interest in property of the Chapter 12 debtor's estate was a "creditor" with a "claim" against the debtor that could be provided for in the debtor's Chapter 12 plan, even though the debtor was not personally liable on the debt owed to the lender.

In re Cady, --- B.R. ---, 2010 WL 4723355 (Bankr. N.D. N.Y., Nov. 22, 2010)

(case no. 5:10-bk-30737) (Bankruptcy Judge Margaret M. Cangilos-Ruiz)

[Text of opinion](#)

Status of claim as prepetition—Generally:

The Fourth Circuit uses the "conduct test" to determine whether a claim arises prepetition or postpetition. Under the "conduct test" the court focuses on the definition of "claim" under Code § 101(5) to determine when a right of payment arises. The "conduct test" focuses on the "actual act that gives rise to a state or federal claim ... not the contingency that gives rise to the right of payment."

Status of claim as prepetition—Under circumstances:

The Chapter 13 debtor's obligation to his wife under the parties' premarital agreement was a prepetition claim under the conduct test, where the parties entered into the agreement prepetition, although under the agreement the debtor was not obligated to make a payment to his wife until the parties obtained a divorce, and this had not yet occurred.

In re Boyette, 2010 WL 4777631 (Bankr. E.D. N.C., Nov 17, 2010)

(case no. 8:09-bk-4573) (Chief Bankruptcy Judge Randy D. Doub)

[Text of opinion](#)

## (2) Proof of Claim

**Proof of Claim: By Secured Creditor:  
Amount of Claim:  
Prepetition Charges**

**Topical compilation:**

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Bankruptcy court did not err in declining to sanction mortgage creditor for its delays:

The bankruptcy court properly applied the applicable standard in declining to impose sanctions on the mortgage creditor under 28 U.S.C. § 1927. The bankruptcy court held that, while the manner in which the creditor’s law firm handled the case had been “terribly inefficient and burdensome for all of the parties involved in the case,” in that it took the firm months in order to file documentation for its claim, the firm’s conduct did not rise to the level of bad faith.

**In re Beers, 2010 WL 4263292 (3rd Cir., Oct. 29, 2010)**

(case no. 10-1105 )

[Text of opinion](#)

Automobile creditor was required to provide additional detail:

The automobile creditor provided sufficient documentation to be entitled to a presumption of validity as to its claim, where the creditor attached to its proof of claim a certificate of title for the vehicle and the sales contract between creditor and the Chapter 13 debtor. These documents established the purchaser of the vehicle and the terms of the purchase, including the purchase price and interest rate. Therefore, the burden of proof shifted to the debtor to rebut the presumption of validity of the creditor's claim. The debtor's testimony that, in her previous Chapter 13 case, which had been dismissed two weeks earlier, the creditor filed a proof of claim indicating the amount due was \$14,679.96, whereas the creditor's proof of claim in the current case stated that \$17,053.16 was due, was sufficient to require the creditor to provide additional information supporting the amount of its claim.

In re Johnson, 2010 WL 4809104 (Bankr. D. S.C., Nov. 19, 2010)

(case no. 3:10-bk-1239) (Bankruptcy Judge David R. Duncan)

[Text of opinion](#)

Mortgage creditor waived prepetition fees by failing to provide statutorily-required explanation:

Where the mortgage creditor failed to comply with N.C. Gen. Stat. § 45-91 insofar as the creditor asserted that the debtor owed the creditor \$8,101.50 in attorneys' fees incurred in connection with a prepetition foreclosure of the debtor's mortgage, the creditor was not permitted to include the fees in its proof of claim. The statute required the creditor to "[e]xplain[] clearly and conspicuously" any fees assessed within 30 days of the assessment, and provided that the fees were waived if the creditor failed to do so. While the creditor's inclusion of the fees in its proof of claim may have been sufficient to inform the debtor of the assessment, the proof of claim did not "explain" the fees.

In re Saeed, 2010 WL 3745641 (Bankr. M.D. N.C., Sept. 17, 2010)

(case no. 2:10-bk-10303) (Bankruptcy Judge Thomas W. Waldrep Jr.)

[Text of opinion](#)

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**Proof of Claim: By Secured Creditor:  
Amount of Claim:  
Postpetition Charges**

**Topical compilation:**

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**Tolling of postpetition interest was permissible:**

Affirming *In re Nixon*, 2009 WL 1845229 (E.D. Pa. 2009), the Third Circuit Court of Appeals found no error in the bankruptcy court's decision to toll the running of postpetition interest on a secured creditor's claim, where the bankruptcy court had found that the creditor was purposefully delaying the proceedings. The action was well within a bankruptcy court's authority under Code § 105(a), and, while Code § 506(b) places no explicit limits on an oversecured creditor's recovery of interest, that provision does not specify, however, that an oversecured creditor must receive interest indefinitely or at the contract rate.

**Fees recovered under Code § 506(b) must be allowable under Code § 502(b)(1):**

The Court of Appeals also summarily affirmed the district court insofar as it held that an oversecured creditor's claim for contractually-permitted attorney's fees must be allowable under Code § 502(b)(1) before the question of whether, under Code § 506(b), the fees are included in the creditor's secured claim is addressed. Thus, because Pennsylvania law permitted the recovery of contractually-permitted attorney's fees only if the fees were reasonable, the bankruptcy court properly disallowed the creditor's claim insofar as it included attorney's fees that were unreasonable.

**In re Nixon, Case No. 09-3135 (3rd Cir., Dec. 15, 2010)**

[Text of opinion](#)

**Attorney's fees disallowed as unreasonable:**

In disallowing an oversecured state taxing authority's proof of claim under Code § 506(b) insofar as the authority sought to recover attorney's fees related to work performed by a private attorney hired by the taxing authority, the bankruptcy court did not err in concluding that the private attorney's fees were unreasonable because the taxing authority already had three salaried attorneys, including one bankruptcy specialist, working on the debtor's case, and the private attorney never appeared in the case except with one of these salaried attorneys.

**Montana Dept. of Revenue v. Duncan, 2010 WL 4903952 (9th Cir., Dec. 2, 2010)**

(case no. 09-36062)

[Text of opinion](#)



**Proof of Claim: By Secured Creditor:  
Ownership of Claim**

**Topical compilation:**

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**Creditor who did not possess mortgage note could not enforce it:**

Sustaining the Chapter 13 debtor’s objection to a mortgage claim filed by Countrywide Home Loans, Inc. as servicer for the Bank of New York, which was the trustee under a securitization trust, the court said that, since the Bank of New York never had actual possession of the note, the bank could not enforce the note, either as a holder or as a nonholder in possession of the note, since, in either case, the bank was required to have actual possession of the note. Constructive possession is not enough; actual possession is required. And, while a servicer has standing to file a proof of claim on behalf of a creditor, an agent has no greater right to enforce the instrument than does its principal.

**In re Kemp, --- B.R. ---, 2010 WL 4777625 (Bankr. D. N.J., Nov. 16, 2010)**

(case no. 1:08-bk-18700; adv. proc. no. 1:08-ap-2448) (Chief Bankruptcy Judge Judith H. Wizmur)

[Text of opinion](#)

**Bearer of note endorsed in blank could enforce note:**

The purported mortgage creditor was entitled to enforce the note, where the note was endorsed in blank by the original payee, thereby making it payable to bearer, and the creditor’s servicer submitted the affidavit of an individual who stated under oath that the servicer was in physical possession of the note on behalf of the creditor. This provided prima facie evidence that the creditor had the right to file a claim based on the note, and the debtor submitted no evidence to the contrary.

**In re Dewberry, 2010 WL 4882016 (Bankr. N.D. Ga., Oct. 21, 2010)**

(case no. 1:10-bk-60155) (Wendy L. Hagenau)

[Text of opinion](#)



**Proof of Claim: By Secured Creditor:  
Secured Status of Claim**

**Topical compilation:**

[PDF](#)   [Word](#)

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**Scope note:** This document collects cases addressing the status of a claim, as of the filing of the debtor's petition, as secured or unsecured. It also collects a few cases involving the avoidance of a lien solely on the basis of state law.

For cases on the avoidance of a lien under Code §§544-552 as fraudulent or preferential, see Avoidable Transfers and Liens (in Part F. of this Section One).

Creditor that inadvertently released lien was properly treated as unsecured creditor:

The North Dakota certificate of title statute, N.D. Cent. Code § 35-01-05.1, provides the exclusive method by which a security interest in a motor vehicle may be perfected; in order for a creditor to have a security interest in a motor vehicle, either the creditor's interest must be noted on the face of the certificate of title or the certificate of title must be in the possession of the creditor. Thus, here, where the creditor released its security interest in the Chapter 7 debtor wife's motor vehicle and mailed the certificate of title to the debtors, even if it did so in error, the creditor did not have a perfected security interest in the vehicle when the debtors subsequently filed a bankruptcy petition, and the creditor could be treated as an unsecured creditor. While the creditor submitted a duplicate copy of the certificate of title that reflected itself as a lienholder, N.D. Cent. Code § 39-05-09.1 only permits an application for a duplicate title when the original title had been lost, stolen, mutilated, or destroyed or had become illegible, none of which were the case here.

**In re Passa, 436 B.R. 120 (Bankr. D. N.D., July 12, 2010)**

(case no. 3:10-bk-30125) (Chief Bankruptcy Judge William A. Hill)

[Text of opinion](#)

Lien on mobile home was not established:

A reference to "MOBIL" under the Schedule of Real Estate owned by the Debtors in the Chapter 13 debtors' loan application was insufficient to establish the intent of the debtors to grant a lien on their mobile home.

In re Scott, 2010 WL 4809340 (Bankr. W.D. Ky., Nov. 19, 2010)

(case no. 1:09-bk-12198) (Chief Bankruptcy Judge Joan A. Lloyd)

[Text of opinion](#)



## Proof of Claim: By Unsecured Creditor

Topical compilation:

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Debtor's tender of knowingly-insufficient amount did not create accord and satisfaction:

The debtor's tender of a \$50 money order to the creditor in full satisfaction of the debtor's \$60,000 debt, which the creditor apparently cashed, did not create an accord and satisfaction, where the amount due was not in dispute, and the debtor could not reasonably argue that the debt was unliquidated. To the contrary, the debtor asserted that, due to his unemployment, he could not afford to pay the entire amount due. Mo. Rev. Stat. § 400.3.311, which establishes the requirements for an accord and satisfaction, controls in disputes where parties reasonably believe that a payment made actually satisfies the amount that is owing and outstanding on a debt, while the opposing party reasonably believes that a different amount is outstanding but for whatever reason knowingly accepts lesser payment in accord and satisfaction of the debt. Such was not the case here.

In re Covington, -- B.R. --, 2010 WL 4291334 (Bankr. E.D. Mo., Oct. 29, 2010)

(case no. 4:09-bk-52354) (Bankruptcy Judge Kathy A. Surratt-States)

[Text of opinion](#)

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## Proof of Claim: Other Issues

### Topical compilation:

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No basis for award of attorney's fees for responding to disallowed proofs of claim:

Although the Chapter 13 debtor's attorney spent additional time responding to two proofs of claim filed by a creditor for debts discharged in the debtor's prior Chapter 7 bankruptcy case, there was no legal authority for the court to award the debtor attorney's fees to compensate for this expenditure of time.

In re Norton, Case No. 3:09-bk-1951 (Bankr. D. S.C., Oct. 26, 2010)

(Bankruptcy Judge David R. Duncan)

[Text of opinion](#)

Creditor's filing duplicate claims did not violate FDCPA:

A creditor's filing of duplicative proofs of claim in the debtor's Chapter 13 case was not an abusive debt collection practice of a kind potentially actionable under the Fair Debt Collection Practices Act.

In re McMillen, --- B.R. ---, 2010 WL 5115880 (Bankr. N.D. Ga., Nov. 15, 2010)

(case no. 1:09-bk-74093; adv. proc. no. 1:09-ap-6611) (Chief Bankruptcy Judge Joyce Bihary)

[Text of opinion](#)

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Part F

Property of the Estate

## Property of the Estate: Generally

Topical compilation:

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**Scope:** This topic collects cases determining whether an asset is property of the estate in the first place, prior to the consideration of exemptions and exclusions.

Debtor's record ownership of real property brought it into bankruptcy estate:

The Chapter 7 debtor's one-half interest in real property owned in joint tenancy with his son was property of his bankruptcy estate, although the son had paid the entire purchase price for the property, and the son testified that he put the debtor's name on the deed to the property only because he (the son) had medical problems and needed help in maintaining the property. Finding the case similar to *Matter of Teranis*, 128 F.3d 469 (7th Cir. 1997), the court said that, whatever the equitable interests may have been between father and son, creditors were entitled to rely on the face of the deed.

In re Risler, 2010 WL 4924752 (Bankr. W.D. Wis., Dec. 2, 2010)

(case no. 1:08-bk-15716; adv. proc. no. 1:09-ap-132) (Bankruptcy Judge Thomas S. Utschig)

[Text of opinion](#)

Foreclosure sale was completed so that property was not included in bankruptcy estate:

Where a foreclosure sale of the debtor's real property was held on October 22, 2009, the purchaser paid consideration, the Substitute Trustee's Deed was then duly recorded on November 9, and the debtor's Chapter 11 petition was not filed until November 20, the foreclosure had been completed and the real property was not property of the debtor's bankruptcy estate. In Tennessee, a foreclosure is effective upon payment of the consideration and satisfaction of the statute of frauds.

**In re Greer, 2010 WL 4817993 (Bankr. M.D. Tenn., Nov. 22, 2010)**

(case no. 3:09-bk-13366; adv. proc. no. 3:09-ap-476) (Bankruptcy Judge Marian F. Harrison)

[Text of opinion](#)

**Note:** The debtor has filed a notice of appeal to the district court.

Refunds generated under Worker, Homeownership and Business Assistance Act were property of estate:

Refunds for prior tax years that were generated under a new federal law, the Worker, Homeownership and Business Assistance Act, that was effective after the Chapter 7 debtors' bankruptcy filing were property of the estate. The act permitted the debtors to apply their 2008 and 2009 net operating losses to their income for 2004 and 2005, increasing the refunds the debtors received for those tax years.

**In re Hooper, 2010 WL 5155828 (Bankr. D. Ariz., Dec. 14, 2010)**

(case no. 2:09-bk-26224) (Bankruptcy Judge Sarah Sharer Curley)

[Text of opinion](#)



**Property of the Estate: Exemptions:  
Avoidance of Liens under Code § 522(f)**

**Topical compilation:**

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**Scope note:** For cases on the debtor's avoidance of a lien under Code § 522(h), see Avoidable Transfers and Liens (in Part G. of this Section One).

Mortgage lien was not extinguished prepetition:

In determining whether a judicial lien impaired the Chapter 7 debtor's homestead exemption, the mortgage on the homestead was taken into account because the mortgage lien was not extinguished in the judicial lienholder's prepetition action to foreclose his lien. While the mortgage holder did not appear in that action, and a default was entered against it, a judgment of foreclosure was not entered before the debtor filed her bankruptcy petition.

**In re Allen**, 2010 WL 4687827 (Bankr. D. Conn., Nov. 10, 2010)

(case no. 2:10-bk-22923) (Bankruptcy Judge Albert S. Dabrowski)

[Text of opinion](#)

**Note:** The creditor has appealed. See *In re Allen*, Case No. 3:10-cv-01887-CFD (D. Conn., filed Dec. 2, 2010).

Lien avoidance is not dependant on debtor's receiving discharge:

Although a majority of courts hold that lien avoidance under Code § 522(f) is not effective until the debtor obtains a discharge, and these courts therefore condition § 522(f) orders on the issuance of a discharge (and the present court followed that procedure prior to being challenged by the debtor in this case), the avoidance of a judicial lien under Code § 522(f) is not subject to the entry of a discharge. While, under Code § 349(b)(1)(B), a judicial lien avoided under § 522(f) is reinstated if the case is subsequently dismissed, a debtor's failure to receive a discharge is not the same as the dismissal of the debtor's case. There are circumstances under which a case may be closed without a discharge but not "dismissed." For example, a Chapter 13 debtor may be ineligible to receive a discharge if the debtor has received a Chapter 7 discharge within the previous 4 years, yet the debtor may nevertheless file a plan under Chapter 13 and fully perform the plan in order to cure mortgage arrears. Such a debtor would be ineligible to receive a discharge, but if the debtor successfully completed the plan, the case would be closed without a discharge or a dismissal. Therefore, § 349 would not be triggered and any liens avoided during such a case would not be restored. Another example would be a debtor who does not obtain a personal financial management certificate, which would preclude the entry of a discharge but would not result in a dismissal. See Code § 727(a)(11). Conditioning lien avoidance on a discharge in a case is contrary to the language of § 349, which only comes into play when a case is dismissed, irrespective of whether or not a discharge is ultimately attained.

In re Mulder, 2010 WL 4286174 (Bankr. E.D. N.Y., Oct. 26, 2010)

(case no. 8:10-bk-74217) (Bankruptcy Judge Robert E. Grossman)

[Text of opinion](#)

**Comment:** This reasoning is also applicable to the question of whether an unsecured lien may be stripped by a Chapter 13 debtor ineligible for a discharge.

Value of homestead for purpose of lien avoidance:

Although exemptions are valued as of the petition date, the value of an asset scheduled by the debtor is not binding in the presence of more reliable evidence, and here, the price at which the Chapter 7 trustee sold the debtors' homestead property, \$157,000, was more reliable evidence of its value than the \$300,000 scheduled by the debtors.

In re Nelson, 2010 WL 3911387 (Bankr. E.D. N.C., Oct. 1, 2010)

(case no. 8:09-bk-3593) (Bankruptcy Judge Stephani W. Humrickhouse)

[Text of opinion](#)

Mechanic's lien is unavoidable statutory lien:

While a mechanic's lien must be judicially enforced in North Carolina, it arises by force of statute and is a statutory, rather than a judicial, lien. Accordingly, a debtor may not avoid a mechanic's lien under Code § 522(f).

In re Helms, 438 B.R. 95 (Bankr. W.D. N.C., Oct. 18, 2010)

(case no. 3:10-bk-31612) (Chief Bankruptcy Judge J. Craig Whitley)

[Text of opinion](#)

Avoidance of multiple liens:

Agreeing with *In re White*, 337 B.R. 686 (Bankr. N.D. Cal. 2005), the court held that, where a debtor seeks to avoid multiple judgment liens under Code § 522(f), the liens must be avoided in order of lower priority, and avoided liens are excluded in the calculation of impairment by higher-priority liens.

In re Brown, 436 B.R. 822 (Bankr. W.D. Va., Sept. 14, 2010)

(case no. 7:10-bk-70974) (Chief Bankruptcy Judge Ross W. Krumm)

[Text of opinion](#)

Lien attaching to homestead property would not be avoided:

Where the Chapter 7 debtors introduced no evidence as to the nature of the debt secured by a judicial lien, so that it was possible that the lien was of a type that could attach to the debtors' homestead, the court denied the debtors' motion to avoid the lien under Code § 522(f) as impairing the debtors' homestead exemption. The court's reasoning is unclear; the debtors' motion for reconsideration interprets the decision as holding that a lien that attaches to homestead property may not be avoided and argues that this is an erroneous reading of § 522(f).

In re Locascio, 2010 WL 4973624 (Bankr. S.D. Tex., Dec. 2, 2010)

(case no. 4:10-bk-37406) (Bankruptcy Judge Letitia Z. Paul)

[Text of opinion](#)

[Debtors' motion for reconsideration](#)

Mortgage deficiency judgment lien may be avoided:

Code § 522(f)(2)(C) precludes the avoidance of a mortgage foreclosure judgment, but it does not preclude the avoidance of a mortgage deficiency judgment lien. This result was consistent with Louisiana law, under which a mortgage creditor's deficiency judgment is merely incidental to the mortgage foreclosure and not a "judgment arising out of a mortgage foreclosure" within the meaning of § 522(f)(2)(C).

*In re McMorris*, 436 B.R. 359 (Bankr. M.D. La., Sept. 16, 2010)

(case no. 3:09-bk-11881) (Bankruptcy Judge Douglas D. Dodd)

[Text of opinion](#)

**Comment:** For cases reaching the same position, see:

- *In re Hart*, 328 F.3d 45 (1st Cir. 2003)
- *In re Maxwell*, 2010 WL 4736206 (Bankr. E.D. Tenn., Nov. 16, 2010) (case no. 3:09-bk-35713) (Bankruptcy Judge Richard S. Stair Jr.) (the purpose of Code § 522(f)(2)(C) was "to remove from the application of § 522(f) any judgment for a foreclosure in states requiring judicial foreclosures or wherein the deficiency judgment is a portion of the foreclosure judgment and not a separate action to collect a deficiency balance on a previously secured but, post-foreclosure unsecured, debt") [Text of opinion](#)
- *In re Burns*, 437 B.R. 246 (Bankr. N.D. Ohio, June 16, 2010)
- *In re Phillips*, --- B.R. ---, 2010 WL 816150 (Bankr. N.D. Ala., March 5, 2010)
- *In re Anderson*, 2010 WL 322167 (Bankr. N.D. Ill., Jan. 25, 2010)
- *In re Linane*, 291 B.R. 457 (Bankr. N.D. Ill. 2003)
- *In re Carson*, 274 B.R. 577 (Bankr. D. Conn. 2002)
- *In re Smith*, 270 B.R. 557 (Bankr. W.D. N.Y. 2001)

See also *In re Been*, 153 F.3d 1034 (9th Cir. 1998) (judicial lien obtained by "sold out" junior lienholder, via suit on its note, after senior lienholder's foreclosure on mortgaged property was not within protection of § 522(f)(2)(C))

The only contrary decisions appear to be two by Bankruptcy Judge Albert Dabrowski. See *In re Criscuolo*, 386 B.R. 389 (Bankr. D. Conn. 2008) and *In re Vincent*, 260 B.R. 617 (Bankr. D. Conn. 2000).

