

Consumer Bankruptcy Law: Chapters 7 & 13

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PREFACE

This monograph provides an overview of consumer bankruptcy law and describes the statutory framework for bankruptcy relief under Chapters 7 and 13 of the Bankruptcy Code, Title 11 of the U.S. Code. It is intended primarily as a reference for Article III judges, especially district judges, who may not handle bankruptcy cases frequently, but other judges may also find it helpful.

This monograph describes the types of fact and legal issues that arise in the bankruptcy and appellate courts, highlighting the relevant and principal Supreme Court, appellate, and trial court authority. Important circuit conflicts are examined where applicable.

Case law is current through December 31, 2014. References to the U.S. Code are to the 2006 version unless stated otherwise. Some unpublished decisions are cited. Although they are not precedential, they may have persuasive value.¹

Appendix B, For Further Reference, lists suggested sources for more complete analysis of bankruptcy issues and law.

The author would like to thank Judge Jon P. McCalla (Western District of Tennessee) for his invaluable review of the draft of this monograph.

1. See Fed. R. App. P. 32.1.

OVERVIEW

The statutory framework for consumer bankruptcy relief is contained in Chapters 7 and 13 of the Bankruptcy Code, Title 11 of the U.S. Code. Relief available under Chapters 7 and 13 is distinct from that under Chapters 9, 11, and 12. While nonconsumer debtors may file for relief under Chapters 7 and 13, the most common debtors are consumers. In the twelve months ending June 30, 2014, there were 1,000,083 bankruptcy filings, 969,970 of which were nonbusiness filings. Of the nonbusiness filings, 649,975 were under Chapter 7 and 318,781 were under Chapter 13.²

Who is a debtor?

Although the term “debtor” has broader meaning in the context of financial transactions, “debtor” in this monograph refers to individuals who file for relief under the Bankruptcy Code.³ A “consumer debtor” is one whose primary debts are “consumer debts,” a term defined in the Bankruptcy Code as “debt incurred by an individual primarily for a personal, family, or household purpose.”⁴ A debtor may have business-related debts and still be a consumer debtor, provided the debts fall within the “consumer debt” definition; one who has less than a majority of “consumer debt” would not necessarily be disqualified for relief under Chapter 7 or 13. But, as will be seen in later discussion of eligibility for bankruptcy relief, the amount of debt is a factor. Notwithstanding that a particular debtor may have a mixture of consumer and nonconsumer debt and still be eligible for relief under these chapters of the Code, the focus of this monograph is on consumer debtors. Thus the discussions to follow apply to individuals filing for bankruptcy relief. The monograph does

2. Detailed Statistical Table F-2, *available at* <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/F02Sep12.pdf>.

3. 11 U.S.C. § 101(13) (“The term ‘debtor’ means person . . . concerning which a case under this title has been commenced.”).

4. 11 U.S.C. § 101(8).

not cover bankruptcy relief for corporations, partnerships, or other entities.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) significantly amended the Bankruptcy Code.⁵ This examination of the Bankruptcy Code's provisions is based on the Code as amended in 2005, along with any relevant subsequent amendments. The 2005 amendments did not change the entire 1978 Bankruptcy Code, but most of its changes were to consumer portions.⁶ Owing to space limitations, this monograph does not attempt to distinguish the pre-2005 Code from the amended Code. Appendix B, For Further Reference, lists resources about the history of the bankruptcy laws of the United States, as well as suggested sources for more complete analysis of bankruptcy issues and law.

What are bankruptcy courts?

The bankruptcy courts are trial courts in the federal judicial system.⁷ Where relevant, the monograph examines procedural issues, including case management tools. Appeals from the bankruptcy courts may go to the district court, or, when an appropriate election has been made, to a bankruptcy appellate panel, and then to the courts of appeals, with final appeal to the Supreme Court of the United States.⁸

This monograph is organized as follows:

- Part 1 is an overview of the structure of the bankruptcy courts, their jurisdiction and jurisdictional limits. It explains the procedural rules and the fundamentals of the Bankruptcy Code's structure, and it summarizes the primary terms used in consumer bankruptcy practice.⁹ The appellate process, including the potential for direct appeals to the circuit courts, is briefly described.

5. Pub. L. 109-8, 119 Stat. 23 (Apr. 20, 2005).

6. For analysis of BAPCPA's amendments and black-lined Code, showing changes made by Act, see Hon. William H. Brown & Lawrence R. Ahern III, *2005 Bankruptcy Reform Legislation* (2d ed. 2005).

7. 28 U.S.C. § 151.

8. *Id.* § 158.

9. For bankruptcy terms, see Glossary, *infra* page 163.

Overview

Part 1 concludes with a short explanation of the scope of consumer-related litigation that occurs in the bankruptcy courts.

- Part 2 discusses the commencement of a bankruptcy case by the filing of a petition; the Code's filing requirements and debtor duties; the automatic stay that comes into effect; exceptions from the stay; grounds for moving for stay relief; and issues related to damages for stay violations.
- Part 3 describes how the bankruptcy estate is created and looks at the function of exemptions that may be claimed by debtors under either the Bankruptcy Code or applicable state law. It analyzes recent Supreme Court and other judicial authority about exemptions and their objections.
- Part 4 explains the claims allowance process, including objections to claims and the different levels of priority for distribution to creditors. It describes the Federal Rules of Bankruptcy Procedure for proofs of claims, along with case analysis of the claims process. Standing to file a proof of claim is an issue that receives substantial attention from the courts, and many issues have arisen in the area of claims filed by home mortgage creditors and other secured creditors.
- Part 5 examines Chapter 7 relief, including the means test, which is an eligibility threshold to relief under Bankruptcy Code § 707. It covers reaffirmation issues, discharge, and the primary exceptions from discharge, with references to illustrative case authority. The grounds for dismissal of cases and potential conversion of a Chapter 7 case to Chapter 13 are also explained.
- Part 6 addresses Chapter 13 relief, beginning with eligibility. It covers the plan proposal and confirmation process, as well as grounds for objection to confirmation and plan modification. Part 6 explains dismissal and conversion of Chapter 13 cases, as well as the discharge issues that arise in Chapter 13 relief.

~ PART 1 ~

INTRODUCTION: BANKRUPTCY COURTS AND THE CODE

1.1 Structure of bankruptcy courts

Bankruptcy relief is under Title 11 of the U.S. Code, through petitions filed in the bankruptcy courts, which are units of the districts courts under 28 U.S.C. § 151. The constitutional basis for bankruptcy relief is Article I, Section 8 of the U.S. Constitution, which authorizes congressional creation of “uniform laws on the subject of Bankruptcies throughout the United States.” “Uniformity” does not necessarily mean that each aspect of the application of bankruptcy relief is the same for every debtor, wherever located. For example, although the Bankruptcy Code governs bankruptcy relief, state law exemptions may apply to debtors in bankruptcy, and state law may be applicable in many determinations that are made in bankruptcy cases, such as when the Uniform Commercial Code controls validity of a security interest, which may influence determination of the allowance of a secured claim. The Uniformity Clause does limit bankruptcy relief to legislation on the federal level. There have been numerous bankruptcy acts,¹⁰ beginning with the Bankruptcy Act of 1800.¹¹ The current Bankruptcy Code is based on the 1978 enactment, as it has been amended several times.¹² The most recent substantial amendment, especially impacting consumer issues, was in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).¹³ BAPCPA frames much of the focus of the discussion to follow, since it created legal issues

10. See, e.g., Charles J. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am. Bankr. Inst. L. Rev. 5 (Spring 1995); Hon. Nancy C. Dreher & Hon. Joan N. Feeney, *Bankruptcy Law Manual* § 1:2 (5th ed. 2014).

11. 2 Stat. 19 (1800).

12. Substantial amendments to the 1978 Code include the Bankruptcy Amendments Act of 1984 and the Bankruptcy Reform Act of 1994.

13. Pub. L. 109-8, 119 Stat. 23 (Apr. 20, 2005).

for the bankruptcy and appellate courts. This monograph highlights the principal appellate decisions addressing consumer issues raised by BAPCPA—as well as by pre-BAPCPA portions of the Bankruptcy Code that remain relevant—and suggests examples of judicial decisions that may form the basis for further research.

Each federal judicial district has a bankruptcy court, composed of one or more bankruptcy judges, and each state has one or more judicial districts. There are ninety bankruptcy districts across the country. Each bankruptcy court generally has its own clerk's office, although the services provided by a clerk's office may be shared with the clerk's office of the district court. Each bankruptcy judge is an Article I judge, a judicial officer of the district court, is appointed by the applicable court of appeals under the procedure outlined in 28 U.S.C. § 152, serving for a fourteen-year term, and is subject to reappointment.

In 1982, the Supreme Court, in *Northern Pipeline Construction Co. v. Marathon Pipeline*,¹⁴ held that the broad, independent authority given to bankruptcy judges under the 1978 Code was an unconstitutional grant to non-Article III courts. In response, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA),¹⁵ under which a bankruptcy court became “a unit of the district court to be known as the bankruptcy court for that district.”¹⁶ “[O]riginal and exclusive jurisdiction of all cases under [the Bankruptcy Code]” is vested in the Article III district court.¹⁷ The district court also has “exclusive jurisdiction” over property of a bankruptcy debtor and of the bankruptcy estate created on the filing of a bankruptcy petition,¹⁸ as well as “original but not exclusive

14. 458 U.S. 50 (1982). For a discussion of *Northern Pipeline* and the jurisdictional history of the bankruptcy courts, see, e.g., *Norton Bankruptcy Law and Practice*, ch. 4 (3d ed. 2013); Hon. David S. Kennedy & Spencer Clift, *An Historical Analysis of Insolvency Laws and Their Impact on the Role, Power and Jurisdiction of Today's United States Bankruptcy Court and Its Judicial Officers*, 9 J. Bankr. L. & Prac. 165 (Feb. 2000).

15. Pub. L. No. 98-353, 98 Stat. 333 (1984).

16. 28 U.S.C. § 151.

17. *Id.* § 1334(a).

18. *Id.* § 1334(e). See *infra* Part 3 for a discussion of bankruptcy estates.

jurisdiction over all civil proceedings arising under title 11, or arising in or related to cases under title 11.”¹⁹

As a practical matter, the district court is rarely the first court to hear matters in a bankruptcy case. BAFJA created a referral process, under which the district court may provide that “any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.”²⁰ In each district, there is a standing order of reference entered by the district court: bankruptcy cases and proceedings are filed initially with the bankruptcy court clerk, so the bankruptcy court acts as the court of first impression for disputed motions or proceedings in or related to bankruptcy cases. In a typical consumer case, absent some contested matter or proceeding, the debtor may never come before the bankruptcy judge, and the case may be administered by the designated trustee.

Section 157(b) of Title 28 describes what a bankruptcy judge may hear and determine. It describes the bankruptcy court’s authority to hear and determine cases under Title 11, and core proceedings arising under Title 11 or arising in a case under Title 11. “Core proceedings” are defined by a non-exclusive list in § 157(b)(2). Section 157(b) describes several core proceedings, separating them from “noncore” proceedings, over which the bankruptcy judge may conduct hearings and enter proposed findings and conclusions. The term “proceeding” is broad, including motions and complaints that may be filed in a bankruptcy case.

As evidenced by the Supreme Court’s decision in *Stern v. Marshall*,²¹ however, the statutory description of a bankruptcy court’s authority is not necessarily constitutional. *Stern* arose out of a Chapter 11 case in which the bankruptcy court had entered a final order in a counterclaim for tortious interference filed by the debtor-in-possession against an individual filing a claim in the case; 28 U.S.C. § 157(b)(2)(C) specifically includes such a counterclaim as a “core proceeding” over which the bankruptcy court may enter a final order. The problem was that the counterclaim was based not on any Bankruptcy Code provision, but on

19. *Id.* § 1334(b).

20. *Id.* § 157(a).

21. 131 S. Ct. 2594 (2011).

state common law, and the Court ruled that the statutory grant of authority violated Article III, Section 1, of the Constitution, when the counterclaim “is not resolved in the process of ruling on the creditor’s proof of claim.”²²

Because of *Stern*, bankruptcy and appellate courts have had to analyze anew whether the bankruptcy court has constitutional authority to enter final orders in some contested matters or proceedings. If the authority is lacking, the bankruptcy judge may still hear a core proceeding, just as it can in a noncore proceeding, and enter a proposed finding of facts and conclusions of law that would be submitted to the district court for consideration in its *de novo* review and entry of a final decision.²³

The Supreme Court stressed the importance of *de novo* review in *Executive Benefits Insurance Agency v. Arkison (In re Bellingham Insurance Agency Inc.)*,²⁴ decided after *Stern*. In *Bellingham*, the defendant challenged the bankruptcy court’s authority to enter final judgment in a noncore fraudulent conveyance proceeding, and an issue was raised as to whether the defendant had consented to the bankruptcy court’s authority. The Ninth Circuit held that the constitutional right to final judgment before an Article III judge was waivable by litigants.²⁵ Without deciding the consent question, the Supreme Court found that the district court had conducted a *de novo* review, and that even if the bankruptcy court’s entry of a judgment was invalid, the district court’s review cured any error.

22. *Id.* at 2690.

23. 28 U.S.C. § 157(c). See, e.g., *Ortiz v. Aurora Health Care, Inc. (In re Ortiz)*, 477 B.R. 714 (E.D. Wis. 2012) (although Title 28 does not specify that bankruptcy court may propose findings and conclusions, in light of *Stern*, its authority to do so is clear). *Safanda v. Castellano (In re Castellano)*, 514 B.R. 555 (Bankr. N.D. Ill. 2014) (treating fraudulent conveyance action as noncore, entering proposed findings and conclusions for district court).

24. 134 S. Ct. 2165 (2014). For a review of over 200 decisions subsequent to *Stern* and prior to *Executive Benefits*, see Hon. John E. Hoffman, Jr., Brian L. Gifford & Andria M. Beckham, *Decisions Interpreting Stern v. Marshall* (Federal Judicial Center Workshop for Bankruptcy Judges, Aug. 1–3, 2012), available at [http://cwn.fjc.dcn/public/pdf.nsf/lookup/BJ120058.pdf/\\$file/BJ120058.pdf](http://cwn.fjc.dcn/public/pdf.nsf/lookup/BJ120058.pdf/$file/BJ120058.pdf).

25. *Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency Inc.)*, 702 F.3d 553 (9th Cir. 2012).

The Supreme Court has granted certiorari on a Seventh Circuit decision²⁶ to determine first, whether a subsidiary state law property issue in a § 541 action deprives the bankruptcy court of constitutional authority to enter final judgment, and second, whether Article III permits a bankruptcy court to have authority as a result of a litigant's consent—and, if so, whether implied consent is sufficient.

When a bankruptcy court's constitutional authority is questioned, the parties may, as a savings provision, consent to the entry of a final order by the bankruptcy court, in both core and noncore proceedings.²⁷ But post-*Stern* decisions have put that in doubt, with the courts of appeals split and certiorari now granted on the issue of Article III waiver. For example, the Sixth Circuit held, in *Waldman v. Stone*,²⁸ that a bankruptcy litigant cannot waive a constitutional right to an Article III judge's entry of final judgment, even though the litigant had consented to the bankruptcy judge's entry of final judgment in a state-law claim against him. The Seventh Circuit agreed, in *Wellness International Network, Ltd. v. Sharif*,²⁹ holding that while the bankruptcy court had constitutional authority to enter final judgment on a creditor's objection to discharge, it lacked constitutional authority to enter final judgment on the creditor's state-law alter-ego liability claim; and that the Chapter 7 debtor did not waive the constitutional issue by consenting to jurisdiction or by failing to object earlier. The Supreme Court, by its grant of certiorari in *Wellness*, is expected to decide the extent to which a party may consent to the bankruptcy court's jurisdiction.³⁰

Fortunately, the issue of the bankruptcy court's authority doesn't arise typically in the everyday administration of consumer cases. In most consumer cases and proceedings, the bankruptcy court's authority to en-

26. 134 S. Ct. 2901 (2014), *granting cert. from Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751 (7th Cir. 2013) (discussed *infra* text accompanying note 29).

27. 28 U.S.C. § 157(c)(2).

28. 698 F.3d 910 (6th Cir. 2012).

29. 727 F.3d 751 (7th Cir. 2013).

30. *See supra* note 26 and accompanying text.

ter final orders is clear and undisputed.³¹ *Stern* did not address the bankruptcy court's subject-matter jurisdiction, but rather its authority over certain proceedings.³² The decision does not restrict the bankruptcy court's authority to enter final orders, subject to appeal, in the basic issues involved in the typical consumer case—matters such as determining an individual's eligibility to file bankruptcy, determining whether the automatic stay applies or has been violated, confirming Chapter 13 plans, determining the discharge of particular debts or objections to the general discharge,³³ allowing claims,³⁴ determining what is property of the bankruptcy estate, allowing exemptions, and other clearly “core” matters involved in a consumer case.³⁵ The authority of the bankruptcy court to enter final—rather than proposed—orders becomes more questionable as the issues involved become more controlled purely by nonbankruptcy state law,³⁶ or when the determination will have no direct impact on the bankruptcy estate. Although the Supreme Court may decide more *Stern* issues in the *Wellness* appeal, the outcome of the full range of potential issues related to the bankruptcy courts' constitutional authority is presently unknown.

The mere fact that state law will be applied does not necessarily mean that an issue before the bankruptcy court is lacking in subject-matter jurisdictional foundation. As the Supreme Court recognized, what consti-

31. See, e.g., *In re Salander O'Reilly Galleries*, 453 B.R. 106 (Bankr. S.D.N.Y. 2011) (matters such as automatic stay, bankruptcy estate, and discharge are clearly within Article I power).

32. See, e.g., *CirTran Corp. v. Advanced Beauty Solutions, LLC* (*In re Advanced Beauty Solutions, LLC*), No. 11-1183-PattPe, 2012 WL 603692 (B.A.P. 9th Cir. Feb. 8, 2012).

33. See *Wellness Int'l Network Ltd. v. Sharif*, 727 F.3d 751 (7th Cir. 2013), cert. granted, 134 S. Ct. 2901 (2014) (distinguishing between bankruptcy court's constitutional authority to enter final judgment on objection to discharge and lack of authority to enter final judgment on state law alter-ego claim by same creditor).

34. See, e.g., *In re Pulaski*, 475 B.R. 681 (Bankr. W.D. Wis. 2012).

35. 28 U.S.C. § 157(b)(2). See, e.g., *Sheehan v. Dobin*, No. 10-6288 (FLW), 2012 WL 426285 (D.N.J. Feb. 9, 2012) (adversary proceeding to determine debtor's interest in property was core).

36. See, e.g., *Shaia v. Taylor* (*In re Connelly*), 476 B.R. 223 (Bankr. E.D. Va. 2012) (*Stern* affects bankruptcy court's constitutional authority over purely state law matters).

tutes property of the bankruptcy estate may be, and often is, determined by state law.³⁷ Congress has given the states an option to require debtors in a particular state to use state law, rather than Bankruptcy Code, exemptions.³⁸ *Stern* and *Bellingham* emphasize, however, that when the bankruptcy court's authority is questioned, each of the courts involved may be required to analyze whether the bankruptcy or district court should enter the final order.

Not limited to the concerns about the bankruptcy court's constitutional authority, the district court may, at any time and on its own or a party's motion, withdraw the reference of a bankruptcy case or proceeding from the bankruptcy court³⁹—but withdrawal is rare, especially in consumer cases.

Assuming that the bankruptcy court enters a final order, the first level of appeal is to either the district court or the bankruptcy appellate panel (BAP), if a BAP has been created by the circuit court and if the particular district court has authorized appeals to the BAP.⁴⁰ Those appellate courts may also, when appropriate, entertain interlocutory appeals.⁴¹ The next level of appeal from the district court or BAP is to the circuit court,⁴² and BAPCPA created an option for the bankruptcy, district, or BAP courts to certify a particular matter of public importance (involving conflicting decisions or need for immediate appeal) directly to the applicable circuit court, which may, in its discretion, take such an appeal.⁴³ Federal

37. *Butner v. United States*, 440 U.S. 48 (1979).

38. See discussion *infra* § 3.6.

39. 28 U.S.C. § 157(d). See also, e.g., *Ortiz v. Aurora Health Care, Inc. (In re Ortiz)*, 477 B.R. 714 (E.D. Wis. 2012) (reference of core proceeding withdrawn). The Seventh Circuit had previously decided, in *Ortiz v. Aurora Health Care, Inc. (In re Ortiz)*, 665 F.3d 906 (7th Cir. 2011), that the bankruptcy court lacked constitutional authority to enter final judgment on debtors' claims that were grounded in Wisconsin law.

40. 28 U.S.C. § 158(a), (b).

41. *Id.* § 158(a)(3), (b)(4).

42. *Id.* § 158(d)(1).

43. *Id.* § 158(d)(2).

appellate courts have accepted several direct appeals on some unique issues presented by BAPCPA's amendments to the Code.⁴⁴

1.2 Procedures and rules in bankruptcy courts

As units of the district courts, the bankruptcy courts apply the Federal Rules of Evidence⁴⁵ and most of the Federal Rules of Civil Procedure, as those Rules are incorporated into Part VII of the Federal Rules of Bankruptcy Procedure. Part VII of the Bankruptcy Rules governs adversary proceedings, or complaints, filed in the bankruptcy court. Bankruptcy Rule 9014(c) applies many of the Part VII Rules to contested matters, or motions, and the bankruptcy judge may order other parts of the Part VII Rules applicable to motion practice. The bulk of the Federal Rules of Bankruptcy Procedure address procedural issues that are unique to bankruptcy cases and their administration.⁴⁶ The bankruptcy courts are trial courts that are not typically involved in the day-to-day administration of a case, but rather conduct hearings on the contested matters and adversary proceedings that are presented by the parties. Normal administrative functions are handled by the clerk's office or by the trustee appointed in a particular case.⁴⁷

In addition to the Federal Rules of Bankruptcy Procedure, each bankruptcy court in a district has local rules addressing procedural issues that are either unique to its district's practice or that supplement the Federal Rules.⁴⁸ Consumer practice varies on some issues district-by-district, even

44. See, e.g., *Johnson v. Zimmer*, 686 F.3d 224 (4th Cir. 2012) (direct appeal accepted and decided on Chapter 13 disposable income issue, involving how to determine household size). See discussion *infra* Part 6.

45. For analysis of the Federal Rules of Evidence as applied in bankruptcy cases, see Hon. Barry Russell, *Bankruptcy Evidence Manual* (2013–2014).

46. For analysis of the Federal Rules of Bankruptcy Procedure, see Lawrence R. Ahern III & Nancy MacLean, *Bankruptcy Procedure Manual* (annual editions).

47. The roles of trustees in Chapter 7 and 13 cases are discussed *infra* Parts 5 and 6.

48. See Fed. R. Bankr. P. 9029(a). The local rules of each court are available on the website of the U.S. Courts, at <http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx>.

though it operates under the same Code and Federal Rules.⁴⁹ For example, in Chapter 13 practice, there is currently no uniform or official plan form to be submitted by debtors, resulting in a variety of plan forms around the country,⁵⁰ as well as disagreement among courts on what a proposed plan may or must contain.⁵¹

For appeals from bankruptcy court orders, Part VIII of the Federal Rules of Bankruptcy Procedure applies; bankruptcy appellate panels, district courts, or circuit courts may also have their own rules for bankruptcy appeals.

To help judges with the detailed financial and other disclosures in bankruptcy practice, the Administrative Office of the United States Courts, in conjunction with the rules committees of the Judicial Conference of the United States, publishes the official and suggested procedural forms.⁵² Each bankruptcy district may also have local forms that are either required by local rule or recommended for more efficient practice.⁵³

The bankruptcy courts accept filings of cases and pleadings within a case by electronic means, and most of the pleading practice before these courts is electronically driven.

49. See, e.g., Scott F. Norberg & Nadja S. Compo, *Report on an Empirical Study of District Variations, and the Roles of Judges, Trustees and Debtors' Attorneys in Chapter 13 Bankruptcy Cases*, 81 Am. Bankr. L.J. 431 (Fall 2007).

50. The Advisory Committee on Bankruptcy Rules has proposed an official form for Chapter 13 plans. Proposed Official Form 113 has been published for comment at <http://www.uscourts.gov/rulesandpolicies/rules/proposed-amendments.aspx>. Assuming final adoption, the new official form and related rule amendments would be effective December 1, 2016.

51. See, e.g., *In re Gordon*, 471 B.R. 614 (D. Colo. 2012) (bankruptcy courts in district had disagreed on whether plan requirement was enforceable).