For a decision holding, without regard to § 522(f)(2)(C), that a mortgage foreclosure judgment may not be avoided under § 522(f)(2)(C), see *In re Nichols*, 265 B.R. 831 (10th Cir. B.A.P. 2001).

Status of security interest as possessory or nonpossessory for the purpose of Code § 522(f)(1)(B):

To determine whether a security interest is possessory or nonpossessory for the purpose of Code § 522(f)(1)(B), which allows a the debtor to avoid a nonpossessory, nonpurchase-money security interest to the extent the lien impairs the debtor's exemption in certain types of collateral, the critical question is how the lien attached and became enforceable against the debtor. In order to create a possessory security interest, the agreement between the parties must contemplate that the secured party will possess the collateral, and the secured party must in fact possess the collateral. In this case, the security agreement provided that the debtors would maintain possession of the collateral until default; thus the debtors granted the credit union only a nonpossessory security interest in the collateral. And the credit union's security interest did not transform into a possessory security interest when the credit union took possession of its collateral after default. The majority rule is that a security interest does not become possessory, and therefore not avoidable, when the creditor takes possession of the collateral following default.

In re Mahoney, 2010 WL 4736237 (Bankr. E.D. Wis., Nov. 16, 2010)

(case no. 2:09-bk-38388) (Bankruptcy Judge Susan V. Kelley)

[Text of opinion](#)



## Property of the Estate: Exemptions: Debtor Who Elects Federal Exemptions

Topical compilation:

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Exemption of entireties property under federal exemptions is not defeated by joint creditor:

A debtor may exempt property owned by the entireties under the federal exemptions even if the debtor's spouse does not join in the bankruptcy petition, and the debtor may exempt this property even if there are joint creditors of the debtor and the debtor's spouse, which would defeat an exemption claimed under Code § 522(b)(3)(B). See generally *In re Brannon*, 476 F.3d 170 (3rd Cir. 2007) (under the federal exemptions, a debtor may exempt the full value of property owned by the entireties, up to the exemption limit; the debtor is not limited to exempting 50% of the value of the property as the value of the debtor's interest in the property).

*In re Segen*, 2010 WL 4453315 (Bankr. E.D. Pa., Nov. 3, 2010)

(case no. 2:10-bk-14574) (Chief Bankruptcy Judge Stephen Raslavich)

[Text of opinion](#)

Ambiguous deed did not overcome presumption that married debtors took property as tenants by the entirety:

Because a deed was ambiguous, in providing that the property was conveyed to the debtors "as Husband and Wife, as joint tenants with right of survivorship and as tenants in common," a presumption that the debtors took the property as tenants by the entirety applied. The debtors were not required to file a reformation action to clarify the deed's ambiguity; Florida caselaw indicated that a court could construe a deed's ambiguous terms to determine the intent of the parties, and that this relief was not restricted to a reformation action.

*In re Aranda*, 2010 WL 5018320 (Bankr. S.D. Fla., Dec. 3, 2010)

(case no. 9:08-bk-26059) (Chief Bankruptcy Judge Paul G. Hyman)

[Text of opinion](#)

R

## Property of the Estate: Exemptions: Debtor Who Elects State Exemptions

Topical compilation:

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Arizona law: Life insurance policy is exempt only if beneficiary is dependent of debtor:

Reversing the bankruptcy court, the BAP held that the cash surrender value of a life insurance policy or an annuity contract under which the debtor's adult, nondependent child was the beneficiary was not exempt under Ariz. Rev. Stat. § 33-1126(A)(7), which permits the exemption of "[t]he cash surrender value of life insurance policies where for a continuous unexpired period of two years such policies have been owned by a debtor and have named as beneficiary the debtor's surviving spouse, child, parent, brother or sister, or any other dependent family member." The BAP reasoned that the phrase "any other dependent family member" indicated that the exemption applied only if the specified family member was a dependent of the debtor.

In re Hummel, --- B.R. ---, 2010 WL 5076421 (9th Cir. B.A.P., Nov. 19, 2010)

(case no. 10-1202)

[Text of opinion](#)

**Note:** One of the debtors involved in this consolidated appeal has filed a notice of appeal.

Idaho law: Exemption of life insurance policy is distinct from exemption of policy's cash surrender value:

Despite a suggestion to the contrary in *In re Oxford*, 274 B.R. 887 (Bankr. D. Idaho 2002), the court concluded that the cash surrender value of a life insurance policy is not exempt under Idaho Code § 11-605(9), which permits the exemption of "[a]ny unmatured life insurance contract owned by an individual, other than a credit life insurance contract." All that is exempted by § 11-605(9) is the life insurance policy itself, and not a debtor's rights under the policy. If a debtor wishes to protect dividends or interests that have accrued under a policy, such as a policy's cash surrender value, he or she must claim exemption in that interest under Idaho Code § 11-605(10), which permits the exemption of "[a]n individual's aggregate interest, not to exceed five thousand dollars (\$5,000) in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the individual under which the insured is the individual or a person of whom the individual is a dependent."

Idaho law: Policies insuring minor children's lives were not exempt:

Certain insurance policies purchased by the debtors, under which their minor child was the insured, were not exempt under Idaho Code § 11-605(10), as that statute applies only where the debtor is either the insured or a dependent of the insured, and not where the insured is a dependant of the debtor.

Idaho law: Debtor wife could not exempt policy of which she was not owner:

The debtor wife could not exempt her interest in one of the policies under Idaho Code § 11-605(10) because she did not own the policy. The debtor husband's parents had purchased it for him years before the debtors were married, and, while the debtors paid the premiums on the policy with community property, that did not give the wife an ownership interest in the policy. Rather, it merely entitled the wife to reimbursement for the increase in separate property value attributable to community expenditures.

*In re Steiner*, 2010 WL 4687955 (Bankr. D. Idaho, Nov. 10, 2010)

(case no. 4:10-bk-40755) (Bankruptcy Judge Jim D. Pappas)

[Text of opinion](#)

Iowa law: Tax refunds were not “disposable earnings” under garnishment statute:

The Chapter 7 debtors’ tax refunds were not “disposable earnings” within the meaning of Iowa Code § 642.21, which provides that “disposable earnings of an individual are exempt from garnishment to the extent provided by the federal Consumer Credit Protection Act.” The tax refunds therefore were not exempt under Iowa Code § 627.6(10), which permits the exemption of amounts protected from garnishment under § 642.21.

Iowa law: Tax credits were not “public assistance benefits”:

The debtors’ Making Work Pay and Hope Scholarship tax credits were not “public assistance benefits” and thus were not exempt under Iowa Code § 627.6(8)(a), which permits the exemption of Social Security benefits, unemployment compensation or “any public assistance benefit.”

*In re Arthur*, — B.R. —, 2010 WL 4674450 (Bankr. S.D. Iowa, Oct. 20, 2010)

(case numbers 3:09-bk-4332, 3:10-bk-463) (Bankruptcy Judge Anita L. Shodeen)

[Text of opinion](#)

Maryland law: Exemption of personal injury claim:

Amending its earlier opinion, which is found at *In re Short*, 2010 WL 4736209 (Bankr. D. Md., Nov. 16, 2010), the bankruptcy court reaffirmed *In re Hurst*, 239 B.R. 89 (Bankr. D. Md. 1999) and *In re Hernandez*, 272 B.R. 178 (Bankr. D. Md. 2001), which held that an exemption of a personal injury claim under Md. Code Ann., Cts. & Jud. Pro. § 11-504(b)(2), which permits the exemption of “[m]oney payable in the event of sickness, accident, injury, or death of any person, including compensation for loss of future earnings,” is limited to money received as compensation for injuries to the person. Thus, a personal injury claim is not exempt to the extent the claim is for prepetition unpaid medical bills, prepetition lost wages, and special damages.

*In re Short*, 2010 WL 4962935 (Bankr. D. Md., Nov. 29, 2010)

(case no. 1:09-bk-30235) (Chief Bankruptcy Judge Duncan W. Keir)

[Text of opinion](#)

Missouri law: Debtor could not exempt trailer as "mobile home":

Reversing the bankruptcy court, the BAP held that a horse trailer that the debtor had modified to live in after his ex-wife had "kicked [him] out" could not be exempted as a "mobile home" under Mo. Rev. Stat. § 513.430.1(6), which does not define the term, where the trailer did not meet the definition of a "manufactured home" in Mo. Rev. Stat. § 700.010, and Missouri state courts had applied the definition in § 700.010 to the term "mobile home" when it was used in other contexts.

In re Hurd, — B.R. —, 2010 WL 5093664 (8th Cir. B.A.P., Dec. 15, 2010)

(case no. 10-6072)

[Text of opinion](#)

Nebraska law: Joint debtors could each exempt equity in same motor vehicle:

Under the Nebraska "wild card" exemption found in Neb. Rev. Stat. § 25-1556(4), the Chapter 7 joint debtors could each exempt \$2,400 of the equity in a motor vehicle that they both employed as a tool of the trade; the statute did not limit the debtors to one \$2,400 exemption.

In re Reisdorff, 2010 WL 4852457 (Bankr. D. Neb., Nov. 23, 2010)

(case no. 4:10-bk-42738) (Chief Bankruptcy Judge Thomas L. Saladino)

[Text of opinion](#)

North Dakota law: Debtor could exempt funds received in sale of personal property included in sale of homestead:

Reversing the bankruptcy court, the BAP held that the debtor was entitled to exempt under North Dakota law, as proceeds from the sale of his homestead, the entire amount received in the sale, even though the Chapter 7 trustee claimed that \$7,700 of the \$225,000 received in the sale represented funds received from the sale of certain furnishings and other personal property that was included in the sale of the home. The debtor deposited the net proceeds of the sale, after payment of the liens on the home, in a savings account, and the BAP reasoned that the debtor's establishment of a savings account for the specific purpose of depositing the proceeds of the sale of his homestead, and his subsequent deposit into that account of the proceeds from the personal property (allegedly) sold with his homestead, constituted sufficient indicia of his intent to convert nonexempt personal property into exempt, homestead property. Because the record was devoid of any contrary evidence, or evidence that the debtor acted with fraudulent intent when he converted nonexempt property into exempt property, the debtor was entitled to exempt the entire amount in his savings account.

*In re Danduran*, 438 B.R. 658 (8th Cir. B.A.P., Nov. 23, 2010)

(case no. 10-6042)

[Text of opinion](#)

**Note:** The Chapter 7 trustee has filed a notice of appeal.

Oregon law: Prepaid rent was not exempt as homestead:

While *In re Casserino*, 379 F.3d 1069 (9th Cir. 2004) held that the last month's rent and a security deposit paid by a debtor for rental housing were exempt under Oregon's homestead exemption statute, the present court would not extend the reasoning to "prepaid rent" paid by the Chapter 7 debtors sometime before their bankruptcy filing.

*In re Schuhmann*, 2010 WL 5125321 (Bankr. D. Or., Dec. 9, 2010)

(case no. 6:10-bk-63024) (Bankruptcy Judge Albert E. Radcliffe)

[Text of opinion](#)

Oregon law: Earned Income Credit has specific exemption:

Where the debtor received a federal tax refund consisting in part of an Earned Income Credit, the debtor needed to separate the two components. Exemption of the EIC was controlled by Or. Rev. Stat. § 18.345(1)(n), while exemption of the rest of the refund was permitted under Or. Rev. Stat. § 18.345(1)(o).

In re Plantz, 2010 WL 4736234 (Bankr. D. Or., Nov. 16, 2010)

(case no. 6:09-bk-65036) (Bankruptcy Judge Albert E. Radcliffe)

[Text of opinion](#)

Texas law: Debtor could claim homestead exemption despite lack of legal title and possession of two arguable homesteads:

The debtor was entitled to claim certain property as his homestead, although he did not hold legal title to the property, and he slept at his new wife's home at nights while being on his claimed homestead property during the days to run his cattle grazing business. Although title to the property was held by the debtor's father's estate, the father's will devised the property to the debtor, and the debtor had been living on the property since 2004 (other than sleeping at his new wife's residence since mid-2008), so he had a present possessory interest in the property. As to the debtor's spending the days at his claimed homestead property and the nights at his new wife's house, the court followed the line of Texas cases holding that a court should honor a debtor's subjective intent, when more than one property was actually used as a residence, under circumstances sufficiently ambiguous so that determining which property was the debtor's homestead was impossible merely from observing how it was used.

In re Tinsley, 2010 WL 4823208 (Bankr. N.D. Tex., Nov. 16, 2010)

(case no. 3:09-bk-36036) (Bankruptcy Judge Stacey G.C. Jernigan)

[Text of opinion](#)



## Property of the Estate: Exemptions: Limitations

**Topical compilation:**

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**Scope:** This topic collects cases involving general principles, and specific Code provisions, limiting a debtor's exemptions, often (although not always) in response to the debtor's misconduct.

Prepetition conveyance from husband to wife was fraudulent:

The debtor husband's conveyance of a truck, solely owned by him, to his debtor wife five days before the debtors filed a joint bankruptcy petition, for no consideration and for the purpose of maximizing the debtors' exemptions, was made with the intent to hinder, delay, or defraud creditors and therefore was a fraudulent conveyance under Code § 548(a)(1). Accordingly, the court sustained the Chapter 7 trustee's objection to the wife's claimed exemption in the truck. The court distinguished cases holding that a debtor's prepetition conversion of nonexempt property to exempt property, in itself, is permissible prebankruptcy planning on the ground that no conveyance is involved in that situation, although the court did not explain why this factual distinction warranted a different outcome.

In re Seymour, Case No. 3:10-bk-377 (Bankr. D. S.C., August 16, 2010)

(Chief Bankruptcy Judge John E. Waites)

[Text of opinion](#)

Proper avenue for asserting objection to prepetition transfer of property claimed as exempt:

The Chapter 13 trustee's objection to the joint debtors' claimed exemption in their homestead property, based on the debtors' prepetition conversion of the property from tenancy in common to tenancy by the entireties, was a fraudulent transfer claim that needed to be asserted as an adversary proceeding rather than as an objection to the debtors' exemptions.

[In re Smith, 2010 WL 3564837 \(Bankr. D. Md., Sept. 13, 2010\)](#)

(case no. 0:10-bk-21614) (Bankruptcy Judge Paul Mannes)

[Text of opinion](#)

Single creditor's objection is not basis for denying objection:

A debtor's exemption may not be denied on the basis of a single creditor's assertion that the exempted property was purchased with funds conveyed by another person in fraud upon the objecting creditor. Thus, here, where the father of the debtor's child gave the debtor \$225,000 that the father acquired in a Ponzi scheme; although the debtor used the money to buy the property she claimed as her exempt homestead, there was no showing that she participated in the father's Ponzi scheme; and, after an involuntary bankruptcy petition was filed against the father, the trustee of the father's bankruptcy estate avoided the \$225,000 conveyance, the existence of a claim by the trustee of the father's bankruptcy estate against the debtor's bankruptcy estate did not warrant denial of the debtor's exemption.

[In re Morgan, 2010 WL 4922581 \(Bankr. E.D. Tenn., Nov. 29, 2010\)](#)

(case no. 1:10-bk-13804) (Chief Bankruptcy Judge John C. Cook)

[Text of opinion](#)



## Property of the Estate: Exemptions: Procedure

Topical compilation:

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[All circuit compilations](#)

Bankruptcy court did not err in disallowing amendment of exemptions:

Affirming *In re Howe*, 2009 WL 2914229 (Bankr. N.D. N.Y. 2009), the district court found no error in the bankruptcy court's conclusion that permitting the Chapter 7 debtors to amend their exemptions, so as to claim a cash exemption rather than a homestead exemption, would cause prejudice to creditors, where the debtors' original homestead exemption permitted them to shield some \$55,000 in equity from creditors, and, after the time for an objection to the homestead exemption had expired, the debtors sought to amend their exemptions to now claim a cash exemption. New York law permitted debtors to claim either a homestead exemption or a cash exemption, but not both.

*In re Howe*, — F.Supp.2d —, 2010 WL 3283372 (N.D. N.Y., August 18, 2010)

(case no. 1:09-cv-873) (District Judge David N. Hurd)

[Text of opinion](#)

R

## Property of the Estate: Exemptions: Other Issues

Topical compilation:

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Debtor may not exempt property that is not part of bankruptcy estate:

Although the funds the debtor received in settlement of her personal injury claim would have been exempt under Code § 522(d)(11)(D) as payments “on account of personal bodily injury,” the debtor was not able to exempt the funds where she had voluntarily paid them to creditors prepetition. A debtor may claim an exemption only in property of the estate, and property is property of the estate only if the debtor holds an interest in the property on the petition date.

Code §522(g) does not permit exemption in voluntarily-transferred property:

If the Chapter 7 trustee was able to recover the payments from the creditors as preferences, the debtor would not then be able to claim an exemption in the recovered payments, as Code § 522(g) permits a debtor to claim an exemption only in property that was transferred involuntarily, even where, as there, the debtor did not conceal the transfer.

In re Rincan, 2010 WL 4777628 (Bankr. D. N.J., Nov. 17, 2010)

(case no. 2:10-bk-13561) (Bankruptcy Judge Donald H. Steckroth)

[Text of opinion](#)

Code § 522(g) permitted debtor's claim of exemption in avoided garnishment:

Even if the trustee of the debtor's bankruptcy estate could set aside a garnishment of funds from the debtor, the debtor would be able to claim an exemption in the funds under Code § 522(g), as the garnishment was an involuntary transfer that the debtor did not attempt to conceal.

In re Morgan, 2010 WL 4922581 (Bankr. E.D. Tenn., Nov. 29, 2010)

(case no. 1:10-bk-13804) (Chief Bankruptcy Judge John C. Cook)

[Text of opinion](#)



Part G

Other Issues

## Authority of the Court

Topical compilation:

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Attorney sanctioned for dishonesty:

Following up *In re Hill*, 437 B.R. 503 (Bankr. W.D. Pa., Oct. 5, 2010), the court issued a public reprimand to both an attorney who had been dishonest to the court during her representation of Countrywide Home Loans and the attorney's law firm. Observing that it had found that the attorney had lied, and that it had not made that finding lightly, the court said it found the attorney's lack of acceptance of responsibility to be troubling, as the attorney continued to insist that she had not lied.

*In re Hill*, --- B.R. ---, 2010 WL 4868005 (Bankr. W.D. Pa., Nov. 24, 2010)

(case no. 2:01-bk-22574) (Chief Bankruptcy Judge Thomas P. Agresti)

[Text of opinion](#)

Court had authority under Code § 105(a) to toll allowance of postpetition interest:

Affirming *In re Nixon*, 2009 WL 1845229 (E.D. Pa. 2009), the Third Circuit Court of Appeals found no error in the bankruptcy court's decision to toll the running of postpetition interest on a secured creditor's claim, where the bankruptcy court had found that the creditor was purposefully delaying the proceedings. The action was well within a bankruptcy court's authority under Code § 105(a), and, while Code § 506(b) places no explicit limits on an oversecured creditor's recovery of interest, that provision does not specify, however, that an oversecured creditor must receive interest indefinitely or at the contract rate.

*In re Nixon*, Case No. 09-3135 (3rd Cir., Dec. 15, 2010)

[Text of opinion](#)

### Mortgage creditor sanctioned for violating consent order:

In an important case, the bankruptcy court awarded the Chapter 11 debtors \$63,000 in compensatory damages from the mortgage creditor (Countrywide Home Loans, and Bank of America as its successor in interest), and assessed punitive damages in the same amount against the creditor, as a sanction for the creditor's attempting to collect on two discharged mortgage debts from the debtors for two years. The parties negotiated a consent order (1) granting relief from the automatic stay, (2) permitting the creditor to foreclose on two mortgaged properties, and (3) providing that the lifting of the stay served as full payment and satisfaction of the creditor's claims secured by the properties. However, the creditor then proceeded to ignore the consent order, and the debtor wife testified that she answered approximately 100 calls over the two years thereafter, while the debtors received an additional 300 calls that they did not answer, as well as 20 written communications.

### Compensatory damages awarded:

The court analyzed the matter as civil contempt arising from the creditor's violation of both the consent order and the discharge injunction. The latter arose because confirmation of the debtors' plan served to discharge the debtors' debts. The court awarded compensatory damages consisting of (1) \$5,000 in attorney's fees; (2) \$1,000.00 for the time expended at the hearing on the motion; (3) \$50 per call for the approximately 300 unanswered calls; (4) \$200 per call for the approximately 100 answered calls; (5) \$2,000 for the 20 inappropriate written demands sent to the debtors; (6) \$10,000 for the embarrassment and humiliation suffered by the debtors in having actual and threatened legal proceedings brought against them by their local government and homeowner's association; and (7) \$10,000 because the reporting of this extinguished debt to credit reporting agencies as seriously in default impacted the debtors' credit rating and impeded the debtors' fresh start.

### Punitive damages imposed:

Declaring that the standard by which courts in the Fourth Circuit awarded punitive damages for violation of an order or discharge injunction required a demonstration of "egregious conduct," "malevolent intent," or "clear disregard of the bankruptcy laws," the court found it "appallingly clear" that the creditor flagrantly disregarded the court's order and discharge injunction. It was "beyond egregious," the court said, that, after almost two years of facing such harassment on their own, the debtors finally caught the creditor's attention only when they retained counsel and filed the present sanctions motion. A sophisticated creditor could not be excused for flagrantly ignoring the terms of an order to which it consented, and even more seriously, having no internal procedures in place to correct the error when it was clearly called to its attention.

[In re Kirkbride, 2010 WL 4809334 \(Bankr. E.D. N.C., Nov. 19, 2010\)](#)

(case no. 8:08-bk-120) (Bankruptcy Judge J. Rich Leonard)

[Text of opinion](#)

[Text of consent order](#)

**Comment:** Insofar as the court awarded damages for the debtors having legal proceedings brought against them due to their continued ownership of the properties, as to which the creditor did not commence the expected foreclosure proceedings, the court's order effectively required the creditor to accept the debtors' surrender of the properties, although the consent order did not explicitly provide for surrender.

#### Bankruptcy court as “court of the United States”; applicability of Anti-Injunction Act:

Circuit courts are split on the issue of whether a bankruptcy court is a “court of the United States,” which is defined in 28 U.S.C. § 451 as “the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.” Compare *In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90 (3rd Cir. 2008) (finding that a bankruptcy court is a unit of the district court which is a “court of the United State” and “thus the bankruptcy court comes within the scope of § 451”); *In re Parker*, 499 F.3d 616 (6th Cir. 2007) (holding that 11 U.S.C § 105(a) is an “expressly authorized” exception under the Anti-Injunction Act, thereby at least implicitly finding that the Anti-Injunction Act, which is applicable only to a “court of the United States,” applies to bankruptcy courts); and *In re Cohoes Indus. Terminal, Inc.*, 931 F.2d 222, 230 (2nd Cir. 1991) (bankruptcy courts have the authority to impose sanctions under 28 U.S.C. § 1927, thereby at least implicitly finding that the bankruptcy court is a “court of the United States”) with *In re Perroton*, 958 F.2d 889 (9th Cir. 1992) (holding that the bankruptcy court is not a “court of the United States” within the meaning of 28 U.S.C. § 451) and *In re Courtesy Inns, Ltd., Inc.*, 40 F.3d 1084 (10th Cir. 1994) (same).

The application of both 28 U.S.C. § 1927, which authorizes the imposition of sanctions under certain circumstances, and the Anti-Injunction Act, which provides that “[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments,” is limited to a “court of the United States.”

#### Enjoining litigation in other forum under Code § 105(a):

Because the Anti-Injunction Act was inapplicable, the bankruptcy court was able to use its equitable powers under Code § 105(a) to enjoin pending state court litigation without regard to the limitations contained in that act. A stay of litigation in another forum may be “necessary or appropriate” to ensure that the state court proceeding does not hurt the bankruptcy estate, impair a debtor's reorganization efforts, or, after termination of the automatic stay, when the dischargeability of a particular debt has not yet been determined. To evaluate a request to enjoin litigation pending in a different forum under Code § 105(a), courts often used traditional preliminary injunction standards, perhaps adapted to the bankruptcy context, and the present court would follow that approach. Under the general preliminary injunction standard as articulated by the Tenth Circuit, the movant must show: (1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) the threatened injury outweighs the harms that the preliminary injunction may cause the opposing party; and (4) the injunction, if issued, would not adversely affect the public interest.

*In re Eastburg*, — B.R. —, 2010 WL 4623798 (Bankr. D. N.M., Nov. 4, 2010)

(case no. 1:10-bk-10131; adv. proc. no. 1:10-ap-1024) (Bankruptcy Judge Robert H. Jacobvitz)

[Text of opinion](#)

Elements required to impose sanctions under 28 U.S.C. § 1927:

Affirming *In re Beers*, 2009 WL 4282270 (D. N.J. 2009), which had affirmed *In re Beers*, 2009 WL 1025402 (Bankr. D. N.J. 2009), the Third Circuit Court of Appeals held that 28 U.S.C. § 1927 requires a finding of four elements for the imposition of sanctions, one of which is bad faith: (1) multiplied proceedings; (2) unreasonably and vexatiously; (3) thereby increasing the cost of the proceedings; (4) with bad faith or with intentional misconduct. *LaSalle Nat'l Bank v. First Connecticut Holding Group*, 287 F.3d 279 (3d Cir. 2002).

*In re Beers*, 2010 WL 4263292 (3rd Cir., Oct. 29, 2010)

(case no. 10-1105 )

[Text of opinion](#)



## Avoidable Transfers and Liens

Topical compilation:

[PDF](#) [Word](#)

[All topical compilations](#)

[All circuit compilations](#)

**Scope note:** Coverage is very selective. Insofar as avoidance of liens is concerned, coverage is limited to avoidance under the Bankruptcy Code. For a few cases on avoidance of a lien solely on the basis of state law, see Proof of Claim: By Secured Creditor: Secured Status of Claim (earlier in this Section One).

Cause of action under New York fraudulent conveyance statute was not established:

In an adversary proceeding by the Chapter 7 trustee to recover property transferred by the debtor to his wife and daughter some 10 years prepetition, the bankruptcy court properly granted summary judgment for the wife and daughter, as the adversary proceeding was based on Code § 544(b)(1), which permitted the trustee to assert the rights of creditors under N.Y. Debt. & Cred. Law § 273-a, and, under § 273-a, a transfer was avoidable where the defendant (1) transferred property to a third party for less than fair consideration while the defendant was being sued, (2) the suit against the defendant was one “for money damages,” and (3) the defendant failed to satisfy a “final judgment” against him. Here, the first two elements may have been satisfied, as the debtor’s former law partner sued him in 1998 and the challenged transfer occurred in 2000, while the case was pending. However, the third element was not satisfied, as no “final judgment” had yet been entered against the debtor. While the trial court had rendered a judgment for the law partner, the debtor had appealed, the appellate court had remanded the case to the trial court for a recalculation of damages, and that recalculation had not yet taken place.

In re Yerushalmi, — F.Supp.2d —, 2010 WL 4703776 (E.D. N.Y., Nov. 20, 2010)

(case no. 2:10-cv-1078) (Senior District Judge Arthur D. Spatt)

[Text of opinion](#)

Creditor had derivative standing:

The bankruptcy court did not err in according the Chapter 7 debtor's creditor derivative standing to commence a fraudulent transfer action for the purpose of recovering the allegedly fraudulently-transferred assets for the debtor's bankruptcy estate.

[In re Rim, 2010 WL 4615174 \(D. N.J., Nov. 3, 2010\)](#)

(case no. 2:10-cv-1066) (District Judge Dennis M. Cavanaugh)

[Text of opinion](#)

Trustee may not invade spendthrift trust:

A Chapter 7 trustee may not use his strong-arm powers under Code § 544(a)(1) to invade a spendthrift trust excluded from the bankruptcy estate by Code § 541(c)(2).

[In re White, 2010 WL 3927485 \(Bankr. D. Md., Sept. 30, 2010\)](#)

(case no. 1:09-bk-13663) (Bankruptcy Judge Nancy V. Alquist)

[Text of opinion](#)

Constructively fraudulent transfer need not be pled with particularity:

Although the Sixth Circuit Court of Appeals has not yet addressed this issue, most courts conclude that the heightened pleading requirements of Federal Rule of Civil Procedure 9(b), which is applicable to adversary proceedings through Bankruptcy Rule 7009 and demands that allegations of fraud or mistake be pled with "particularity," are inapplicable to fraudulent transfer actions based on constructive fraud under Code § 548(a)(1)(B).

[In re Anderson, 2010 WL 4959948 \(Bankr. E.D. Tenn., Dec. 1, 2010\)](#)

(case no. 2:10-bk-50757; adv. proc. no. 2:10-ap-5081) (Bankruptcy Judge Marcia Phillips Parsons)

[Text of opinion](#)

## Required Documentation

### Financial education documents:

[PDF](#) [Word](#)

[All topical compilations](#)

[All circuit compilations](#)

### Documents required under Code § 521:

[PDF](#) [Word](#)

### Court may not vacate dismissal:

The court lacks the authority to reinstate a case dismissed under Code § 521(i) for failure to provide the required information.

*In re Guidry*, 2010 WL 4052173 (Bankr. S.D. Tex., Oct. 14, 2010)

(case no. 4:10-bk-37113) (Bankruptcy Judge Wesley W. Steen)

[Text of opinion](#)

R

## Valuation of Assets

**Topical compilation:**

[PDF](#) [Word](#)

[All topical compilations](#)

[All circuit compilations](#)

**Valuation of New Hampshire commercial property in poor condition:**

Valuing a 2.49-acre parcel of land in Exeter, New Hampshire, that was improved for commercial use but was in below-average condition and required possible removal and disposal of asbestos, lead paint, and certain hydrocarbons, the court found the value of the property to be \$265,500 whether it was valued as raw land or as improved property. In arriving at a valuation as raw land, the court deducted \$25,000 from the appraisals for asbestos remediation, but did not include costs for lead paint removal, as it was unnecessary in a raw land valuation, or for hydrocarbon remediation, as it was speculative and uncertain on the record before the court.

**In re Roy, 2010 WL 4916576 (Bankr. D. N.H., Nov. 30, 2010)**

(case no. 1:10-bk-10086) (Bankruptcy Judge J. Michael Deasy)

[Text of opinion](#)

**Valuation of Connecticut residential property—Court simply averaged two credible appraisals:**

In valuing the Chapter 7 debtor's homestead in Niantic, Connecticut, where the court found the respective appraisers to be qualified and credible witnesses with their respective valuations based upon an appropriate comparable sales approach, the court averaged the appraisers' valuations of \$325,000 and \$370,000 to arrive at \$347,500.

**In re Allen, 2010 WL 4687827 (Bankr. D. Conn., Nov. 10, 2010)**

(case no. 2:10-bk-22923) (Bankruptcy Judge Albert S. Dabrowski)

[Text of opinion](#)

Valuation of Pennsylvania residential property:

The court concluded that the Chapter 13 debtors' 47-year-old colonial style home, on about a 1/2 acre lot, located in West Chester, Pennsylvania, with the residence consisting of nine rooms, including four bedrooms, totaling about 1,900 sq. ft of livable space, in slightly-below-average condition, was no greater than \$290,000, where the average adjusted sales price of the six West Chester homes, all sold in the fall of 2009, employed as comparable by the parties' appraisers was \$289,941.67.

In re Butler, 2010 WL 4736205 (Bankr. E.D. Pa., Nov. 15, 2010)

(case no. 2:10-bk-12776; adv. proc. no. 2:10-ap-317) (Bankruptcy Judge Bruce Fox)

[Text of opinion](#)

Valuation of Miami, Florida, residential property:

The court valued the debtor's home in Miami, Florida, at \$156,660.

In re Avendano, 2010 WL 5058390 (Bankr. S.D. Fla., Dec. 3, 2010)

(case no. 1:09-bk-36558) (Bankruptcy Judge A. Jay Cristol)

[Text of opinion](#)



## Violation of Discharge Injunction

Topical compilation:

[PDF](#)   [Word](#)

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[All circuit compilations](#)

Mortgage creditor sanctioned for violating consent order:

In an important case, the bankruptcy court awarded the Chapter 11 debtors \$63,000 in compensatory damages from the mortgage creditor (Countrywide Home Loans, and Bank of America as its successor in interest), and assessed punitive damages in the same amount against the creditor, as a sanction for the creditor's attempting to collect on two discharged mortgage debts from the debtors for two years. The parties negotiated a consent order (1) granting relief from the automatic stay, (2) permitting the creditor to foreclose on two mortgaged properties, and (3) providing that the lifting of the stay served as full payment and satisfaction of the creditor's claims secured by the properties. However, the creditor then proceeded to ignore the consent order, and the debtor wife testified that she answered approximately 100 calls over the two years thereafter, while the debtors received an additional 300 calls that they did not answer, as well as 20 written communications.

Compensatory damages awarded:

The court analyzed the matter as civil contempt arising from the creditor's violation of both the consent order and the discharge injunction. The latter arose because confirmation of the debtors' plan served to discharge the debtors' debts. The court awarded compensatory damages consisting of (1) \$5,000 in attorney's fees; (2) \$1,000.00 for the time expended at the hearing on the motion; (3) \$50 per call for the approximately 300 unanswered calls; (4) \$200 per call for the approximately 100 answered calls; (5) \$2,000 for the 20 inappropriate written demands sent to the debtors; (6) \$10,000 for the embarrassment and humiliation suffered by the debtors in having actual and threatened legal proceedings brought against them by their local government and homeowner's association; and (7) \$10,000 because the reporting of this extinguished debt to credit reporting agencies as seriously in default impacted the debtors' credit rating and impeded the debtors' fresh start.

[continued on the next page]

[continued from the preceding page]

**Punitive damages imposed:**

Declaring that the standard by which courts in the Fourth Circuit awarded punitive damages for violation of an order or discharge injunction required a demonstration of “egregious conduct,” “malevolent intent,” or “clear disregard of the bankruptcy laws,” the court found it “appallingly clear” that the creditor flagrantly disregarded the court’s order and discharge injunction. It was “beyond egregious,” the court said, that, after almost two years of facing such harassment on their own, the debtors finally caught the creditor’s attention only when they retained counsel and filed the present sanctions motion. A sophisticated creditor could not be excused for flagrantly ignoring the terms of an order to which it consented, and even more seriously, having no internal procedures in place to correct the error when it was clearly called to its attention.

**In re Kirkbride, 2010 WL 4809334 (Bankr. E.D. N.C., Nov. 19, 2010)**

(case no. 8:08-bk-120) (Bankruptcy Judge J. Rich Leonard)

[Text of opinion](#)

[Text of consent order](#)

**Comment:** Insofar as the court awarded damages for the debtors having legal proceedings brought against them due to their continued ownership of the properties, as to which the creditor did not commence the expected foreclosure proceedings, the court’s order effectively required the creditor to accept the debtors’ surrender of the properties, although the consent order did not explicitly provide for surrender.

**Discharged debt could not attach to newly-acquired property interest:**

Where a judgment against the Chapter 7 debtor husband individually was included in the joint debtors’ discharge, and under North Carolina law the judgment did not attach to real property owned by the debtors as tenants by the entirety on the bankruptcy petition date, the judgment could not thereafter attach to the husband’s interest in the real property following his and his wife’s divorce.

**In re Glover, 2010 WL 3603470 (Bankr. M.D. N.C., Sept. 14, 2010)**

(case no. 2:08-bk-10505) (Chief Bankruptcy Judge William L. Stocks)

[Text of opinion](#)

Debt collected by creditors was discharged prepetition debt, not new postpetition debt:

The creditors' collection from the Chapter 7 debtor, following his discharge, of sums due on a prepetition debt that was included in the debtor's discharge violated the discharge injunction. While the creditors, following the debtor's discharge, obtained a judgment against both the debtor and his corporation, the debt collected by the creditors was not based solely on the debtor's alleged postdischarge personal guarantee of the corporation's liability; rather, the debt was predicated at least in part on the debtor's prepetition liability to the creditors.

*In re McPhedran*, 2010 WL 3909856 (Bankr. W.D. La., Sept. 30, 2010)

(case no. 4:08-bk-51453) (Chief Bankruptcy Judge Robert R. Summerhays)

[Text of opinion](#)

**Comment:** In an unusual colloquy, the court appeared to believe that Code § 523(d) authorizes reaffirmation agreements made after the debtor's discharge.

Sanctions imposed on mortgage servicer:

Superseding *In re Gude*, 2010 WL 3788104 (Bankr. D. Neb., Sept. 22, 2010), the court awarded sanctions against the Chapter 13 debtors' mortgage servicer, Litton Loan Servicing LP, in the amount of \$2,593.35, representing the debtors' attorney's fees incurred in remedying the servicer's violation of the discharge injunction. This was the second time the servicer had caused grief to these debtors by asserting erroneous fees and expenses, the court said. The first time, after evidence was presented at a hearing that it was all a big mistake and the servicer's representatives apologized, the court determined that no sanction should be imposed. This time was different. And, if similar problems arose again, the sanctions against the servicer would be much greater.

*In re Gude*, 2010 WL 3834560 (Bankr. D. Neb., Sept. 27, 2010)

(case no. 8:04-bk-82697) (Bankruptcy Judge Timothy J. Mahoney)

[Text of opinion](#)

Authority of district court to resolve claim of violation of discharge injunction:

While the district court had the authority to consider and dispose of an action for contempt of the discharge injunction arising out of a case in the bankruptcy court of this district, the court also recognized its authority to refer such a claim to the bankruptcy court that entered the discharge order. In this case, the court found the latter action to be preferable.

Maddox v. Auburn University Federal Credit Union, --- B.R. ---, 2010 WL 4867983 (M.D. Ala., Dec. 1, 2010)

(case no. 3:10-cv-729) (Senior District Judge W. Harold Albritton III)

[Text of opinion](#)

Status of unpaid portion of domestic support obligation in Chapter 13:

While the Chapter 13 debtors were permitted to pay less than the full amount of a domestic support obligation under Code § 507(a)(1)(B), the unpaid portion of the debt would not be discharged.

In re Anderson, 439 B.R. 206 (Bankr. M.D. Ala., August 17, 2010)

(case no. 1:06-bk-10845) (Chief Bankruptcy Judge Dwight H. Williams Jr.)

[Text of opinion](#)



## Miscellaneous Issues

Topical compilation:

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Third Circuit: Private employers may discriminate in hiring:

Affirming *Rea v. Federated Investors*, 431 B.R. 18 (W.D. Pa., Jan. 29, 2010), the Third Circuit Court of Appeals held, in accordance with most courts that have addressed the issue, that Code § 525(b) does not prohibit a private employer from refusing to hire an individual because that individual has filed bankruptcy. Observing that § 525(a), which applies to governmental employers, explicitly prohibits discrimination in hiring, while § 525(b) does not, the court found it “abundantly clear that Congress modeled § 525(b) off of § 525(a) and that any differences between the two are a result of Congress acting intentionally and purposefully.” The court said that *Leary v. Warnaco, Inc.*, 251 B.R. 656 (S.D. N.Y. 2000) appeared to be the only decision reaching the contrary position.

*Rea v. Federated Investors*, Case No. 10-1440 (3rd Cir., Dec. 15, 2010)

[Text of opinion](#)

**Note:** This issue is also being litigated in *Burnett v. Stewart Title, Inc.*, Case No. 10-20250 (5th Cir., filed April 19, 2010), in which oral argument is set for January 31, 2011, and *Myers v. Toojay's Management Corp.*, Case No. 10-10774 (11<sup>th</sup> Cir., filed Feb. 22, 2010), in which oral argument is set for January 27, 2011.

Case would be dismissed under Code § 109(g)(1):

The determination that a failure on the part of a debtor was willful under Code § 109(g)(1) need not be made in the order dismissing the preceding case, but can be subsequently made when a court considers a motion to dismiss. The debtor has the burden of establishing eligibility for bankruptcy and thus has the burden of showing that a failure in the preceding case was not willful. *In re Montgomery*, 37 F.3d 413 (8th Cir. 1994). Here, the Chapter 13 debtors' case was precluded by § 109(g)(1) where their previous case had been dismissed 23 days earlier for failure to abide by a court order giving the debtors 10 days to become current on plan payments and turn over copies of 2009 tax returns.

*In re Robinson*, 2010 WL 4668980 (Bankr. N.D. Iowa, Nov. 9, 2010)

(case no. 2:10-bk-1610) (Chief Bankruptcy Judge Paul J. Kilburg)

[Text of opinion](#)

Court declines to seal documents in adversary proceeding:

Denying the debtor's motion under Code § 107(b) to seal the documents filed in an adversary proceeding against the debtor, the court adopted the rule articulated in *In re Gitto Global Corp.*, 422 F.3d 1 (1st Cir. 2005) and subsequently embraced in *In re Neal*, 461 F.3d 1048 (8th Cir. 2006): "[M]aterial that would cause a reasonable person to alter his opinion of an interested party triggers the protections of § 107(b)(2) based on a showing that either (1) the material is untrue, or (2) the material is potentially untrue and irrelevant or included within a bankruptcy filing for an improper end." Here, in an adversary proceeding asserting that the debtor, an attorney, employed abusive and malicious litigation tactics in state-court litigation with the adversary plaintiff, the documents introduced by the plaintiff were not only *relevant* to his claim that the debtor owed him a nondischargeable debt, but were *essential* to plead and argue his cause of action under § 523(a)(6), while the debtor voluntarily waived his privacy rights with respect to documents he filed that contained sensitive medical information, records, and reports.

*In re Copeland*, 2010 WL 4683941 (Bankr. N.D. Okla., Nov. 10, 2010)

(case no. 4:09-bk-13443; adv. proc. no. 4:09-ap-1140) (Bankruptcy Judge Dana L. Rasure)

[Text of opinion](#)

R

Section Two:  
Chapter 7 Issues

## Abuse: Under Totality of the Circumstances

**Topical compilation:**

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Abuse found—Based on unreasonable expenses for home mortgage, private schooling and recreation:

Granting the debtors a Chapter 7 discharge would be an abuse, under the totality of the circumstances, where (1) the debtors' mortgage payments of \$3695 per month, which constituted 64% of their monthly income, were unreasonable and excessive, even though the court had little evidence before it to determine what would constitute a reasonable housing expense; (2) the debtors' \$540 monthly expense to send two of their children to a private elementary school was unreasonable in the absence of evidence that the schooling was anything more than a personal preference; and (3) the debtors budgeted \$663 per month for recreation but testified that their spending for recreation was "virtually nil at this point." If the court assumed that the debtors could obtain housing at twice the IRS standard of \$985, or \$1960, the debtors would have monthly disposable income of \$911, which would give them the ability to pay a meaningful amount to satisfy the claims of their unsecured creditors.