52. See the Official and Procedural Forms, available at <http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx>.

53. See, e.g., *In re Smith*, 511 B.R. 612 (Bankr. W.D. Mo. 2014) (discussing its local rule and plan form concerning effect of case conversion); *In re Armistead*, No. 11-36535, 2012 WL 3202964 (Bankr. S.D. Tex. Aug. 3, 2012) (discussing its local rule and form requirement for home mortgage creditors).

1.3 Structure of Bankruptcy Code

The Bankruptcy Code is divided by chapters, using odd numbers. Some chapters refer to a particular form of relief, and others contain portions of the Code that apply generally to any form of relief.

- Chapter 1 (discussed *infra* Parts 1 and 2) contains general provisions and definitions of many terms that appear throughout the Code. Section 103 states that Chapters 1, 3, and 5 apply to the relief sought under Chapter 7, 12, or 13.
- Chapter 3 (discussed *infra* Part 2) deals with commencement of the case, its administrative aspects, and the various officers, including trustees. It is applicable in Chapter 7 and 13 cases.
- Chapter 5 (discussed *infra* Parts 3 and 4) contains provisions for creditors and their claims, duties and benefits for the debtor, and the bankruptcy estate, including its exclusions and exemptions. It is applicable in Chapter 7 and 13 cases.
- Chapter 7 provides for liquidating cases, including for consumer debtors and certain nonconsumer debtors. Subchapters I and II of Chapter 7 are discussed *infra* Part 5.
- Chapter 9 (outside the scope of this monograph) deals with debt adjustment for a municipality.
- Chapter 11 (outside the scope of this monograph) addresses reorganization and liquidation relief, which typically is used by corporations or other entities, but may be available to individual debtors.
- Chapter 12 (outside the scope of this monograph) provides for reorganization by family farmers or family fishermen.
- Chapter 13 (discussed *infra* Part 6) describes readjustment of debts by individuals with regular income.
- Chapter 15 (outside the scope of this monograph) covers ancillary and cross-border cases.⁵⁴

The Glossary, *infra*, contains definitions of bankruptcy terms.

54. See, e.g., Hon. Louise De Carl Adler, *Managing the Chapter 15 Cross-Border Insolvency Case: A Pocket Guide for Judges* (Federal Judicial Center 2d ed. 2014).

1.4 United States trustee and bankruptcy administrator

Under 28 U.S.C. § 581, the U.S. Attorney General appoints a U.S. trustee for regions composed of judicial districts. The U.S. trustee has a variety of duties in consumer cases, including the establishment and supervision of a panel of private trustees to serve in all Chapter 7 cases,⁵⁵ the appointment of standing Chapter 13 trustees,⁵⁶ and the supervision “of the administration of cases and trustees in cases under” all chapters of the Code.⁵⁷ Under congressional action, the judicial districts in North Carolina and Alabama were excluded from the U.S. trustee program; these districts have bankruptcy administrators, who serve the equivalent function. While the trustee appointment and supervisory role of these administrative officers may be their most prevalent role in consumer cases, they enjoy broad statutory authority to “raise and . . . appear and be heard on any issue in any case or proceeding under this title [11].”⁵⁸

1.5 Litigation in bankruptcy courts

Bankruptcy courts are courts of first impression with jurisdiction over matters arising in or related to a bankruptcy case. Bankruptcy courts conduct hearings or trials on contested motions, contested plan confirmations, objections to claims, objections to exemptions, complaints about discharge of debts, and other matters that arise in or are related to the bankruptcy case. Bankruptcy Rule 7001 describes different types of adversary proceedings, which generally require the filing and proper service of a complaint.⁵⁹ Motion practice—or contested matters that do not fall within the requirements for an adversary proceeding—is governed by Bankruptcy Rules 9013 and 9014. Like the district courts, bankruptcy

55. 28 U.S.C. § 586(a)(1).

56. *Id.* § 586(b).

57. *Id.* § 586(a)(3).

58. 11 U.S.C. § 307.

59. *See* Fed. R. Bankr. P. 7001. Service of process is addressed in Fed. R. Bankr. P. 7004, which incorporates and expands on Fed. R. Civ. P. 4. *See generally* Lawrence R. Ahern III & Nancy MacLean, *Bankruptcy Procedure Manual* (annual editions).

courts use alternative dispute resolution. Many bankruptcy courts encourage mediation and have a pool of approved mediators.⁶⁰

The scope of consumer bankruptcy litigation is wide-reaching, including subject-matter both within and outside of the Bankruptcy Code. Violations of the automatic stay, bankruptcy estate issues, claims allowance, exemptions, discharge, plan confirmation objections, and other topics related to the Bankruptcy Code itself are discussed *infra* Parts 2 through 6. Outside of the Code, some of the commonly litigated consumer cases involve home mortgages and debt-collection activity (e.g., Truth in Lending Act, Real Estate Settlement Procedures Act, Fair Debt Collection Practices Act (FDCPA),⁶¹ and other consumer protection acts, both federal and state). Even when based, in part, on nonbankruptcy law, bankruptcy litigation often revolves around the allowance or disallowance of a claim filed by a creditor, or the recovery of assets for the benefit of the bankruptcy estate. The bankruptcy court also rules on a variety of avoidance litigation, often brought by the trustee,⁶² but on occasion by a debtor seeking to avoid some transfer or lien in order to claim the asset as exempt.⁶³

60. See, e.g., General Order Adoption of Procedures Governing Mediation (Bankr. S.D.N.Y.), available at <http://www.nysb.uscourts.gov>.

61. See, e.g., *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014) (filing proof of claim for time-barred debt violated FDCPA); *Patrick v. PYOD, LLC*, No. 1:14-cv539-RLY-TAB, 2014 WL 4100414 (S.D. Ind. Oct. 20, 2014) (citing *Crawford*, filing time-barred proofs of claim was cause of action under FDCPA).

62. See 11 U.S.C. §§ 544–551, for avoidance powers.

63. See *id.* § 522(g) & (h). See also, e.g., *Dickson v. Countrywide Home Loans (In re Dickson)*, 655 F.3d 585 (6th Cir. 2011) (recognizing debtor's standing under § 522(g)(1) & (h)).

~ PART 2 ~

**COMMENCEMENT OF CASE
AND AUTOMATIC STAY**

A consumer bankruptcy case, under either Chapter 7 or 13, is commenced with the filing of a basic petition, Official Form 1, with additional schedules, statement of financial affairs and forms required to complete the case filing process. The petition and its related schedules and statements are executed under penalty of perjury. Several Code sections come into play in this initial filing stage.

- Title 28 provides for proper venue.
- Title 11, § 109 describes who may be a debtor under each Chapter, with requirements for Chapters 7 and 13 (reviewed *infra* Parts 5 and 6).
- Section 301 provides for voluntary cases, which constitute the majority of Chapter 7 filings, while Chapter 13 is exclusively voluntary.
- Section 302 describes joint petitions, frequently filed by spouses under Chapters 7 and 13.
- Section 342 details notices required to be given to creditors of a case filing.
- Section 362 describes the automatic stay, which is triggered upon the commencement of the case.
- Section 521 spells out debtor's duties to satisfy eligibility and filing requirements.

2.1 Venue

Venue for bankruptcy cases is addressed in 28 U.S.C. § 1408, which provides that a case should be commenced in the district in which the individual has her domicile, residence, principal place of business, or principal assets for the 180 days, or greater portion thereof, immediately prior

to filing. Official Form 1 asks debtors to indicate that the venue is proper. For individuals in Chapter 7 or 13, this venue is typically driven by domicile or residence, but venue is waivable, and unless a timely objection is made to improper venue, the case may proceed in the filing district.⁶⁴ The bankruptcy court may transfer a case from one venue to another “in the interest of justice or for the convenience of the parties.”⁶⁵

It is unsettled whether the court may retain a case filed in the wrong venue, over the objection of a party in interest. Individuals sometimes file in the wrong venue, not necessarily out of bad faith, but because they live in one district yet are physically closer to another district; or perhaps because the attorney filing the case practices in another district. For example, a Northern Mississippi resident who lives close to the state line and works in Memphis, Tennessee, might more easily file in the Western District of Tennessee, with a Tennessee attorney. Absent any objection by creditors or other party in interest, the court may be unaware of the improper venue. The Sixth Circuit addressed this scenario, holding that venue must be strictly construed, and in the face of a timely objection (there by the U.S. trustee), the bankruptcy court had no discretion to retain an improperly venued case.⁶⁶ Under this strict view, the case must either be dismissed or transferred to the court with proper venue. Lacking such appellate authority, some bankruptcy courts have interpreted the combination of the venue statute and Bankruptcy Rule 1014 to permit retention of an improperly venued case, despite a timely objection.⁶⁷

2.2 Individual and joint petitions

Individuals who are consumer debtors may file for relief under either Chapter 7 or 13, as long as they satisfy eligibility requirements (discussed *infra* Parts 5 and 6). Generally, a person residing or domiciled in the United States is potentially a debtor.⁶⁸

64. See 28 U.S.C. § 1412; Fed. R. Bankr. P. 1014.

65. 28 U.S.C. § 1412. See also Fed. R. Bankr. P. 1014(a).

66. *Thompson v. Greenwood*, 507 F.3d 416 (6th Cir. 2007).

67. See, e.g., *In re Lazaro*, 128 B.R. 168 (Bankr. W.D. Tex. 1991).

68. 11 U.S.C. § 109(a). Section 109(b) specifically defines who is and is not eligible as a Chapter 7 debtor, but those requirements are directed primarily toward non-

Code § 302 provides that a joint petition may be filed by an individual and that “individual’s spouse,” and many Chapters 7 and 13 cases are joint filings by spouses. Issues addressed by some courts include whether this Code limitation on filings by spouses requires that the debtors be legally married under applicable state law, and whether bankruptcy cases may be filed by same-sex couples who may or may not be recognized as legally married by their state of residence or domicile.⁶⁹ A flexible interpretation of § 302 ran headlong into the 1996 enactment of the Defense of Marriage Act (DOMA), which defines “marriage” as a legal union between one man and one woman, and “spouse” as a person of the opposite sex who is a husband or wife.⁷⁰ The bankruptcy court in the Central District of California concluded that “no legally married couple should be entitled to fewer bankruptcy rights than any other legally married couple,” rejecting the U.S. trustee’s motion to dismiss a case filed by a same-sex couple, and holding that DOMA’s definition violated equal protection rights of legally married persons under the Fifth Amendment’s Due Process Clause.⁷¹

In *United States v. Windsor*,⁷² a taxpayer and surviving spouse of a same-sex couple had been denied spousal deduction on her tax return under DOMA’s definition of “marriage” and “spouse.” The Supreme Court held that DOMA’s definition of “marriage” was unconstitutional, depriving the taxpayer of Fifth Amendment protection. On the same day,

individuals. The threshold test for Chapter 7 eligibility is in § 707(b), the “means test,” discussed *infra* Part 5. Section 109(e) defines who is eligible as a Chapter 13 debtor, a topic explored *infra* Part 6.

69. See, e.g., *In re Matson*, 509 B.R. 860 (Bankr. E.D. Wis. 2014) (applying *United States v. Windsor*, 133 S. Ct. 2675 (2013), same-sex debtors legally married in Iowa were eligible to jointly file as spouses in Wisconsin, even though Wisconsin law didn’t recognize marriage).

70. 1 U.S.C. § 7.

71. *In re Balas*, 449 B.R. 567, 569 (Bankr. C.D. Cal. 2011) (en banc). See also *In re Somers*, 448 B.R. 677 (Bankr. S.D.N.Y. 2011) (holding decisions unrelated to bankruptcy and joint filings on constitutionality of DOMA may impact effect of that statute). See also *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012) (DOMA’s provisions denying federal benefits to same-sex, legally married couples in Massachusetts violated equal protection rights).

72. 133 S. Ct. 2675 (2013).

in *Hollingsworth v. Perry*,⁷³ the Court declined to rule on the constitutionality of state law restrictions on same-sex couples because of lack of standing of the petitioners. Although the *Hollingsworth* ruling allowed a lower court decision to stand and same-sex marriages to resume in some states, questions remain about the availability to same-sex couples of some state law rights. For example, although federal law may now permit same-sex married couples to file jointly for bankruptcy relief, under the *Windsor* holding, their rights to use applicable state law exemptions may still be undecided, particularly if those exemptions are restricted by the state's definition of "marriage."⁷⁴

2.3 Filing requirements

Section 521 of the Bankruptcy Code describes the debtor's requirements, or duties, for assuring a bankruptcy petition filing that will survive a motion to dismiss. In addition to a basic petition, Official Form 1, the debtor must file a list of creditors, with appropriate addresses, to enable the clerk's office noticing creditors of the filing.⁷⁵ In the typical case, "unless the court orders otherwise," a consumer debtor must file the following schedules and statements, if not with the petition, within forty-five days of initial filing:⁷⁶

1. Schedules of assets and liabilities.⁷⁷
2. Schedules of current income and liabilities.⁷⁸

73. 133 S. Ct. 2652 (2013).

74. See, e.g., *DeAngelis v. Holmes (In re Holmes)*, No. 1:12-bk-01801-RNO, 2013 WL 4446947, at *8 (Bankr. M.D. Penn. Aug. 21, 2013) (*Hollingsworth* "leaves any decision to change the state law definition of marriage in the hands of the state legislature").

75. 11 U.S.C. § 521(a)(1)(A). For notice provisions, see 11 U.S.C. § 342 and Fed. R. Bankr. P. 2002. For notice provided to creditors of case filing and certain deadlines, such as for proofs of claim, see Official Forms 9A, 9C, and 9I.

76. See Fed. R. Bankr. P. 1007-1(c) for time limits for filing required schedules and statements.

77. 11 U.S.C. § 521(a)(1)(B)(i). Official Forms 6–6H contain schedules of real and personal property, property claimed as exempt, secured and unsecured creditors, executory contracts, unexpired leases, and codebtors.

Part 2: Commencement of Case and Automatic Stay

3. Statement of financial affairs.⁷⁹
4. Evidence from the debtor's attorney or petition preparer that the consumer debtor was provided with explanation of choices between the various chapters for bankruptcy relief.⁸⁰ If no attorney or petition preparer was involved, the debtor makes a certification of receipt from the clerk of available remedies under each chapter.⁸¹
5. Copies of "payment advices" or other evidence of payroll information received by the debtor from an employer within sixty days before petition filing.⁸²
6. Statement of monthly net income.⁸³ This is necessary for the "means test" calculation for eligibility and other purposes, which are discussed later in regard to Chapters 7 and 13 relief.
7. Statement of "any reasonably anticipated increase in income or expenditures over the twelve-month period following the date of the filing."⁸⁴
8. As an eligibility requirement prior to filing either Chapter 7 or 13, individuals are required to engage in prebankruptcy budget and credit counseling, and to file with the court a certificate of completion of that requirement.⁸⁵ If a debt repayment plan was developed in conjunction with that counseling, a copy of the plan

78. *Id.* § 521(a)(1)(B)(ii). Official Forms 6I and J are important for determining eligibility and plan confirmation (discussed *infra* for Chapter 7 and 13 cases).

79. *Id.* § 521(a)(1)(B)(iii). See Official Form 7.

80. 11 U.S.C. §§ 342(b) & 521(a)(1)(B)(iii). See Official Form 1, Exhibit B.

81. See Procedural Form 201A.

82. 11 U.S.C. § 521(a)(1)(B)(iv).

83. *Id.* § 521(a)(1)(B)(v). See Official Forms 22A for Chapter 7 and 22C for Chapter 13.

84. 11 U.S.C. § 521(a)(1)(B)(vi). See Official Forms I & J, 22A & 22C.

85. 11 U.S.C. § 521(b)(1). See Official Form 1, Exhibit D.

must be filed.⁸⁶ Failure to obtain the counseling before filing the petition typically results in dismissal for lack of eligibility.⁸⁷

These schedules and statements are executed under penalty of perjury. Failure to complete the required filings within forty-five days results in an automatic case dismissal, unless the court finds cause to extend that time.⁸⁸

2.4 Debtor's duties subsequent to filing petition

In addition to the basic filing requirements, the debtor has postfiling duties (discussed in this section), including:

- state how collateral for secured debt will be treated, and comply with that stated intention;
- attend a meeting of creditors that is conducted by the trustee, and otherwise cooperate with the trustee; and
- comply with tax return requirements.

If the case is filed under Chapter 7, the debtor must file within thirty days of the petition date, or on or before the § 341 meeting of creditors, whichever is earlier, a statement of intentions as to retaining, redeeming, or surrendering property that is collateral for a secured loan.⁸⁹ Failure to file this statement of intention typically will result in termination of the automatic stay under § 362(h).⁹⁰ Section 521(a)(2)(B) provides that the debtor must perform whatever the stated intention was, as to secured property, within thirty days after the first date set for the § 341 meeting of creditors. Pursuant to § 521(a)(6), the Chapter 7 debtor may not retain

86. 11 U.S.C. § 521(b)(2).

87. See, e.g., *In re Ingram*, 460 B.R. 904 (B.A.P. 6th Cir. 2011); *Gibson v. Dockery (In re Gibson)*, No. CC-10-1399-PaHKi, 2011 WL 7145612 (B.A.P. 9th Cir. Dec. 1, 2011) (affirming sua sponte dismissal).

88. 11 U.S.C. § 521(i). See, e.g., *Soto v. Doral Bank (In re Soto)*, 491 B.R. 307 (B.A.P. 1st Cir. 2013) (case automatically dismissed on failure to provide payment advices within forty-five days).

89. 11 U.S.C. § 521(a)(2)(A). See Official Form 8, which also contains in Part B a statement of personal property subject to an unexpired lease, and the debtor's intention about assumption of a lease.

90. See, e.g., *In re Blixseth*, 454 B.R. 92 (B.A.P. 9th Cir. 2011).

personal property collateral unless, within forty-five days after the meeting of creditors, the debtor either redeems the property under § 721 or enters into a reaffirmation agreement with the creditor under § 524(c). The choices of redemption or reaffirmation are discussed *infra*, Part 5, under Chapter 7 relief.

A debtor has a duty to cooperate with the case trustee in the performance of the trustee's statutory obligations.⁹¹ A debtor is required to attend the meeting of creditors, as provided under Code § 341, and if the court holds a discharge determination under § 524(d), the debtor is required to attend.⁹² Discharge hearings are not held normally, unless there is a reaffirmation issue involved or the debtor is acting pro se.

A debtor who has an interest in an educational retirement account or under a qualified state tuition program, as defined in IRS Code § 523(b)(1) or 530(b)(1), must file with the court a record of that account.⁹³

Chapter 7 and 13 debtors must provide to the case trustee, no later than seven days before the first date set for the meeting of creditors, a copy, or transcript, of the federal income tax return for the most recent tax year preceding the petition filing, and if requested, a copy is to be furnished to a creditor.⁹⁴ Failure to provide these tax returns results in dismissal of the case, “unless the debtor demonstrates that the failure . . . is due to circumstances beyond the control of the debtor.”⁹⁵ In addition, if requested by the court, trustee, or party in interest, the debtor must provide a copy of all federal income tax returns—or transcripts, and their amendments—that are filed during the case, including those prepetition returns that are filed after commencement of the case.⁹⁶ Failure to file the postpetition tax returns can also result in case dismissal or conversion,

91. 11 U.S.C. § 521(a)(3) & (4).

92. *Id.* § 521(a)(5).

93. *Id.* § 521(e).

94. *Id.* § 521(e)(2)(A).

95. *Id.* § 521(e)(2)(B) & (C). *See, e.g., In re Chassie*, No. 10-41432-MSH, 2011 WL 133007 (Bankr. D. Mass. Jan. 14, 2011) (dismissal resulting from debtor's failure to provide required tax return).

96. 11 U.S.C. § 521(f)(1)–(3).

upon motion of the taxing authority.⁹⁷ Postpetition tax returns are more commonly relevant in Chapter 13 cases than Chapter 7 because monitoring a debtor's tax returns may lead to potential modification of confirmed plans over the three- to five-year period of a plan.⁹⁸ In a Chapter 13 case, until a plan is confirmed, and annually thereafter until the case is closed, the debtor is obligated to provide a statement, under penalty of perjury, of the income and expenses for the most recent tax year, if the court, trustee, or party-in-interest requests it.⁹⁹

If requested by the U.S. trustee or case trustee, the debtor shall provide some documentary evidence of identity—typically required at the § 341 meeting of creditors—such as driver's license or passport.¹⁰⁰

2.5 Joint administration and substantive consolidation

Although a joint petition of two individuals may be permitted under § 302, it actually creates two bankruptcy estates, one for each debtor. The Code is simply permitting the joint filing for convenience, with one filing fee required. From a practical standpoint, the joint filing is treated as one case, jointly administered by the court and trustee, unless an issue arises, such as the need to determine separate property interests of the two debtors. In the typical joint filing, each debtor may have individual, as well as joint, debts, and there may be instances in which distribution to claimants will vary, depending on whether a claim was against both debtors or only against one individual.¹⁰¹ Although not expressly authorized in the Code, there are rare instances in which the court may be required to substantively consolidate the two bankruptcy estates, in which event, the assets and liabilities of the two individuals are literally combined.¹⁰² Bankruptcy Rule 1015 addresses consolidation and joint administration.

An issue arises occasionally when only one spouse files, and later the other spouse attempts to join in that petition, without filing a separate

97. *Id.* § 521(j).

98. See *infra* Part 6 for discussion of plan modification.

99. 11 U.S.C. § 521(f)(4) & (g).

100. *Id.* § 521(h).

101. The claims allowance and distribution processes are discussed *infra* Part 4.

102. See, e.g., *In re Bonham*, 229 F.3d 750 (9th Cir. 2000).

bankruptcy. The majority rule is that such joinder is not permitted, since § 302 refers to an initial joint filing.¹⁰³ If the spouse not filing originally needs bankruptcy relief, he or she may file a separate petition and then ask the court to jointly administer the two cases, or, if appropriate, substantively consolidate them.¹⁰⁴

2.6 Prebankruptcy credit counseling

Before filing a petition, individuals seeking relief under any chapter of the Bankruptcy Code must complete counseling from an approved nonprofit budget and credit counseling agency.¹⁰⁵ Although there are exceptions in the statute,¹⁰⁶ they are rarely applied. Moreover, the need to meet this threshold eligibility requirement is strictly enforced; debtors who do not file the required certificate of completion are ineligible for relief.¹⁰⁷ Early case law questioned whether a case filed by an ineligible debtor should be dismissed or stricken,¹⁰⁸ but the general result of failure to complete the counseling prepetition is dismissal. Completing it after the petition filing has not been the answer, since § 109(h) requires the counseling “during the 180-day period ending on the date of filing the petition.”¹⁰⁹ There was also disagreement among courts as to whether completion on the same date as the petition filing was sufficient, and most courts have adopted the view that so long as the counseling is actually completed before the time of the petition filing, completion on the same date is compliance.¹¹⁰

103. See *In re Clinton*, 166 B.R. 195 (Bankr. N.D. Ga. 1994) (finding no reported decision allowed single filer to later amend petition to add spouse).

104. See Fed. R. Bankr. P. 1015(b).

105. 11 U.S.C. § 109(h).

106. See *id.* § 109(h)(2)–(4) for potential exceptions from the requirement.

107. See, e.g., *In re Mitrano*, 409 B.R. 812 (E.D. Va. 2009) (absent circumstances described in statute, bankruptcy court has no discretion to waive § 109(h) requirement, with debtor ineligible and case dismissed).

108. See, e.g., *Adams v. Zarnel (In re Zarnel)*, 619 F.3d 156 (2d Cir. 2010) (remanding to determine if striking petition or dismissal was appropriate).

109. See, e.g., *Gibson v. Dockery (In re Gibson)*, No. CC-10-1399-PaHKi, 2011 WL 7145612 (B.A.P. 9th Cir. Dec. 1, 2011); *In re Ingram*, 460 B.R. 904 (B.A.P. 6th Cir. 2011).

110. See *In re Francisco*, 390 B.R. 700 (B.A.P. 10th Cir. 2008) (discussing various views and adopting position that completion on same day, but before petition, satisfied

Section 111 of the Code describes the list of nonprofit budget and credit counseling agencies, as selected by the United States trustee, or bankruptcy administrator.