**In re Gearhart, 2010 WL 4866179 (Bankr. M.D. Pa., Nov. 23, 2010)**

(case no. 1:10-bk-00741) (Chief Bankruptcy Judge Mary D. France)

[Text of opinion](#)

Abuse not shown—Where debtors lacked ability to pay:

Granting the debtors a Chapter 7 discharge would not be an abuse, under the totality of the circumstances, where there was no evidence that the debtors had projected disposable income with which to make a Chapter 13 plan payment, and no evidence that the debtors could find alternative living arrangements sufficient to create monthly disposable income. In short, the court was left with nothing more than the fact that the debtors had a big house, which was more than they needed and more expensive than they could afford. However, the house was purchased 10 years ago, at a time when the debtors could afford the house, and was not purchased recently as a means of “parking” the debtors' equity.

**In re Rudmose, 2010 WL 4882059 (Bankr. N.D. Ga., Nov. 9, 2010)**

(case no. 1:10-bk-74514) (Bankruptcy Judge Wendy L. Hagenau)

[Text of opinion](#)



## Bad Faith or "Cause" as Basis for Dismissal

**Topical compilation:**

[PDF](#) [Word](#)

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**Scope:** This topic collects cases under both Code § 707(a) and § 707(b)(3)(A).

Code § 707(a) applies to debtors with primarily business debts:

The fact that the Chapter 7 debtors' debt was primarily business debt did not prevent the dismissal of their case under Code § 707(a) for "cause."

Ability to pay, in itself, may demonstrate "cause" for dismissal or conversion:

"Cause" existed to dismiss a Chapter 7 case filed by debtors with monthly income of at least \$42,446, and annual income of more than \$500,000, from their joint medical practice, on the debtors' lack of good faith in making no attempts whatever at tightening their belts; the debtors budgeted, as monthly expenses, \$15,714 as mortgage payment on primary residence, nearly \$5,000 as mortgage payment on vacation home, more than \$2,000 as payments on three luxury motor vehicles, \$1,500 as food expenses for themselves and their two children, \$320 for recreation, and \$4,575 for private school tuition. In the Sixth Circuit, ability to pay unsecured creditors is a sufficient basis for dismissal or conversion of a case under § 707(a). See *In re Zick*, 931 F.2d 1124 (6th Cir. 1991). The rule is different in the Third Circuit; see *Perlin v. Hitachi Capital America Corp.*, 497 F.3d 364 (3rd Cir. 2007).

*In re Rahim*, --- B.R. ---, 2010 WL 5128944 (Bankr. E.D. Mich., Dec. 16, 2010)

(case no. 2:10-bk-57577) (Bankruptcy Judge Steven Rhodes)

[Text of opinion](#)

R

## Denial or Revocation of Discharge

**Topical compilation:**

[PDF](#) [Word](#)

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**Scope note:** Coverage is quite selective.

Denial of discharge under Code § 727(a)(3) was warranted:

Affirming *In re Moreo*, 2009 WL 2929949 (Bankr. E.D. N.Y. 2009), the district court found no error in the denial of the Chapter 7 debtor wife's discharge under Code § 727(a)(3) for having failed to keep or preserve accurate records in connection with the operation of the wife's bagel store, where the store was small and its complexity and volume should have been manageable because the wife had employees and accountant to assist her in running the store.

Denial of discharge under Code § 727(a)(4)(A) was warranted:

Nor was there error in denying both debtors a discharge under Code § 727(a)(4)(A) for having made a false oath or account, where the debtors failed to disclose (1) three lawsuits by one or both debtors that may have had value to the estate, and (2) the debtor husband's 100% shareholder ownership of the bagel store, and there was other evidence suggesting that the debtors misrepresented their assets in their bankruptcy filings.

*In re Moreo*, 437 B.R. 40 (E.D. N.Y., Sept. 3, 2010)

(case no. 2:09-cv-4740) (District Judge Joseph F. Bianco)

[Text of opinion](#)

Debtors' allegedly false loan application did not warrant denial of discharge:

A letter from the Chapter 7 debtors' attorney, stating that the debtors had disposed of the collateral for the creditor's loan, did not, in itself, establish a basis for denying the debtors a discharge under Code §§727(a)(2), (4)(A), (5), although it appeared that the debtors had disposed of the collateral prior to entering into the loan, where the creditor presented no evidence that it investigated the value of the collateral, or even verified its existence, before making the loan. While the creditor was free to continue to conduct business in this manner, it should not expect, in the event of a bankruptcy filing by any of its loan recipients, to be granted leave to file adversary complaints on the basis of evidence that the court could only describe as "sparing."

Curtis v. Friendly Finance Service - Eastgate Inc., Case No. 3:10-cv-00415-JTT-KLH (W.D. La., Dec. 13, 2010)

(District Judge James T. Trimble, Jr.)

[Text of opinion](#)

Debtor's failure to disclose prepetition check was inadvertent:

The bankruptcy court's factual finding, that the Chapter 7 debtor's failure to disclose his \$1,000 prepetition check to his fiancé was inadvertent, was not clearly erroneous, so that the debtor's failure to disclose the check did not warrant denial of the debtor's discharge under either Code § 727(a)(2)(A) as a transfer of estate property with intent to hinder, delay, or defraud a creditor, or under § 727(a)(4)(A) as the making of a false oath.

Rapid Settlements, Ltd. v. Shcolnik, 2010 WL 4639070 (S.D. Tex., Nov. 8, 2010)

(case no. 4:10-cv-1366) (District Judge Nancy F. Atlas)

[Text of opinion](#)

**Note:** The creditor has again appealed. See *Rapid Settlements Ltd v. Shcolnik*, Case No. 10-20800 (5<sup>th</sup> Cir., filed Nov. 23, 2010).

Debtor's failure to confirm Chapter 13 plan longer than 36 months showed less than "best effort":

The debtor, who had received a Chapter 13 discharge within six years of filing his current Chapter 7 petition, was not eligible to receive a Chapter 7 discharge, although he had paid 76.5% of the allowed unsecured claims in the Chapter 13 case, because the debtor's plan in that case did not represent his "best effort" as required under Code § 727(a)(9)(B)(ii). The plan in the previous case did not represent the debtor's best effort because he could have sought to confirm a plan with a term longer than 36 months, even though to do so would have required the debtor to establish "cause." While courts disagreed under pre-BAPCPA law whether the desire to pay more to creditors constituted "cause" under former Code § 1322(d) to extend the plan term beyond 36 months, the best-reasoned case law held that it did.

In re Ward, 2010 WL 4922713 (Bankr. E.D. Mich., Nov. 29, 2010)

(case no. 2:10-bk-68727) (Bankruptcy Judge Thomas J. Tucker)

[Text of opinion](#)



**Reaffirmation Agreements;  
Statements of Intention;  
Redemption of Collateral;  
Assumption of Lease of Personal Property**

**Topical compilation:**

[PDF](#)   [Word](#)

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[All circuit compilations](#)

Deferral of discharge, so as to accommodate reaffirmation agreement, denied as unnecessary:

Denying the Chapter 7 debtors' third motion for a deferral of their discharge, which the debtors sought in order to rebut the presumption of undue hardship that had arisen with respect to their agreement to reaffirm an automobile loan, the court said that (1) a reaffirmation agreement needed only to be made, not approved, before a debtor's discharge in order to be effective; (2) because the debtors did not sign the reaffirmation agreement until 49 days after the first meeting of creditors, the debtors' car ceased to be property of the estate before the agreement was even signed, and the creditor had had the right to enforce its *ipso facto* clause since that time; and (3) in any event, the creditor's remedies were limited to those available under state law, and, under Massachusetts law, the lender of a consumer auto loan may repossess its collateral without a hearing only if the "default is material and consists of the debtors [sic] failure to make one or more payments as required by the agreement or the occurrence of an event which substantially impairs the value of the collateral." The debtors' bankruptcy filing was, therefore, not a material default under state law and, so long as the debtors remained current on the loan, the creditor could not repossess the car without notice and a hearing. The court said that it was confident that no judge in Massachusetts would permit a car loan lender to repossess its collateral based on a default triggered by a prior bankruptcy filing where payments were current.

**In re Koufos, 2010 WL 4638408 (Bankr. D. Mass., Nov. 8, 2010)**

(case no. 4:09-bk-44158) (Bankruptcy Judge Melvin S. Hoffman)

[Text of opinion](#)

Rules governing enforceability of reaffirmation agreements, generally:

In an opinion that the court described as having been circulated among, and having received the concurrence of, the other bankruptcy judges in the district, the court stated that:

- Under Code § 524(c)(1), a reaffirmation agreement is only “enforceable” if “such agreement was made before the granting of the discharge.” Under Bankruptcy Rule 4004(c)(1), a discharge order is typically issued by the clerk's office promptly after the expiration of the time fixed for filing objections to the debtor's discharge. However, under Rule 4004(c)(2), a debtor may file a motion asking the court to “defer the entry of an order granting a discharge for 30 days and, on a motion within that [subsequent 30-day] period, the court may defer entry of the order to a [still-later] date certain.” It was critical that debtors file a motion to defer entry of a discharge order when they were having delays in finalizing a reaffirmation agreement, as it was generally not appropriate for the bankruptcy court to set aside a discharge order for the sole purpose of considering a reaffirmation agreement, and then thereafter re-enter a discharge order.
- While Bankruptcy Rule 4008(a) provides that “[a] reaffirmation agreement shall be filed no later than 60 days after the first date set for the meeting of creditors,” that rule also allows the court to “enlarge the time to file a reaffirmation agreement.” Thus, a debtor or creditor may, at any time, file a motion to enlarge the time to file a reaffirmation agreement. Technically, the court has the power to enlarge the time to file a reaffirmation agreement without a motion even being made.
- A court hearing on a reaffirmation agreement is required (1) under Code § 524(c)(6), where the debtor “was not represented by an attorney during the course of negotiating” the reaffirmation agreement, and the debt is not a consumer debt secured by real property; and (2) under Code § 524(m), where the presumption of undue hardship is triggered and the reaffirmation agreement is not with a credit union. However, due to frequent errors involving the checking of the wrong box with respect to undue hardship, or the failure to check any box at all, the court was going to scrutinize the math and set a reaffirmation agreement for a hearing whenever the math in Part II of the agreement was “negative.” The court might also set the reaffirmation agreement for hearing when the math was positive when the agreement was filed but was negative when the debtor filed his Schedules I and J.
- Where the presumption of undue hardship is triggered, a hearing must be held within 60 days of when the reaffirmation agreement is filed because § 524(m)(1) requires that the presumption “shall be reviewed by the court” and also provides that the presumption expires after 60 days. While, in theory, the court could be satisfied that the debtor has rebutted the presumption of undue hardship with a good written explanation and not set a hearing, in reality the court was rarely satisfied with the debtor’s written explanation and would hold a hearing.
- It should be considered a basic part of Chapter 7 debtor representation that an attorney advise his client as to something as fundamental and significant as a reaffirmation agreement and assist him in the negotiation of the agreement.

[continued on the following page]

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- If a presumption of undue hardship arises in the case of a represented debtor, the debtor's attorney must check the box stating that such a presumption arises. The court, not the attorney, has the discretion to determine otherwise.

Presumption of undue hardship was not rebutted:

Here, the court could not find that the presumption of undue hardship had been overcome, and the reaffirmation agreement would be disapproved, where the agreement pertained to a 2007 Dodge truck in which the debtor had no equity, the interest rate on the debt was 17.5%, the debtor had 71 more months of payments on the vehicle, and the debtor's only current source of income was government assistance, a major portion of which would soon expire.

In re Grisham, 436 B.R. 896 (Bankr. N.D. Tex., Sept. 7, 2010)

(case no. 3:10-bk-32524) (Bankruptcy Judge Stacey G.C. Jernigan)

[Text of opinion](#)

**Comment:** In discussing at length the necessity of checking the "correct box" with respect to whether the presumption of undue hardship arose, the court appears to be addressing only the boxes at the top of the first page of the standard reaffirmation agreement. The court did not appear to explicitly address the checking of the box, in the attorney's certification portion of the form, stating that "A presumption of undue hardship has been established with respect to this agreement. In my opinion, however, the debtor is able to make the required payment." This leaves unanswered the question of what the debtor's attorney should do when the presumption has arisen, the attorney does not believe that the debtor can make the payments, but the debtor nonetheless desires to present the agreement to the court for approval.

### Effect of presumption of undue hardship under Code § 524(m):

Code § 524(m)(1) does not distinguish between reaffirmation agreements that were negotiated with the assistance of counsel and those that were negotiated without the assistance of counsel, or between those in which the debt being reaffirmed is a consumer debt secured by real property and those in which the debt being reaffirmed is not a consumer debt secured by real property. If a presumption of undue hardship arises, the court must review the presumption, and if the presumption is not rebutted to its satisfaction, the court may disapprove the agreement. See *In re Schmidt*, 397 B.R. 481 (Bankr. W.D. Mo. 2008). The lone exception is for reaffirmation agreements with federal credit unions, with respect to which the presumption of undue hardship never arises. See Code § 524(m)(2).

### Court's responsibility where presumption of undue hardship does not arise:

When a reaffirmation agreement is filed and a presumption of undue hardship does not arise, there are three possible scenarios:

- If the debtor was represented by an attorney during the course of negotiating the agreement, the court does not need to approve or disapprove the agreement. Code § 524(c)(6)(A).
- If the debtor was not represented by an attorney during the course of negotiating the agreement, and the debt being reaffirmed is a consumer debt secured by real property, the court likewise does not need to approve or disapprove the agreement. Code § 524(c)(6)(B).
- However, if the debtor was not represented by an attorney during the course of negotiating the agreement and the debt being reaffirmed is not a consumer debt secured by real property, the court needs to review and approve the agreement as not imposing an undue hardship on the debtor or the debtor's dependents and being in the debtor's best interest. Code § 524(c)(6)(A), (B).

*In re Coleman*, 2010 WL 5067429 (Bankr. D. S.D., Dec. 7, 2010)

(case no. 1:10-bk-10171) (Bankruptcy Judge Charles L. Nail Jr.)

[Text of opinion](#)

Court may not vacate discharge to allow formation of reaffirmation agreement:

It is improper to vacate a Chapter 7 debtor's discharge to allow him to enter into a valid reaffirmation agreement. The requirements of Code § 524(c)(1) must be strictly applied. Nothing in the Bankruptcy Code and Rules gives the court authority to vacate the discharge to allow the parties to avoid the statutory mandates of § 524(c)(1).

In re Nichols, 2010 WL 4922538 (Bankr. N.D. Iowa, Nov. 29, 2010)

(case no. 6:10-bk-1323) (Chief Bankruptcy Judge Paul J. Kilburg)

[Text of opinion](#)

Court could approve agreement following debtor's discharge:

Where the Chapter 7 debtor entered into a reaffirmation agreement before receiving a discharge, but the court disapproved the agreement after the debtor failed to appear at the hearing on approval of the agreement, the court would vacate its order disapproving the agreement, and would approve the agreement upon the debtor's motion, as there was no question that the debtor was advantaged by the agreement. It was not necessary for the court to set aside the debtor's discharge in order to approve the agreement.

In re McKinney, 2010 WL 4505958 (Bankr. D. Conn., Nov. 2, 2010)

(case no. 2:10-bk-22116) (Bankruptcy Judge Albert S. Dabrowski)

[Text of opinion](#)

Creditor violated stay by taking possession of mobile home surrendered by debtor:

The secured creditor willfully violated the automatic stay by taking possession of a mobile home surrendered by the Chapter 7 debtor without obtaining relief from stay. Surrender by the debtor is not equivalent to abandonment by the trustee, and the mobile home remained property of the estate following its surrender by the debtor.

In re Nulik, 2010 WL 5114734 (Bankr. D. Kan., Dec. 8, 2010)

(case no. 6:08-bk-10673; adv. proc. no. 6:08-ap-5257) (Chief Bankruptcy Judge Robert E. Nugent)

[Text of opinion](#)

Debtor who converts to Chapter 7 must file statement of intention:

Code § 521(a)(2)(A), which requires a Chapter 7 debtor to file a statement of intention within 30 days of the filing of the Chapter 7 petition or before the date of the meeting of creditors, whichever is earlier, applies in cases converted from Chapter 13. See *In re Quillen*, 2008 WL 2778881 (Bankr. D. Md. 2008) (stating that, after conversion to Chapter 7, a debtor must file a statement of intention); *In re Sanabria*, 317 B.R. 59 (8th Cir. B.A.P. 2004) (pre-BAPCPA case presuming that a debtor who converts from Chapter 13 to Chapter 7 is required to file a statement of intention). See also Bankruptcy Rule 1019(1)(B), which provides that, after conversion from Chapter 13 to Chapter 7, a statement of intention, if required, must be filed "within 30 days after entry of the order of conversion or before the first date set for the meeting of creditors, whichever is earlier."

Statement must be filed prior to meeting of creditors:

However, under § 362(h)(1)(A), which provides that the automatic stay terminates if "if the debtor fails within the applicable time set by section 521(a)(2)" to file a required statement of intention, "the applicable time set by section 521(a)(2)" must be construed to refer only to the date of the meeting of creditors in a converted case, as there is no "filing of the Chapter 7 petition" in such a case.

Termination of stay was not postponed until order granting relief from stay was effective:

The court's having granted the creditor's motion for relief from stay, under which the stay would terminate on a date later than it would under Code § 362(h), due to the automatic 14-day stay of the court's order arising under Bankruptcy Rule 4001(a)(3), did not serve to extend the automatic stay. *In re Duran*, 483 F.3d 653 (10th Cir. 2007) held that a bankruptcy rule may not modify a creditor's substantive rights, and those rights include the termination of the automatic by operation of law, as occurs under § 362(h).

*In re Padilla*, 2010 WL 4735820 (Bankr. D. N.M., Nov 16, 2010)

(case no. 1:09-bk-15203; adv. proc. no. 1:10-ap-1098) (Bankruptcy Judge Robert H. Jacobvitz)

[Text of opinion](#)

Attorney may not exclude representation in negotiation of reaffirmation agreement:

An attorney who otherwise represents a Chapter 7 debtor may not exclude negotiation of a reaffirmation agreement from the attorney's representation. Because the Bankruptcy Code does not offer a mechanism for the court to independently approve a reaffirmation agreement under circumstances in which a debtor's attorney has not executed the declaration required by Code § 524(c)(3), the failure of counsel to endorse Part C of the form of reaffirmation agreement provided for in § 524(k)(5) by itself renders the agreement unenforceable.

In re Barron, -- B.R. --, 2010 WL 5168889 (Bankr. D. Ariz., Dec. 14, 2010)

(case no. 4:10-bk-28871) (Bankruptcy Judge Eileen W. Hollowell)

[Text of opinion](#)



## Other Issues

Topical compilation:

[PDF](#) [Word](#)

[All topical compilations](#)

[All circuit compilations](#)

Deferral of discharge, so as to accommodate reaffirmation agreement, denied as unnecessary:

Denying the Chapter 7 debtors' third motion for a deferral of their discharge, which the debtors sought in order to rebut the presumption of undue hardship that had arisen with respect to their agreement to reaffirm an automobile loan, the court said that (1) a reaffirmation agreement needed only to be made, not approved, before a debtor's discharge in order to be effective; (2) because the debtors did not sign the reaffirmation agreement until 49 days after the first meeting of creditors, the debtors' car ceased to be property of the estate before the agreement was even signed, and the creditor had had the right to enforce its *ipso facto* clause since that time; and (3) in any event, the creditor's remedies were limited to those available under state law, and, under Massachusetts law, the lender of a consumer auto loan may repossess its collateral without a hearing only if the "default is material and consists of the debtors [sic] failure to make one or more payments as required by the agreement or the occurrence of an event which substantially impairs the value of the collateral." The debtors' bankruptcy filing was, therefore, not a material default under state law and, so long as the debtors remained current on the loan, the creditor could not repossess the car without notice and a hearing. The court said that it was confident that no judge in Massachusetts would permit a car loan lender to repossess its collateral based on a default triggered by a prior bankruptcy filing where payments were current.

In re Koufos, 2010 WL 4638408 (Bankr. D. Mass., Nov. 8, 2010)

(case no. 4:09-bk-44158) (Bankruptcy Judge Melvin S. Hoffman)

[Text of opinion](#)

Standing to asset prepetition cause of action:

If a Chapter 7 debtor can show that a prepetition cause of action is exempt from the bankruptcy estate, then the debtor has standing to assert that cause of action to the extent of the exemption even if the trustee has not abandoned the estate's interest in the claim.

[In re Bottcher, 2010 WL 4882516 \(Bankr. D. Mass., Nov. 24, 2010\)](#)

(case no. 4:09-bk-45519; adv. proc. no. 4:10-ap-4119) (Bankruptcy Judge Melvin S. Hoffman)

[Text of opinion](#)

Creditor could reopen closed case:

A creditor of the Chapter 7 debtor was a "party in interest" entitled to reopen the debtor's bankruptcy case under Bankruptcy Rule 5010.