2.7 Automatic stay

The automatic stay is one of the critical components of any bankruptcy case: it stops creditors from pursuing collection actions against a debtor who has declared bankruptcy. There are certain exceptions. Here is an outline of how § 362's automatic stay functions:

- The stay is automatically triggered by the commencement of a bankruptcy case, without the need for a court order. § 362(a)
- The stay stops or delays a broad range of creditor actions, subject to statutory exceptions. § 362(a) & (b)
- A creditor can seek relief by filing a motion to have the stay lifted. Any objections to the motion will trigger a contested proceeding. § 362(d)
- Violations of the stay may result in monetary damages, and possibly punitive damages. § 362(k)
- The stay's effect on property ends once the property no longer belongs to the bankruptcy estate, and generally when the case is closed or dismissed. Its effect on the individual debtor ends when discharge is granted. § 362(c)
- In cases involving repeat filers, the stay may be limited in time, or may not go into effect. § 362(c)(3) & (c)(4)

The commencement of a bankruptcy case by the filing of a petition acts as an order for relief under the chapter designated on the petition.¹¹¹ An automatic stay goes into effect without the need for any court action,¹¹² and a bankruptcy estate is immediately created.¹¹³ The stay stops

§ 109(h)); *In re Arkuszewski*, 507 B.R. 242 (Bankr. N.D. Ill. 2014) (discussing split of authority on meaning of "date of filing" in § 109(h)(1), debtor was not eligible when credit briefing was completed on same day but after filing of petition).

111. 11 U.S.C. § 301(b).

112. *Id.* § 362(a).

113. *Id.* § 541(a). See discussion *infra* Part 3.

almost all creditor actions, unless an exception to the stay, found in § 362(b), applies, or until the creditor moves the court for relief from the stay, under § 362(d). The automatic stay and its exceptions are sources of frequent litigation in the bankruptcy courts, often resulting in appeals.

Courts are called on to decide if a particular creditor action violated the stay, if a § 362(b) exception protects the actions, or if a violation occurred, whether damages are appropriate under § 362(k). Legislative history states the purpose of the § 362(a) automatic stay:

The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.¹¹⁴

Whether a creditor is secured or unsecured, the stay broadly stops, at least temporarily, the following actions:¹¹⁵ (1) continuation or commencement of judicial and administrative actions against the debtor;¹¹⁶ (2) enforcement of any judgment against the debtor or property of the bankruptcy estate;¹¹⁷ (3) actions to obtain possession of or exercise control over property of the estate;¹¹⁸ (4) actions to create or perfect a lien against property of the estate, or of the debtor;¹¹⁹ (5) acts to collect, assess, or recover claims against the debtor that arose prepetition, or to set off against a prepetition debt, although there are exceptions for certain setoff

114. H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977).

115. The automatic stay focuses on actions against individual, consumer debtors. There are other aspects of the stay that apply in nonconsumer business cases.

116. 11 U.S.C. § 362(a)(1); *see, e.g., In re Byrd*, 357 F.3d 433 (4th Cir. 2004).

117. 11 U.S.C. § 362(a)(2); *see, e.g., In re Shuman*, 122 B.R. 317 (Bankr. S.D. Ohio 1990).

118. 11 U.S.C. § 362(a)(3); *see, e.g., Jacks v. Wells Fargo Bank, N.A. (In re Jacks)*, 642 F.3d 1323 (11th Cir. 2011) (distinguishing actions by mortgage creditor that were not violations of stay); *In re Perl*, 513 B.R. 566 (B.A.P. 9th Cir. June 5, 2014) (mortgage lender violated stay by changing locks and preventing debtor's access to personal property that was property of estate).

119. 11 U.S.C. § 362(a)(4) & (5). However, § 362(b)(3)'s exception from the stay permits certain acts to maintain or continue to maintain a perfected security interest.

actions;¹²⁰ and (6) commencement or continuation of U.S. Tax Court proceedings concerning the tax liability of an individual “for a taxable period ending before the date of the order for relief.”¹²¹

Creditors are often advised that if there is any doubt about the reach of the stay, they should move for stay relief under § 362(d) rather than run the risk of violation and potential monetary damages. Such relief is by motion practice under Bankruptcy Rule 4001. The volume of litigation over stay violations and the number of reported decisions are too extensive to cover in this brief overview of the subject. The following examples illustrate a few of the many issues raised in consumer debtor cases.

- Under Supreme Court authority, *Citizens Bank of Maryland v. Strumpf*,¹²² a bank’s temporary, administrative freeze of an account is not a stay violation. But the better course of action by a bank is to promptly move for stay relief if it intends to set off the account against a prepetition debt.¹²³
- Internal recording of postpetition fees by a mortgage creditor did not violate § 362(a)(3), (5), or (6), provided there was no collection activity in the Chapter 13 case against the debtor or bankruptcy estate.¹²⁴

120. 11 U.S.C. § 362(a)(6), (7). See 11 U.S.C. § 362(b)(6), (17), (26), and (27) for stay exceptions allowing setoff, with only § 362(b)(26) applying to individuals. See also *Sexton v. Dep’t of Treasury*, 508 B.R. 646 (Bankr. W.D. Va. 2014) (analyzing § 362(b)(26), IRS violated stay by offset to collect prepetition non-tax debt).

121. 11 U.S.C. § 362(a)(8). *But see* *Schoppe v. Comm’r of Internal Revenue*, 711 F.3d 1190 (10th Cir. 2013) (bankruptcy filing did not stay taxpayer’s appeal of tax court’s adverse decision; discussing split of authority between Fifth and Ninth Circuits, tax court petition initiated by taxpayer was not continuation of administrative proceeding against debtor).

122. 516 U.S. 16 (1995). See also *Mwangi v. Wells Fargo Bank, N.A. (In re Mwangi)*, 764 F.3d 1168 (9th Cir. 2014).

123. See *Harchar v. United States (In re Harchar)*, 694 F.3d 639 (6th Cir. 2012) (IRS’s temporary delay in processing tax refund, while deciding whether to seek setoff, was not violation of § 362(a)(3) or (6), and IRS promptly filed motion for stay relief). See also Gregory P. Johnson, *Following Strumpf: Will Allowance of an Administrative Freeze Begin the Erosion of the Automatic Stay?*, 5 J. Bankr. L. & Prac. 193 (1996).

124. *Jacks v. Wells Fargo Bank, N.A. (In re Jacks)*, 642 F.3d 1323 (11th Cir. 2011).

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- Notice of annual tax statement to the debtor, or notice of a mortgage payment increase (for example, when property taxes increased or an adjustable rate increase occurred in a mortgage) was not a stay violation, provided there was no threatening or coercive action;¹²⁵ but such notices raise issues in Chapter 13 cases, in which a mortgage likely is being paid through a plan.¹²⁶ Fact questions are often presented as to when a notice crosses the line into demand or threat.¹²⁷
- Although a state child support creditor did not violate the stay by sending collection letters, because of § 362(b)(2)'s exception, it violated the terms of the confirmed Chapter 13 plan, which provided for payment of the allowed claim.¹²⁸
- Refusal to return a repossessed vehicle, in which the debtor's interests had not been terminated prebankruptcy under state law, was a willful stay violation, resulting in damages.¹²⁹ Of course, postpetition repossessions without stay relief are stay violations, and they become willful violations if the creditor had any notice of the bankruptcy filing.¹³⁰

125. See, e.g., *Knowles v. Bayview Loan Servicing, LLC* (*In re Knowles*), 442 B.R. 150 (B.A.P. 1st Cir. 2011).

126. See *Campbell v. Countrywide Home Loans, Inc.*, No. 07-20499, 2008 WL 3906382 (5th Cir. Aug. 26, 2008) (sending escrow statement and notice of payment increase not stay violation), *opinion withdrawn & superseded by* *Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348 (5th Cir. 2008). Accord *In re Zotow*, 432 B.R. 252 (B.A.P. 9th Cir. 2010). But see, e.g., *Patterson v. Homecomings Fin. LLC*, 425 B.R. 499 (E.D. Wis. 2010) (debtors had plausible cause of action for stay violation when lender collected post-petition charges that were not disclosed). See discussion *infra* Part 6.

127. See, e.g., *In re Ocasio*, 272 B.R. 815 (B.A.P. 1st Cir. 2002) (threat to "get [the money] from your face" easily violated stay).

128. See *Fla. Dep't of Revenue v. Rodriguez* (*In re Rodriguez*), 367 F. App'x 25 (11th Cir. 2010). See also *In re DeSouza*, 493 B.R. 669 (B.A.P. 1st Cir. 2013) (state court collection of alimony did not fall within § 362(b)(2)'s specific exceptions from stay).

129. *Weber v. SEFCU* (*In re Weber*), 719 F.3d 72 (2d Cir. 2013); *Thompson v. GMAC*, 566 F.3d 699 (7th Cir. 2009); *Johnson v. Smith* (*In re Johnson*), 501 F.3d 1163 (10th Cir. 2007).

130. See, e.g., *In re Carlton*, No. 10-00079-8-RDD, 2013 WL 2297082 (Bankr. E.D.N.C. May 24, 2013); *In re Suggs*, 377 B.R. 198 (B.A.P. 8th Cir. 2007).

- Asking the Chapter 7 debtor to consider reaffirmation of secured debt was not a stay violation, again assuming no threatening or coercive action.¹³¹
- Filing a proof of claim, even though ultimately disallowed, and filing other pleadings in the bankruptcy case, were not stay violations.¹³²
- Prosecuting state court civil action after Chapter 13 filing violated the stay.¹³³
- Postpetition eviction from a home or apartment typically violates the stay, as does continuing with foreclosure, without stay relief.¹³⁴
- Failure to release garnishment may be a stay violation.¹³⁵
- IRS's temporary freeze of tax refund processing did not violate the stay, since the debtor had no due process right to prompt payment, and IRS was investigating who to pay and whether it had right of setoff.¹³⁶
- Credit union's notice to debtor that account would be closed did not violate the stay, when no coercion to pay was involved.¹³⁷
- Mortgage creditor did not violate the stay by refusing to foreclose after the Chapter 13 debtor's plan surrendered the home. The

131. See, e.g., *In re Jefferson*, 144 B.R. 620 (Bankr. D.R.I. 1992) (citing numerous opinions on issue).

132. See, e.g., *Knowles v. Bayview Loan Servicing, LLC (In re Knowles)*, 442 B.R. 150 (B.A.P. 1st Cir. 2011); *In re Briggs*, 143 B.R. 438 (Bankr. E.D. Mich. 1992). But see *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014) (filing time-barred proof of claim violated Fair Debt Collection Practices Act), *supra* note 61.

133. *Wesley v. Oh (In re Oh)*, No. NC-07-1325-MdKB, 2008 WL 8448837 (B.A.P. 9th Cir. Apr. 16, 2008). But see *In re Mason*, No. 13-1391, 2013 WL 2423893 (3d Cir. June 5, 2013) (per curiam) (stay not violated by eviction when debtor had no possessory interest in leased property, which did not become property of bankruptcy estate).

134. See, e.g., *In re Perl*, 513 B.R. 566 (B.A.P. 9th Cir. 2014); *In re Derringer*, 375 B.R. 903 (B.A.P. 10th Cir. 2007).

135. See, e.g., *In re Scroggin*, 364 B.R. 772 (B.A.P. 10th Cir. 2007).

136. *Harchar v. United States (In re Harchar)*, 694 F.3d 639 (6th Cir. 2012).

137. See *Messick v. Ascend Fed. Credit Union*, 424 B.R. 344 (E.D. Tenn. 2010).

court concluded that it lacked authority to force state remedy of foreclosure.¹³⁸

2.7.1 Exceptions from automatic stay

Despite its breadth, the automatic stay has twenty-seven statutory exceptions,¹³⁹ set forth in § 362(b), many of which do not come into play in consumer cases. Again, the volume of decisional and other authority on the exceptions is too vast to cover in this monograph, but a brief review of the most common exceptions in consumer cases is illustrative.

Section 362(b)(1) provides an exception from the automatic stay for “the commencement or continuation of a criminal action” against the debtor.¹⁴⁰ Typically easy to apply, § 362(b)(1) is often relevant in such state actions as enforcement of delinquent child support or insufficient funds checks. But questions may exist as to whether the purported criminal action is in reality a civil debt collection action.¹⁴¹ The bankruptcy court may need to determine whether the attempted action is civil or criminal contempt, especially when a state court action involves potential incarceration of the debtor.¹⁴²

Section 362(b)(2) permits a range of actions concerning marital dissolution, child custody, and domestic support obligations—including collection actions—that may reach postpetition income. Thus it is widely

138. See, e.g., *In re Arsenault*, 456 B.R. 627 (Bankr. S.D. Ga. 2011). See also *In re Rose*, 512 B.R. 790 (Bankr. W.D.N.C. 2014) (majority of courts find nothing in Bankruptcy Code’s “surrender” to compel creditor to take possession of property).

139. There are twenty-eight subsections, but only twenty-seven exceptions because § 362(b)(5) was repealed in 1998.

140. See, e.g., *United States v. Robinson* (*In re Robinson*), 764 F.3d 554 (6th Cir. 2014) (although Bankruptcy Code § 362(b)(1) addresses only action against debtor, 18 U.S.C. § 3613(a) permits enforcement of criminal restitution judgment against property of Chapter 13 estate).

141. See, e.g., *McMaster v. Small* (*In re Small*), 486 F. App’x 436 (5th Cir. 2012) (bankruptcy court didn’t err in finding enforcement of spousal support not protected by § 362(b)(1) & (2)); *In re Fussell*, 928 F.2d 712 (5th Cir. 1991) (discussing test for creditor’s criminal or civil motivation in pursuing action).

142. See, e.g., *Guariglia v. Cmty. Nat’l Bank & Trust Co.*, 382 F. Supp. 758 (E.D.N.Y. 1974), *aff’d*, 516 F.2d 896 (2d Cir. 1975) (discussing difference in civil and criminal contempt actions and whether stay applies).

applicable in consumer cases. One of the exceptions that was broadened by BAPCPA, § 362(b)(2), incorporates the term “domestic support obligation,” which is defined in § 101(14A). “Domestic support obligation” includes the normal alimony, maintenance, and support obligations. It also includes obligations that are owed to or recoverable by the spouse or child, as well as to governmental units, such as state child support agencies.¹⁴³ The term “domestic support obligation” appears in other parts of the Code, including the § 523(a)(5) exception from discharge (discussed *infra* Parts 5 and 6), and the § 507(a)(1) priority claim provision (discussed *infra* Parts 4 and 6).

There are many factual and statutory interpretive issues that arise in consumer cases under the § 362(b)(2) exception, as well as the application of the “domestic support obligation” concept in other Code sections.¹⁴⁴ For example, courts have had to determine the extent to which the exception permits a state court—although authorized by § 362(b)(A)(iv) to proceed with dissolution of the marriage—to divide marital property. Since such a property division likely impacts the debtor’s property interest that has come into the bankruptcy estate, it is not surprising that some limitations on the exception come into play.¹⁴⁵ There is frequent interplay between this exception and the effect of a plan confirmation in Chapter 13. For instance, a plan may provide for payment of all or part of prepetition support, while § 362(b)(2)’s collection exceptions from the stay may permit an entity to do things such as sus-

143. See, e.g., *Rivera v. Orange Cty. Prob. Dep’t (In re Rivera)*, 511 B.R. 643 (B.A.P. 9th Cir. 2014) (under California law, parent’s debt to county for support of incarcerated child was domestic support obligation).

144. For examination of multiple issues related to domestic support obligations, see Hon. William H. Brown, *Bankruptcy and Domestic Relations Manual* (annual editions) [hereinafter *Bankruptcy & Domestic Relations Manual*].

145. See, e.g., *In re Exum*, No. 08-10079-RGM, 2008 WL 465818 (Bankr. E.D. Va. Feb. 21, 2008) (§ 362(b)(2)’s exception from stay did not permit equitable distribution of marital property); *In re Secrest*, 453 B.R. 623 (Bankr. E.D. Va. 2011) (relief from stay to pursue equitable division of marital property not a matter of right, and bankruptcy court had discretion to determine whether cause existed for stay relief for that purpose or whether bankruptcy court would continue to retain jurisdiction).

pend a driver's license,¹⁴⁶ which would adversely affect the debtor's ability to work and fund the confirmed plan. Issues exist, notwithstanding the exception, as to whether the debtor's postpetition earnings are protected in Chapter 13.¹⁴⁷ Although a creditor may be permitted to take actions under § 362(b)(2), that creditor must be cognizant that it could still violate the terms of a confirmed plan, since § 1327's effect of confirmation binds creditors.¹⁴⁸ Judicial interpretation of the statutory interplay is often required.¹⁴⁹

Section 362(b)(3) is a limited exception from the stay for post-bankruptcy perfection of a security interest, which comes into play more often in commercial than consumer cases.

Section 362(b)(4) contains a police and regulatory power exception that may be applicable in consumer cases when enforcement of public health and safety laws or regulations are involved.¹⁵⁰

Section 362(b)(9) provides that the automatic stay does not apply to tax audits, notices of tax deficiency or tax assessments; but the exception

146. 11 U.S.C. § 362(b)(2)(D). *See, e.g., In re Penaran*, 424 B.R. 868 (Bankr. D. Kan. 2010).

147. *See, e.g., In re Omine*, 485 F.3d 1305, *withdrawn pursuant to settlement*, 2007 WL 6813797 (11th Cir. 2007) (holding state child support agency violated stay by collection against debtor's postpetition earnings). *See also In re DeSouza*, 493 B.R. 669 (B.A.P. 1st Cir. 2013) (interpreting § 362(b)(2)'s specific exceptions, state court collection of alimony from postpetition wages violated stay).

148. The effect of plan confirmation is discussed *infra* Part 6.

149. *See, e.g., In re McGrahan*, 459 B.R. 869 (B.A.P. 1st Cir. 2011). The bankruptcy court found that the confirmed plan bound a state, preventing interception of tax refunds under § 362(b)(2)(F). The appellate court reversed, holding that plan provisions did not sufficiently address the interception power under that exception. For the plan to control over the exception, it must specifically address the interception authority, giving the creditor due process notice. *See also Fla. Dep't of Revenue v. Rodriguez (In re Rodriguez)*, 367 F. App'x 25 (11th Cir.), *cert. denied*, 131 S. Ct. 128 (2010) (although no stay violation occurred because of § 362(b)(2)(B)'s exception, state revenue department violated Chapter 13 confirmation order by attempting collection of child support in excess of plan's provisions). *Cf. In re Fort*, 412 B.R. 840 (Bankr. W.D. Va. 2009) (§ 362(b)(2)(C) permitted withholding of income, and state's collection action was permitted).

150. *See California v. Villalobos*, 453 B.R. 404 (D. Nev. 2011) (discussing scope of § 362(b)(4)).

does not reach collection of the tax, for which stay relief would be required.¹⁵¹

Section 362(b)(10) rarely is an issue in consumer cases, since it deals with nonresidential real property leases, and § 362(b)(11)'s exception from the stay for presentment of a negotiable instrument has been addressed infrequently in consumer cases.¹⁵² Section 362(b)(12) through (b)(17) would not apply in consumer Chapter 7 or 13 cases, while § 362(b)(18)'s exception for creation or perfection of a statutory lien for postpetition ad valorem property taxes could apply.

Section 362(b)(19) permits the continued withholding from a debtor's wages and collection of any loan against a pension, profit-sharing, stock bonus, or other retirement plan established under the IRS Code sections delineated in the exception. This exception works in conjunction with § 541(b)(7), which excludes such wage withholdings from property of the bankruptcy estate, and § 523(a)(18), which excepts such loan obligations from discharge. Also, in Chapter 13's § 1322(f), such loan repayment withholdings are not included in the disposable income that is considered for eligibility and plan purposes, and the debtor is not permitted in a plan to modify the terms of such a loan repayment.

Section 362(b)(20) permits enforcement of liens or security interests when the court had previously entered a stay relief order in a prior bankruptcy case, called an *in rem* order, providing that the stay in a future case would not apply as to that specific property. The debtor could move to impose the stay in a future case, "based upon changed circumstances or for other good cause shown, after notice and hearing."¹⁵³

Section 362(b)(21) permits action to enforce a lien or security interest if the debtor was ineligible to file for bankruptcy relief under § 109(g) or because the debtor was in violation of a prior order that prohibited the debtor from filing again for bankruptcy relief. Eligibility for relief under

151. See, e.g., *In re Waugh*, 109 F.3d 489 (8th Cir. 1997).

152. See, e.g., *In re Thomas*, 428 F.3d 735 (8th Cir. 2005).

153. 11 U.S.C. § 362(b)(20). See also 11 U.S.C. § 362(d)(4) for the *in rem* relief provision; and see, for example, *In re Alakozai*, 499 B.R. 698 (B.A.P. 9th Cir. 2013) and *In re Muhaimin*, 343 B.R. 159 (Bankr. D. Md. 2006), for application of such relief.

Chapters 7 and 13 are discussed *infra* Parts 5 and 6. Section 109(g)(2)'s impact on a new bankruptcy case is discussed *infra*.

The exceptions in § 362(b)(22) and (23) address whether the automatic stay applies to unlawful detainer and eviction proceedings for residential property when the landlord has gotten a prebankruptcy judgment for possession.¹⁵⁴

Section 362(b)(26) permits setoff by a governmental unit, under nonbankruptcy law (typically the Internal Revenue Code), of a prebankruptcy income tax refund against a prebankruptcy tax liability, and this exception certainly may be applicable in consumer cases.¹⁵⁵

2.7.2 Waivers of automatic stay

Generally waiver by a debtor (before filing bankruptcy) of any of the protections under Title 11—including the automatic stay—is not enforceable, as against public policy.¹⁵⁶ Yet there are instances in which courts have found that a debtor waived the protection of the stay. For example, in *Roseman v. Roseman*,¹⁵⁷ the debtor had allowed the state court to proceed with a divorce, participating in the contested divorce and child custody proceedings without telling his spouse or the state court of his bankruptcy filing. The Sixth Circuit held that an equitable exception to the stay was appropriate. Specific fact analysis is required before applying such a waiver.

154. For discussion of these exceptions, see Hon. Alan Ahart, *The Inefficiency of the New Eviction Exceptions to the Automatic Stay*, 80 Am. Bankr. L.J. 125 (2006). See also 11 U.S.C. § 362(l) and (m), containing conditions for application of § 362(b)(22) and (23).

155. See, e.g., *In re Gould*, 603 F.3d 1100 (9th Cir.), *cert. denied*, 131 S. Ct. 577 (2010) (§ 362(b)(26) gives IRS setoff right without seeking stay relief). See also *Harchar v. United States (In re Harchar)*, 694 F.3d 639 (6th Cir. 2012), *supra* notes 123, 136. Cf. *Sexton v. Dep't of Treasury*, 508 B.R. 646 (Bankr. W.D. Va. 2014), *supra* note 120. Section 362(b)(24) rarely applies in consumer cases, and § 362(b)(27) and (28) would not apply to consumer debtors.

156. *In re Huang*, 275 F.3d 1173 (9th Cir. 2002). See generally Bruce H. White, *The Enforceability of Pre-petition Waivers of the Automatic Stay*, 15 Am. Bankr. L.J. 26 (1997).

157. 14 F.3d 602 (6th Cir. 1993).

2.7.3 Codebtor stay

One of the differences between Chapters 13 and 7 is that § 1301 provides a stay as to most actions against an individual who cosigned or is obligated with the Chapter 13 debtor on a consumer debt.¹⁵⁸ Section 1301 has the following exceptions: (1) the codebtor became liable on the debt in the ordinary course of the codebtor's business, and (2) the case is closed, dismissed, or converted to another chapter. Also, the party seeking to proceed against the codebtor may move for relief, showing that the codebtor actually received the consideration underlying the claim; the Chapter 13 plan does not propose to pay the debt in full; or the creditor's interest would be "irreparably harmed by continuation of the stay."¹⁵⁹

2.7.4 Termination of stay

The automatic stay typically terminates when the bankruptcy case is closed, dismissed, or the individual receives a discharge. The property, at this point, is no longer property of the estate, and the debtor's personal discharge is protected by a discharge injunction.¹⁶⁰ There are exceptions to this general rule. Section 362(c) contains provisions for the stay's early termination or never coming into effect when a debtor has been in prior cases within defined times.¹⁶¹ For example, § 362(c)(3) provides that when an individual was a debtor in a case pending within the prior year and that case was dismissed, in the subsequent case the automatic stay shall terminate "with respect to the debtor on the 30th day after the filing

158. See *Dugan v. U.S. Bank (OH)* (*In re Dugan*), No. 4:11-ap-1267, 2012 WL 6825328 (Bankr. E.D. Ark. June 20, 2012) (§ 1301 doesn't apply to business obligation); *In re Sarner*, No. 10-17487-JNF, 2011 WL 5240200 (Bankr. D. Mass. Oct. 31, 2011) (§ 1301 applies only to consumer debts).

159. 11 U.S.C. § 1301(c). See also *Faulkner v. CEFU* (*In re Faulkner*), No. 12-08069, 2013 WL 2154790 (Bankr. C.D. Ill. May 17, 2013) (notwithstanding debtor's discharge, § 1301 didn't require credit union's release of lien on cosigned car loan when plan hadn't fully paid secured claim).