[In re Rim, 2010 WL 4615174 \(D. N.J., Nov. 3, 2010\)](#)

(case no. 2:10-cv-1066) (District Judge Dennis M. Cavanaugh)

[Text of opinion](#)

Debtor's adult daughters were "family" members for purpose of filing fee waiver:

Agreeing with the Chapter 7 debtor that the IRS test for dependency should be employed to determine whether the debtor's two adult daughters would be considered part of the debtor's "family" for the purpose of 28 U.S.C. § 1930(f)(1), which permits the waiver of the Chapter 7 filing fee if the debtor "has income less than 150 percent of the income official poverty line ... applicable to a family of the size involved and is unable to pay that fee in installments," the court found that the daughters were dependents of the debtor and thus were properly considered to be part of the debtor's "family." While the debtor also claimed that one daughter's husband part of her family, the court did not need to resolve that issue, as, in Virginia, 150 percent of the 2010 DHHS Guideline for a family of three is \$2,288.75 per month, and the debtor's monthly income was \$1,801. The IRS dependency test is stated in [IRS Publication 501](#).

[In re Frye, --- B.R. ---, 2010 WL 5030795 \(Bankr. W.D. Va., Oct. 7, 2010\)](#)

(case no. 5:10-bk-51285) (Chief Bankruptcy Judge Ross W Krumm)

[Text of opinion](#)

Court denied debtor's motion seeking authorization for sale of exempt homestead:

Denying the Chapter 7 debtor's "emergency" motion for a court order authorizing the debtor to see her exempt homestead property, the court explained that (1) Code § 363 permits the Chapter 7 trustee, not the debtor, to sell property of the estate, and the debtor had not obtained the trustee's concurrence in the motion; and (2) while the time for objections to the debtor's claimed exemption of the equity in the homestead had passed, there was still time for someone to file a motion under Code § 522(q) to limit the debtor's homestead exemption to \$146,450, as under Bankruptcy Rule 4003(b)(3) a party in interest had until the "closing of a case" to assert an objection to a homestead exemption under § 522(q). Observing that the debtor filed her bankruptcy petition almost immediately after signing the sale contract on her house, and that she apparently was not facing a foreclosure, repossession or other imminent harm when she filed her case, the court found it "not particularly fair or appropriate" to tax the system with an "emergency" when the debtor could have filed her case either sooner or later in order to more easily accommodate the timetable under which she wanted to sell her homestead.

In re Gonzales, 2010 WL 4340936 (Bankr. N.D. Tex., Oct. 27, 2010)

(case no. 3:10-bk-35766) (Bankruptcy Judge Stacey G.C. Jernigan)

[Text of opinion](#)

Court denied trustee's motion to convey interest in prepetition claim to debtor:

Denying the Chapter 7 trustee's motion to convey to the debtor a 15% interest in any recovery in litigation of the debtor's prepetition wrongful termination claim, which was property of the estate, in order to encourage the debtor to fully cooperate with the trustee in the prosecution of the litigation, the court found the conveyance unnecessary and unwise, as (1) under Code § 521(a)(3), the debtor had a duty to cooperate with the trustee; (2) the court could order the debtor to cooperate with the trustee, and the debtor's discharge could be revoked under Code § 727(d)(3) if he failed to comply with that order; (3) while the litigation was in Nevada, there was no need to provide the debtor with funds to travel to that state; (4) the debtor's full cooperation was in his own best financial interests even without the conveyance of the 15% interest; and (5) it was simply not good policy to let a debtor demand a quid pro quo, in addition to a discharge and an opportunity for a fresh start, every time the trustee needed the debtor's reasonable cooperation.

In re Bohannon, 2010 WL 3957477 (Bankr. S.D. Tex., Oct. 7, 2010)

(case no. 4:10-bk-33291) (Bankruptcy Judge Wesley W. Steen)

[Text of opinion](#)

Court orders partial disgorgement of attorney's fees paid by debtor:

Ordering the law firm that represented a Chapter 7 debtor to disgorge \$500 of the \$1200 fee paid by the debtor, the court said that the law firm (1) did not provide the services the debtor expected when the firm contracted with an unaffiliated attorney whom the debtor had never met to attend the debtor's meeting of creditors, and then failed to disclose this fee sharing in its fee disclosure statement prepared to comply with Bankruptcy Rule 2016; and (2) charged the debtor a \$150 "service fee" for arranging credit counseling and other related services, and also did not disclose this fee in its Rule 2016 statement.

In re Harwell, 439 B.R. 455 (Bankr. W.D. Mich., Nov 23, 2010)

(case no. 1:09-bk-9528) (Bankruptcy Judge Scott W. Dales)

[Text of opinion](#)



Section Three:  
Chapter 13 Issues

## Part A

Confirmation of Plan—Treatment of Secured Claims—  
Effect of Hanging Paragraph

**Confirmation of Plan:  
Treatment of Secured Claims: Effect of Hanging Paragraph:  
Other Issues Relating to 910 Vehicles**

**Topical compilation:**

[PDF](#)   [Word](#)

[All topical compilations](#)

[All circuit compilations](#)

Application of 910-day period in successive cases was subject to equitable tolling:

In what appears to be the first case taking this position, the court held that equitable tolling applied in determining whether the 910-day period of the hanging paragraph in Code § 1325(a)(5) had expired, where the debtors filed their first Chapter 13 case within the 910-day period and, after that case was dismissed, the debtors filed a second Chapter 13 case more than 910 days after the purchase of the vehicle. Disagreeing with *In re Maas*, 416 B.R. 767 (Bankr. D. Kan. 2009) and *In re Murphy*, 375 B.R. 919 (Bankr. M.D. Ga. 2007), the court said that *Young v. U.S.*, 535 U.S. 43, 122 S.Ct. 1036, 152 L.Ed.2d 79 (2002), which applied equitable tolling in the context of the three-year lookback period for the nondischargeability of tax claims, governed.

**In re Hingiss, 2010 WL 4941622 (Bankr. E.D. Wis., Dec. 2, 2010)**

(case no. 2:10-bk-29145) (Bankruptcy Judge James E. Shapiro)

[Text of opinion](#)

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## Part B

Confirmation of Plan—Treatment of Secured Claims—  
Issues Not Involving Hanging Paragraph

**Confirmation of Plan:  
Treatment of Secured Claims:  
Generally**

**Topical compilation:**

[PDF](#)   [Word](#)

[All topical compilations](#)

[All circuit compilations](#)

**Adequate protection payments—Generally:**

The Bankruptcy Code does not specifically define “adequate protection payments.” Various provisions within Code § 363 circumscribe the debtor's right to use property in which a secured creditor has an interest, but § 363(e) states that, upon request of a lienholder, the court “shall prohibit or condition such use ... as is necessary to provide adequate protection of such interest.” Section 361 recognizes three nonexclusive forms of adequate protection applicable to the debtor's continue use of a secured creditor's collateral: cash payments to the extent the collateral has declined in value, additional collateral to compensate the secured creditor for such a decline, or other relief “as will result in the realization by [the secured creditor] of the indubitable equivalent of such entity's interest in such property.”

**Adequate protection payments—Claims secured by real property collateral:**

The only way for a Chapter 13 debtor to supply adequate protection to real estate lienholders is to provide them with the “indubitable equivalent” of their interest in the real estate, which is the full amount of the contractual monthly payment due to the mortgagee. *In re Perez*, 339 B.R. 385 (Bankr. S.D. Tex. 2006), *aff'd Perez v. Peake*, 373 B.R. 468 (S.D. Tex. 2007).

**In re Fernandez**, — B.R. —, 2010 WL 3943932 (Bankr. S.D. Tex., Oct. 6, 2010)

(case no. 4:07-bk-35173) (Bankruptcy Judge Jeff Bohm)

[Text of opinion](#)

**Note:** The debtor's attorney has appealed. See *In re Fernandez*, Case No. 4:10-cv-04044 (S.D. Tex., filed Oct. 22, 2010).

**Comment:** Code § 1326(a)(1)(C) explicitly requires the debtor to make preconfirmation adequate protection payments, but only on debts secured by personal property collateral.

Amount stated in proof of claim is binding in absence of objection to proof of claim:

Where the mortgage creditor filed a proof of claim asserting a claim in the amount of \$413,910, and the Chapter 13 debtors did not object to the proof of claim, which therefore was allowed, the debtors' plan could not treat the creditor's claim as one for \$393,741, which was the amount the debtors asserted was owed to the creditor.

*In re Mounelaphom*, — B.R. —, 2010 WL 4484618 (Bankr. D. Mass., Oct. 29, 2010)

(case no. 4:08-bk-41324) (Bankruptcy Judge Melvin S. Hoffman)

[Text of opinion](#)

Court would apply *Till* rate despite disagreement with decision:

The present court argued in *In re Cook*, 322 B.R. 336 (Bankr. N.D. Ohio 2005) that courts had rushed headlong to embrace the decision in *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S.Ct. 1951, 158 L.Ed.2d 787 (2004) as precedential when it is not based upon traditional American jurisprudence. However, the Sixth Circuit Court of Appeals has indicated in dicta that bankruptcy courts should follow *Till* when determining interest rates in Chapter 13 plans. See *In re American HomePatient, Inc.*, 420 F.3d 559 (6th Cir. 2005). In addition, the Bankruptcy Appellate Panel for the Sixth Circuit has endorsed *Till*'s prime-plus approach in the context of Code § 1325(a)(5). See *In re Taranto*, 365 B.R. 85 (6th Cir. B.A.P. 2007). In light of these developments, the court believed that the Sixth Circuit Court of Appeals would adopt *Till* in the Chapter 13 context if presented directly with the question. Accordingly, the court would apply the prime-plus approach in this case. The current national prime rate was 3.5%, and the 5.25% interest rate suggested by the debtors fell in the middle of the 1% to 3% range suggested by *Till* and would be approved.

*In re Blanton*, 2010 WL 4503188 (Bankr. N.D. Ohio, Oct. 29, 2010)

(case no. 6:10-bk-60160) (Bankruptcy Judge Russ Kendig)

[Text of opinion](#)



**Confirmation of Plan:  
Treatment of Secured Claims:  
Bifurcation, Lien Stripping, Modification**

**Topical compilation:**

[PDF](#)   [Word](#)

[All topical compilations](#)

[All circuit compilations](#)

Court approves “hybrid” plan combining cramdown and cure and maintenance:

In a case involving a Chapter 13 debtor who resided in a multi-family residence, which the court apparently held was not protected by the anti-modification clause of Code §1322(b)(2), the court denied an objection to confirmation of the debtor’s plan filed by a creditor holding a mortgage lien on the residence. Following the “hybrid” approach approved in *In re Brown*, 175 B.R. 129 (Bankr. D. Mass. 1994), which allows a Chapter 13 debtor to cram down a secured claim to the value of the collateral and then maintain contractual payments on that reduced principal amount, the plan treated the mortgage creditor’s claim as follows: (1) the claim was bifurcated under Code § 506(a) into a secured claim of \$310,000 and an unsecured claim of \$109,399.05, with the total of these two amounts representing the amount stated in the creditor’s proof of claim; (2) the debtor would acquire a reverse mortgage on the residence in the estimated amount of \$168,555.44; (3) the proceeds of the reverse mortgage would be paid to the creditor in a lump sum, thereby paying all prepetition and postpetition arrears, with the remaining balance treated as an advance payment of principal; (4) a secured debt in the amount of \$141,444.56 would remain after this prepayment, and the debtor would pay this amount in equal monthly payments over the remaining 25 years of the mortgage note, at the interest rate provided for in the note; currently, that rate was 7.1% annually, requiring monthly payments of \$1,008; (5) under Code § 364(d), the mortgage creditor’s lien would be subordinated to the lien that would be granted by the debtor in acquiring the reverse mortgage; (6) the creditor’s unsecured claim of \$109,399.05 would be separately classified under Code § 1322(b)(1), because a deficiency claim is unlike other unsecured claims; and (7) because the amount available to unsecured creditors in a Chapter 7 case would be \$6,975, and the plan paid the debtor’s other unsecured creditors \$4,194.28, which was 100% of their claims, the mortgage creditor would receive \$2,780.72 (a dividend of 2.54%) in payment of its separately-classified unsecured claim, so that the plan complied with the best interests of the creditors test in Code § 1325(a)(4).

The court denied the creditor’s objection in a written order dated November 18, 2010, and stating only that the court’s reasons were articulated orally on the record.

[In re Jones, Case No. 1:07-bk-15662 \(Bankr. D. Mass., Nov. 18, 2010\)](#)

(Bankruptcy Judge Joan N. Feeney)

[Debtor's plan](#)

[Mortgage creditor's objection to confirmation of plan](#)

Cure and maintenance plan needed to provide for both postpetition and prepetition arrearages:

Where the Chapter 13 debtors proposed a “hybrid” plan under which a secured claim would be crammed down to the value of the collateral, and the debtors would then maintain contractual payments on that reduced principal amount, but the debtors had not made any postpetition payments to the mortgage creditor, the debtors’ proposed plan, which provided for the payment of the prepetition arrearage over the term of the plan, but folded the postpetition arrearage into the crammed down value to be paid over the life of the original note, could not be confirmed. There was nothing in the plan that dealt with the substantial unpaid postpetition amount owed the creditor, the court emphasized, and Code § 1322(b)(5) is written in the conjunctive; a “cure and maintenance” plan must provide for both “the curing of any defaults within a reasonable time and the maintenance of payments.”

In re Mounelaphom, — B.R. —, 2010 WL 4484618 (Bankr. D. Mass., Oct. 29, 2010)

(case no. 4:08-bk-41324) (Bankruptcy Judge Melvin S. Hoffman)

[Text of opinion](#)

Valuation of property for purpose of claim modification: Standard for valuation:

Where a debtor proposes to retain property under a plan of reorganization, the court must value the property in light of the proposed post-bankruptcy use of the property. As a general rule, that value will be the replacement, or fair market value, of the property valued in a manner consistent with the debtor's use of the property. *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 117 S.Ct. 1879, 138 L.Ed.2d 148 (1997).

Valuation of property for purpose of claim modification: Time of valuation:

It is generally agreed that the property should be valued as it stands at the time of the proceeding.

In re Roy, 2010 WL 4916576 (Bankr. D. N.H., Nov. 30, 2010)

(case no. 1:10-bk-10086) (Bankruptcy Judge J. Michael Deasy)

[Text of opinion](#)

**Anti-modification provision of Code § 1322(b)(2)—Burden of proof:**

While the debtor bears the ultimate burden of persuasion to convince the court that the secured creditor's claim may be modified, the secured creditor bears the initial burden of proof to show by a preponderance of the evidence that its claim falls within the anti-modification provision of Code § 1322(b)(2).

**Anti-modification provision of Code § 1322(b)(2)—Application to mixed-use property:**

Agreeing with the reasoning in *In re Scarborough*, 461 F.3d 406 (3rd Cir. 2006) that the real property that secures a mortgage must consist of only the debtor's principal residence in order for the anti-modification provision of § 1322(b)(2) to apply, the court held that the Chapter 13 debtors' plan could modify a mortgage that encumbered a single parcel of real property on which both the debtors' primary residence and a stand-alone apartment building were located. The court declined to follow *In re Macaluso*, 254 B.R. 799 (Bankr. W.D. N.Y. 2000), which held that § 1322(b)(2) precludes modification where a mortgage attaches to a single parcel of real property holding the debtor's primary residence, even if other structures are also located on the property. The court also declined to follow the approach taken in *Litton Loan Servicing, LP v. Beamon*, 298 B.R. 508 (N.D. N.Y. 2003) and *In re Brunson*, 201 B.R. 351 (Bankr. W.D. N.Y. 1996), in which the courts looked to the parties' intention to ascertain whether homeownership was the predominant purpose of the transaction.

**In re Moore, 2010 WL 4791833 (Bankr. N.D. N.Y., Nov. 18, 2010)**

(case no. 6:09-bk-61990) (Bankruptcy Judge Diane Davis)

[Text of opinion](#)

**Additional co-signers did not permit modification of claim:**

The existence of additional co-signers on the debtors' mortgage note did not, in itself, render the mortgage holder's claim outside the protection of the anti-modification provision of Code § 1322(b)(2), where the additional co-signers did not pledge any additional collateral.

**In re Flickinger, 2010 WL 4923933 (Bankr. M.D. Pa., Nov. 24, 2010)**

(case no. 1:09-bk-08739; adv. proc. no. 1:10-ap-00147) (Chief Bankruptcy Judge Mary D. France)

[Text of opinion](#)

Lien strip—Date of valuation:

While courts are divided as to the relevant valuation date for determining whether a debt is secured by value in the collateral, the court did not need to resolve the issue where the parties agreed that home values in the Chapter 13 debtors' residential area were "stable."

*In re Butler*, 2010 WL 4736205 (Bankr. E.D. Pa., Nov. 15, 2010)

(case no. 2:10-bk-12776; adv. proc. no. 2:10-ap-317) (Bankruptcy Judge Bruce Fox)

[Text of opinion](#)

Fourth Circuit allows stripping of wholly unsecured lien from debtor's residence:

Affirming *In re Millard*, 414 B.R. 73 (D. Md., Sept. 28, 2009) in a brief per curiam opinion, the Fourth Circuit Court of Appeals said it agreed with the reasoning of the district court, which held that the anti-modification provision of Code § 1322(b)(2) does not bar the stripping off of a wholly unsecured lien from a Chapter 13 debtor's principal residence. Prior to this ruling, the Fourth Circuit was one of the circuits in which there is no circuit-level authority on the issue, although there remains no published opinion.

*In re Millard*, Case No. 09-2266 (4th Cir., Dec. 15, 2010)

[Text of opinion](#)

Bankruptcy court erred in determining amount due on mortgage:

Reversing the bankruptcy court, which had denied the Chapter 13 debtor's motion to strip an allegedly wholly unsecured lien from the debtor's residence, apparently on the ground that Md. Code Ann., Real Prop. § 7-102(a) limited the amount due under the debtor's note given for the first mortgage on the property, thereby rendering the appraised value of the residence greater than the amount due, the district court held that the statute did not have that effect. While the statute provides that "[n]o mortgage or deed of trust may be a lien or charge on any property for any principal sum of money in excess of the aggregate principal sum appearing on the face of the mortgage or deed of trust and expressed to be secured by it, without regard to whether or when advanced or readvanced," the district court held that the costs of interest and late charges were part and parcel of the amount owed on the mortgage.

*Thomas v. Litton Loan Servicing, LP*, 2010 WL 4788563 (D. Md., Nov. 17, 2010)

(case no. 8:10-cv-373) (District Judge Alexander Williams Jr.)

[Text of opinion](#)

Liens securing homeowner association assessments have no special protection from stripping:

Granting the Chapter 13 debtors' motion to strip, as wholly unsecured by value in the collateral, liens on the debtors' principal residence securing prepetition homeowner association assessments, the court said that "[p]ut simply, the Bankruptcy Code provides no special status, even in the area of dischargeability, for unpaid pre-petition assessments."

In re Cook, 2010 WL 4687953 (Bankr. E.D. Va., Nov. 10, 2010)

(case no. 1:10-bk-10113; adv. proc. No. 1:10-ap-1300) (Bankruptcy Judge Stephen S. Mitchell)

[Text of opinion](#)

Extension of lien to improvements, easements and fixtures did not preclude application of anti-modification provision:

A claim that was secured by the debtor's principal residence, "together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property," was "secured only by a security interest in real property that is the debtor's principal residence" and thus was protected by the anti-modification provision of Code § 1322(b)(2).

In re Lopez, 2010 WL 4875884 (Bankr. N.D. Cal., Nov. 24, 2010)

(case no. 4:10-bk-47520) (Bankruptcy Judge Edward D. Jellen)

[Text of opinion](#)

Date as of which value of property is to be determined:

There are two schools of thought as to the appropriate valuation date on Chapter 13 motions to value pursuant to Code § 506(a), the petition date and the plan's effective date. However, the court did not need to resolve the issue.

In re Avendano, 2010 WL 5058390 (Bankr. S.D. Fla., Dec. 3, 2010)

(case no. 1:09-bk-36558) (Bankruptcy Judge A. Jay Cristol)

[Text of opinion](#)

Debtor ineligible for a discharge may strip wholly unsecured lien:

Agreeing with *In re Tran*, 431 B.R. 230 (Bankr. N.D. Cal. 2010), the court said that nothing in the Bankruptcy Code prohibits a Chapter 13 debtor who is ineligible for a discharge from stripping off a wholly unsecured lien.

*In re Grignon*, 2010 WL 5067440 (Bankr. D. Or., Dec. 7, 2010)

(case no. 3:10-bk-34196) (Bankruptcy Judge Trish M. Brown)

[Text of opinion](#)

Debtor ineligible for a discharge may strip wholly unsecured lien:

Saying it was persuaded by *In re Tran*, 431 B.R. 230, 235 (Bankr. N.D. Cal. 2010), the court held that lien strips are permitted in Chapter 20 cases even without a discharge, if the plan otherwise complies with the requirements of the Bankruptcy Code. The statutory basis for the lien strip is Code § 1322(b)(2), not § 506(d).