160. 11 U.S.C. § 362(c)(1) & (2). The discharge injunction in § 524 is discussed *supra* § 5.10

161. See 11 U.S.C. § 362(c), as amended by BAPCPA. See, e.g., *In re Scarborough*, 457 F. App'x 193 (3d Cir. 2012) (stay not in effect during gap period between dismissal and reinstatement of case, and foreclosure occurring during that gap wasn't stay violation).

of the later case.”¹⁶² The statute, as amended in 2005, led to disagreement among courts on whether the stay that terminated applied only to the debtor, as opposed to both the debtor and property of the estate. This issue is not resolved on a circuit level.¹⁶³ Section 362(c)(3)(B) and (C) contain means for a party in interest—which would include the debtor and trustee—to move for the stay to remain in effect beyond the thirty days; but there is a presumption that the current case was not filed in good faith, and the presumption must be rebutted by clear and convincing evidence.¹⁶⁴

Section 362(c)(4), by contrast, provides that if the individual has been a debtor in two or more cases that were pending within the previous year, and those cases were dismissed, the automatic stay does not go into effect in the current case.¹⁶⁵ There is the potential for the debtor or another party in interest to move to impose the stay, but the motion must be filed within thirty days of the petition filing,¹⁶⁶ and the moving party must prove by clear and convincing evidence that the current case was filed in good faith to overcome the presumption of bad-faith filing.¹⁶⁷

There are other provisions in § 362 that may affect how long the stay remains in effect. For example, § 362(e)(2), added in 2005, provides that the stay terminates on the 60th day after a motion for stay relief, if the

162. 11 U.S.C. § 362(c)(3)(A). *See, e.g., In re Rodriguez*, 487 B.R. 275 (Bankr. D. N.M. 2013) (§ 362(c)(3) applied when Chapter 11 case had been pending within one year of current Chapter 13 filing).

163. *Compare Reswick v. Reswick (In re Reswick)*, 446 B.R. 362 (B.A.P. 9th Cir. 2011) (stay terminated as to both debtor and property of estate), *with Holcomb v. Hardeman (In re Holcomb)*, 380 B.R. 813 (B.A.P. 8th Cir. 2008) (stay terminated only as to debtor).

164. *See, e.g., In re Mayberry*, No. 13-31233-H3-13, 2013 WL 1694471 (Bankr. S.D. Tex. Apr. 18, 2013); *In re Pence*, 469 B.R. 643 (Bankr. W.D. Va. 2012).

165. *See Singh v. Cusick (In re Singh)*, No. EC-11-1700-DJUMk, 2013 WL 1615849 (B.A.P. 9th Cir. Apr. 15, 2013) (no stay in effect in third case filed within year); *Bates v. BAC Home Loans (In re Bates)*, 446 B.R. 301 (B.A.P. 8th Cir. 2011) (§ 362(c)(4) is clear, and stay didn’t come into effect in third case within one year).

166. 11 U.S.C. § 362(c)(4)(B). *See, e.g., In re Williams*, No. 12-02129-8-RDD, 2012 WL 2856124 (Bankr. E.D.N.C. July 11, 2012).

167. 11 U.S.C. § 362(c)(4)(B) & (D).

court has not entered a final order on that motion or extended the time for good cause.¹⁶⁸

2.7.5 Stay relief

Section 362(d) provides for stay relief on motion of a creditor or party in interest. There are multiple ways in which the bankruptcy court may grant relief: termination, annulment, modification or conditioning; and the court has discretion in deciding the appropriate relief under the particular facts.¹⁶⁹ The grounds for relief, under § 362(d), are also varied, including the undefined “cause.”¹⁷⁰ Lack of “adequate protection” is included in “cause” for relief.¹⁷¹ A common issue in consumer cases is whether the debtor has equity in collateral that would protect the creditor pending a sale or confirmation of a plan.¹⁷²

Motions for stay relief are governed by Bankruptcy Rules 4001 and 9013. The ensuing motions and contested hearings comprise a considerable amount of a bankruptcy court’s docket, both in consumer and non-consumer cases.

168. See, e.g., *In re McKenzie*, 737 F.3d 1034 (6th Cir. 2013) (bankruptcy court had good cause for extending stay under § 362(e)(2)).

169. See, e.g., *In re Myers*, 491 F.3d 120 (3d Cir. 2007) (approving dismissal of case and retroactive annulment of stay). See also *Grady v. A.H. Robins Co., Inc.*, 839 F.2d 198 (4th Cir. 1998) (describing factors to consider for stay annulment); *Cruz v. Stein Strauss Trust #1361 (In re Cruz)*, No. CC-13-1554-KiTaD, 2014 WL 4258990 (B.A.P. 9th Cir. Aug. 29, 2014) (applying similar factors). And see *Kadlecek v. Schwank USA, Inc.*, 486 B.R. 336 (M.D.N.C. 2013) (applying *Grady* factors). Cf. *In re Hudson*, 504 B.R. 569 (B.A.P. 9th Cir. 2014) (reversing stay annulment).

170. See, e.g., *Lee v. Anasti (In re Lee)*, 461 F. App’x 227 (4th Cir. 2012) (cause existed to allow state court to determine quiet title action).

171. See 11 U.S.C. § 361 for adequate protection, and see, e.g., *Rocco v. J.P. Morgan Chase Bank*, 255 F. App’x 638 (3d Cir. 2007), for discussion of adequate protection in Chapter 13.

172. See, e.g., *In re Crawford*, No. 11-24158-SBB, 2012 WL 930281 (Bankr. D. Colo. Mar. 19, 2012) (oversecured creditor adequately protected pending sale of property).

2.7.6 Standing for stay relief motion

An issue increasingly litigated is whether the party moving for stay relief has standing to seek that relief. The threshold standing question¹⁷³ must be reached before deciding the merits of the motion. For purposes of filing for stay relief, the moving party must have both constitutional and prudential standing. Constitutional standing requires: injury-in-fact; an injury traceable to another party's conduct; and an injury that can be remedied by the relief being sought.¹⁷⁴ A finding of constitutional standing is not dispositive of prudential standing, which is the equivalent of "real party in interest," a term not defined in the Bankruptcy Code.¹⁷⁵ Bankruptcy Rule 7017, incorporating Federal Rule of Civil Procedure 17(a), provides that "an action must be prosecuted in the name of the real party in interest," and, unless ordered otherwise, Rule 7017 would apply in contested stay relief motions.¹⁷⁶ Section 362(d) of the Code refers to relief from the automatic stay "on request of a party in interest."

The Ninth Circuit Bankruptcy Appellate Panel explored the need for standing for stay relief in the context of a mortgage servicer's and assignee's motion. This is a common scenario in consumer cases. In *In re Veal*,¹⁷⁷ the assignee of the home mortgage did not establish existence or actual possession of the original note. In examining whether the assignee had established standing and was the real party in interest to enforce the note, the *Veal* court looked at Articles 3 and 9 of the Uniform Commercial Code. The court concluded that an assignee and servicer of the mortgage, who were not the original payees of the note, must show facts to support standing. To show that the assignee had some interest in the note, either as holder, a party entitled to enforce the note, or with some

173. See *Warth v. Seldin*, 422 U.S. 490 (1975).

174. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1962). See generally Hon. Nancy C. Dreher & Hon. Joan N. Feeney, *Bankruptcy Law Manual* (5th ed. 2014).

175. See 11 U.S.C. § 1109 for a nonexclusive list of "party in interest." See also *Bennett v. Spear*, 520 U.S. 154, 162 (1997) ("prudential principles . . . bear on the question of standing"); *In re Smith*, 522 F. App'x 760, 764 (7th Cir. 2013) (movant's standing under § 362(d) depends on movant being party in interest).

176. See Fed. R. Bankr. P. 9014(c).

177. 449 B.R. 542 (B.A.P. 9th Cir. 2011).

ownership or other interest in the note, assignment of the mortgage was not sufficient, under UCC Article 9. The mortgage servicer, which might or might not be the same entity as the assignee, needed to establish that it was the agent of the holder, or of the assignee, in order to have standing. While these standing issues seem to cross over into the merits of whether relief should be granted, they can be resolved, in most instances, if the moving party attaches sufficient documentation to its motion to establish assignment, possession of the note, or other evidence that the movant has a “colorable” right as owner, holder, or assignee of an enforceable obligation.¹⁷⁸ In other words, the fact that the party moving for stay relief is the mortgage servicer may not be enough: the movant may have to prove that it is authorized to enforce the underlying obligation.¹⁷⁹ To establish standing, the movant usually has to show it possesses the note, at least in the mortgage scenario.¹⁸⁰

A “colorable claim” has a lesser requirement than ultimate proof one of the grounds for stay relief under § 362(d). “Colorable claim” has been defined as “a plausible legal claim. In other words, a claim strong enough to have a reasonable chance of being valid if the legal basis is generally correct and the facts can be proven in court. *The claim need not actually result in a win.*”¹⁸¹ This does not mean that a moving party’s standing is

178. See, e.g., *Sardana v. Bank of Am., N.A. (In re Sardana)*, No. AZ-10-1368-DMkMa, 2011 WL 3299861 (B.A.P. 9th Cir. June 7, 2011) (servicer bank failed to show colorable claim for standing purposes, when note had been assigned to another, and bank didn’t show retention of right to enforce assigned note). Cf. *Junk v. CitiMortgage, Inc. (In re Junk)*, 512 B.R. 584 (Bankr. S.D. Ohio 2014) (creditor had sufficient colorable interest in note and mortgage for standing).

179. See, e.g., *In re Alcide*, 450 B.R. 526 (Bankr. E.D. Pa. 2011).

180. See *Miller v. Deutsche Bank Nat’l Trust Co. (In re Miller)*, 666 F.3d 1255 (10th Cir. 2012) (remanding for bank to establish physical possession of mortgage note, to satisfy Colorado’s UCC requirement that bank be holder of evidence of debt).

181. *Elstner-Bailey v. Fed. Nat’l Mortg. Ass’n (In re Elstner-Bailey)*, No. CC-11-1038-DKiPa, 2011 WL 6934490, at *4 (B.A.P. 9th Cir. Oct. 4, 2011) (citing definition of “colorable claim” from Cornell University Law School’s Legal Information Institute). See also *In re Escobar*, 457 B.R. 229, 236 (Bankr. E.D.N.Y. 2011) (level of proof for standing purposes “must be somewhere along the spectrum of providing some evidence of a litigable right or colorable claim at one end, to at the other end, demonstrating that the mo-

always put at issue; but if standing is contested, the bankruptcy court should not reach the substantive merits of the motion before deciding the threshold issue of standing.¹⁸²

2.7.7 Violations of automatic stay and damages

Another source of frequent litigation in the bankruptcy courts is whether violations of the automatic stay are willful, and, if so, the extent of damages that may result. An initial issue may be whether an action that violates the § 362(a) stay is void or voidable. The majority view is that stay violations are void,¹⁸³ at least unless the court retroactively annuls the stay, for cause, under § 362(d).¹⁸⁴ The minority view is that stay violations are voidable, and the cases so holding are fact-specific.¹⁸⁵ Although annulment of the stay, in order to validate an action that otherwise was a violation, is rare, it may be justified under particular facts, such as when the debtor has filed bankruptcy multiple times to stop a foreclosure, and the prior filings have been found to be in bad faith.¹⁸⁶

Violation of the stay may not only result in the action being void, it may lead to monetary damages under § 362(k), which provides that “an individual injured by a willful violation of a stay . . . shall recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages.” There are instances in which the violation does not require monetary damages, for example, when the

vant holds a valid, perfected and enforceable lien and more likely than not will prevail in the underlying [mortgage] litigation stayed by the bankruptcy filing”).

182. See *In re Thomas*, 469 B.R. 915, 922 (B.A.P. 10th Cir. 2012) (citing *Miller*, 666 F.3d at 1260–64).

183. See *United States v. White*, 466 F.3d 1241 (11th Cir. 2006); *In re Soares*, 107 F.3d 969 (1st Cir. 1997); *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522 (3d Cir. 1994); *In re Schwartz*, 954 F.2d 569 (9th Cir. 1992). The Seventh Circuit indicated, in *Matthews v. Rosene*, 739 F.3d 249 (7th Cir. 1984), that actions in violation of the stay were generally void.

184. See, e.g., *Easley v. Pettibone Mich. Corp.*, 990 F.2d 905 (6th Cir. 1993) (action void unless annulment of stay granted).

185. See *Bronson v. United States*, 46 F.3d 1573 (Fed. Cir. 1995); *Sikes v. Global Marine, Inc.*, 881 F.2d 176 (5th Cir. 1989).

186. For a collection of case authority on annulment, see *In re Siciliano*, 13 F.3d 748 (3d Cir. 1994).

creditor had no knowledge of the bankruptcy filing at the time it served a foreclosure complaint on the debtor. The complaint service was a stay violation and void, but the action was not willful.¹⁸⁷ That creditor simply had to start over, by seeking § 362(d) stay relief to proceed with foreclosure.

It does not take much to satisfy the “willful” requirement of § 362(k). Any knowledge of the bankruptcy filing is generally sufficient to turn a stay violation from innocent to willful. Willfulness does not require that the violating party formed a specific intent to take egregious action; an intentional act, taken with knowledge of the bankruptcy filing, is enough, according to case law.¹⁸⁸ Once the creditor knows about the bankruptcy, it has the burden to prevent a stay violation.¹⁸⁹

As to damages for a violation, under § 362(k) the bankruptcy court is required to award actual damages, which must be proved by the debtor.¹⁹⁰ Actual damages may include specifics, such as lost wages or out-of-pocket expenses,¹⁹¹ as well as emotional distress. Under the pre-2005 Code, in which damages for stay violation were in § 362(h), there was authority that actual damages should not include non-economic losses, such as emotional distress.¹⁹² Increasingly, however, courts are more open to emotional distress damages if they are sufficiently supported by proof.¹⁹³ The Ninth Circuit adopted a three-part test: the debtor must show that emotional distress actually caused significant harm, clearly established in the proof, with a “causal connection between that significant

187. *In re Kline*, 472 B.R. 98 (B.A.P. 10th Cir. 2012).

188. *See, e.g., Thompson v. GMAC*, 566 F.3d 699 (7th Cir. 2009).

189. *See Fleet Mortg. Grp., Inc. v. Kaneb*, 196 F.3d 265 (1st Cir. 1999).

190. *See, e.g., In re Nixon*, 419 B.R. 281 (Bankr. E.D. Pa. 2009) (debtor failed to prove any damages).

191. *See, e.g., Stoker v. Aurora Loan Servs., Inc. (In re Stoker)*, No. 09-33976, 2010 WL 958030 (Bankr. S.D. Tex. Mar. 10, 2010).

192. *See, e.g., Aliello v. Providian Fin. Corp.*, 239 F.3d 876 (7th Cir. 2001).

193. *See Lodge v. Kondaur Capital Corp.*, 750 F.3d 1263 (11th Cir. 2014) (expressing three-part test to qualify emotional distress as actual damages); *Young v. Repine (In re Repine)*, 536 F.3d 512 (5th Cir. 2008) (citing other circuit authority allowing recovery of emotional distress damages).

harm and the violation of the automatic stay.”¹⁹⁴ If allowed, damages for emotional distress can be significant.¹⁹⁵

An element of damages recognized in § 362(k) and case law is the debtor’s attorney fees and costs of prosecuting the motion related to a stay violation. But there is some disagreement about the extent to which fees are recoverable. In a Chapter 11 case, *Sternberg v. Johnston*,¹⁹⁶ the Ninth Circuit, applying § 362(k), pointed out that once the stay violation was remedied, the debtor may not be entitled to further fee recovery. Often the only significant—if not the only—actual damages suffered by the stay violation are the debtor’s attorney fees related to that violation. Moreover, § 362(k) refers only to the “individual injured”¹⁹⁷ (typically a debtor) being allowed damage recovery; so, if the debtor has no liability to her attorney, are the attorney fees incurred the debtor’s damages? Taking a strict view, a court might hold that if the debtor is not liable for the fees, the fees are not allowable under § 362(k).¹⁹⁸ Another court might view the allowance of attorney fee damages as independent of whether the fees were actually paid by the debtor.¹⁹⁹ The Ninth Circuit distinguished its prior opinion in *Sternberg*, recognizing that the debtor’s attorney fees incurred in defending an appeal by the creditor of a stay violation order were recoverable “actual damages,” and that those fees were a part of enforcing the stay.²⁰⁰ In another Ninth Circuit distinction of *Sternberg*, when the creditor made a conditional offer to settle, without

194. *In re Dawson*, 390 F.3d 1139, 1149 (9th Cir. 2004). See also *Lodge*, 750 F.3d at 1271 (similar three-part test).

195. See *America’s Servicing Co. v. Schwartz-Tallard*, 438 B.R. 313 (D. Nev. 2010), *aff’d*, 765 F.3d 1096 (9th Cir. 2014) (\$20,000 emotional distress damages).

196. 595 F.3d 937 (9th Cir.), *cert. denied*, 131 S. Ct. 180 (2010).

197. See *In re Pace*, 67 F.3d 187 (9th Cir. 1995) (discussing whether trustee was “individual” entitled to § 362(k) damages).

198. See *In re Thompson*, 426 B.R. 759 (Bankr. N.D. Ill. 2010).

199. See *Young v. Repine (In re Repine)*, 536 F.3d 512 (5th Cir. 2008) (statute didn’t require prevailing party to show fees had actually been paid).

200. *Schwartz-Tallard v. America’s Servicing Co. (In re Schwartz-Tallard)*, 765 F.3d 1096 (9th Cir. 2014) (distinguishing *Sternberg*).

admitting its stay violation, the debtor was entitled to attorney fees as actual damages for continued litigation to remedy the stay violation.²⁰¹

The statute also provides, “in appropriate circumstances,” for recovery of punitive damages. The Fifth Circuit required a showing of “egregious conduct” to justify punitive damages, and that is a typical expression of the requirement.²⁰² The facts of each violation and the nature of the willfulness, as well as the extent to which it was “egregious,” are all factors in the punitive damage equation.²⁰³

Government entities may violate the stay and be subject to damages, since § 106(a) abrogates sovereign immunity as to § 362 compliance.²⁰⁴ Under § 106(a)(3), however, this abrogation does not permit punitive damages against a governmental unit.²⁰⁵

2.7.8 Effect of stay relief on eligibility to file bankruptcy

Section 109(g) provides that an individual who has been a debtor in a case pending within the 180 days is not eligible to file another bankruptcy case under two circumstances: (1) The prior case was dismissed for the debtor’s willful failure to abide by a court order or to appear in court in prosecution of the case;²⁰⁶ or (2) The debtor requested and received voluntary dismissal of the prior case after a motion for relief from the auto-

201. *Snowden v. Check Into Cash of Wash., Inc. (In re Snowden)*, 69 F.3d 651 (9th Cir. 2014).

202. *Repine*, 536 F.3d 512. See also *In re Knaus*, 889 F.2d 77 (8th Cir. 1989).

203. See, e.g., *Credit Nation Lending Servs., LLC v. Nettles*, 489 B.R. 239 (N.D. Ala. 2013) (punitive damages were appropriate for refusal to return repossessed vehicle, although only actual damages were debtor’s attorney fees).

204. *But see Fla. Dep’t of Rev. v. Diaz (In re Diaz)*, 647 F.3d 1073 (11th Cir. 2011) (discussing sovereign immunity as to a state governmental entity when debtor did not prosecute stay violation until four years after discharge).

205. See, e.g., *In re Griffin*, 415 B.R. 64 (Bankr. N.D.N.Y. 2009). See also *Harchar v. United States (In re Harchar)*, 694 F.3d 639 (6th Cir. 2012) (IRS didn’t waive sovereign immunity under § 106(b) by filing proof of claim for tax years other than for year of refund in dispute).

206. See, e.g., *Allen v. Wayside Transp. Corp. (In re Allen)*, No. MB 00-115, 2001 WL 36381911 (B.A.P. 1st Cir. June 15, 2001) (subsequent case properly dismissed when debtor had failed to appear for § 341 meeting of creditors in prior case).

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matic stay was filed.²⁰⁷ The second condition has resulted in some disagreement among courts as to whether the statute is to be applied literally or whether the court may consider the relevance of the stay relief motion to the new bankruptcy filing. In *Rivera v. Matos (In re Rivera)*,²⁰⁸ the court reviewed three predominant views taken by various courts on § 109(g)(2): a strict or mandatory application whenever the voluntary dismissal occurred after a stay relief motion was filed; an equitable or discretionary application; and a causal connection view. Another court, in *In re Richter*,²⁰⁹ applied a fourth approach, finding that it was relevant whether the stay relief motion was actually pending and unresolved in the prior case when the debtor moved to voluntarily dismiss. Under the causal connection approach, the court might consider the relationship between the prior stay relief request and the new bankruptcy, for example, to determine if the creditor requesting the relief would be prejudiced by the new case filing.²¹⁰ Of course, there is authority that § 109(g)(2) must be applied literally.²¹¹

207. 11 U.S.C. § 109(g)(1) & (2).

208. 494 B.R. 101 (B.A.P. 1st Cir. 2013).

209. No. 10-01260, 2010 WL 4272915 (Bankr. N.D. Iowa Oct. 22, 2010).

210. See, e.g., *In re Payton*, 481 B.R. 460 (Bankr. N.D. Ill. 2012); *In re Durham*, 461 B.R. 139 (Bankr. D. Mass. 2011).

211. See, e.g., *Moran v. Frisard (In re Ulmer)*, 19 F.3d 234 (5th Cir. 1994); *In re Andersson*, 209 B.R. 76 (B.A.P. 6th Cir. 1997). See also Ned W. Waxman, *Judicial Follies: Ignoring the Plain Meaning of Bankruptcy Code § 109(g)(2)*, 48 Ariz. L. Rev. 149, 152–57 (2006).

~ PART 3 ~

BANKRUPTCY ESTATE AND EXEMPTIONS

A summary of principles of the bankruptcy estate includes:

- *The bankruptcy estate broadly includes all legal or equitable interests held by a debtor in property. § 541(a)*
- *Property that is not included in the estate is described in § 541(b).*
- *Although some property may be in possession of a third party, it may be subject to recovery by the estate, through turnover or avoidance. §§ 542–550*
- *Certain property may be exempt from the bankruptcy estate under either § 522 of the Bankruptcy Code or applicable state law.*

A significant occurrence with the commencement of a bankruptcy case is the immediate creation of a bankruptcy estate, broadly consisting of all of the debtor's property rights in real and personal property, subject to the exceptions in § 541(b). The Code does not require that the debtor have possession of property in order for it to be brought into the estate, since § 541(a) states that the estate comprises property "wherever located or by whomever held."²¹² This basic concept illustrates why property, such as a vehicle, that has been repossessed before the bankruptcy filing is property of the estate, subject to turnover to the debtor or trustee,²¹³ assuming that the debtor's interest in the property has not been fully terminated under applicable law. The Supreme Court underscored this concept in *United States v. Whiting Pools, Inc.*,²¹⁴ recognizing that property in the hands of a creditor at the time of a bankruptcy filing may be property of the estate. This concept works in tandem with the automatic stay, under which a creditor may violate the stay by refusing to turn over repossessed proper-

212. 11 U.S.C. § 541(a).

213. *See id.* §§ 542 and 543 for turnover, discussed *infra* § 3.3.

214. 462 U.S. 198 (1983).

ty.²¹⁵ The debtor's interest in property is the focus, and except for what the Code prevents from coming in, the estate includes the debtor's "legal or equitable interests."²¹⁶

Another characteristic underlying the bankruptcy estate is that, although federal law ultimately determines the estate's property, bankruptcy courts often look to nonbankruptcy law for purposes of a debtor's interest in property, a concept also recognized by the Supreme Court in *Butner v. United States*.²¹⁷ Examples of relevant state law include the Uniform Commercial Code and state statutes that fix a time when a debtor no longer has a right to redeem property that has been repossessed or foreclosed.²¹⁸

3.1 Inclusions in estate property

Under § 541(a), the bankruptcy estate includes: (1) all legal or equitable interests of the debtor as of case commencement (subject to § 541(d)'s provision that if the debtor holds only the legal interest, that is all that comes into the estate); (2) all interests of the debtor and debtor's spouse (whether a joint filing or not) in community property (subject to exceptions reviewed below); (3) interests in property that the trustee may recover, and property preserved for benefit of creditors; (4) certain interests that the debtor acquires within 180 days after the bankruptcy filing; (5) proceeds, profits, and other such additions to property of the estate; and (6) interests that the estate itself acquires after case commencement.

Community property is determined by the law of a debtor's applicable state. In community property jurisdictions, § 541(a)(2) includes within the bankruptcy estate community property in which the debtor has sole, equal, or joint management and control, or property that is liable for a claim against the debtor, or against the debtor's interest in the

215. See, e.g., *Weber v. SEFCU (In re Weber)*, 719 F.3d 72 (2d Cir. 2013); *Thompson v. GMAC*, 566 F.3d 699 (7th Cir. 2009). Automatic stay is discussed *supra* Part 2.

216. 11 U.S.C. § 541(a)(1).

217. 440 U.S. 48 (1979).

218. See, e.g., *Weber*, 719 F.3d 72 (under New York law, debtor had equitable interest in repossessed vehicle, with right to redeem, which became property of Chapter 13 estate).

community property. The Code distinguishes tenancy by entirety and joint tenancy property from community property. In states recognizing tenancy by entirety or joint tenancy, the debtor's interest in such property is exempt, to the extent that the applicable nonbankruptcy law recognizes it as exempt from process.²¹⁹

Section 541(a)(3) and (4) recognize that if a bankruptcy trustee recovers property under one of the recovery, avoidance, or preservation powers,²²⁰ that recovery belongs to the bankruptcy estate. This comes into play often. For example, if the trustee avoids an unperfected lien that would be prior to other liens, assuming it were valid, the avoided lien does not improve the position of the junior liens; instead, its position is preserved for the benefit of the estate.²²¹

When a debtor files bankruptcy, the estate is entitled to receive certain interests to which the debtor is entitled at that time, or it becomes entitled within 180 days from the filing date. Section 541(a)(5) includes within that description a bequest, devise, or inheritance; interests resulting from a property settlement agreement with the debtor's spouse, or from a divorce decree; and interests as a beneficiary of a life insurance policy or death benefit plan. Some of the issues presented by these provisions include whether the debtor may disclaim an inheritance, preventing it from becoming property of the estate,²²² and whether there is a distinction made for property passing to the debtor, not by inheritance, but by a "payable on death account" or "death deed."²²³ Section 1306(a) may expand the 180-day time, including within the Chapter 13 bankruptcy es-

219. 11 U.S.C. § 522(b)(3)(B).

220. *See id.* §§ 329(b), 363(n), 543, 510(c), 547, 548, 550, 551, 553, & 723.

221. 11 U.S.C. § 551. *See, e.g., In re Messina*, 687 F.3d 74 (3d Cir. 2012) (trustee's avoidance of junior lien was for benefit of estate, priming debtors' exemption claim to sale proceeds). *But see Degiacomo v. Traverse (In re Traverse)*, 753 F.3d 19 (1st Cir. 2014) (although trustee could avoid unperfected mortgage, preservation of lien yielded no benefit to estate).

222. *See, e.g., In re Chenoweth*, 3 F.3d 1111 (7th Cir. 1993) (disclaimer could be set aside). *See also* Stephen E. Parker, *Can Debtors Disclaim Inheritances to the Detriment of Their Creditors?*, 25 Loy. U. Chi. L.J. 31 (1993).

223. *See In re Hall*, 441 B.R. 680 (B.A.P. 10th Cir. 2009) (such acquisitions didn't become property of estate under § 541(a)(5)).

tate more inheritances and other postpetition acquisitions. Although this is the majority view, including that held by the Fourth Circuit,²²⁴ there is a split of authority.²²⁵

Although § 541(a)(6) includes postpetition proceeds that accrue from property of the estate, in Chapter 7, postpetition “earnings from services performed by an individual debtor” are not included.²²⁶ Section 1306 brings such postpetition earnings into the estate, at least to the extent necessary to fund the Chapter 13 plan.

3.2 Exclusions from estate

Although property is broadly included within the estate, there are exclusions, which are set forth in § 541(b). If the debtor actually has no interest—legal or equitable—in property, for example, because the debtor’s interest had been irrevocably terminated, it would not come into the estate under § 541(a)(1).²²⁷ Under § 541(b)(1), if the debtor’s interest in property is limited to a power that can be exercised solely for the benefit of another, that interest does not become property of the estate. Lease interests in nonresidential real property that have terminated prebankruptcy do not come into the estate, an exclusion that would not apply typically in consumer cases.²²⁸

Pursuant to § 541(b)(5) and (6),²²⁹ the bankruptcy estate does not include funds placed in certain educational retirement accounts or tui-

224. See, e.g., *Carroll v. Logan*, 735 F.3d 147 (4th Cir. 2013) (§ 1306(a) included in estate inheritance received more than 180 days after petition filing).

225. See, e.g., *Dale v. Maney* (*In re Dale*), 505 B.R. 8 (B.A.P. 9th Cir. 2014) (agreeing with *Carroll*); *In re Roberts*, 514 B.R. 358 (Bankr. E.D.N.Y. 2014) (adopting majority view). Accord *In re Tinney*, No. 07-42020-JJR13, 2012 WL 2742457 (Bankr. N.D. Ala. July 9, 2012). Contra *In re McAllister*, 510 B.R. 409 (Bankr. N.D. Ga. 2014) (discussing conflicting authority and disagreeing with *Carroll*).

226. 11 U.S.C. § 541(a)(6).

227. See, e.g., *In re Graves*, 609 F.3d 1153 (10th Cir. 2010), cert. denied, 131 S. Ct. 906 (2011) (debtor’s prepetition tax refund had been applied to other tax obligation).

228. 11 U.S.C. § 541(b)(2). Sections 541(b)(3) and (4) also would not apply in the typical consumer case.

229. See also *id.* § 541(e) for definitions related to § 541(b)(5) and (6); and see § 521(c) for debtor’s obligation to disclose records of such accounts.

tion credit accounts. Section 541(b)(7) also excludes from the estate funds withheld from wages by a debtor's employer when the withholding is for contribution to described tax-deferred retirement accounts, such as Employee Retirement Income Security Act (ERISA)²³⁰ benefit plans and others recognized by the Internal Revenue Service.²³¹ Only those contributions being withheld at the time of the bankruptcy filing may be shielded by § 541(b)(7), according to *Seafort v. Burden (In re Seafort)*.²³² In *Seafort*, the issue was whether a Chapter 13 debtor could continue to withhold from wages contributions to a 401(k) retirement account, after the debtor had repaid an existing loan from that account. The Sixth Circuit, reading §§ 541(a), 541(b)(7), and 1306 together, held that the debtor could not, since postpetition earnings were disposable income required to fund the plan. The split of authority on this issue is reviewed in *Parks v. Drummond (In re Parks)*,²³³ a Ninth Circuit Bankruptcy Appellate Panel opinion, agreeing with *Seafort*.

Section 541(b)(8) excludes described pawned and pledged property from the estate. In addition to the § 541(b) exclusions, § 541(c) recognizes the validity of such agreements and instruments as spendthrift trusts that are valid under applicable nonbankruptcy law. If the debtor has only a beneficial interest in a trust with a restriction on transfer, and that trust is enforceable under applicable law, § 541(c)(2) continues the nonbankruptcy protection of a beneficiary's interest in that trust by insulating it from inclusion in the bankruptcy estate. Not surprisingly, this can be a source of litigation in the bankruptcy court, which may be asked to decide if the alleged trust is recognized by the applicable law.²³⁴

Section 541(c)(2)'s protections extend to retirement funds that are held in trust and have transfer restrictions under federal law, such as

230. 29 U.S.C. §§ 1001–1003.

231. For discussion of these exclusions, see Hon. William H. Brown, Lawrence R. Ahern III & Nancy Fraas MacLean, *Bankruptcy Exemption Manual*, ch. 2 (annual editions) [hereinafter *Bankruptcy Exemption Manual*].

232. 669 F.3d 662 (6th Cir. 2012).

233. 475 B.R. 703 (B.A.P. 9th Cir. 2012).

234. See, e.g., *Wetzel v. Regions Bank*, 649 F.3d 831 (8th Cir. 2011) (debtor's beneficial interest in testamentary trust, containing spendthrift provision valid under Arkansas law, did not become property of estate).

those under ERISA²³⁵ and the Civil Service Retirement Act.²³⁶ Individual retirement accounts may not be excluded under § 541(c)(2), but are subject to exemption under § 522(b) and (d),²³⁷ discussed *infra*.

3.3 Turnover

Sections 542 and 543 provide for turnover of property belonging to the bankruptcy estate, a remedy commonly sought by debtors, especially in Chapter 13, to recover property that was repossessed just before the bankruptcy filing. Assuming that the debtor's interest in the repossessed property has not been terminated with finality under applicable non-bankruptcy law, the failure of a repossessing creditor to promptly return the property may be a stay violation.²³⁸ The secured creditor may move for stay relief and seek adequate protection, under §§ 362(d) and 361, but it is normally best for the creditor to return the repossessed property and then move for relief. The trustee may also seek turnover,²³⁹ although there are limits on the scope of §§ 542 and 543.²⁴⁰

235. *Patterson v. Shumate*, 504 U.S. 753 (1992).

236. 5 U.S.C. §§ 8331–8351. *See also* *Whetzel v. Alderson*, 32 F.3d 1302 (8th Cir. 1994) (Civil Service Retirement Act restricted transfer). *See Bankruptcy Exemption Manual*, *supra* note 231, ch. 2, for discussion of spendthrift trusts and federal-law exclusions.

237. *See Rousey v. Jacoway*, 544 U.S. 320 (2005) (holding IRA exempt under § 522(d)(1)(E)). The Code was subsequently amended to add exemptions under § 522(b)(3)(C) and (d)(12).

238. *See, e.g., Weber v. SEFCU (In re Weber)*, 719 F.3d 72 (2d Cir. 2013); *Thompson v. GMAC*, 566 F.3d 699 (7th Cir. 2009); and *see* discussion of automatic stay *supra* Part 2.

239. *See, e.g., Shapiro v. Henson*, 739 F.3d 1198 (9th Cir. 2014) (concluding plain language of § 542 does not restrict turnover to property still in possession of defendant; disagreeing with *In re Pyatt*, 486 F.3d 423 (8th Cir. 2007)); *In re Ruiz*, 455 B.R. 745 (B.A.P. 10th Cir. 2011) (trustee obtained turnover of money in Chapter 7 debtor's checking account).

240. *See, e.g., Lovald v. Falzerano (In re Falzerano)*, 686 F.3d 885 (8th Cir. 2012) (trustee couldn't obtain debts owed to Chapter 7 debtor by turnover, based on theory of unjust enrichment).

3.4 Avoidance recovery

Property of the estate includes recoveries by a trustee under the various avoidance sections of the Code, including preferences,²⁴¹ fraudulent transfers,²⁴² and unauthorized postpetition transfers.²⁴³ Section 550 addresses recovery from and liability of transferees of avoided transfers.²⁴⁴ Section 551 preserves avoided transfers for the benefit of the bankruptcy estate. The debtor, more commonly in Chapter 13 than 7, has some opportunity to exempt recoveries by the trustee²⁴⁵ and to avoid transfers, to the extent the trustee declines to pursue avoidance if the subject transfer was not voluntarily made by the debtor and if the debtor is able to claim the avoided transfer of a property interest as exempt.²⁴⁶ The threshold to the debtor's use of avoidance power typically revolves around the question of whether the transfer at issue was voluntary. For example, when the debtor voluntarily transferred a security interest in a vehicle, the trustee was successful in objecting to the debtor's use of § 522(g) to claim an exemption in the vehicle.²⁴⁷ Although the security interest was not perfected by the creditor, and the trustee avoided that transfer, the transfer by the debtor was nevertheless voluntary.

3.5 Judicial estoppel

The effect of a debtor's failure to schedule or otherwise disclose a cause of action is a common issue in the bankruptcy and appellate courts. There is a wealth of reported decisions in which courts have applied judicial estoppel, preventing the debtor or former debtor from pursuing a cause of

241. See 11 U.S.C. § 547.

242. See *id.* § 548.

243. See *id.* § 549.

244. See, e.g., *In re Allen*, No. 13-3543, 2014 WL 267211 (3d Cir. Sept. 26, 2014) (holding district court erred in applying narrow definition of "recover" under § 550, and discussing split among Fifth, Second, and Tenth Circuits on whether "recovery" of funds is required before they can be considered property of estate).

245. See 11 U.S.C. § 522(g).

246. See *id.* § 522(h).

247. *Russell v. Kuhnel (In re Kuhnel)*, 495 F.3d 1177 (10th Cir. 2007).

action that was not scheduled in the bankruptcy case.²⁴⁸ The theory is that the debtor is obligated to schedule and disclose all assets, including causes of action; the debtor's failure to disclose is equivalent to a representation that no cause of action exists. For example, in Chapter 13, courts have construed the debtor's failure to schedule a cause of action, in conjunction with obtaining a confirmation, to be reliance by the bankruptcy court on the nondisclosure in affirming the plan, thereby justifying application of judicial estoppel.²⁴⁹ The duty to disclose is part of the § 521 duty to schedule all assets, and it is interpreted as a continuing duty, especially in Chapter 13 cases that may be in active plans for up to five years.²⁵⁰ Exceptions have been found, however: when the cause of action belonged to the bankruptcy estate; when the failure to disclose was not the debtor's fault;²⁵¹ and when the "innocent trustee" had the opportunity to pursue the undisclosed action for the benefit of creditors.²⁵² The debtor's failure to schedule a cause of action is harmful—not simply to the debtor but to the unsecured creditors who would potentially benefit—and if the cause of action belongs to the bankruptcy estate, as it would if it arose prepetition (and possibly postpetition in Chapter 13), the trustee perhaps should not be prejudiced by the debtor's nondisclosure.

3.6 Exemptions

The basic concept behind exemptions, whether bankruptcy or state law controls, is to provide some level of protection for debtors. As one court

248. See, e.g., *Kimberlin v. Dollar Gen. Corp.*, 520 F. App'x 312 (6th Cir. 2013); *Jones v. United States*, 476 F. App'x 815 (11th Cir. 2012); *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472 (6th Cir. 2010); *Moses v. Howard Univ. Hosp.*, 606 F.3d 789 (D.C. Cir. 2010). For application of judicial estoppel by nonbankruptcy courts, based on a debtor's failure to schedule the cause of action, see Hon. William H. Brown, Lundy Carpenter & Donna T. Snow, *Debtors' Counsel Beware: Use of the Doctrine of Judicial Estoppel by Nonbankruptcy Forums*, 75 Am. Bankr. L.J. 197 (Spring 2001).

249. See, e.g., *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269 (11th Cir. 2010).

250. See, e.g., *Rainey v. UPS, Inc.*, 466 F. App'x 542 (7th Cir. 2012).

251. See, e.g., *Javery v. Lucent Techs., Inc.*, 741 F.3d 686 (6th Cir. 2014) (failure to schedule was debtor's attorney's mistake).

252. See, e.g., *Stephenson v. Malloy*, 700 F.3d 265 (6th Cir. 2012); *Reed v. City of Arlington*, 650 F.3d 571 (5th Cir. 2011).

expressed it, “the historical purpose of exemptions laws has been to protect a debtor from his creditors, to provide him with the basic necessities of life so that even if his creditors levy on all of his nonexempt property, the debtor will not be left destitute and a public charge.”²⁵³ The applicable exemptions for specific assets and their dollar limits may or may not serve this purpose in today’s economy. A review of state exemptions reveals that some states have amended their laws within recent years, increasing exemption amounts for various types of property, including homesteads, while other states still have rather limited amounts or scope of available exemptions.²⁵⁴ The federal homestead and other exemption amounts are listed in the Bankruptcy Code, § 522(d).²⁵⁵

Exemptions are frequent sources of litigation in the bankruptcy and appellate courts. This is not surprising because if a debtor succeeds in claiming specific property as exempt, that property is protected from administration by the trustee or from collection processes by creditors. In some states, debtors in bankruptcy have choices between exemptions under the Bankruptcy Code and exemptions under their applicable state law. In other states, debtors are limited to the applicable state-law exemptions. Consequently, the Bankruptcy Code is not the only governing authority; state laws may also come into play.²⁵⁶

“[N]o property can be exempted . . . unless it first falls *within* the bankruptcy estate.”²⁵⁷ Section 522 describes the method for first deciding which exemptions are available to a particular debtor, and this varies de-

253. *In re Krebs*, 527 F.3d 82, 85 (3d Cir. 2008) (quoting H.R. Rep. No. 95-595, at 126 (1977)).

254. See, e.g., *Bulan v. Calloway (In re 1256 Hertel Ave. Assocs., LLC)*, 761 F.3d 252 (2d Cir. 2014) (New York’s increased homestead applied to debtor’s filing bankruptcy after amendment’s effective date); *In re Kyle*, 510 B.R. 804 (Bankr. S.D. Ohio 2014) (debtor entitled to Ohio homestead increased one week before bankruptcy filing). For a summary of each state’s exemptions, see appendices in *Bankruptcy Exemption Manual*, *supra* note 231.

255. See 11 U.S.C. § 104. The exemption amounts in § 522(d) are subject to automatic increases every three years based on changes in the Consumer Price Index, with the next adjustment scheduled for April 1, 2016.

256. See *Bankruptcy Exemption Manual*, *supra* note 231, for in-depth discussion of exemptions and related issues.

257. *Owen v. Owen*, 500 U.S. 305, 308 (1991).

pending on the state in which the debtor is domiciled when filing bankruptcy, a different question from the venue of the case. For example, a debtor may properly file a bankruptcy case in the Western District of Tennessee, where the debtor has had a residence or domicile for at least 180 days,²⁵⁸ but be unable to claim Tennessee exemptions because of § 522(b)'s requirements.

Explaining this difference in venue and exemption availability requires looking at how § 522(b) is structured. As background, in the 1978 Code, which still forms the foundation for the current Bankruptcy Code, Congress created an opt-out for each state, allowing a state legislature to decide if debtors domiciled in that state who filed for bankruptcy relief could claim exemptions under the Bankruptcy Code or would be restricted to using the state's exemptions. If it wished, a state could allow its domiciliaries to choose between the two exemption schemes, or it could eliminate that choice. Notably, the Supreme Court held that the earlier Bankruptcy Act of 1898, which relied on using exemptions for the state in which the "bankrupt" had been domiciled for six months, was constitutional, and that the variation in available exemptions did not violate the Uniformity Clause.²⁵⁹ Subsequent constitutional attacks on the 1978 opt-out have failed.²⁶⁰

BAPCPA made the opt-out more complex by changing the time for measuring which state exemptions would be available, in an attempt to deter debtors from moving from one state to another with more favorable exemptions just before filing bankruptcy. Under § 522(b), as amended in 2005, the debtor is first given a choice between claiming exemptions under § 522(d) or under state law applicable on the date of filing bankruptcy.²⁶¹ Then, the Code states that the choice of § 522(d) exemptions is available "unless the State law that is applicable to the debtor . . . specifically does not so authorize"²⁶²—in other words, the state has opted out of

258. 28 U.S.C. § 1408(1).

259. *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181 (1902).

260. See, e.g., *In re Sullivan*, 680 F.2d 1131 (7th Cir. 1982); *Rhodes v. Stewart*, 705 F.2d 159 (6th Cir. 1983). The history of congressional adoption of this opt-out procedure is interesting. See *Bankruptcy Exemption Manual*, *supra* note 231, ch. 4.

261. 11 U.S.C. § 522(b)(1).

262. *Id.* § 522(b)(2).

§ 522(d). The next hurdle for debtors is to determine which state's laws are applicable.

Assuming that a debtor would like or is required to claim state exemptions under § 522(b)(3)(A), the appropriate state is the one in which the debtor was domiciled for “the 730 days immediately preceding the date of the filing of the petition,” but if the debtor was not domiciled in a particular state for the full 730 days, then we look to “the place in which the debtor’s domicile was located for 180 days immediately preceding the 730-day period, or for a longer period of such 180-day period than in any other place.”²⁶³ The bottom line is that, in each bankruptcy case, the debtor, trustee, parties in interest, and perhaps the court, may have to determine where the debtor was domiciled for two years—easy if the debtor was, in fact, in one place that long; but many debtors move more frequently. Remember that the venue for the case is still a six-month window, while exemption is governed by a different time. If a debtor has changed domicile within the preceding 730 days, looking back an additional 180 days is required. Why is this complicated? Counting days may be easy, but then you run into questions of whether the state law that ends up being applicable under that calculation would permit the debtor, who no longer resides or is domiciled in that state, to benefit from that state’s exemption laws.

For example, a debtor properly filed a consumer case in the District of Colorado, where the debtor had been domiciled for more than six months; but the debtor had moved within the 730 days before filing in the District of Colorado, and for the greater part of the 180 days before that 730 days, the debtor was domiciled in Texas. The debtor owns a home in Colorado and has not owned a home in Texas for two years. Colorado has opted out, which means that its residents or domiciliaries may not use the § 522(d) exemptions.²⁶⁴ This debtor would like to claim exemptions. Would Texas law recognize that this debtor, who has not lived there for a couple of years, could still benefit from Texas exemptions? Texas has an unlimited homestead exemption, meaning that, if

263. *Id.* § 522(b)(3)(A).

264. Colo. Rev. Stat. § 13-54-107.

available, any equity above valid security claims on the home is exempt.²⁶⁵ Texas is not an opt-out state, so its debtors may freely choose between whichever exemption scheme is more favorable, the § 522(d) or state. There are at least two questions: Are Texas exemptions available generally to nonresidents? and Is Texas's favorable homestead, or other Texas exemptions, available for use on property located in Colorado? As to the first question, it appears that Texas exemptions are generally not restricted only to its residents. As to the second question, Texas property law would limit the homestead to property "in this state."²⁶⁶ There may be a different answer as to availability of exemptions other than the homestead. For example, a state's exemptions on personal property may not be restricted to its residents or domiciliaries.²⁶⁷ The use of a state's exemptions outside that state is referred to as extraterritoriality, and state laws, if they exist, simply vary on that effect,²⁶⁸ as well as on whether a nonresident or nondomiciliary may use that state's exemptions, regardless of location of the relevant property. It is no surprise, therefore, that since 2005 a considerable amount of litigation has ensued—reaching appellate levels—as to which state's exemptions are applicable, or if any are available.²⁶⁹

A question related to the transient debtor is whether the opt-out from the applicable state controls. The Fifth Circuit considered the case of a debtor who had moved from Florida to Texas within the 730 days before filing bankruptcy in Texas, a proper venue for the case. The debtor was not eligible for Texas exemptions, having been domiciled there for less than a full 730 days. The debtor was therefore required under § 522(b) to look to Florida for exemptions, but Florida's exemptions apply only to its residents, and Florida is an opt-out state. Since the debtor

265. Tex. Const. art. XVI, §§ 50, 51; Tex. Prop. Code §§ 41.001–41.002.

266. Tex. Prop. Code § 41.002(d).

267. See *Bankruptcy Exemption Manual*, *supra* note 231, ch. 4, for summary of each state's exemption restrictions on residency or domicile.

268. See *In re Roberts*, 450 B.R. 159 (N.D. Iowa 2011), as an example of a state's homestead, here Iowa's, being available as to property located in another state, there California.

269. See, e.g., *Camp v. Ingalls (In re Camp)*, 631 F.3d 757 (5th Cir. 2011); *In re Long*, 470 B.R. 186 (Bankr. D. Kan. 2012).

is no longer a resident of Florida, Florida's exemptions are not available, and its opt-out statute refers to "residents of the state."²⁷⁰ Under these facts, the Fifth Circuit, in *Camp v. Ingalls (In re Camp)*,²⁷¹ applied the fall-back provision in § 522(b). This provision states that if the domiciliary requirements resulted in the debtor not having state exemptions available, the debtor may use the § 522(d) exemptions. Even though this debtor was not governed by Texas exemptions, which permit choice between state exemptions or § 522(d), the debtor could use § 522(d); whereas, if Florida law had controlled, the debtor would not have had that exemption available. This savings provision, in a sentence at the end of § 522(b), provides that "[i]f the effect of the domiciliary requirement . . . is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d)."

Section 522(b)(1) provides that if there are joint debtors in the case, one debtor may not elect to use state exemptions and the other elect the § 522(d) exemptions. Each of the joint debtors is required to elect the same source of exemptions. If they cannot agree, they are "deemed to elect" § 522(d)—unless, of course, the applicable state has opted out of § 522(d). Under the look-back for domicile purposes, it is possible that the two joint filers were not both domiciled in the same state for 730 days or even the prior 180-day period. In *In re Connor*,²⁷² the joint filers (husband and wife) lacked common domicile for the look-back period. The court decided that the Code mandated the exemption source available to each debtor based on his and her domicile. Mr. Connor had to use North Carolina's exemptions. Mrs. Connor, however, was ineligible for exemptions from both North Carolina and her prior state, Florida, which required residency. The court concluded that Mrs. Connor was not "electing" a different choice: she had only the § 522(d) exemptions available under the § 522(b) savings provision (described above).