*In re Hill*, --- B.R. ---, 2010 WL 4873054 (Bankr. S.D. Cal., Nov. 29, 2010)

(case no. 3:09-bk-19516) (Bankruptcy Judge Margaret M. Mann)

[Text of opinion](#)



**Confirmation of Plan:  
Treatment of Secured Claims:  
Plan Provisions Restricting Residential Mortgage Creditors**

**Topical compilation:**

[PDF](#)   [Word](#)

[All topical compilations](#)

[All circuit compilations](#)

E.D. Va.: Plan provisions approved:

Although a different judge, in *In re Russell*, 2010 WL 2671496 (Bankr. E.D. Va., June 30, 2010) (Bankruptcy Judge Stephen S. Mitchell), denied confirmation of a Chapter 13 plan that included several provisions directing the mortgage creditor's application of payments made under the plan, Judge Robert G. Mayer confirmed a plan including the following provisions:

Confirmation of the plan shall impose a duty on Real Property Creditors and/or servicers of such Creditors, with respect to application of mortgage and mortgage-related payments, to comply with the provisions of 11 U.S.C. §524(i) and all Administrative Order(s) of the Bankruptcy Court relating to Arrearages, Administrative Arrearages, Mortgage Payments, and Conduit Mortgage Payments. As a result, all Real Property Creditors and/or servicers for such Creditors shall have an affirmative duty to do the following upon confirmation of the Plan:

- A. To apply all post-petition payments received from the Chapter 13 Trustee and designated to the pre-petition arrearage claim and the administrative arrearage claim only to such claims;
- B. To apply all post-petition payments received from the Chapter 13 Trustee and designated as Conduit Mortgage Payments only to the month designated for payment by the Chapter 13 Trustee;
- C. To apply all post-petition payments received directly from the Debtor in a non-conduit mortgage plan only to post-petition payments unless otherwise ordered by the Court;
- D. To refrain from assessing or adding any additional fees or charges to the loan obligation of the Debtor based solely on the pre-petition default;

[continued on the following page]

[continued from the preceding page]

E. To refrain from assessing or adding any additional fees or charges to the loan obligation of the Debtor (including additional interest, escrow and taxes) unless notice of such fees and charges has been timely filed pursuant with the Court and a proof of claim has been filed and has not been disallowed upon objection of the Chapter 13 Trustee or the Debtor;

F. To the extent that any post-confirmation fees or charges are allowed and are added to the Plan, to apply only payments received from the Chapter 13 Trustee and designated in payment of such fees and charges to such fees and charges.

G. To the extent that any post-confirmation fees or charges are allowed and are NOT added to the Plan, to apply only payments received directly from the Debtor and designated in payment of such fees and charges to such fees and charges.

In re Johnson, Case No. 1:10-bk-16789 (Bankr. E.D. Va., Dec. 2, 2010)

(Bankruptcy Judge Robert G. Mayer)

[Chapter 13 plan](#)

[Plan confirmation order](#)

R

## Part C

### Confirmation of Plan—Treatment of Unsecured Claims

**Confirmation of Plan:  
Treatment of Unsecured Claims:  
Compliance with Projected Disposable Income Requirement**

**Topical compilation:**

[PDF](#)   [Word](#)

[All topical compilations](#)

[All circuit compilations](#)

Nondebtor spouse is not required to turn over spouse's share of joint tax refund:

A Chapter 13 debtor's nonfiling spouse is not required to turn over to the Chapter 13 trustee the spouse's share of a joint tax refund received after the confirmation of a Chapter 13 plan providing for the debtor's turning over of tax refunds received while the case is pending, at least where neither the plan nor the plan confirmation order contains a specific provision requiring such turnover.

In re Malewicz, 2010 WL 4613119 (Bankr. E.D. N.Y., Nov. 4, 2010)

(case no. 8:09-bk-74807) (Bankruptcy Judge Robert E. Grossman)

[Text of opinion](#)

Debtor may not deduct expense of repaying debt whose lien has been stripped:

In calculating their projected disposable income, the above-median Chapter 13 debtors could not deduct a secured debt expense for repayment of a debt secured by a junior mortgage lien that the debtors had stripped as not secured by value in the collateral.

In re May, 2010 WL 4702384 (Bankr. E.D. Wis., Nov. 12, 2010)

(case no. 2:09-bk-26324) (Bankruptcy Judge Susan V. Kelley)

[Text of opinion](#)

Social Security income is excluded from projected disposable income:

Rejecting *In re Timothy*, 2009 WL 1349741 (Bankr. D. Utah 2009) and *In re Cranmer*, 433 B.R. 391 (Bankr. D. Utah 2010), the court said that a Chapter 13 debtor's Social Security income is expressly excluded from the calculation of the debtor's projected disposable income. And here, because no showing had been made that the case was unusual or that there were any changes in the debtors' income or expenses that were known or virtually certain at the time of confirmation, *Hamilton v. Lanning*, 130 S.Ct. 2464, 177 L.Ed.2d 23 (2010) did not require the addition of the Social Security income to the calculation.

*In re Welsh*, --- B.R. ---, 2010 WL 4735994 (Bankr. D. Mont., Nov 16, 2010)

(case no. 2:10-bk-61285) (Bankruptcy Judge Ralph B. Kirscher)

[Text of opinion](#)

**Note:** The Chapter 13 trustee has appealed. See *In re Welsh*, Case No. 10-1465 (9th Cir. B.A.P., filed Dec. 2, 2010).



## Part D

### Confirmation of Plan—Other Issues

**Confirmation of Plan:  
Good Faith**

**Topical compilation:**

[PDF](#)   [Word](#)

[All topical compilations](#)

[All circuit compilations](#)

**Scope:** This topic includes both good faith under Code § 1325(a)(3), requiring good faith in proposing the plan, and good faith under Code § 1325(a)(7), added by BAPCPA, requiring good faith in filing the bankruptcy petition. For cases on bad faith as a ground for dismissal under Code § 1307(c), see the topic “Other Issues” (in Part E. of this Section Three).

Expiration of 910-day period did not demonstrate bad faith under Code § 1325(a)(3):

Mere speculation was not enough to establish that the plan in the debtors’ second Chapter 13 case, which they filed three months after their earlier Chapter 13 case had been dismissed, was proposed in bad faith for the purpose of Code § 1325(a)(3), although, due to the passage of time since the filing of the earlier case, the debtors’ motor vehicle was no longer a 910-day vehicle, and the plan treated it as such.

In re Hingiss, 2010 WL 4941622 (Bankr. E.D. Wis., Dec. 2, 2010)

(case no. 2:10-bk-29145) (Bankruptcy Judge James E. Shapiro)

[Text of opinion](#)

Plan was proposed in good faith despite exclusion of Social Security benefits:

The Chapter 13 debtors' plan was proposed in good faith, although the plan would pay only 8.5% of unsecured claims, while the debtors continued to make payments on claims secured by an "Airstream" trailer, two ATVs and three automobiles, and the debtors did not contribute their Social Security income to the calculation of their projected disposable income.

*In re Welsh*, --- B.R. ---, 2010 WL 4735994 (Bankr. D. Mont., Nov 16, 2010)

(case no. 2:10-bk-61285) (Bankruptcy Judge Ralph B. Kirscher)

[Text of opinion](#)

**Note:** The Chapter 13 trustee has appealed. See *In re Welsh*, Case No. 10-1465 (9th Cir. B.A.P., filed Dec. 2, 2010).



**Confirmation of Plan:  
Other Issues**

**Topical compilation:**

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[All circuit compilations](#)

Creditor could not vacate plan confirmation two years later:

A creditor was bound by a confirmed Chapter 13 plan that treated the creditor's claim as secured in the amount of \$1,000 and unsecured in the amount of \$49,565.23, where the debtors served the petition and the plan on the creditor, and the creditor did not assert that it lacked notice of either document. Accordingly, the creditor received due process and could not now, two years later, seek to vacate the order confirming the plan.

**In re Scott, 2010 WL 4809340 (Bankr. W.D. Ky., Nov. 19, 2010)**

(case no. 1:09-bk-12198) (Chief Bankruptcy Judge Joan A. Lloyd)

[Text of opinion](#)

**R**

## Effect of Plan Confirmation

**Topical compilation:**

[PDF](#) [Word](#)

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[All circuit compilations](#)

**Scope:** This topic addresses several related matters: (1) The effect of plan confirmation on the rights of creditors and the debtor; (2) the debtor's remedy for a creditor's asserted violation of a confirmed plan, the court's confirmation order, or Code § 1927(a); (3) the effect of plan confirmation on the property of the debtor's bankruptcy estate; and (4) the effect of plan confirmation on the scope of the automatic stay.

Plan confirmation bound creditor as to nonpriority status of its claim:

The confirmation of the debtors' Chapter 13 plan, which treated a creditor's claim as a general, unsecured claim, precluded the creditor from later asserting that its claim was a priority claim.

In re Anderson, 439 B.R. 206 (Bankr. M.D. Ala., August 17, 2010)

(case no. 1:06-bk-10845) (Chief Bankruptcy Judge Dwight H. Williams Jr.)

[Text of opinion](#)

Plan confirmation bound creditor as to treatment of its 910-day vehicle:

The mere fact that the motor vehicle lender was allegedly able to produce evidence that it was a "910 creditor" protected by the hanging paragraph of Code § 1325(a)(5) from having its claim bifurcated did not entitle the creditor to relief from a bankruptcy court order confirming the debtors' Chapter 13 plan that provided for bifurcation of the claim, in the absence of a showing that the evidence was unavailable for presentation at the confirmation hearing.

In re Castleberry, 437 B.R. 705 (Bankr. M.D. Ga., Sept. 29, 2010)

(case no. 5:10-bk-51298) (Bankruptcy Judge James D. Walker Jr.)

[Text of opinion](#)

R

## Part E

Issues Other Than Confirmation of Plan

## Miscellaneous Actions against Mortgage Creditors

**Topical compilation:**

[PDF](#) [Word](#)

[All topical compilations](#)

[All circuit compilations](#)

**Scope:** Most actions against mortgage creditors are covered elsewhere. This topic collects cases that don't fit into another topic.

Prior foreclosure judgment bound non-party debtor:

The Chapter 13 debtor's adversary proceeding against the mortgage creditor, asserting claims of fraud and violation of the Truth in Lending Act, was precluded by a prior state court judgment foreclosing the mortgage, even though the debtor was not a named defendant in the foreclosure action, as, when the mortgage creditor filed its foreclosure action against the record owner of the property, the creditor recorded a *lis pendens*, and under state law this had the effect of rendering the debtor, who held an unrecorded interest in the property, a subsequent purchaser who was bound by the foreclosure judgment. Accordingly, the doctrine of claim preclusion prevented the debtor from relitigating the matter in the form of her adversary proceeding. While claim preclusion does not absolutely bar a defendant, or one in privity with the defendant, from filing a subsequent suit, Wisconsin courts had adopted an exception to this rule called the common-law compulsory counterclaim rule. Under this rule, a party seeking to avoid claim preclusion is barred from bringing a subsequent action if a decision in favor of that party would either nullify the previous judgment or would impair rights established by that judgment, and, here, a favorable ruling for the debtor on her claims would nullify the rights in the property that were vested in the creditor as a result of the foreclosure judgment.

In re Lokowich, 2010 WL 4793308 (Bankr. W.D. Wis., Nov. 19, 2010)

(case no. 3:09-bk-14739; adv. proc. no. 3:09-ap-317) (Chief Bankruptcy Judge Robert D. Martin)

[Text of opinion](#)

**Note:** The debtor has filed a notice of appeal.

R

## Modification of Plan

**Topical compilation:**

[PDF](#) [Word](#)

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**Modification granted—Following debtor’s loss of job and separation from spouse:**

Denying the Chapter 13 trustee’s objection to the debtor’s proposed modification of her plan, which reduced the monthly payment and shortened the plan term from 54 to 36 months following the loss of her job and her separation from her nondebtor husband, the court held that (1) the projected disposable income requirement of Code § 1325(b) does not apply to plan modifications, and (2) the proposed modification was in good faith; if the debtor’s income increased in the future, the trustee was free to seek a further modification of the debtor's plan.

**In re Davis, — B.R. —, 2010 WL 5136037 (Bankr. N.D. Ill., Dec. 16, 2010)**

(case no. 1:08-bk-16025) (Bankruptcy Judge Eugene R. Wedoff)

[Text of opinion](#)

**Modification denied—Due to debtor’s bad faith in misrepresenting income:**

Concluding that the Chapter 13 debtor misrepresented her income while manipulating her expense deductions so as to justify a reduced plan payment, the court said that these facts proved a lack of good faith, and the debtor’s proposed plan modification could not be confirmed.

**Projected disposable income requirement is inapplicable:**

The projected disposable income requirement of Code § 1325(b) does not apply to modification of a confirmed plan.

**In re Kearney, — B.R. —, 2010 WL 4942140 (Bankr. E.D. Wis., Dec. 3, 2010)**

(case no. 2:09-bk-24918) (Bankruptcy Judge Susan V. Kelley)

[Text of opinion](#)

Increase in "base" of plan is not permitted purpose of modification:

The purposes for modification of a confirmed plan set forth in Code § 1329 constitute an exclusive list. An increase in the "base" of the Chapter 13 debtors' plan, as proposed by the debtors in their modified plan, was not one of the permitted purposes, where the debtors did not explain how payments to creditors would change as a result of the increase in the "base."

Projected disposable income requirement is inapplicable:

The projected disposable income requirement of Code § 1325(b) does not apply to modification of a confirmed plan.

Liquidation analysis applies to plan modifications:

Where the Chapter 13 debtors received a settlement of a personal injury claim during the pendency of their case, the debtors' proposed modification of their plan required a liquidation analysis taking into account the settlement proceeds, although the debtors' claimed exemption of a portion of the proceeds would be allowed in the absence of any objections.

In re Walker, 2010 WL 4259274 (Bankr. C.D. Ill., Oct. 21, 2010)

(case no. 3:07-bk-70358) (Bankruptcy Judge Mary P. Gorman)

[Text of opinion](#)



## Other Issues

**Topical compilation:**

[PDF](#) [Word](#)

[All topical compilations](#)

[All circuit compilations](#)

Distribution of funds held by trustee in case in which no plan is confirmed:

As amended by BAPCPA, Code § 1326(a)(2) states that, “[a] payment made under paragraph (1)(A)—that is, a payment made under the plan—“shall be retained by the trustee until confirmation or denial of confirmation.... If a plan is not confirmed, the trustee shall return any such payments not previously paid and not yet due and owing to creditors pursuant to paragraph (3) to the debtor, after deducting any unpaid claim allowed under section 503(b).” The reference to “paragraph 3” apparently relates to § 1326(a)(3), which authorizes the court to “upon notice and a hearing, modify, increase, or reduce the payments required under this subsection pending confirmation of a plan.” Read literally, § 1326(a)(2) conditions the disbursement to creditors on whether the court has entered an order modifying payments otherwise required by Section 1326(a). However, in deciphering § 1326(a)(2), some courts—including the present court—have concluded that the reference to § 1326(a)(3) is intended to refer to adequate protection payments generally. Accordingly, upon dismissal of a Chapter 13 case in which no plan is confirmed, funds held by the Chapter 13 trustee will be distributed first to the recipients of unsatisfied adequate protection payments, then to administrative claimants, and finally to the debtor.

**In re Fernandez**, — B.R. —, 2010 WL 3943932 (Bankr. S.D. Tex., Oct. 6, 2010)

(case no. 4:07-bk-35173) (Bankruptcy Judge Jeff Bohm)

[Text of opinion](#)

**Note:** The debtor's attorney has appealed. See *In re Fernandez*, Case No. 4:10-cv-04044 (S.D. Tex., filed Oct. 22, 2010).

**Comment:** For a fuller discussion of these issues, see *In re Perez*, 339 B.R. 385 (Bankr. S.D. Tex. 2006), *aff'd Perez v. Peake*, 373 B.R. 468 (S.D. Tex. 2007).

Agreement created lease that debtor needed to assume in order to retain mobile home:

Because an agreement under which the Chapter 13 debtor obtained possession of a mobile home was a true lease agreement, rather than a secured purchase agreement, the debtor needed to assume the lease under Code § 365 in order to retain possession of the mobile home. Assumption of the lease required the debtor, under § 365(b)(1), to promptly cure any existing defaults as well as to provide adequate assurance of future performance. In determining that the agreement was a lease, the court applied the factors stated in UCC § 1-203.

**In re Kinds, 2010 WL 4386929 (Bankr. N.D. Miss., Oct. 29, 2010)**

(case no. 1:10-bk-12502) (Chief Bankruptcy Judge David W. Houston, III)

[Text of opinion](#)

Conversion to Chapter 7, for default under plan, denied for time being:

Denying the Chapter 13 trustee's motion, under Code § 1307(c), to convert the debtors' case to Chapter 7, the court said it could not agree that the debtors, who operated a liquor store, were in material default, or that it was in the best interest of creditors or the estate to convert the case. The debtors, who were 25 months into their 60-month plan, were current with plan payments and had made substantial progress in paying prepetition taxes. Although they had not lived up to an agreed order to pay all postpetition taxes, they had made an attempt to catch up. The debtors were entering the busiest time of the year for their business, the holiday season, and factors such as the store's good location, lack of competition, and sufficient inventory level indicated that the store was poised to record sizeable profits by year's end. However, because the debtors had been down this road before, without success, the court stated that the case would be converted if the debtors did not become current on all postpetition tax obligations by January 15, 2011.

**In re Morrison, 2010 WL 4929604 (Bankr. E.D. Okla., Nov. 30, 2010)**

(case no. 7:08-bk-81186) (Chief Bankruptcy Judge Tom R. Cornish)

[Text of opinion](#)

Firm that failed to execute written agreement during initial consultation was precluded from receiving any fees:

Where the Chapter 13 debtor consulted with an attorney at a law firm on November 17, 2009, to discuss her bankruptcy options but did not retain the firm at that time, and she then met with the firm again and signed a fee agreement on December 15, 2009, the firm failed to comply with Code § 528(a)(1), which requires an attorney to execute a written fee agreement within five days of providing any bankruptcy assistance services. The record clearly established that, at the meeting on November 17, the firm was a “debt relief agency” and that it provided “bankruptcy assistance” to the debtor, who was then an “assisted person.” Accordingly, the firm’s contract with the debtor was unenforceable, and the firm was not entitled to receive any fees in the case. Congress could have chosen to set the deadline within five days after the debtor decided to retain the firm. But it did not. Instead the deadline Congress chose was five days after counsel provided any bankruptcy assistance to the debtor.

*In re Humphries*, 2010 WL 5101036 (Bankr. E.D. Mich., Dec. 8, 2010)

(case no. 2:10-bk-41299) (Bankruptcy Judge Steven Rhodes)

[Text of opinion](#)

**Note:** The law firm has appealed. See *In re Humphries*, Case No. 2:10-cv-14928-DML-MKM (E.D. Mich., filed Dec. 13, 2010).

Unsecured portion of undersecured debt is considered as unsecured debt for purpose of debt limits:

While there is a split of authority concerning whether Code § 506(a) applies in the application of the debt limits under Code § 109(e), the court aligned itself with the majority of courts, which looked outside the debtor's bankruptcy schedules to determine whether the amount of a debtor's undersecured portion of debts should be included in the debtor's unsecured debt.

*In re Rubens*, 2010 WL 4791879 (Bankr. S.D. Fla., Nov. 17, 2010)

(case no. 0:10-bk-10142) (Bankruptcy Judge Raymond B. Ray)

[Text of opinion](#)



Section Four:  
Cases under  
Related Federal Statutes

## Home Ownership and Equity Protection Act (HOEPA)

Judgment against mortgage foreclosure rescue operation affirmed:

Affirming *In re O'Brien*, 423 B.R. 477 (Bankr. D. N.J., Jan. 22, 2010), the district court held that, in an adversary proceeding by Chapter 13 debtors against the operator of a foreclosure rescue operation, the bankruptcy court did not err in rendering judgment in favor of the debtors on theories of common law fraud and violation of the New Jersey Consumer Fraud Act (CFA), the New Jersey Home Ownership Security Act of 2002 (HOSA), the Truth in Lending Act (TILA), and the Home Ownership and Equity Protection Act. Nor did the bankruptcy court err in determining that the transaction involved, although nominally structured as a sale/leaseback transaction, was in actuality an equitable mortgage; in concluding that the debtors did not act with unclean hands; and in awarding the debtors attorney's fees of \$33,932.50 for violation of the CFA, TILA, and HOSA.

*Cleveland v. O'Brien*, 2010 WL 4703781 (D. N.J., Nov. 12, 2010)

(case no. 3:10-cv-3169) (Chief District Judge Garrett E. Brown Jr.)

[Text of opinion](#)

## Truth in Lending Act (TILA)

Judgment against mortgage foreclosure rescue operation affirmed:

Affirming *In re O'Brien*, 423 B.R. 477 (Bankr. D. N.J., Jan. 22, 2010), the district court held that, in an adversary proceeding by Chapter 13 debtors against the operator of a foreclosure rescue operation, the bankruptcy court did not err in rendering judgment in favor of the debtors on theories of common law fraud and violation of the New Jersey Consumer Fraud Act (CFA), the New Jersey Home Ownership Security Act of 2002 (HOSA), the Truth in Lending Act (TILA), and the Home Ownership and Equity Protection Act. Nor did the bankruptcy court err in determining that the transaction involved, although nominally structured as a sale/leaseback transaction, was in actuality an equitable mortgage; in concluding that the debtors did not act with unclean hands; and in awarding the debtors attorney's fees of \$33,932.50 for violation of the CFA, TILA, and HOSA.

*Cleveland v. O'Brien*, 2010 WL 4703781 (D. N.J., Nov. 12, 2010)

(case no. 3:10-cv-3169) (Chief District Judge Garrett E. Brown Jr.)