A twist in the Code comes into play if the debtor is able to, and does, choose state exemptions under § 522(b)(3). That debtor may also claim nonbankruptcy federal exemptions (i.e., under federal statutes other than

270. Fla. Stat. Ann. § 222.20 (1979).

271. 631 F.3d 757 (5th Cir. 2011).

272. 419 B.R. 304 (Bankr. E.D.N.C. 2009).

§ 522(d)), but if the debtor chooses the § 522(d) exemptions, § 522(b)(2) appears to limit the exemptions to those under § 522(d). At least one court has construed this literally to mean that a § 522(d) exemption debtor may not also benefit from the variety of federal exemptions that are outside the Bankruptcy Code.²⁷³

The debtor makes her exemption claim on Schedule C, an Official Form that is part of the required schedules to be filed with, or shortly after, a petition filing.²⁷⁴ Generally, exemptions are determined as of the petition filing date,²⁷⁵ and each joint debtor is entitled to her exemptions.²⁷⁶

3.7 Objections to exemption claims

The procedure and general timing requirements for objecting to a debtor's exemption claims are set out in Bankruptcy Rule 4003(b), which provides that a party in interest may file an objection within thirty days after conclusion of the § 341 meeting of creditors or within thirty days after any amendment to Schedule C. The court may, for cause, extend that time, provided that a motion for extension is filed before the original time expired. Several issues have arisen about this timing, and the Supreme Court, in *Taylor v. Freeland & Kronz*,²⁷⁷ interpreted the Rule strictly, holding that a trustee who did not object within the thirty-day window was barred. *Taylor* involved a debtor's claim of exemption in a potential employment discrimination action, and she valued the cause of action on Schedule C as "unknown." The opinion stands for the principle that the trustee was put on notice by the debtor's exemption claim and value of "unknown," triggering a requirement to object.

273. *In re Schena*, 439 B.R. 776 (Bankr. D.N.M. 2010). See also *Bankruptcy Exemption Manual*, *supra* note 231, ch. 5, for discussion of nonbankruptcy federal exemptions.

274. See 11 U.S.C. § 522(l), providing that the debtor "shall file a list of property that the debtor claims as exempt," but if the debtor does not, a dependent of the debtor may file such a list.

275. See, e.g., *Wolfe v. Jacobson (In re Jacobson)*, 676 F.3d 1193 (9th Cir. 2012).

276. 11 U.S.C. § 522(m). See *Dykstra Exterior, Inc. v. Nestlen (In re Nestlen)*, 441 B.R. 135 (B.A.P. 10th Cir. 2010) (under § 522(m) each joint debtor had homestead exemption, essentially doubling amount available).

277. 503 U.S. 638 (1992).

In *Schwab v. Reilly*,²⁷⁸ the Supreme Court held that when the debtor claims exemption under a statute—in this case, § 522(d)(5) & (6)—that allows exemption only in the debtor’s “interest” in an asset, rather than the asset itself, and the statute has a dollar cap on amount, the trustee is not required to object to an exemption that falls within the statute’s cap. In *Schwab*, the debtor had claimed dollar exemptions in cooking equipment, but the trustee was able to sell the equipment for more than the exemption amounts, resulting in payment to the debtor for her exemption claims and a balance available for the bankruptcy estate. The debtor, relying on *Taylor*, argued that the trustee’s failure to timely object was a bar. The Court distinguished the case at hand from its decision in *Taylor*, on the basis that the exemption at issue in *Schwab* was within the dollar amounts in the statute, and the statute did not allow exemption of the asset itself, only the debtor’s interest in that asset.

Subsequent to *Schwab*, other courts have explained that a debtor’s attempts to claim the entire asset—by means such as stating on Schedule C that the exemption is for the full market value or 100% of the asset’s value—may trigger the need for an objection.²⁷⁹ But when an exemption statute—whether § 522(d) or state law—exempts only the debtor’s interest in an asset, an objection may not be required under Rule 4003(b), assuming the dollar amount claimed is within the applicable statutory limits. An example of this occurs in *In re Gebhart*,²⁸⁰ in which Chapter 7 trustees did not object to debtors’ homestead exemption claims, but the trustees were allowed to sell the homes, paying the allowed exemption amounts to debtors, with the appreciated value of the homes, above the exemptions, available for distribution to creditors.²⁸¹

There are some exemptions, both under § 522(d) and applicable state laws, that do not refer to the debtor’s “interest” but permit exemption in an entire asset, without reference to a dollar cap. For example, § 522(d)(9) exempts “professionally prescribed health aids” without a

278. 560 U.S. 770 (2010).

279. See, e.g., *In re Salazar*, 449 B.R. 890 (Bankr. N.D. Tex. 2011).

280. 621 F.3d 1206 (9th Cir. 2010).

281. See also *In re Orton*, 687 F.3d 612 (3d Cir. 2012) (trustee had benefit of appreciated value of oil and gas leases, with debtor limited to receiving exempt amount).

dollar limit. For such exemptions, the *Schwab* analysis would not come into play. If a party in interest believed such an exemption was improper, an objection would be required.

3.8 Exemption of retirement funds

Certain retirement funds are exempt from creditor claims in bankruptcy proceedings. The amendments to the Code in 2005 included the addition of two specific exemption sections for retirement funds “to the extent those funds are in a fund or account that is exempt from taxation under” several sections of the Internal Revenue Code (IRC).²⁸² The same exemption appears in § 522(b)(3)(C), making it available to debtors who choose or must use state exemptions, and in § 522(d)(12) for debtors using the Bankruptcy Code exemptions. The exemption is for federally recognized, tax-exempt retirement accounts, such as pension plans under IRC § 401, annuity plans under IRC § 403, IRAs under IRC § 408, Roth IRAs under IRC § 408A, and plans covered by IRC §§ 414, 457, and 501(a). Specific restrictions on exemption of these funds—when there is a question about favorable IRS rulings on tax exemption—are set forth in § 522(b)(4).²⁸³ There is a monetary cap on exemption for IRA accounts, currently at \$1,245,475, subject to automatic increase on April 1, 2016, and every three years thereafter.²⁸⁴

There was a question whether an IRA is exempt from the bankruptcy estate when the fund was created by one person and then passed by inheritance to a beneficiary. The Fifth and Seventh Circuits had split on the issue.²⁸⁵ Affirming the Seventh Circuit, the Supreme Court held, in *Clark*

282. 11 U.S.C. § 522(b)(3)(C) & (d)(12).

283. See *Daley v. Mostoller* (*In re Daley*), 717 F.3d 506 (6th Cir. 2013) (discussing effect of favorable IRS ruling on account that was not disqualified from tax exemption by debtor’s grant of boilerplate lien to brokerage company, when debtor never incurred debt related to lien).

284. 11 U.S.C. § 522(n).

285. See *Chilton v. Moser*, 674 F.3d 486 (5th Cir. 2012) (holding that inheritance did not prevent exemption); *Mullen v. Hamlin* (*In re Hamlin*), 465 B.R. 863 (B.A.P. 9th Cir. 2012) (same); *In re Nessa*, 426 B.R. 312 (B.A.P. 8th Cir. 2010) (same). Cf. *In re Heffron-Clark*, 714 F.3d 559 (7th Cir. 2013) (distinguishing spousal inheritances from IRAs inherited from someone other than the debtor’s spouse, with the latter not exempt).

v. Rameker,²⁸⁶ that an inherited IRA is not a “retirement fund” within the meaning of § 522(b)(3)(C).²⁸⁷ *Rameker*’s effect on state-law exemptions—which are often similar to but contain different language from § 522(d)(3)(C)—remains to be seen.

3.9 Tenancy by entirety and joint tenancy exemption

Property held in joint tenancy or tenancy by entirety is exempt from the bankruptcy estate under § 522(b)(3)(B), which requires that the debtor be using state exemptions, by choice or opt-out. A debtor’s claim of this exemption depends on the applicable state law protecting such property from process. Such tenancies are not recognized in all states, and there will be variations in the scope of the exemption, depending, for example, on whether the applicable state law protects both realty and personalty titled in one of these tenancies.²⁸⁸ Issues arise in joint consumer cases as to whether both debtors’ property interests are protected under applicable state tenancy law, and the outcome may depend on whether a creditor has a claim against only one tenant or against both.²⁸⁹

3.10 Limits on homestead exemptions: § 522(o), (p), and (q)

BAPCPA added three types of monetary caps on the homestead exemption. The first, § 522(o), addresses perceived abuse when a debtor has attained value in the homestead by improper means. It applies to homesteads claimed under § 522(b)(3)(A), which means the debtor is using a state-law homestead exemption. Thus the available exemption amount is “reduced to the extent that such value is attributable to any portion of

286. 134 S. Ct. 2242 (2014), *aff’g Heffron-Clark*, 714 F.3d 559.

287. Since the language of § 522(d)(12) is identical to the language of § 522(b)(3)(C), the holding implicitly applies to both sections.

288. *See, e.g., In re Scioli*, No. 13-2762, 2014 WL 2119187 (3d Cir. May 22, 2014) (under Delaware law, debtor’s claim of tenancy by entirety ownership of vehicles was invalid).

289. *See Bankruptcy Exemption Manual*, *supra* note 231, ch. 4, for discussion of cases interpreting tenancy by entirety and joint tenancy protection by exemption.

any property that the debtor disposed of in the 10-year period [before filing bankruptcy] with the intent to hinder, delay, or defraud a creditor,” assuming that the debtor could not have exempted the disposed property.²⁹⁰ This limitation is directed toward preventing a debtor’s conversion of what would have been nonexempt property into an exemptible homestead within the ten years before bankruptcy filing, but it only applies when the conversion was done with intent to hinder, delay, or defraud creditors. The party objecting to the claimed homestead, seeking to limit the amount by § 522(o)’s reduction, bears the burden of proving the debtor’s intent, and, in the relatively few times this has come into play since 2005, courts have applied traditional fraudulent intent analysis, such as looking for “badges” of fraud.²⁹¹ The Eighth Circuit Bankruptcy Appellate Panel concluded that § 522(o) did not really change the prior law on fraudulent conversion of nonexempt to exempt assets; it simply imposed a ten-year look-back period for that examination.²⁹² Conversion of nonexempt to exempt property, in or outside of the ten-year period, is not prohibited in the absence of fraudulent intent.²⁹³

Converting nonexempt assets to exempt assets as a part of prebankruptcy planning has always been controversial: although not prohibited by the Bankruptcy Code, such a conversion is obviously made with the intent to shield assets from creditors. The line between acceptable and fraudulent conversions is cloudy, at best.²⁹⁴ Most consumer debtors file bankruptcy on the eve of some event, such as foreclosure, without the benefit of prebankruptcy planning—significant conversion of assets to gain exemptions is rare.

The second cap, § 522(p), places a monetary cap on the debtor’s “interest” in a homestead that was acquired during a period of 1,215 days before filing bankruptcy. The current cap is \$155,675. Section 522(p)’s cap applies when a debtor “elects” state exemptions under § 522(b)(3)(A); but

290. 11 U.S.C. § 522(o).

291. See, e.g., *In re Addison*, 540 F.3d 805 (8th Cir. 2008).

292. *In re Wilmoth*, 397 B.R. 915 (B.A.P. 8th Cir. 2008).

293. See *In re Willcut*, 472 B.R. 88 (B.A.P. 10th Cir. 2012).

294. See Lawrence Ponoroff & Stephen Knippenberg, *Debtors Who Convert Their Assets on the Eve of Bankruptcy: Villains or Victims of the Fresh Start?*, 70 N.Y.U.L. Rev. 235 (May 1995).

some debtors are forced to use the state exemptions because of the opt-out provision. Some courts have construed the statute's inclusion of the word "interest" as referral to improvement in equity value in the homestead;²⁹⁵ but other courts have applied a title theory to the statute—for example, when the debtor acquired legal title within the look-back period.²⁹⁶ Notice that § 522 (p) does not require a showing of fraudulent intent.

The third cap, § 522(q), like § 522(p), is a monetary cap, with the same dollar amount. Section 522(q) is triggered by one of the statute's designated criminal, fraudulent, or other acts. Included in the acts that would affect the limitation on homestead amount are felonies under Title 18 that would indicate the bankruptcy filing was an abuse of Title 11; violations of federal or state securities law; fraud in a fiduciary capacity or in relation to a security transaction; a criminal act; an intentional tort; and willful or reckless misconduct leading to serious physical injury or death. This statute has rarely come into play in reported decisions,²⁹⁷ and most of the triggering events would be uncommon in consumer cases.

The caps are subject to automatic cost-of-living adjustment every three years (referred to as "bankruptcy dollar adjustments"), with the next adjustment scheduled for April 1, 2016.

3.11 Lien avoidance under § 522(f)

A potential and often-used benefit to consumer debtors is § 522(f)(1) to "avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption" to which the debtor would otherwise be entitled.²⁹⁸ The first subsection (A) of this statute allows avoidance of "judicial" liens and is not applicable to other types of liens, such as voluntary security interests or statutory liens. Under the wording of the statute, avoidance is allowed if the debtor would have been entitled to claim exemption in the property, and the lien impairs that exemption

295. See, e.g., *Willcut*, 472 B.R. 88.

296. See, e.g., *In re Aroesty*, 385 B.R. 1 (B.A.P. 1st Cir. 2008). Cf. *In re Peake*, 480 B.R. 367 (Bankr. D. Kan. 2012) (distinguishing *Aroesty* based on state law).

297. See *In re Larson*, 513 F.3d 325 (1st Cir. 2008) (applying § 522(p) in criminal act scenario).

298. 11 U.S.C. § 522(f).

right. The debtor need not have formally claimed an exemption before using § 522(f).²⁹⁹ There is a restriction of avoidance of judicial liens, which secure a domestic support obligation that is excepted from discharge under § 523(a)(5) and shielded from avoidance.³⁰⁰

An issue with avoidance of judicial liens relates to the statute's "fixing" term, which, under *Farrey v. Sanderfoot*,³⁰¹ comes into play when the debtor acquires an interest in the property, compared to when the lien attached. In *Farrey*, the debtor acquired his interest in a house by award from a divorce court, and the spouse acquired a judicial lien at the same time. Avoidance of that lien was not permitted under § 522(f) because the debtor's interest was not acquired prior to fixing of the lien. Judicial liens in the domestic relations arena are common in consumer cases, and the *Farrey* analysis continues to be a factor.³⁰²

Section 522(f)(1)(B) permits lien avoidance of certain consensual, but nonpossessory, nonpurchase-money security interests in specific personal property, including household goods, which are defined under § 522(f)(4). Avoidance here is restricted by some monetary limits and by use of a statutory formula for calculating the extent to which such a lien impairs an exemption.³⁰³

3.12 Effect of case conversion on exemption objection

Rule 1019(2)(B) provides that when a case is converted to Chapter 7, a new objection period begins, unless "the case was converted . . . more than one year after entry of the first order confirming a plan under chapter 11, 12, or 13," or the case had previously been in Chapter 7, and the time for objection had expired in the original Chapter 7 phase.

299. *Botkin v. Dupont Cmty. Credit Union*, 650 F.3d 396 (4th Cir. 2011).

300. *See, e.g., In re Johnson*, 445 B.R. 50 (Bankr. D. Mass. 2011).

301. 500 U.S. 291 (1991).

302. *See, e.g., McCoy v. Kuiken (In re Kuiken)*, 484 B.R. 766 (B.A.P. 9th Cir. 2013) (construing § 522(f) as requiring debtor's continuous interest in homestead to avoid judicial lien; conveyance after judgment lien and then reconveyance to debtor defeated avoidance).

303. 11 U.S.C. § 522(f)(2)(A). For cases applying the formula, *see, e.g., In re Lehman*, 205 F.3d 1255 (11th Cir. 2000); *In re Holland*, 151 F.3d 547 (6th Cir. 1998); *In re Silveira*, 141 F.3d 34 (1st Cir. 1998).

3.13 Effect of exemptions after discharge

Section 522(c) broadly protects property that was exempt in the bankruptcy case, even after completion of the case and discharge of the debtor, but there are exceptions. Once property is allowed as exempt, to that extent the property or exempt interest passes back to the debtor, and § 522(c) states that the exempt interest is not liable for prepetition claims.³⁰⁴ The principal statutory exceptions from this general rule that are applicable in consumer cases are for (1) debts that are excepted from discharge under § 523(a)(1) and (5), which are certain tax and domestic support obligations; and (2) secured liens that are not avoided under an applicable Code section.³⁰⁵ Section 523(c)(1) provides that the exposure of exempt property to debts that are not discharged under § 523(a)(1) or (5) is applicable “notwithstanding any provision of applicable nonbankruptcy law to the contrary.”³⁰⁶

3.14 Constitutionality of bankruptcy-specific state exemptions

Some states have adopted exemptions that are only available to its residents or domiciliaries who file for bankruptcy relief. Sometimes these bankruptcy-specific exemptions are more favorable than the same type of exemption available to persons not filing bankruptcy. The constitutionality of these laws has been questioned as unfairly benefitting those seeking bankruptcy protection, but the appellate courts addressing the issue have upheld the laws. For example, the Sixth Circuit held that Michigan’s homestead exemption—which was more favorable for bankruptcy filers than for debtors not in bankruptcy—survived constitutional attack.³⁰⁷ The court concluded that the opt-out allowed Michigan to structure its

304. See, e.g., *Davis v. Cox*, 356 F.3d 76 (1st Cir. 2004).

305. See 11 U.S.C. § 522(c)(3) and (4) for other exceptions that are not typically applicable in consumer cases.

306. For effect of pre-2005 amendment of § 523(c) on Texas homestead exemption, see *In re Davis*, 170 F.3d 475 (5th Cir. 1999).

307. *Richardson v. Schafer (In re Schafer)*, 689 F.3d 601 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1244 (2013).

exemption laws for bankruptcy purposes, and that the distinction was applied uniformly within the state.³⁰⁸

3.15 Surcharge of exemptions

Prior to the Supreme Court's decision in *Law v. Siegel*,³⁰⁹ the circuits were split on the issue of whether a debtor's exempt property may be surcharged to pay the expenses of a trustee. *Siegel* was a Chapter 7 case in which the Ninth Circuit affirmed surcharge against the debtor's homestead to allow the trustee's recovery of costs related to the debtor's misconduct.³¹⁰ This issue had arisen when the debtor had done something, typically in bad faith, such as concealing assets, causing the trustee to spend time and expense finding or recovering property for the benefit of creditors. The Code does not specify a surcharge remedy, nor do the Rules. The Tenth Circuit had held, in *In re Scrivner*,³¹¹ that the absence of a Code provision was fatal to surcharging, even though the debtor had failed to comply with an order to turn over to the trustee nonexempt property. "Section 105(a) does not empower courts to create remedies and rights in derogation of the Bankruptcy Code and Rules."³¹² More recently, the First Circuit had approved the use of § 105(a) to allow a surcharge of exempt assets in a case of the debtor's concealment of nonexempt assets from the trustee.³¹³ In addition to the *Law* opinion, the Ninth Circuit has precedent allowing surcharge, as an equitable remedy, "when reasonably necessary."³¹⁴ The Eleventh Circuit has disapproved surcharge as inconsistent with the Code's specific exemption provisions.³¹⁵ In *Siegel*,

308. *Id. Accord* Sheehan v. Peveich, 574 F.3d 248 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 1066 (2010) (West Virginia); *In re Kulp*, 949 F.2d 1106 (10th Cir. 1991) (Colorado); *In re Applebaum*, 422 B.R. 684 (B.A.P. 9th Cir. 2009) (California); *In re Westby*, 486 B.R. 509 (B.A.P. 10th Cir. 2013) (Kansas).

309. 134 S. Ct. 1188 (2014).

310. *Law v. Siegel*, 435 F. App'x 697 (9th Cir. 2011).

311. 535 F.3d 1258 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 1613 (2009).

312. *Id.* at 1265.

313. *Malley v. Agin*, 693 F.3d 28 (1st Cir. 2012).

314. *Latman v. Burdette*, 366 F.3d 774, 786 (9th Cir. 2004). *See also In re Onubah*, 375 B.R. 549 (B.A.P. 9th Cir. 2007) (allowing surcharge of homestead).

315. *In re Cox*, 338 F.3d 1238 (11th Cir. 2003).

Part 3: Bankruptcy Estate and Exemptions

the Supreme Court held that the bankruptcy court exceeded its authority by imposing a surcharge, contravening § 522(k), which protects exempt property from liability for administrative claims.³¹⁶ The debtor's claim of homestead exemption had been allowed for lack of objection, and the trustee's attempted surcharge was for recovery of a portion of the attorney fees (an administrative expense) incurred in contesting the debtor's fabricated second mortgage. The Court pointed to remedies other than surcharge that might address a debtor's improper actions in the case.³¹⁷

316. *Siegel*, 134 S. Ct. at 1195.

317. *Id.* at 1198.

~ PART 4 ~

**CLAIMS ALLOWANCE AND
DISTRIBUTIONS TO CREDITORS**

4.1 Overview

The process for claims held by creditors involves the following steps:

- *Timely filing of a proof of claim on Official Form 10. § 501 & Fed. R. Bankr. P. 3002*
- *Allowance or disallowance of the proof of claim, depending on whether an objection is filed. § 502 & Fed. R. Bankr. P. 3007*
- *Sufficient documentation of a proof of claim to support its validity. Fed. R. Bankr. P. 3001*
- *If assets are available in the bankruptcy estate for payment of claims, a priority scheme exists. § 507*

The majority of Chapter 7 consumer cases are “no-asset,” meaning that nothing will be distributed to unsecured creditors from the bankruptcy estate.³¹⁸ However, secured creditors may have their claims satisfied through redemption or reaffirmation,³¹⁹ or else their liens would typically continue to be valid after the bankruptcy case is closed, absent some avoidance of the lien by the debtor or trustee.³²⁰ If there are potential assets that may be available for distribution to unsecured creditors, the

318. The notice to creditors of the petition filing and that it is a no-asset, Chapter 7 case is on Official Form 9A. For more extensive discussion of the claims process, see, for example, Hon. William H. Brown, *The Law of Debtors and Creditors*, ch. 14 (2013).

319. Redemption under 11 U.S.C. § 722 and reaffirmation under 11 U.S.C. § 524 are discussed *infra* Part 5.

320. The trustee’s lien avoidance powers are not within the scope of this monograph, but the trustee has various powers, listed in 11 U.S.C. §§ 544–551. Lien avoidance under 11 U.S.C. § 522(f) is discussed *supra* Part 3.

creditors will be given notice of the opportunity to file proofs of claims.³²¹ In Chapter 13 cases, the amount and timing of distribution to creditors is determined by a confirmed plan. To participate in the distribution, creditors must file a proof of claim.³²² The Code's method for distribution to creditors in Chapter 7 cases is discussed in Part 4, and distribution for Chapter 13 cases is discussed *infra* Part 6. Part 4 describes the proof of claim process (set forth in the Bankruptcy Code and Rules), highlights significant issues in consumer cases, and reviews the levels of priority for claims.

"Creditor" is defined in § 101(10), with the most common example being an "entity that has a claim that arose at the time of or before the order for relief."³²³ The order for relief occurs automatically with the commencement, or filing, of the bankruptcy petition. As defined in § 101(5), "claim" includes either "a right to payment" or "a right to an equitable remedy for breach of performance," with the more common claim being a right to payment.³²⁴ The general concept for claims, which may be paid in consumer cases, is that they arose prepetition, before the filing of the bankruptcy case. In Chapter 13 cases, the Code provides for postpetition claims.³²⁵

4.2 Filing proof of claim

To be eligible for a distribution from the bankruptcy estate, a creditor must file a proof of claim, and that claim must be allowed. A valid secured lien typically passes through the bankruptcy administration unchanged,³²⁶ especially in Chapter 7 cases, and secured creditors may not be required to file a proof of claim to facilitate that process. But if a se-

321. This notice is given on Official Form 9C if it is an asset Chapter 7, and on Official Form 9I for a Chapter 13 case. If assets are discovered after original notice of a no-asset Chapter 7, Procedural Form B204 is used to notify creditors of opportunity to file proofs of claims.

322. *In re Pajian*, 508 B.R. 708 (Bankr. N.D. Ill. 2014).

323. 11 U.S.C. § 101(10)(A).

324. See *id.* § 101(5) for complete definition of "claim."

325. See *id.* § 1305. Postpetition claims are discussed *infra* Part 6.

326. See, e.g., *Shelton v. CitiMortgage, Inc. (In re Shelton)*, 477 B.R. 749 (B.A.P. 8th Cir. 2012) (disallowance of untimely proof of claim didn't void creditor's lien).

cured creditor wants a distribution, particularly in Chapter 13 cases, the creditor must file a proof of claim. Bankruptcy Rule 3002(a) specifically addresses the need for only an unsecured creditor to file a proof of claim,³²⁷ but the reality of distribution in asset cases is that a trustee, Chapter 7 or 13, has no basis for paying anything to a creditor, unsecured or secured, without an allowed claim.³²⁸ Section 501 authorizes the filing of a proof of claim (using Official Form 10 and its supplements), when necessary. The procedure for filing claims is fleshed out in Bankruptcy Rules 3001 and 3002, discussed below.

The proof of claim is filed with the bankruptcy court clerk in the district where the case is pending.³²⁹ While the typical claimant will be the creditor, the Code and Rules provide for a claim to be executed and filed by others. Rule 3001(b) states that “a proof of claim shall be executed by the creditor or the creditor’s authorized agent.” If the creditor does not file a claim within the time provided, Code § 501(b) provides that an entity obligated with the debtor, or that has secured the claim, may file a proof of claim. Also, Rule 3004 permits either the trustee or debtor to file a proof of claim on behalf of a creditor who fails to file a timely claim.³³⁰

327. See, e.g., *In re Weise*, 455 B.R. 702 (Bankr. E.D. Wis. 2011). The Advisory Committee on Bankruptcy Rules has proposed amending Bankruptcy Rule 3002(a), requiring both secured and unsecured creditors to file a proof of claim in order to have an allowed claim; but the amended rule would make it clear that failure to file a proof of claim would not render the creditor’s lien void. This and other proposed rule changes, as well as changes to certain Official Forms, has been published for comment at <http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx>. Assuming final adoption, this change to Rule 3002(a) would be effective December 1, 2016.

328. For duties of Chapter 7 and 13 trustees, see 11 U.S.C. §§ 704 & 1302.

329. See Fed. R. Bankr. P. 3002(b) & 5005(a).

330. For an example of a Chapter 13 debtor having the opportunity to file a claim on behalf of a creditor, see *Michigan Dep’t of Treasury v. Hight (In re Hight)*, 670 F.3d 699, 703 (6th Cir. 2012). Rule 3004 imposes a thirty-day time, after expiration of the creditor’s time, for the debtor or trustee to file such a proof of claim. See, e.g., *Municipality of Carolina v. Gonzalez (In re Gonzalez)*, 490 B.R. 642 (B.A.P. 1st Cir. 2013) (debtor’s proof of claim on behalf of municipality was untimely).

4.3 Proof of claim—Official Form 10

Bankruptcy Rule 3001 describes a proof of claim as “a written statement setting forth a creditor’s claim.” Official Form 10 is used for this purpose, and there are some supplements to that form that come into play under situations discussed below. The proof of claim is executed under penalty of perjury, and it may be filed by the actual creditor or the creditor’s authorized agent.³³¹ Form 10 contains various spaces to designate the following: amount of the claim and its basis; identifying information about the account and debtor; whether it is secured, unsecured, or partially both; if secured, the value of collateral; whether it is a priority claim; and supporting documentation. Form 10 also requires identification of the addresses for notices and payment to be sent to the claimant filing the proof of claim.

There are instances in which an “informal” proof of claim—a pleading that establishes the equivalent of Official Form 10—has been recognized.³³² But creditors run a severe risk that such an informal process may not measure up. The safe course of action is to file a claim on the official form.³³³

4.4 Time for filing proof of claim

The applicable bar dates for filing a proof of claim are found, not in the Code, but in Bankruptcy Rule 3002(c). The time requirements are specific for Chapter 7 and 13 cases. The general rule is that “a proof of claim is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors called under § 341(a) of the Code.”³³⁴ For governmental units, the time is extended for prepetition claims, permitting claim filing “not later than 180 days after the date of the order for re-

331. See Fed. R. Bankr. P. 3001(b) and Official Form 10. The person authorized to file a proof of claim is often in dispute. See *infra* § 4.7.

332. See, e.g., *Clark v. Valley Fed. Sav. & Loan Ass’n (In re Reliance Equities, Inc.)*, 966 F.2d 1338 (10th Cir. 1992) (establishing five-part test for informal proof of claim).

333. See, e.g., *In re Batista-Sanchez*, 502 B.R. 227 (Bankr. N.D. Ill. 2013) (stay relief motion was not informal proof of claim).

334. Fed. R. Bankr. P. 3002(c).

lief.”³³⁵ In Chapter 13 cases, the government has additional time to file a proof of claim related to a prepetition tax return that is not filed by the debtor until after the case has been filed.³³⁶

These time limits are strictly construed and enforced. Untimeliness is one of the grounds for disallowance of a claim for bankruptcy under Code § 502(b)(9). While there are specific exceptions from the general timing rule (e.g., for infants, incompetents, foreign creditors),³³⁷ the focus of this timing discussion is on the failure of creditors to file timely claims under the ninety-day deadline, running from the *first date set* for the meeting of creditors, and not from the actual first meeting. Rule 3002(c) leaves little room for lengthening the ninety-day time, and Bankruptcy Rules 9006(b)(1) and (3) allow enlargement of the time for claims “only to the extent and under the conditions stated” in Rule 3002(c). These restrictions have been interpreted to mean that the bankruptcy court may not excuse a late proof of claim on the basis of excusable neglect.³³⁸ Although occasionally a court will find equitable reasons to allow a late-filed claim, for example, when the creditor was not scheduled and did not receive timely notice of the case and claims bar date,³³⁹ most courts have found they lack equitable authority to extend the proof of claim bar date, even when the result is harsh.³⁴⁰ Even though a creditor not scheduled in time to file a proof of claim would not receive a distribution in the case, there are other remedies available. For example, § 523(a)(3) provides an exception from discharge for claims that were not scheduled in time to

335. *Id.* Rule 3002(c)(1). *See also* 11 U.S.C. § 502(b)(9).

336. Fed. R. Bankr. P. 3002(c)(1) and 11 U.S.C. § 502(b)(9) give the government sixty days after the debtor’s tax return is filed, under 11 U.S.C. § 1308, to file a proof of claim for that return’s liability. The government may obtain additional time upon the filing of a timely motion under Fed. R. Bank. P. 3002(c)(1).

337. *See* Fed. R. Bankr. P. 3002(c)(2)–(6).

338. *See, e.g., In re Moore*, No. 10-11491, 2012 WL 1192776 (Bankr. N.D.N.Y. Apr. 10, 2012).

339. *See, e.g., Goodman v. IRS (In re Adams)*, 502 B.R. 645 (Bankr. N.D. Ga. 2013); *Russo v. Freda (In re Russo)*, No. 09-3274 (FLW), 2009 WL 4672669 (D.N.J. Dec. 7, 2009).

340. *See, e.g., In re Aleman*, 499 B.R. 236 (Bankr. D.P.R. 2013); *In re Harp*, No. A10-00021-DMD, 2011 WL 6099551 (Bankr. D. Alaska Dec. 7, 2011).

permit the filing of a timely proof of claim,³⁴¹ and in Chapter 13, a claim not provided for in a confirmed plan will survive discharge.³⁴²

Even though the time to file claims is strictly applied under the rule, the disallowance of a claim typically requires an objection to be filed by a party in interest under Code § 502(b).³⁴³ There is some authority that a court cannot prohibit a late claim filing, resulting in an untimely claim being subject to payment by a trustee in the absence of an objection.³⁴⁴ The Chapter 13 debtor, for example, may have good reason for not objecting to an untimely claim: if that claim may not be discharged because the debtor bears some responsibility for failure to properly schedule the creditor; or if the debtor does not provide for the claim in the plan; or the debtor may simply prefer to pay the late claim.³⁴⁵

4.5 Claim allowance

Under § 502(a), a claim filed under § 501 “is deemed allowed, unless a party in interest . . . objects.” Without the filing of an objection, there is no contested issue to bring the court into the claim allowance process, and the allowance happens as a matter of course.³⁴⁶ Bankruptcy Rule 3007 provides for objections, discussed below. Rule 3001(f) states that “a proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.” As explained *infra*, whether a claim has been executed and filed in accordance with applicable rules is a significant, frequently litigated issue.

341. See *infra* Part 5.

342. See 11 U.S.C. § 1328(a) (discharge generally includes only debts “provided for by the plan”). *And see, e.g.*, N. Cal. Glaziers v. Wolter, No. 08-4487SC, 2009 WL 1458272 (N.D. Cal. May 26, 2009). See also *Rake v. Wade*, 508 U.S. 464 (1993), for definition of “provided for by the plan.” Chapter 13 discharge is discussed *infra* Part 6.

343. See *infra* § 4.6 for discussion of objections to claims.

344. See, e.g., *In re Smith*, No. 09-43823, 2010 WL 5018379 (Bankr. W.D. Wash. Dec. 3, 2010).

345. See 11 U.S.C. § 1328(a) and *infra* Part 6 for discussion of Chapter 13 plans and discharge.

346. See *In re Mouzon Enters., Inc.*, 610 F.3d 1329 (11th Cir. 2010) (objection to claim triggered contested matter under Fed. R. Bankr. P. 9024).

4.6 Objections to claims

The key to preventing a claim's allowance is that a party in interest must object. Rule 3007, which governs objections, does not specify a time within which objections must be filed, only that an objection must be in writing and must be filed and served on the claimant and other required parties "at least 30 days prior to the hearing."³⁴⁷ As in other areas of the Code, "party in interest" is not a defined term, but the case trustee clearly has standing as a party in interest. Code § 704(a)(5) authorizes the Chapter 7 trustee to "examine proofs of claims and object to the allowance," and § 1302(b)(1) gives this same authority to Chapter 13 trustees. It is not always clear that a Chapter 7 debtor has standing, since unless there are sufficient assets to pay all claims in full and return some funds to the debtor, a Chapter 7 debtor may have no financial stake in whether a claim is allowed.³⁴⁸ If there is an issue whether a claim will be discharged (e.g., tax claim), the debtor may be able to establish standing by showing that an objection to a claim affects the extent to which nondischargeable debts will burden the debtor after the case is over.³⁴⁹ A Chapter 13 debtor may be able to establish standing to object, for example, when a debtor lacks the ability to fund a 100% plan and nondischargeable debts will remain unpaid. A creditor may also have standing to object to another party's proof of claim, but that will depend on whether the objecting creditor has a legally protected interest that is adversely affected by the claim.³⁵⁰

Although the Bankruptcy Rules may affect allowance,³⁵¹ the Bankruptcy Code provides the substantive grounds for objection to claims. Section 502(b) sets forth nine grounds for disallowance of claims, most of which do not appear in typical consumer cases. The grounds include: unenforceability under applicable law or the parties' agreement; claim for

347. Fed. R. Bankr. P. 3007(a).

348. See, e.g., *Khan v. Regions Bank (In re Khan)*, 544 F. App'x 617 (6th Cir. 2013).

349. See, e.g., *In re Drost*, 228 B.R. 208 (Bankr. N.D. Ind. 1998). Chapter 7 discharge and exceptions from discharge are discussed *infra* Part 5; Chapter 13 discharge and its exceptions are discussed *infra* Part 6.

350. See, e.g., *Adair v. Sherman*, 230 F.3d 890 (7th Cir. 2000); *In re FBN Food Servs., Inc.*, 82 F.3d 1387 (7th Cir. 1996).

351. See *infra* § 4.7.

unmatured interest; claim unmatured at petition date; property tax assessments exceeding value of property; and late-filed claim.³⁵² An example covered by § 502(b)(1)—that the claim is unenforceable under a nonbankruptcy law—is when the claim is time-barred under state law.³⁵³ Basically, any applicable law that provides a defense to the claim may be the source of this objection.

To illustrate some of the issues that are litigated in connection with claims disallowance, consider whether the filing of a proof of claim for a debt that is time-barred under applicable law also violates the Fair Debt Collection Practices Act (FDCPA). Most courts have held that filing a proof of claim does not form the basis for a FDCPA cause of action,³⁵⁴ sometimes concluding that the claims allowance process preempts the FDCPA, or perhaps other federal and state consumer protection statutes.³⁵⁵ These opinions recognize that objecting to a claim is relatively simple,³⁵⁶ and that if nonbankruptcy law would affect the disallowance, the objecting party should raise it under § 502(b)(1). The Eleventh Circuit held, however, that the filing of a proof of claim for a debt that was time-barred under applicable state law violated the FDCPA. The court considered the proof of claim as a collection activity for a debt that was stale and uncollectible under state law.³⁵⁷

As discussed in the next section, lack of documentation of the proof of claim presents claim allowance issues, including whether the claim is objectionable under applicable nonbankruptcy law. For example, appli-

352. See 11 U.S.C. § 502(b)(1)–(9).

353. See, e.g., *Dorsey v. PRA Receivables Mgmt., LLC* (*In re Dorsey*), No. 07-21082PM, 2008 WL 2511897 (Bankr. D. Md. June 20, 2008).

354. See, e.g., *Simmons v. Roundup Funding, LLC*, 622 F.3d 93 (2d Cir. 2010); *In re Varona*, 388 B.R. 705 (Bankr. E.D. Va. 2008).

355. See *B-Real, LLC v. Chaussee* (*In re Chaussee*), 399 B.R. 225 (B.A.P. 9th Cir. 2008).

356. See, e.g., *Roberts v. Pierce* (*In re Pierce*), 435 F.3d 891 (8th Cir. 2006) (discussing “negative notice” procedure for giving claimant notice of objection to claim; if claimant doesn’t respond to objection and request hearing, claim may be disallowed, citing Fed. R. Bankr. P. 9007).

357. *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014). Accord *Patrick v. PYOD, LLC*, No. 1:14-cv539-RLY-TAB, 2014 WL 4100414 (S.D. Ind. Oct. 20, 2014).

cable state law may require that a creditor supply sufficient proof, or documentation, of its claim in order to have an enforceable right to payment.³⁵⁸

Rule 3001(f) provides prima facie validity to a properly executed and filed proof of claim; thus, opinions are written in terms of the objecting party having the burden to overcome, or rebut, this grant of prima facie validity.³⁵⁹ As discussed *infra* § 4.7, the burden of proof shifts between the objecting party and claimant, but the claimant bears the ultimate burden to establish its claim. Assuming that an objection overcomes the prima facie validity, the claimant then must prove, or persuade the court, that the claim is valid.³⁶⁰

Clearly, the contested litigation over a proof of claim may involve Bankruptcy Rule 9011, if counsel for either the claimant or objector stray beyond the bounds of required investigation and proper representations to the court.³⁶¹

4.7 Documentation of claims and applicable Bankruptcy Rule

The failure of a claimant to support the proof of claim with documentation, required by Bankruptcy Rule 3001(c), is a fertile area of litigation in the claims allowance process, with questions about whether insufficient

358. See, e.g., *In re Taranto*, No. 10-76041-ast, 2012 WL 1066300 (Bankr. E.D.N.Y. Mar. 27, 2012) (under New York law, insufficient documentation of credit card debt barred claimant's right to payment). Cf. *In re Nussman*, 501 B.R. 297 (Bankr. E.D.N.C. 2013) (although North Carolina law required attachment of contract to complaint, court distinguished state court suit from proof of claim).

359. See, e.g., *Stewart v. Batmanghelich* (*In re Stewart*), 373 F. App'x 682 (9th Cir. 2010).

360. See, e.g., *In re Pursley*, 451 B.R. 213 (Bankr. M.D. Ga. 2011) (discussing shifting burden).

361. See, e.g., *In re Taylor*, 655 F.3d 274 (3d Cir. 2011) (counsel for claimant violated Rule 9011 by false representations in regard to response to claims and stay relief objections); *In re MacFarland*, 462 B.R. 857 (Bankr. S.D. Fla. 2011) (debtor's counsel sanctioned under Rule 9011 for improper claims objections when claims were scheduled). See also *In re Wingerter*, 594 F.3d 931 (6th Cir. 2010) (discussing reasonable inquiry by claimant).

documentation in itself is a ground for disallowance. To put the issues into focus, an understanding of Rule 3001(c), as amended, is necessary.

(c) SUPPORTING INFORMATION.

(1) *Claim Based on a Writing.* Except for a claim governed by paragraph (3) of this subdivision, when a claim, or an interest in property of the debtor securing the claim, is based on a writing, a copy of the writing shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

(2) *Additional Requirements in an Individual Debtor Case; Sanctions for Failure to Comply.* In a case in which the debtor is an individual:

(A) If, in addition to its principal amount, a claim includes interest, fees, expenses, or other charges incurred before the petition was filed, an itemized statement of the interest, fees, expenses, or charges shall be filed with the proof of claim.

(B) If a security interest is claimed in the debtor's property, a statement of the amount necessary to cure any default as of the date of the petition shall be filed with the proof of claim.

(C) If a security interest is claimed in property that is the debtor's principal residence, the attachment prescribed by the appropriate Official Form shall be filed with the proof of claim. If an escrow account has been established in connection with the claim, an escrow account statement prepared as of the date the petition was filed and in a form consistent with applicable non-bankruptcy law shall be filed with the attachment to the proof of claim.

(D) If the holder of a claim fails to provide any information required by this subdivision (c), the court may, after notice and hearing, take either or both of the following actions:

(i) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(ii) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

(3) *Claim Based on an Open-End or Revolving Consumer Credit Agreement.*

(A) When a claim is based on an open-end or revolving consumer credit agreement—except one for which a security interest is

claimed in the debtor's real property—a statement shall be filed with the proof of claim, including all of the following information that applies to the account:

- (i) the name of the entity from whom the creditor purchased the account;
- (ii) the name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account;
- (iii) the date of an account holder's last transaction;
- (iv) the date of the last payment on the account; and
- (v) the date on which the account was charged to profit and loss.

(B) On written request by a party in interest, the holder of a claim based on an open-end or revolving consumer credit agreement shall, within 30 days after the request is sent, provide the requesting party a copy of the writing specified in paragraph (1) of this subdivision.

(d) EVIDENCE OF PERFECTION OF SECURITY INTEREST. If a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by evidence that the security interest has been perfected.³⁶²

One of the reasons that so much litigation over documentation occurs is that claims frequently are bought and sold, assigned from one entity to another,³⁶³ opening the door to questions by the debtor or trustee as to whether the claimant is the proper person or entity to be filing the proof of claim.

In other words, standing of the claimant may be put at issue, with some courts concluding that an objection to standing is a substantive, statutory ground for disallowance under § 502(b)(1).³⁶⁴ Pursuant to Rule 3001(c)(1), a copy of the writing should be filed with the proof of claim,

362. Fed. R. Bankr. P. 3001(c), as amended, effective December 1, 2012.

363. See Fed. R. Bankr. P. 3001(e) for assignment of claims, both before and after a proof of claim is filed. *See also, e.g., In re Taranto*, No. 10-76041-ast, 2012 WL 1066300 (Bankr. E.D.N.Y. Mar. 27, 2012) (Rule 3001(e) limits who may file assigned claims, but doesn't relieve assignee of otherwise proving underlying claim in response to objection).

364. *See, e.g., In re Richter*, 478 B.R. 30 (Bankr. D. Colo. 2012) (failure to prove ownership of claim meant claim unenforceable under applicable state law).

if the claim, or a security interest, is based on a writing. Prior to the December 2011 addition of subpart (c)(2) and the December 2012 addition of subpart (c)(3), however, there was no specific description of what the writing should contain. Those amendments to the Rule now spell out what the claimant should attach when the proof of claim is filed in an individual debtor's case, and when the proof of claim is based on open-end or revolving consumer credit, such as a credit card account. Subpart (c)(3) directly addresses accounts that have been transferred from one claimant to another. Rule 3001(d) requires that a proof of claim based on a security interest in property also "be accompanied by evidence" of perfection, and this is useful to trustees, and perhaps debtors, who may find cause to object to the claim as secured when perfection is lacking.

Official Form 10's Attachment A must be filed by a home mortgage creditor to implement the requirements of Rule 3001(c)(2). Attachment A itemizes prepetition interest, fees, expenses, and charges that are included in the proof of claim, as well as a statement of the amount required to cure any prepetition default. If an escrow is a part of the claim, an escrow statement must be attached. These rule and form amendments appear to have reduced some of the litigation over claims in consumer cases. But bankruptcy courts have disagreed about the extent to which documentation requirements under the rules form an independent basis for claim disallowance, and so a brief overview of the rule changes is helpful.³⁶⁵

The predominant view in the bankruptcy courts is that, although Rule 3001(c), before its December 2011 amendment, required some level of documentation when a claim is supported by a writing, Code § 502(b) provides the only statutory grounds for disallowance of a proof of claim, with failure to document the claim not among those grounds.³⁶⁶ Most bankruptcy courts hold that a failure to attach the writing or to otherwise document the proof of claim results in loss of the prima facie effect of the proof of claim, under Rule 3001(f), requiring the claimant, in the face of

365. See *In re Brunson*, 486 B.R. 759 (Bankr. N.D. Tex. 2013) (reviewing split of judicial views on effect of lack of documentation before Rule 3001(c) amendment, and suggesting that rule's amendment would resolve disagreement).

366. See, e.g., *In re MacFarland*, 462 B.R. 857 (Bankr. S.D. Fla. 2011).

an objection, to come forward with proof to support the claim.³⁶⁷ In other words, a failure to sufficiently document the basis for the claim results in no prima facie establishment of the claim's validity, and an objection based on lack of documentation rebuts that prima facie presumption, shifting the burden back to the claimant to supplement the proof of claim or amend it to sufficiently support the claim.³⁶⁸ Prior to the amendment to Bankruptcy Rule 3001(c)(2), the Tenth Circuit held, in *Caplan v. B-Line, LLC (In re Kirkland)*,³⁶⁹ that the claimant's failure to attach any documentation at all, or to produce any in response to the trustee's objection to the claim, was sufficient cause to disallow the claim when an objection was made. The court's reasoning was based on a combination of the Code, the then-applicable rule, and Official Form 10.³⁷⁰

Kirkland illustrates the view that a claimant, here an assignee/purchaser of the original claim, may have its claim disallowed when it doesn't comply with the applicable procedural requirements for a proof of claim. The literal application of *Kirkland's* holding may have been put into question by the subsequent amendment to Bankruptcy Rule 3001(c), which "was directed at claim documentation and the appropriate sanction for failure to comply with Rule 3001's documentation requirement."³⁷¹ In *Kirkland*, the claimant's claim had been disallowed as a sanction for not complying with Rule 3001. But the amended Rule's more restrictive counterpart, Rule 3001(c)(2)(D), provides that in the evidentiary hearing on claims allowance, following an objection based on lack of documentation, the claimant would be precluded "from presenting the omitted information in any form . . . unless the court determines that the failure was substantially justified or is harmless."³⁷² The Advisory Committee Note to amended Rule 3001(c) states that a lack of documentation "is not in itself a ground for disallowance of the claim. The claim can be

367. See, e.g., *Ahmadi v. CitiMortgage, Inc. (In re Ahmadi)*, 467 B.R. 782 (Bankr. M.D. Pa. 2012).

368. For a discussion of different views of the effect of lack of documentation and the shifting burden of proof, see, e.g., *In re Pursley*, 451 B.R. 213 (Bankr. M.D. Ga. 2011).

369. 572 F.3d 838 (10th Cir. 2009).

370. *Kirkland*, 572 F.3d at 840–41 (citations omitted).

371. *In re Reynolds*, 470 B.R. 138, 142–43 (Bankr. D. Colo. 2012).

372. Fed. R. Bankr. P. 3001(c)(2)(D)(i). See also *Reynolds*, 470 B.R. at 143.

disallowed only if it comes within one of the grounds for disallowance under § 502(b) of the Bankruptcy Code.”³⁷³

It may be true that § 502(b)(1)’s focus on enforceability under applicable nonbankruptcy law requires the claimant to support its proof of claim with attachments, for example, when state law required that a creditor relying on a contractual obligation produce evidence of a written contract.³⁷⁴ And there are reported opinions in which an assignee of a claim failed to support its proof of claim, or lacked standing to file the claim, when it did not attach any evidence of the assignment.³⁷⁵ To put it another way, although amended Rule 3001(c) imposes an evidentiary sanction on the effect of insufficient documentation, it is not always clear when that evidentiary sanction and the application of § 502(b)(1) are different in the end result. Likewise, distinguishing between loss of prima facie validity and disallowance of the claim is not always easy.

Litigation of home mortgage claims (discussed *infra* Part 6) arises in Chapter 7 cases and, even more commonly, in Chapter 13 cases, in which debtors usually are trying to keep their homes. Rule 3002.1 (discussed *infra* Part 6), along with two supplements to Official Form 10, specifically address notices that are required for claims secured by a Chapter 13 debtor’s principal residence. Rule 3002.1 seeks to prevent some of the recurring litigation over whether a home mortgage creditor kept the debtor and trustee informed of changes in the mortgage payments and of postpetition charges, such as attorney fees.