[Text of opinion](#)

R

# Permanent Resources

# Bankruptcy Code, Rules and Forms

## Bankruptcy Code

[Full Text of Code \(Cornell Law School\)](#)

Amendments Effective December 1, 2009:

The five-day periods found in each of these provisions are changed to seven-day periods:

- Code § 109(h)(3)(A)(ii)
- Code § 322(a)
- Code § 332(a)
- Code § 342(e)(2)
- Code § 521(e)(3)(B)
- Code § 521(i)(2)
- Code § 704(b)(1)(B)
- Code § 749(b)
- Code § 764(b)

See PL 111-16, May 7, 2009, 123 Stat 1607, the Statutory Time-Periods Technical Amendments Act of 2009.

## Bankruptcy Rules and Forms

[Federal Rules of Bankruptcy Procedure \("Bankruptcy Rules"\)](#)

[Official bankruptcy forms](#)



## Federal Rulemaking Resources

Background:

- [U.S. Courts: Federal Rulemaking](#)
- [The Rulemaking Process](#)
- [Summary of the Rulemaking Process](#)
- [Federal Rulemaking: Bankruptcy Rules](#)
- [The Judicial Conference of the United States](#)

The players:

- The Advisory Committee on Bankruptcy Rules (the "Advisory Committee"), which initiates proposed changes to the Bankruptcy Rules or Official Forms.
- The Committee on Rules of Practice and Procedure (referred to as "the Standing Committee") of the Judicial Conference of the United States, which reviews the proposed changes.
- The Judicial Conference itself, which approves proposed changes and submits proposed rule (but not bankruptcy form) changes to the Supreme Court. The 27-member Judicial Conference is the policy-making body for the federal court system. The Chief Justice of the Supreme Court serves as its presiding officer. Its other members are the chief judges of the 13 courts of appeals, a district judge from each of the 12 geographic circuits, and the chief judge of the Court of International Trade. (See the Judicial Conference website, above, for more information.)

The process for the approval of a new or amended Bankruptcy Rule or Official Form is as follows:

- Formulation by the Advisory Committee.
- Approval for publication for public comment by the Standing Committee. The public comment period generally is six months.
- Review of comments by the Advisory Committee; possible modification of proposal. If the modification is significant, the proposal may be submitted to the Standing Committee for publication for another round of public comment. Otherwise, the proposal is submitted to the Standing Committee for final approval.
- Final Approval by the Standing Committee.

- Approval by the Judicial Conference, typically at its annual conference in September.
- Approval by the U.S. Supreme Court. Must be by May 1 for a rule to be effective that year; the rule may not be effective earlier than December 1. See 28 U.S.C. § 2075, which is part of the [Rules Enabling Act](#).
- Lack of disapproval by the U.S. Congress.

Technical changes may be approved without publication for public comment. And it appears that the Judicial Conference is the final authority on Bankruptcy Forms; they do not appear to be submitted to the Supreme Court or Congress.

Reports of the various bodies involved in the rulemaking process:

- [Judicial Conference Proceedings](#)
- [Committee Reports \(Advisory Committee and Standing Committee\)](#)
- [Committee Minutes \(Advisory Committee and Standing Committee\)](#)



**Bankruptcy Rules:  
Amendments Effective December 1, 2010**

*Rules involved:* Rules 1007, 1019, 4001, 4004, 5009, 7001, and several rules relating to Chapter 15 proceedings.

*Status:* Approved by the Supreme Court on April 28, 2010. Will take effect on December 1, 2010, unless Congress disapproves the amendments.

*Summary of Changes:*

- Bankruptcy Rule 1007 (subsection (c) amended so as to extend from 45 to 60 days the time for individual debtors in Chapter 7 to file the statement of completion of a course in personal financial management; subsection (a)(2), relating to involuntary petitions, was also amended)
- Bankruptcy Rule 1019 (new subsection (2)(B) provides that a new time period to object to a claim of exemption arises when a case is converted to Chapter 7 from Chapter 11, 12, or 13; the new time period does not arise, however, if the conversion occurs more than one year after the first order confirming a plan, or if the case was previously pending under Chapter 7 and the objection period had expired in the original Chapter 7 case.)
- Bankruptcy Rule 4001 (amended to change two time periods that were inadvertently omitted from the time computation amendments package effective December 2009)
- Bankruptcy Rule 4004
  - Amended to include a deadline in subdivision (a) for the filing of motions (rather than complaints) objecting to discharge under Code §§727(a)(8), 727(a)(9), 1328(f)
  - Subdivision (c)(1) is amended to take account of the authority under subdivision (d) to raise objections to discharge under Code §§727(a)(8), (a)(9) by motion
  - Subdivision (c)(4) is added, directing the court in Chapter 11 and 13 cases to withhold the entry of the discharge if the debtor has not filed with the court a statement of completion of a course concerning personal financial management as required by Rule 1007(b)(7)
  - Subdivision (d) is amended to provide that objections to discharge under Code §§727(a)(8), 727(a)(9), and 1328(f) are commenced by motion and are treated as contested matters rather than adversary proceedings
- Bankruptcy Rule 5009 (amended to add new subdivision (b), requiring the clerk to provide notice to individual debtors in Chapter 7 and 13 cases that their cases may be closed if they fail to file a statement of completion of financial management course.

- Bankruptcy Rule 7001 (amended to provide that objections to discharge under Code §§ 727(a)(8), 727(a)(9), and 1328(f) are to be commenced by motion rather than by complaint, corresponding to the proposed amendment to Rule 4004)
- Changes reflecting Chapter 15: New Rule 5012; amendments to Rules 1014, 1015, 1018, 5009(c), and 9001

*History:* Submitted for final approval by the Advisory Committee at its meeting of March 26-27, 2009, and by the Standing Committee at its meeting of June 1-2, 2009. Granted final approval for the Judicial Conference at its meeting of September 15, 2009.

[Full text of rule changes](#)

[Public Comments Received](#)

[Report of Committee on Rules of Practice and Procedure \(June 1-2, 2009, meeting\)](#)

[Report of the Advisory Committee on Bankruptcy Rules \(March 26-27, 2009, meeting\)](#)



## **Bankruptcy Forms: Amendments Effective December 1, 2010**

*Forms Involved:* Forms 9A, 9C, 9I (notice of the meeting of creditors in Chapter 7 and 13 cases); 20A (notice of a motion or objection), 20B (notice of an objection to a claim); 22A, 22B, and 22C (calculation of disposable income); 23 (certification of completion of a personal financial management course)

*Status:* The Judicial Conference, in its meeting of September 14, 2010, approved the amendments to Forms 9A, 9C, 9I, 20A, 20B, 22A, 22B, and 22C, to be effective on December 1, 2010. Previously, the Judicial Conference, in its meeting of September 15, 2009, approved the amendment to Form 23 to be effective on December 1 of that year. Apparently the revised form will not be implemented until December 1, 2010, however, as it implements a corresponding change to Bankruptcy Rule 1007(c).

[Judicial Conference Proceedings of September 15, 2009](#) (see page 31 for Form 23)

### *Summary of Changes:*

- Official Forms 9A, 9C, 9I, which are forms for the notice of the meeting of creditors in Chapter 7 and 13 cases.
  - Advisory Committee Note: Forms 9A, 9C, and 9I are amended in the "Deadlines" section on the front and the "Discharge of Debts" section on the back. The changes conform to amendments to Bankruptcy Rules 4004 and 7001 [effective December 1, 2010] that direct that certain objections to discharge [under Code §§727(a)(8), 727(a)(9), 1328(f)] be brought by motion rather than by complaint.
- Official Forms 20A (notice of a motion or an objection), 20B (notice of an objection to a claim).
  - Advisory Committee Note: The form is amended to require that the title of the case include all names used by the debtor within the last eight years. This change conforms to the 2005 amendment of § 727(a)(8), which extended from six years to eight years the period during which a debtor is barred from receiving successive discharges. In conformity with Rule 9037, the filer is directed to provide only the last four digits of any individual debtor's taxpayer-identification number.

- Official Forms 22A, 22B, and 22C, for calculation of disposable income
  - Advisory Committee Note:

Forms 22A, lines 19A, 19B, 20A, and 20B, and Forms 22C, lines 24A, 24B, 25A, and 25B, are amended to delete the terms "household" and "household size" and to replace them with "number of persons" or "family size." Under § 707(b)(2)(A)(ii)(J) means test deductions for food, clothing, and other items and for health care are permitted to be taken in the amounts specified in the IRS National Standards. The IRS National Standards are based on numbers of persons, not household size. Similarly, the IRS Local Standards are based on family, not household, size. The IRS itself generally determines the applicable number of persons or family size for these purposes according to the number of dependents that the debtor claims for federal income tax purposes.

In order for Forms 22A and 22C to reflect more accurately the manner in which the specified National and Local Standards are applied by the IRS, the references to "household" and "household size" are deleted, and the substituted terms—"number of persons" and "family size"—are defined in terms of exemptions on the debtor's federal income tax return and other dependents.

Form 22A, line 8, Form 22B, line 7, and Form 22C, line 7, are amended to add an instruction that only one joint filer should report regular payments by another person for household expenses. Reporting of the figure by both spouses results in an erroneous double-counting of this source of Income.

The introductory instruction to Part I of Form 22A is amended to direct debtors in joint cases to file separate forms if only one of the debtors is entitled to an exemption under Part I and the debtors believe that the filing of separate forms is required by § 707(b)(2)(C) of the Code. The language of § 707(b) is ambiguous about how the exclusions from means testing authorized by § 707(b)(1) (for debtors whose debts are not primarily consumer debts) and (b)(2)(D) (for certain disabled veterans, National Guard members, and Armed Forces reservists) are to be applied in joint cases. The form does not impose a particular interpretation of these provisions. It leaves up to joint debtors the initial determination of whether the exclusion of one spouse from means testing relieves the other spouse from the obligation to complete the form, and allows any dispute over this matter to be resolved by the courts.

- Official Form 23 (amended to conform to the amendment to Rule 1007(c); changes the deadline for a chapter 7 debtor to file a statement of completion of a personal financial management course from 45 to 60 days after the first date set for the meeting of creditors)

*History:* The amendments to Forms 9A, 9C, and 9I apparently originated in correspondence between the Advisory Committee and the Standing Committee. According to the Standing Committee's report on its June 14-15, 2010, meeting, "[t]he advisory committee and the Committee approved these changes after the Committee's meeting, when the issue first arose." The Standing Committee has submitted the amendments to the Judicial Conference for approval to be effective on December 1, 2010.

The amendments to Forms 20A, 20B originated at the Advisory Committee's meeting of April 29-30, 2010. They were not published for public comment. At its June 14-15, 2010, meeting, the Standing Committee submitted the amendments to the Judicial Conference for approval to be effective on December 1, 2010.

The amendments to Forms 22A, 22B, 22C originated at the March 26-27, 2009, meeting of the Advisory Committee. They were published for public comment; no changes were made following publication. The Advisory Committee, at its meeting of April 29-30, 2010, submitted the amendments for final approval. At its June 14-15, 2010, meeting, the Standing Committee recommended that the Judicial Conference approve the amendments at its September 2010 meeting, to be effective on December 1, 2010.

The amendment to Form 23 originated at the March 26-27, 2009, meeting of the Advisory Committee; it was not published for public comment. At its June 1-2, 2009, meeting, the Standing Committee submitted the amendment to the Judicial Conference for approval. The Judicial Conference approved the amendment at its September 15, 2009, meeting.

[Report of Committee on Rules of Practice and Procedure \(June 14-15, 2010, meeting\)](#) (see pages 14-15 for forms other than Form 23)

[Report of Advisory Committee on Bankruptcy Rules \(April 29-30, 2010, meeting\) \(with copies of amended forms\)](#) (see pages 16-17, 54-80)

[Report of Advisory Committee on Bankruptcy Rules \(March 26-27, 2009, meeting\)](#) (see pages 5, 7, 38-40, 71-80)

R

**Bankruptcy Rules:  
Proposed Amendments Effective December 1, 2011**

*Rules Involved:* Rules 1004.2 [new], 2003, 2019, 3001, 3002.1 [new], 4004, 6003

*Status:* The Judicial Conference approved these proposed amendments at its September 14, 2010, meeting. The amendments will now be submitted to the Supreme Court for its approval.

*Summary of Changes:*

- Bankruptcy Rule 1004.2 (new rule relating to Chapter 15 petitions)
- Bankruptcy Rule 2003 (amended to require the filing of a statement, upon adjourning of meeting of creditors, specifying the date and time to which the meeting is adjourned)
- Bankruptcy Rule 2019 (amended to expand the scope of the disclosure requirements in Chapter 9 and 11 cases)
- Bankruptcy Rule 3001 (amended to prescribe in greater detail the supporting information required to accompany certain proofs of claim)
- Bankruptcy Rule 3002.1 (new rule implementing Code § 1322(b)(5) by requiring increased disclosure by residential mortgage creditors)
- Bankruptcy Rule 4004 (amended to permit a party to seek an extension of time to object to a debtor's Chapter 7 discharge in response to information acquired during the "gap period")
- Bankruptcy Rule 6003 (amended to clarify that the requirement of a 21-day waiting period before a court can enter certain orders at the beginning of a case does not prevent the court from specifying an effective date for the order that is earlier than the date of its issuance)

*History:* The amendments or creation of Rules 2003, 2019, 3001, 3002.1, and 4004 originated with the Advisory Committee at its March 26-27, 2009, meeting. New rule 1004.2 originated at the Advisory Committee's meeting of March 27-28, 2008. The origin of the amendment to Rule 6003 cannot be determined.

It appears that all the proposed changes were published for public comment. In response to the comments received, the Advisory Committee at its April 29-30, 2010, meeting made no changes, or only stylistic changes, to Rules 1004.2, 2003, 4004, and 6003. The Advisory Committee made significant changes, although not requiring renewed publication, to Rules 2019, 3001, and 3002.1. One aspect of the proposed amendment of Rule 3001 was withdrawn and redrafted as a proposed subsection (c)(3) of that Rule. See the following section on proposed Bankruptcy Rule changes to be effective (potentially) on December 1, 2012.

The Advisory Committee then submitted all seven proposed changes to the Standing Committee, which, in its meeting of June 14-15, 2010, approved sending the amendments to the Judicial Conference.

[Report of Committee on Rules of Practice and Procedure \(June 14-15, 2010, meeting\)](#) (see pages 5-15)

[Report of Advisory Committee on Bankruptcy Rules \(April 29-30, 2010, meeting\) \(with full text of proposed changes, as amended at meeting, and comments received\)](#) (see pages 1-53)

[Report of Committee on Rules of Practice and Procedure \(June 1-2, 2009, meeting\)](#) (see pages 4-8)

[Report of Advisory Committee on Bankruptcy Rules \(March 26-27, 2009, meeting\) \(with full text of proposed changes\)](#) (see pages 5-8, 43-70)

R

**Bankruptcy Forms:  
Proposed Amendments Effective December 1, 2011**

**Bankruptcy Rules:  
Proposed Amendments Effective December 1, 2012**

*Rules Involved:* 3001 (proof of claim), 7054 (taxing of costs), 7056 (summary judgment)

*Forms Involved:* Form 10 (proof of claim), Attachment A to Form 10 [new], Schedule 1 to Form 10 [new], Schedule 2 to Form 10 [new], Form 25A (small business reorganization)

*Status:* Published for public comment on August 12, 2010. Comments will be accepted through February 16, 2011. Public hearings are scheduled in San Francisco, California, on January 7, 2011, and in Washington, D.C., on February 4, 2011.

[Full text of proposed amendments](#)

[Website for submitting comments](#)

The earliest the Bankruptcy Rule changes can be effective is December 1, 2012. The changes to the Bankruptcy Forms are apparently slated to be effective on December 1, 2011, so as to correspond to the effective date of the amendment to Rule 3001 and the creation of new Rule 3002.1. While existing committee reports do not specify a proposed effective date, the forms themselves incorporate a December 2011 effective date.

*Summary of Changes:*

- Bankruptcy Rule 3001 (amendment through addition of new subdivision (c)(3), establishing requirements for the documentation of claims based on an open-ended or revolving consumer credit agreement)
- Bankruptcy Rule 7054 ("amended in subdivision (b) to provide more time for a party to respond to a prevailing party's bill of costs and to increase the time for seeking review of the clerk's taxing of costs. The existing rule provides for the taxing of costs on one day's notice. That time period is extended to 14 days in order to provide a more realistic opportunity for a party to prepare a response. The five-day period for seeking court review is changed to seven days to conform to the convention used throughout the rules of specifying time periods of fewer than 30 days as multiples of seven. These changes bring the rule into conformity with Civil Rule 54(d).")
- Bankruptcy Rule 7056 ("amended to alter the incorporated Civil Rule 56's default deadline for filing a motion for summary judgment. Rule 7056 makes Civil Rule 56 applicable in bankruptcy adversary proceedings. As of December 1, 2009, Civil Rule 56(c) provides that, unless a local rule or court order otherwise provides, the deadline for filing a motion for summary judgment is 30 days after the close of discovery. Because of the swift pace of some bankruptcy proceedings and contested matters (to which Rule 7056 applies by virtue of Rule 9014(c)), a default deadline

based on the scheduled hearing date, rather than the close of discovery, is adopted.”)

- Bankruptcy Form 10 (form for submitting proofs of claims; amended in several respects, described below)
- Attachment A to Bankruptcy Form 10 (new; “It is a required proof of claim attachment for home mortgage claims that implements Rule 3001(c)(2). The form provides a uniform format for setting forth the following components of the amount of a mortgage claim: principal, interest, fees, expenses, and charges owed as of the petition date. It also requires the filer to state the amount necessary to cure any prepetition default, break out the components of that amount, and attach an escrow account statement if the mortgage installment payment includes an escrow deposit.”)
- Supplement 1 to Bankruptcy Form 10 (new; “It implements Rule 3002.1(b). The filer of a claim secured by a security interest in the debtor's principal residence must use this form during course the of a chapter 13 case to provide notice of changes in the ongoing installment payment amount. This notice will allow a debtor to properly maintain mortgage payments while in bankruptcy as permitted by § 1322(b)(5) of the Bankruptcy Code.”)
- Supplement 2 to Bankruptcy Form 10 (new; “It implements Rule 3002.1(c) by providing a uniform format for the filer of a claim secured by a security interest in the debtor's principal residence to provide notice of fees, expenses, and charges that are incurred during the course of a chapter 13 case.”)
- Bankruptcy Form 25A (a model plan of reorganization for small businesses; is amended to change the effective date provision)

#### Changes to Form 10:

- Additional information is sought concerning the interest rate specified for secured claims.
- The filer of the claim must indicate whether the rate is fixed or variable, and the form clarifies that the rate in question is the one applicable when the bankruptcy case was filed.
- Part 7 of the form and related instructions are revised to clarify that, consistent with Rule 3001 (c), a filer must attach redacted copies of documents that support a claim or provide evidence of the perfection of a lien; the attachment of only a summary of those documents is not sufficient. The need for the redaction of documents is highlighted.
- In order to emphasize the duty imposed on a party filing a proof of claim, the signature box of the form now includes a declaration that the information provided is true and correct to the best of the filer's knowledge, information, and reasonable belief. The related instruction also reminds the filer that the signature constitutes a certification that the claim meets the requirements of Rule 9011 (b). An individual filing a claim must indicate the capacity in which he or she is doing so, and check boxes are added to the signature block for that purpose.

- A new space is provided for indicating a uniform claim identifier. The use of this 24-character identifier is optional for the claim filer and is intended to facilitate the making of chapter 13 disbursements by means of electronic fund transfers.
- Stylistic and formatting changes are made throughout the form.

*History:* Submitted for publication for public comment by the Advisory Committee at its April 29-30, 2010, meeting. Approved for publication by the Standing Committee at its June 14-15, 2010, meeting.

[Report of Committee on Rules of Practice and Procedure \(June 14-15, 2010, meeting\)](#) (see pages 16-17)

[Report of Advisory Committee on Bankruptcy Rules \(April 29-30, 2010, meeting\) \(off-center version with full text of proposed changes\)](#) (see pages 527-530 and 616-634)



# Internet Resources

## **Exemptions**

[John Bates' Exemptions Express](#)

## **National Consumer Law Center**

[Foreclosing a Dream: State Laws Deprive Homeowners of Basic Protections \(February 2009\)](#)

[—Summary of State Foreclosure Laws](#)

[50-State Report on Unfair and Deceptive Acts and Practices Statutes \(February 2009\)](#)

[—State-by-State Analysis](#)

For more, see the [NCLC website](#)

## **United States Trustee Program**

[USTP website](#)

[Guidelines for Reviewing Mortgage Proofs of Claim \(April 2009\) \(for Chapter 13 trustees\)](#)

[Chapter 13 Trustees Weigh Advantages and Disadvantages of Paying Debtors' Ongoing Mortgages \(June 2009\)](#)

[United States Trustee Manual](#)

[Chapter 7 Handbooks and Reference Materials](#)

[Chapter 11 Handbooks and Reference Materials](#)

[Chapter 12 Handbooks and Reference Materials](#)

[Chapter 13 Handbooks and Reference Materials](#)

[Statement of the U.S. Trustee's Program on Legal Issues Arising under the Chapter 13 Disposable Income Test \(April 20, 2010\)](#)

[Statement of the U.S. Trustee's Program on Legal Issues Arising under the Chapter 7 Means Test \(April 23, 2010\)](#)

[United States Trustee's Perspective in Consumer Bankruptcy Cases \(March 2010\)](#)

[U.S. Trustee FAQs](#)

## Other Websites

[13Network](#)

[American Bankruptcy Institute \(ABI\)](#)

[--Bankruptcy Blog Exchange](#)

[Bankruptcy Blogs \(Justia\)](#)

[Internal Revenue Manual: Financial Analysis Handbook \(IRS\)](#)

[National Association of Bankruptcy Trustees \(NABT—Chapter 7\)](#)

[National Association of Chapter 13 Trustees \(NACTT\)](#)

[--NACTT Academy](#)

[National Association of Consumer Bankruptcy Attorneys \(NACBA\)](#)



# Supreme Court Case Status

## Cases accepted for 2010-2011 term:

*Ransom v. FIA Card Services, N.A.*, Case No. 09-907

Petition to review *In re Ransom*, 577 F.3d 1026 (9th Cir., August 14, 2009), in which the Ninth Circuit Court of Appeals held that a debtor may claim a motor vehicle ownership expense in the means test only if the debtor has a contractual payment obligation. While this is a Chapter 13 case, the Ninth Circuit's opinion was not dependent on that context, and its reasoning applies equally to Chapter 7 cases.

The question presented for review, as stated in the petitioner's brief, is: "Whether, in calculating the debtor's 'projected disposable income' during the plan period, the bankruptcy court may allow an ownership cost deduction for vehicles only if the debtor is actually making payments on the vehicle." Oral argument was held on October 4, 2010.

[Supreme Court docket](#)

[Collected case documents on SCOTUSblog](#)

*Stern v. Marshall*, Case No. 10-179 (U.S. Sup. Ct., pet. for cert. filed August 3, 2010)

Petition to review *In re Marshall*, 600 F.3d 1037 (9th Cir., March 19, 2010) in which the Ninth Circuit Court of Appeal held that (1) the Chapter 11 debtor's adversary proceeding to recover for her stepson's alleged tortious interference with her expectancy of inheritance or gift from her deceased husband was a non-core proceeding for which the bankruptcy court could issue only proposed findings of fact and conclusions of law; and (2) a Texas probate court's finding that the debtor's husband did not intend to give the debtor a gift was entitled to preclusive effect. The Supreme Court has already reversed the Ninth Circuit Court of Appeals once. See *Marshall v. Marshall*, 547 U.S. 293, 126 S.Ct. 1735, 164 L.Ed.2d 480 (2006), reversing *In re Marshall*, 392 F.3d 1118 (9th Cir. 2004).

*Status:* Petition granted limited to Questions 1, 2, and 3 presented by the petition (September 28, 2010). These questions are:

1. Whether the Ninth Circuit opinion, which renders §157(b)(2)(C) surplusage in light of §157(b)(2)(B), contravenes Congress' intent in enacting §157(b)(2)(C).
2. Whether Congress may, under Articles I and III, constitutionally authorize core jurisdiction over debtors' compulsory counterclaims to proofs of claim.
3. Whether the Ninth Circuit misapplied *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) and *Katchen v. Landy*, 382 U.S. 323 (1966) and contravened the Supreme Court's post-*Marathon* precedent, creating a circuit split in the process, by holding that Congress cannot constitutionally authorize non-Article III bankruptcy judges to enter final judgment on all compulsory counterclaims to proofs of claim

[Supreme Court docket](#)

[Case documents at SCOTUSblog](#)

## Certiorari petitions pending for 2010-2011 term:

*Weinman v. Graves*, Case No. 10-401 (U.S. Sup. Ct., pet. for cert. filed Sept. 21, 2010)

Petition for certiorari filed by the Chapter 7 trustee to review *In re Graves*, 609 F.3d 1153 (10th Cir., June 29, 2010), in which the court held that, where, prior to filing for bankruptcy relief, the Chapter 7 debtors had irrevocably applied their prepetition tax refund to prepayment of their taxes for the next tax year, the estate's interest in the prepayment was limited to the debtors' contingent reversionary interest in the prepayment attributable to prepetition earnings. Turnover was not appropriate because the debtors were never in "possession, custody, or control" of their contingent reversionary interest in the prepayment. However, if the debtors were entitled to a refund after their tax liability for the next year was determined, the trustee was entitled to demand turnover of any amount of the refund that was attributable to the debtors' prepetition earnings.

Status: Distributed for conference of January 7, 2011.

[Supreme Court docket](#)

[Text of \*Graves\* opinion](#)

## General Resources

[ScotusWiki](#)

[SCOTUSblog](#)



# BAPCPA Circuit Court Decisions

**Issues covered (in this order):**

- Constitutionality of BAPCPA as applied to attorneys
- Means test: Income
- Means test: Secured debt expense deduction despite intent to surrender collateral
- Means test: Transportation ownership expense deduction in absence of contractual expense
- Means test: Other Expense
- Chapter 7 reaffirmation
- Chapter 13 hanging paragraph: negative equity
- Chapter 13 hanging paragraph: surrender in full satisfaction
- Chapter 13 hanging paragraph: other issues
- Chapter 13 plan length
- Chapter 13 projected disposable income
- Limitation of exemptions
- Other issues

## Constitutionality of BAPCPA as applied to attorneys

### *Controlling:*

*Milavetz, Gallop & Milavetz, P.A. v. U.S.*, — U.S. —, 130 S.Ct. 1324, 176 L.Ed.2d 79 (March 8, 2010), reversing in part *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 541 F.3d 785 (8th Cir. 2008), held that:

- The “text and statutory context” of Code §101(12A), which defines “debt relief agency,” “foreclose a reading ... that excludes attorneys.”
- Code § 526(a)(4), which prohibits a debt relief agency from “advis[ing] an assisted person ... to incur more debt in contemplation of” filing for bankruptcy, should be construed to prohibit a debt relief agency only from advising a debtor to incur more debt because the debtor is filing for bankruptcy, rather than for a valid purpose. The provision “refers to a specific type of misconduct designed to manipulate the protections of the bankruptcy system,” not to abuse in general.
- The requirements in § 528 that an attorney identify himself or herself as a debt relief agency and include certain information about his or her bankruptcy-assistance and related services are “reasonably related to the [Government’s] interest in preventing deception of consumers” and therefore pass constitutional muster. The term “debt relief agency” is not misleading to consumers, and the statute does not apply to attorneys who represent creditors

### *Other decided cases:*

*Olsen v. Holder*, Case No. 07-35616 (9th Cir., Nov. 2, 2010) (reversing, on the basis of *Milavetz*, the district court insofar as it held that Code § 526(a)(4) violates the First Amendment)

*Connecticut Bar Ass’n v. U.S.*, 620 F.3d 81 (2nd Cir., Sept. 7, 2010) (*Milavetz* foreclosed a First Amendment challenge to Code § 526(a)(4) insofar as the provision prohibited a debt relief agency from advising an assisted person “to incur more debt in contemplation of” bankruptcy; *Milavetz* did not preclude a First Amendment challenge to Code § 526(a)(4) insofar as it prohibited a debt relief agency from advising an assisted person “to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor” in a bankruptcy case; Code §§527, 528 regulate commercial speech and, while mandating certain disclosures, do not suppress speech)

*Adams v. Zelotes*, 606 F.3d 34 (2nd Cir., May 18, 2010) (following *Milavetz*)

*Hersh v. U.S. ex rel. Mukasey*, 553 F.3d 743 (5<sup>th</sup> Cir. 2008) (construing Code § 526(a)(4) 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, the court held that the provision, as so construed, is not facially unconstitutional under the First Amendment)

## Means test: Income

### *Decided cases:*

*Blausey v. U.S. Trustee*, 552 F.3d 1124 (9th Cir. 2009) (the \$4,000 in monthly benefits received by a debtor under a private disability insurance policy was "income" for the purpose of calculating the debtor's "current monthly income")

**Means test: Secured debt expense deduction despite intent to surrender collateral**

*Decided cases:*

*In re Rudler*, 576 F.3d 37 (1st Cir., Aug. 5, 2009) (deduction allowed)

*Pending cases:*

*In re Quigley*, Case No. 09-2102 (4<sup>th</sup> Cir., filed Sept. 28, 2009) (Chapter 13 case)

**Means test: Transportation ownership expense deduction in absence of contractual expense**

*Petition for certiorari accepted by the Supreme Court:*

*Ransom v. FIA Card Services, N.A.*, Case No. 09-907 (Chapter 13 case)

*Decided cases:*

*In re Tate*, 571 F.3d 423 (5th Cir., June 10, 2009) (deduction allowed)

*In re Ross-Tousey*, 549 F.3d 1148 (7th Cir., Dec. 17, 2008) (deduction allowed)

*In re Washburn*, 579 F.3d 934 (8<sup>th</sup> Cir., August 28, 2009) (deduction allowed)

*In re Ransom*, 577 F.3d 1026 (9<sup>th</sup> Cir., August 14, 2009) (deduction not allowed)

*Pending cases:*

*In re Coffin*, Case No. 10-9008 (1<sup>st</sup> Cir., filed Oct. 6, 2010) (Chapter 13 case)

*In re Stipe*, Case No. 09-3798 (3rd Cir., filed Sept. 30, 2009) (Chapter 13 case)

*In re Kimbro*, Case No. 08-5871 (6<sup>th</sup> Cir., filed July 16, 2008) (Chapter 13 case) (oral argument was held on March 12, 2009)

*Skehen v. Soos*, Case No. 10-2007 (10th Cir., filed Jan. 12, 2010) (Chapter 13 case) (stayed pending the Supreme Court's decision in *In re Ransom*)

**Means test: Other expense**

*Decided cases:*

*In re Egebjerg*, 574 F.3d 1045 (9th Cir., Aug. 3, 2009) (a debtor's obligation to repay a loan from his retirement account was not deductible as a secured debt expense or as an other necessary expense, nor did it constitute a special circumstance for the purpose of the means test)

## Chapter 7 reaffirmation

### *Decided cases:*

*In re Jones*, 591 F.3d 308 (4<sup>th</sup> Cir., Jan. 11, 2010) (BAPCPA eliminated ride-through for personal property serving as collateral for a secured debt)

*In re Dumont*, 581 F.3d 1104 (9th Cir., Sept. 15, 2009) (same)

## Chapter 13 hanging paragraph: negative equity

### *Cases holding that negative equity is protected:*

*In re Peaslee*, 585 F.3d 53 (2nd Cir., Oct. 9, 2009) (unanimous panel decision following decision in *In re Peaslee*, 13 N.Y.3d 75 (N.Y., June 24, 2009))

*In re Price*, 562 F.3d 618 (4th Cir., April 13, 2009) (unanimous panel decision)

*In re Dale*, 582 F.3d 568 (5th Cir., Sept. 8, 2009) (unanimous panel decision)

*In re Westfall*, 599 F.3d 498 (6<sup>th</sup> Cir., March 24, 2010) (unanimous panel decision)

*In re Howard*, 597 F.3d 852 (7th Cir., March 1, 2010) (unanimous panel decision)

*In re Mierkowski*, 580 F.3d 740 (8th Cir., Sept. 8, 2009) (case no, 08-3866) (2-1 panel decision)

*In re Callicott*, 580 F.3d 753 (8th Cir., Sept. 9, 2009) (following *Mierkowski*, above)

*In re Ford*, 574 F.3d 1279 (10th Cir., Aug. 3, 2009) (2-1 panel decision)

*In re Graupner*, 537 F.3d 1295 (11th Cir., Aug. 6, 2008) (unanimous panel decision)

### *Cases holding that negative equity is not protected:*

*In re Penrod*, 611 F.3d 1158 (9th Cir., July 16, 2010)

Circuits without pending Court of Appeal activity: 1<sup>st</sup> and 3<sup>rd</sup>

## Chapter 13 hanging paragraph: surrender in full satisfaction

*Decided cases (all have disallowed):*

*AmeriCredit Financial Services, Inc. v. Tompkins*, 604 F.3d 753 (2nd Cir., May 18, 2010)

*Tidewater Finance Co. v. Kenney*, 531 F.3d 312 (4th Cir., June 25, 2008)

*In re Miller*, 570 F.3d 633 (5th Cir., June 5, 2009)

*In re Long*, 519 F.3d 288 (6th Cir., March 4, 2008)

*In re Wright*, 492 F.3d 829 (7<sup>th</sup> Cir., July 3, 2007)

*Capital One Auto Finance v. Osborn*, 515 F.3d 817 (8th Cir., Feb. 5, 2008)

*In re Ballard*, 526 F.3d 634 (10th Cir., May 19, 2008)

*In re Barrett*, 543 F.3d 1239 (11th Cir., Sept. 29, 2008)

Circuits in which the question is still open: 1<sup>st</sup>, 3<sup>rd</sup>, 9<sup>th</sup>, D.C.

## Chapter 13 hanging paragraph: other issues

*Pending cases:*

None.

## Chapter 13 plan length

### *Decided cases:*

*In re Frederickson*, 545 F.3d 652 (8th Cir. Oct 27, 2008) (“applicable commitment period” is temporal requirement where the debtor’s projected disposable income is positive; the court did not decide the issue where PDI is negative)

*In re Kagenveama*, 541 F.3d 868 (9th Cir., June 23, 2008) (“applicable commitment period” is a temporal requirement for a debtor with positive projected disposable income, but has no application to a debtor with negative projected disposable income)

*In re Tennyson*, 611 F.3d 873 (11th Cir., July 16, 2010) (the “applicable commitment period” is a temporal requirement for all debtors)

### *Pending cases:*

*Baud v. Carroll*, Case No. 09-2164 (6th Cir., filed Sept. 15, 2009) (whether an above-median Chapter 13 debtor’s plan must be 60 months long even where the debtor has negative projected disposable income) (oral argument was held on August 6, 2010)

## Chapter 13 projected disposable income

Controlling: *Hamilton v. Lanning*, 130 S.Ct. 2464, 177 L.Ed.2d 23 (June 7, 2010) (adopting forward-looking approach)

### *Decided cases (prior to Hamilton v. Lanning):*

*In re Nowlin*, 576 F.3d 258 (5th Cir., July 17, 2009) (adopting forward-looking approach; the bankruptcy court could take into account the fact that the debtor would complete repaying a loan from her 401(k) account in the 24<sup>th</sup> month of her 60-month plan)

*In re Turner*, 574 F.3d 349 (7th Cir., July 20, 2009) (adopting forward-looking approach; the debtor could not deduct the expense of repaying a secured debt for which he intended to surrender the collateral)

*In re Frederickson*, 545 F.3d 652 (8th Cir. Oct 27, 2008) (adopting forward-looking approach; no specific issue involved)

*In re Lasowski*, 575 F.3d 815 (8th Cir. Aug 12, 2009) (applying *Frederickson*; debtor may not deduct full monthly payment for debt that will be repaid in full prior to end of plan term)

*In re Kagenveama*, 541 F.3d 868 (9th Cir., June 23, 2008) (adopting mechanical approach)

*In re Lanning*, 545 F.3d 1269 (10th Cir., Nov. 13, 2008) (adopting forward-looking approach; the debtor's income had decreased)

### *Decided cases (following Hamilton v. Lanning):*

*In re Darrohn*, 615 F.3d 470 (6th Cir., July 22, 2010) (the debtor's income from a new job should be taken into account; a debtor may not subtract payments on a secured debt for which the collateral is to be surrendered)

*In re Johnson*, 2010 WL 2594354 (7<sup>th</sup> Cir., June 21, 2010) (the bankruptcy court did not err in excluding workers' compensation benefits that the debtor wife received during the six-month lookback period used on Form 22C but that had stopped on the petition date)

### *Pending cases:*

*In re Coffin*, Case No. 10-9008 (1<sup>st</sup> Cir., filed Oct. 6, 2010) (deduction of standard IRS vehicle ownership expense where the debtor has no contractual obligation)

*In re Stipe*, Case No. 09-3798 (3rd Cir., filed Sept. 30, 2009) (deduction of standard IRS vehicle ownership expense where the debtor has no contractual obligation)

*In re Quigley*, Case No. 09-2102 (4<sup>th</sup> Cir., filed Sept. 28, 2009) (deduction of secured debt expense where the debtor intends to surrender the collateral for the debt)

*In re Edwards*, Case No. 10-60288 (5<sup>th</sup> Cir., filed April 15, 2010) (deduction of standard IRS vehicle ownership expense where the debtor has no contractual obligation; stayed pending the decision of the Supreme Court in *Ransom v. MBNA*.)

*In re Kimbro*, Case No. 08-5871 (6<sup>th</sup> Cir., filed July 16, 2008) (deduction of standard IRS vehicle ownership expense where the debtor has no contractual obligation) (oral argument was held on March 12, 2009)

*In re Wathen*, Case No. 09-60043 (9<sup>th</sup> Cir., filed Nov. 6, 2009) (deduction of secured debt expense where debtor intended to avoid lien) (oral argument is scheduled for December 8)

*Renteria v. Skelton*, Case No. 10-55059 (9<sup>th</sup> Cir., filed Jan. 12, 2010) (Whether the term "unsecured creditors" in Code § 1325(b)(1)(B), to whom a Chapter 7 debtor must pay his or her projected disposable income, includes only general [nonpriority] unsecured creditors, or includes priority creditors as well)

*Skehen v. Soos*, Case No. 10-2007 (10<sup>th</sup> Cir., filed Jan. 12, 2010) (deduction of vehicle ownership expense in the absence of a contractual expense) (stayed pending the Supreme Court's decision in *In re Ransom*)

## Limitation of exemptions

### *Decided cases:*

*In re Fehmel*, 2010 WL 1287618 (5th Cir., April 5, 2010) (applying Code § 522(p) but not finding it necessary to decide between the "title" and the "equity" interpretations of the provision)

*In re Greene*, 583 F.3d 614 (9th Cir. 2009) (the debtor's filing of a declaration of homestead did not constitute the "acquisition" of an "interest" in the property under Code § 522(p))

*In re Rogers*, 513 F.3d 212 (5th Cir. 2008) (the homestead exemption cap found in Code § 522(p) does not apply to a homestead interest established within the 1,215-day period preceding the filing of the bankruptcy petition if the debtor acquired title to the property before that statutory period)

*In re Larson*, 513 F.3d 325 (1st Cir. 2008) (the limitation of the homestead exemption to \$125,000 in Code § 522(q)(1)(B)(iv), applicable where the debtor's debt arises from "any criminal act, intentional tort, or willful or reckless misconduct" causing serious physical injury or death in the preceding five years, applied to the Chapter 7 debtor's \$1 million debt arising from her settlement of a civil action to recover for a wrongful death caused by the debtor's operation of a motor vehicle, where the debtor had been criminally charged with negligent vehicular homicide in state court, and that court had found facts sufficient to find the debtor guilty of negligent vehicular homicide, but had continued the case without a formal determination for one year)

*In re Addison*, 540 F.3d 805 (8th Cir. 2008) (before fraudulent intent could be found under Code § 522(o), there needed to appear in evidence some facts or circumstances that were extrinsic to the mere fact of conversion of nonexempt assets into exempt assets and that were indicative of a fraudulent purpose)

## Other issues

### *Decided cases:*

*In re Zarnel*, 619 F.3d 156 (2nd Cir., August 26, 2010) (a debtor who files a voluntary bankruptcy petition without complying with the prepetition credit counseling requirement found in Code § 109(h) commences a case; the restrictions of § 301 and § 109(h) are not jurisdictional, but rather elements that must be established to sustain a voluntary bankruptcy proceeding)

*Community Bank, N.A. v. Riffle*, 617 F.3d 171 (2nd Cir., August 9, 2010) (the Chapter 13 debtors complied with Code § 521(a)(1)(B)(iv), requiring a debtor, “unless the court orders otherwise,” to file “copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor”; only the debtor husband had income, and the debtors, who filed their bankruptcy petition on September 21, 2007, submitted (1) the husband’s September 14, 2007, payment advice, which covered the pay period through September 7 and was the last payment advice the husband received during the applicable 60-day period, and which showed the husband’s earnings and deductions for that pay period as well as his year-to-date earnings and payroll deductions for various categories; and (2) an “Sales Earnings Report” previously prepared by the husband’s employer, which showed his gross earnings for each pay period from January 5, 2007, through August 31, 2007)

*In re Barner*, 597 F.3d 651 (5th Cir., Feb. 15, 2010) (Code §§ 362(b)(20), (d)(4), which provide for in-rem relief-from-stay orders, did not overrule *Jefferson v. Mississippi Gulf Coast YMCA, Inc.*, 73 B.R. 179 (S.D. Miss. 1986), which held that the automatic stay does not bar foreclosure proceedings “where an Order ... was entered lifting the stay ... in a previous bankruptcy involving the same debtors, the same creditors and the same property”)

*In re Warren*, 568 F.3d 1113 (9th Cir., June 18, 2009) (a court’s authority to waive the requirement of providing the information specified in Code § 521(a)(1)(B) may be exercised even after the expiration of the 45-day period established in § 521(i)(1) for the provision of that information)

*In re Acosta-Rivera*, 557 F.3d 8 (1st Cir., Feb. 19, 2009) (same as above)

*In re Casey*, 274 Fed. Appx. 205 (3rd Cir., April 18, 2008) (Code § 521(e)(2)(A)(i) requires a debtor to submit to the court the most recent tax return that he or she has actually filed with the IRS; the provision does not require the debtor to complete, file with the IRS, and submit a more recent return)



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