4.8 Redaction of information from proof of claim

Official Form 10 requires, as identifying information, only the last four digits of any number (e.g., Social Security) that the claimant uses to iden-

373. *Reynolds*, 470 B.R. at 144 (quoting Advisory Committee Note (2011) to Rule 3001, and citing Report of the Judicial Conference Committee on Rules of Practice and Procedure, 2011 U.S. Order 0018 (Apr. 26, 2011)).

374. See, e.g., *In re Lytell*, No. 11-2473, 2012 WL 253111 (E.D. La. Jan. 26, 2012) (no contract attached); *In re Foy*, 469 B.R. 209 (Bankr. E.D. Pa. 2012) (Pennsylvania law required evidence of judgment assignment, with contractual obligation merging into judgment).

375. See, e.g., *In re Gauthier*, 459 B.R. 526 (Bankr. D. Mass. 2011).

tify the debtor. Bankruptcy Rule 9037 specifically requires the claimant to redact personal information from an electronic or paper filing. In litigation over the failure of a claimant to comply with these requirements, most courts have found no private right of action for damages.³⁷⁶ Generally, the appropriate remedy is redaction and the restriction of public access to the offending filing.³⁷⁷

4.9 Reconsideration and amendment of claims

Section 502(j) and Bankruptcy Rule 3008 provide for the court to reconsider claims for cause. This authority has been used to reconsider a claim that was previously disallowed or allowed. The statute refers to “the equities of the case” justifying reconsideration, giving the court broad discretion to ascertain whether sufficient cause was shown to reconsider a prior claim allowance or disallowance.³⁷⁸ Reconsideration may be a factor in a creditor’s amendment of its proof of claim.³⁷⁹ Amendment of claims is not mentioned in the Code or Rules; whether a creditor is permitted to amend its prior proof of claim is within the court’s discretion. Some courts apply Federal Rule of Civil Procedure 15, by analogy, to that determination.³⁸⁰ Allowing a claim amendment may be tied to whether the amendment changes the nature of the original claim, for example from unsecured to secured, or whether it merely changes the amount of the claim.³⁸¹ If the amended claim is, in reality, a new claim, it would be untimely under § 502’s time requirements.³⁸²

376. See, e.g., *Holloway v. Cmty. Bank*, No. 3:10-CV-75, 2011 WL 4500042 (E.D. Tenn. Sept. 27, 2011).

377. See, e.g., *Dunbar v. Cox Health Alliance, LLC (In re Dunbar)*, 446 B.R. 306 (Bankr. E.D. Ark. 2011).

378. See, e.g., *Nicholas v. Oren (In re Nicholas)*, 457 B.R. 202 (Bankr. E.D.N.Y. 2011) (applying Fed. R. Civ. P. 60); *In re Brewster*, No. 10-54254, 2011 WL 4458792 (Bankr. W.D. Tex. Sept. 14, 2011) (applying Fed. R. Civ. P. 59).

379. See, e.g., *In re Smith*, 465 B.R. 350 (Bankr. D. Mass. 2012).

380. See, e.g., *In re Unroe*, 937 F.2d 346 (7th Cir. 1991).

381. See, e.g., *In re Tanaka Bros. Farms, Inc.*, 36 F.3d 996 (10th Cir. 1994).

382. See, e.g., *In re Jackson*, 482 B.R. 659 (Bankr. S.D. Fla. 2012).

4.10 Effect of claim allowance order

Assuming proper notice of a claim objection, the entry of an order allowing or disallowing the claim has finality effect. For example, in *Hann v. Educational Credit Management Corp. (In re Hann)*,³⁸³ the First Circuit held that entry of an order allowing a student loan claim at zero, following the Chapter 13 debtor's un rebutted proof that the debt had been paid in full, was a final order, preventing the creditor's collection attempts. Notwithstanding that student loan debt is excepted from discharge under § 523(a)(8), discharge was not the issue in *Hann*; rather, the claimant had notice of the objection and did not respond, and the bankruptcy court made a factual finding that the debt was fully paid.

4.11 Priority claims and order of distribution

In addition to the categories of secured and unsecured claims, § 507 of the Code establishes levels of priorities for certain claims. Priority simply refers to the order of payment, assuming that there are assets in a case available for distribution to creditors whose claims have been allowed. In Chapter 7 cases in which assets are available, § 726(a) sets out the payment scheme. Section 726(a)(1) directs the first distribution to be made in the order of priority found in § 507. Section 726(a)(2) next provides for distribution to allowed unsecured claims, and a descending order of distribution follows in § 726(a)(3)–(6), with the last distribution to the debtor of any excess. Payments to Chapter 7 debtors are rare indeed, and § 726 doesn't come into play at all if the case is “no-asset.” In Chapter 13 cases, the order of distribution is not governed by § 726, but the priorities of § 507(a) are part of the requirements for a plan, under § 1322(a)(2), with a confirmed plan governing the distributions.³⁸⁴

Domestic support obligations are first priority in § 507(a)(1), which also includes alimony, maintenance, and support. The definition of a domestic support obligation (DSO) contained in § 101(14A) is much broader than pre-BAPCPA. Although the concept of bankruptcy claims is tied to prepetition debts, § 101(14A) includes interest accruing postpeti-

383. 711 F.3d 235 (1st Cir. 2013).

384. See *infra* Part 6 for discussion of priorities and distributions in Chapter 13 cases.

tion, as well as debt incurred pre- and postpetition. A DSO may be one “owed to or recoverable by” the spouse, former spouse, child, or other named relatives, as well as “a governmental unit.”³⁸⁵ The statute, by including “governmental units” in the definition of DSO, may also make “assistance provided by a governmental unit” a DSO.³⁸⁶ Any unsecured debt that falls within the scope of § 101(14A)’s definition is entitled to § 507(a)(1) priority, to be paid from the first funds available for distribution from the bankruptcy estate. DSOs are also excepted from discharge, under § 523(a)(5); thus, to the extent there are not funds for payment of any, or all, of a DSO, the debt survives the discharge in both Chapter 7 and 13 cases.³⁸⁷

Section 507(a)(1) has three internal levels of priority. The first level is for a trustee’s expenses related specifically to administration of assets for payment of allowed DSOs.³⁸⁸ The second level is for the obligations that are owed directly to, or recoverable by, a spouse, former spouse, or child of the debtor, or the child’s parent, legal guardian, or responsible relative. Included in this second level are domestic support claims filed by a governmental unit on behalf of one of the named individuals.³⁸⁹ The third level is for DSOs assigned prior to the bankruptcy filing, unless the assignment was for the purpose of collection, in which event the assigned claim falls under the second level.³⁹⁰ Since the 2005 amendments, there has been relatively little case law about the difference in priorities for governmental units under the second and third tiers; but when there is an issue of proper tier, the claimant has the burden of proof.³⁹¹ The differ-

385. 11 U.S.C. § 101(14A)(A).

386. *Id.* § 101(14A)(B). See, e.g., *Rivera v. Orange Cty. Prob. Dep’t (In re Rivera)*, 511 B.R. 643 (B.A.P. 9th Cir. 2014), *supra* note 143.

387. Chapter 7 discharge and its exceptions are discussed *infra* Part 5; Chapter 13 discharge is discussed *infra* Part 6.

388. 11 U.S.C. § 507(a)(1)(C). Although this structurally appears in third order, to the extent the trustee administers assets for the benefit of a domestic support creditor, the trustee’s expenses prime other priorities.

389. *Id.* § 507(a)(1)(A).

390. *Id.* § 507(a)(1)(B).

391. See, e.g., *In re Hack*, No. 08-72553, 2009 WL 1392068 (Bankr. C.D. Ill. May 14, 2009).

ence in priority tier is significant in Chapter 13 plans, since § 1322(a)(4) permits a plan to pay less than 100% of a domestic support claim that has been assigned for purposes other than collection, provided the debtor's projected disposable income is dedicated to the plan for a full five years.³⁹²

The second level of priority under § 507(a)(2) is for administrative expenses that are allowed under § 503(b)'s categories. The most common examples in consumer cases are the trustee's expenses and debtor's attorney fees. Section 503(b)(1)(A) provides for the "actual, necessary costs and expenses of preserving the estate," and § 503(b)(2) includes "compensation and reimbursement awarded under section 330(a)." Section 330(a) addresses compensation of officers of the estate, including attorneys employed by the trustee under § 327. Section 329 provides for attorney fees for the debtor's attorney, and Rule 2016 requires professionals seeking compensation from the bankruptcy estate to file an application, setting forth details of the services rendered and expenses incurred. Fees for attorneys in Chapter 7 and 13 cases are discussed *infra* Parts 5 and 6.

The other priorities under § 507(a)(3)–(10) may be applicable in a particular consumer case, but they are rare enough to be beyond the scope of this monograph,³⁹³ with the exception of § 507(a)(8)'s priority, which is relevant in Chapter 7 consumer cases in which a debtor has income or other tax obligations described in § 507(a)(8). Section 523(a)(1)'s exception from discharge (discussed *infra* Part 5) refers in part to § 507(a)(8) for some of the taxes that may not be subject to discharge.

392. See *In re Penaran*, 424 B.R. 868 (Bankr. D. Kan. 2010), for discussion of the interface between § 507(a)(1)(B) priority and Chapter 13 plans, discussed *infra* Part 6.

393. For a discussion of § 507(a) priorities, see, e.g., *Norton Bankruptcy Law and Practice*, ch. 49 (3d ed. 2013).

RELIEF UNDER CHAPTER 7

5.1 Overview

Debtor relief under Chapter 7 of the Bankruptcy Code has four major components:

- *Eligibility as a debtor under the Code’s “means test.” § 707*
- *Methods for retaining collateral and reaffirmation of secured debt. §§ 524 & 722*
- *Discharge of prepetition debts, objections to discharge, exceptions from discharge, and the effect of discharge. §§ 523, 524 & 727*
- *Potential conversion of a case to another chapter, or case dismissal. §§ 706 & 707*

Chapter 7 bankruptcy relief is commonly referred to as liquidation. The Chapter 7 trustee may liquidate nonexempt assets, assuming they have value, and distribute proceeds for the benefit of creditors. But the reality is that most consumer Chapter 7 cases have no assets available for the trustee’s administration. An asset that has negligible or no value for the estate may be abandoned by the trustee,³⁹⁴ which would result in the asset passing back to the debtor. Relief for consumer debtors under Chapter 7 typically involves debtors having valid secured claims against their real and personal property, such as home and vehicle, with the secured liens passing through the bankruptcy and with debtors receiving a discharge of their *in personam* liability to both secured and unsecured creditors.³⁹⁵ There are exceptions to the general discharge,³⁹⁶ and there may be objections to the overall discharge;³⁹⁷ but assuming no discharge issues, the

394. *See* 11 U.S.C. § 554.

395. *See id.* § 524(a).

396. *See id.* § 523.

397. *See id.* § 727.

typical no-asset Chapter 7 case will move through administration quickly, with no distribution to creditors. To the extent the secured claims are not avoided or otherwise adversely affected during the Chapter 7 case administration,³⁹⁸ the secured claims may be reaffirmed by debtors,³⁹⁹ the collateral might be redeemed;⁴⁰⁰ the debtor might surrender the collateral to creditors;⁴⁰¹ or the lien might simply remain intact after the bankruptcy case is closed.⁴⁰² Secured creditors often move for and obtain automatic stay relief to act on their state-law rights to the collateral.⁴⁰³

5.2 Eligibility and dismissal under means test

The threshold test for Chapter 7 eligibility is set forth in § 707. To be eligible for Chapter 7 bankruptcy, a debtor must meet several criteria. Income cannot exceed a certain limit, and if it does, the debtor must pass the “means” test. Prior to 2005, a bankruptcy judge had the discretion to dismiss a Chapter 7 bankruptcy case if he or she determined the debtor’s income was sufficient to fund a repayment plan under Chapter 13.⁴⁰⁴ A Chapter 7 case filed by an individual whose debts are primarily consumer debts may be dismissed involuntarily if a presumption of abuse is found. Alternatively, the Chapter 7 case may be converted to Chapter 11 or 13, with the debtor’s consent. When an individual filing for bankruptcy under Chapter 7 has enough money to repay creditors an amount specified in § 707(b)(2)’s means test formula, through a Chapter 13 bankruptcy, it is deemed an abuse of the bankruptcy system. Essentially, the application of the formula determines whether the debtor needs Chapter 7 relief.⁴⁰⁵

398. *See id.* § 506(d).

399. *See id.* § 524(c).

400. *See id.* § 722.

401. *See id.* § 521(a)(2).

402. *See id.* § 506.

403. *See supra* Part 2 for discussion of relief from automatic stay.

404. A Chapter 7 case may still be dismissed under a § 707(b)(3) totality-of-circumstances finding that the debtor is able to pay a significant amount of debt in a Chapter 13 case. *See, e.g., In re Pittman*, 506 B.R. 496 (Bankr. S.D. Ohio 2014) (debtor’s ability to pay 24% to unsecured creditors was cause for dismissal).

405. 11 U.S.C. § 707(b). *See, e.g., Witcher v. Early (In re Witcher)*, 700 F.3d 619 (11th Cir. 2012) (ability to pay debts is part of § 707(b)(3)’s totality-of-circumstances

Failure of the test amounts to presumption of abuse. Prior to 2005, under § 707 a Chapter 7 case could be dismissed if the court found it to be a *substantial* abuse of the Code's provisions.

If the court does not find the means test determinative as to whether the case constitutes an abuse, it may nevertheless dismiss the case under the more general abuse standards,⁴⁰⁶ pursuant to § 707(b)(3)'s "bad faith" and "totality of circumstances" thresholds for Chapter 7 relief. In *Ng v. Farmer (In re Ng)*,⁴⁰⁷ for example, although the bankruptcy court did not grant the U.S. trustee's motion to dismiss under the means test, it properly applied a totality-of-circumstances test to dismiss the Chapter 7 case under § 707(b)(3)(B).⁴⁰⁸

Section 707(a) also permits dismissal of a Chapter 7 case for bad faith.⁴⁰⁹ The Eleventh Circuit held that a Chapter 7 debtor's prepetition bad faith could be cause for dismissal under § 707(a), concluding that the statute's undefined "cause" was not limited to bad-faith actions occurring after the petition's filing.⁴¹⁰ In applying the bad-faith analysis, pre-2005 case law is still relevant because BAPCPA did not add a definition of bad faith.⁴¹¹

Dismissal may be granted, after notice and hearing, for other cause, including unreasonable delay by a debtor that is prejudicial to creditors, failure to pay required fees, and failure to file the documents required

test). For discussion of the means test in Chapter 7, see Hon. Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 Am. Bankr. L.J. 231 (2005).

406. See *Calhoun v. U.S. Trustee*, 650 F.3d 338 (4th Cir. 2011) (even if there is no presumption of abuse under 11 U.S.C. § 707(b)(2)'s means test, court may dismiss case under totality of circumstances when evidence supports that Chapter 7 debtors were able to pay creditors). See also *Kulakowski v. U.S. Trustee (In re Kulakowski)*, 735 F.3d 1296 (11th Cir. 2013) (§ 707(b)(2) did not subsume § 707(b)(3)).

407. 477 B.R. 118 (B.A.P. 9th Cir. 2012).

408. See also *Perlin v. Hitachi Capital Am. Corp.*, 497 F.3d 364 (3d Cir. 2007).

409. See, e.g., *In re Smith*, 507 F.3d 64 (2d Cir. 2007).

410. *Piazza v. Nueterra Healthcare Physical Therapy, LLC (In re Piazza)*, 719 F.3d 1253 (11th Cir. 2013) (noting circuit split and agreeing with Third Circuit, and Eighth and Ninth Circuits holding that prepetition bad faith not sufficient "cause" for dismissal of voluntary Chapter 7 petition under § 707(a)).

411. For application of bad faith prior to 2005 amendments, see, e.g., *In re Tamecki*, 229 F.3d 205 (3d Cir. 2000); *In re Padilla*, 222 F.3d 1184 (9th Cir. 2000); *In re Huckfeldt*, 39 F.3d 829 (8th Cir. 1994); and *In re Zick*, 931 F.2d 1124 (6th Cir. 1991).

under § 521(a) within fifteen days of the petition filing, unless the court, for cause, grants additional time.⁴¹² For purposes of Chapter 7 eligibility, the means test in § 707(b) begins with an exclusion, providing that the court should not consider in its calculation that the debtor has made, or continues to make, charitable contributions, as defined in Code § 548(d)(3) and (4).⁴¹³

The test then looks at a debtor's "current monthly income," which is a defined term under § 101(10A), going back to the six-month period before the bankruptcy filing⁴¹⁴ for the debtor's average monthly income from all sources. Current monthly income includes any amount contributed on a regular basis by anyone other than the debtor, or debtor's spouse in a joint case, toward the debtor's household expenses, but specifically excludes Social Security benefits and other less-common exceptions.⁴¹⁵ For purposes of Chapter 7, the statutory exclusion of Social Security income from current monthly income and the subsequent means test seems clear.⁴¹⁶ Distinctions have been made between this specific statuto-

412. 11 U.S.C. § 707(a)(1)–(3). See *supra* Part 2 for discussion of filing requirements.

413. 11 U.S.C. § 707(b)(1). See *Wadsworth v. Word of Life Christian Ctr. (In re McGough)*, 737 F.3d 1268 (10th Cir. 2013) (interpreting § 548(a)(2)'s 15% limitation of charitable contributions).

414. There is a different six-month period when the debtor did not file with the petition the schedule of current income required by 11 U.S.C. § 521(a)(1)(B)(ii). See 11 U.S.C. § 101(10A)(A)(ii).

415. *Id.* § 101(10A)(B). See *Miller v. U.S. Trustee (In re Miller)*, BAP No. WY-14-002, Bankr. No. 13-20384, 2014 WL 5018464 (B.A.P. 10th Cir. Oct. 8, 2014) (wages received in six-month period were current monthly income, although wages were for work performed before period began); *In re Strickland*, 504 B.R. 542 (Bankr. D. Minn. 2014) (income earned in six-month prepetition period was current monthly income, even though not received during that period).

416. Much of the judicial interpretation of § 707(b)'s means test has occurred in Chapter 13 cases, in which § 1325(b) incorporates § 707(b)(2). See, e.g., *Mort Ranta v. Gorman*, 721 F.3d 241 (4th Cir. 2013); *Drummond v. Welsh (In re Welsh)*, 711 F.3d 1120 (9th Cir. 2013); *Beaulieu v. Ragos (In re Ragos)*, 700 F.3d 220 (5th Cir. 2012); *Anderson v. Cranmer (In re Cranmer)*, 697 F.3d 1314 (10th Cir. 2012); *Baud v. Carroll*, 634 F.3d 327 (6th Cir. 2011) (all holding that Social Security benefits excluded in § 101A(B) for purposes of Chapter 13 analysis).

ry exclusion and other benefits, such as under the Railroad Retirement Act⁴¹⁷ and private disability insurance benefits.⁴¹⁸

Official Form 22A⁴¹⁹ is used to make the calculations in applying the means test. There is a presumption of abuse if a debtor's current monthly income exceeds a statutory formula after deductions set forth in § 707(b)(2) for applicable monthly expenses. The monthly expenses are generally determined by use of Internal Revenue Service National Standards and Local Standards, plus deductions for contractual secured debt payments, priority claims, and other necessary expenses itemized in the statute.⁴²⁰ If the resulting net current monthly income, multiplied by sixty, is not less than \$12,475, or the greater of \$7,475 and 25% of the debtor's nonpriority unsecured claims, there is a presumption of abuse.⁴²¹ Official Form 22A's step-by-step process of the presumptive abuse testing leads the calculation through the debtor's income from all sources, and determines whether the means test applies, based on the debtor's applicable median family income. The median family income is a state-sensitive amount, based on a family of the same or smaller size, as determined by the Bureau of the Census each year,⁴²² and that information is available from the Department of Justice, U.S. trustee,⁴²³ as well as the bankruptcy court clerk. If the debtor's and spouse's current monthly income is less than the applicable median family income, based on household size, no one may move for

417. See *Meyer v. Scholz (In re Scholz)*, 477 B.R. 877 (B.A.P. 9th Cir. 2011) (Railroad Retirement Act benefits included in current monthly income).

418. See *Blausey v. U.S. Trustee*, 552 F.3d 1124 (9th Cir. 2009) (private disability insurance benefits included in current monthly income).

419. See Committee Notes to Official Form 22A for explanation of the form and its relevant income and expense calculations.

420. See 11 U.S.C. § 707(b)(2)(i)–(iv). The Internal Revenue Standards are available at http://www.irs.gov/irm/part5/irm_05-015-001.html#d0e1365.

421. Section 707(b)(2)'s monetary amounts are subject to automatic, periodic adjustment every three years, for inflation, with the next adjustment scheduled for April 1, 2016. See 11 U.S.C. § 104.

422. See *id.* § 101(39A).

423. See <http://www.usdoj.gov/ust>.

dismissal under the means test.⁴²⁴ In other words, the means test ends up not applying to below-median-income Chapter 7 debtors.⁴²⁵

The determination of household size has not been a consistent methodology, since a debtor's family may be made up of various individuals living in the home less than full time. The Fourth Circuit addressed this issue in *Johnson v. Zimmer*.⁴²⁶ After discussing the various approaches taken by bankruptcy courts (heads-on-bed, income-tax dependent, and economic unit approaches), the court adopted the economic unit approach in a case with a debtor having part-time custody of two minor children and a spouse having part-time custody of three minor children. Although the case involved § 707(b)'s use in Chapter 13, the statutory analysis is applicable in Chapter 7. The court recognized that a fractional application of each individual's time spent in the home was relevant to the economic impact of actual time in the home on family expenses.

Most of the litigation over the application of IRS Standards for determination of allowable expenses takes place in Chapter 13 cases. Judicial interpretations of this part of the means test are discussed *infra* Part 6. For now, it should be noted that the IRS National Standards are for expenses, based on family size, for necessities such as food, apparel, household supplies, personal care, and some miscellaneous expenses. IRS Local Standards are based on state or regional costs for expenses like housing, utilities, and transportation. Housing expenses are broken into categories like mortgage, rent, taxes, insurance, and utilities. Transportation costs are broken into operating expenses and ownership costs.

In Chapter 13 cases, § 707(b) issues arise as to whether the IRS Standards are allowable deductible expenses, without regard to actual expenses, or whether the Standards set caps, with a debtor limited to the lesser of that cap or actual expense.⁴²⁷ The Supreme Court held, in the Chapter 13 case *Ransom v. FIA Card Services, N.A.*,⁴²⁸ that a debtor owning a vehicle without any debt against it cannot claim an allowance for

424. 11 U.S.C. § 707(b)(7).

425. See Official Form 22A.

426. 686 F.3d 224 (4th Cir. 2012).

427. See *infra* Part 6 for discussion of case authority.

428. 131 S. Ct. 716 (2011).

vehicle ownership expense under § 707(b)(2)(A)(ii)(I) and the related IRS Local Standards for vehicle ownership. In other words, a debtor must have an actual expense to justify a § 707(b)(2) deduction from current monthly income. Using this rationale—which would be applicable in both Chapter 7 and 13 cases—other courts have held that if the debtor is surrendering a home or vehicle, there is not an allowance deduction in the means test for the secured debt on that surrendered collateral.⁴²⁹ However, there is authority that contractual payments are deductible without regard to the necessity of, or the nature of, the collateral, since § 707(b)(2)(A)(iii) allows a deduction for the “average monthly payments on account of secured debts . . . scheduled as contractually due to secured creditors in each month of the 60 months following the date of the filing of the petition.”⁴³⁰

In applying the Chapter 7 means test, the Ninth Circuit held that a debtor cannot deduct payments being made on a loan from a 401(k) retirement account, either as one of the “other necessary expenses” or as a “special circumstance,” under § 707(b)(2).⁴³¹ The debtor argued that the monthly payments were for a secured debt, and that § 707(b)(2)(A)(iii) allowed the deduction. But the court held that the debtor owed himself for a retirement account loan, and that the obligation was not a “debt” under § 101(12)’s definition.⁴³²

The Code and related Official Form 22A permit specific deductions for family safety, as well as support of elderly, chronically ill, or disabled household members, certain education expenses for dependent children,

429. See, e.g., *In re Fredman*, 471 B.R. 540 (Bankr. S.D. Ill. 2012) (secured debt on surrendered home not deductible); *In re Sterrenberg*, 471 B.R. 131 (Bankr. E.D.N.C. 2012) (secured debt on surrendered car not deductible).

430. See, e.g., *Drummond v. Welsh (In re Welsh)*, 711 F.3d 1120, 1134 (9th Cir. 2013). “In enacting the BAPCPA, Congress did not see fit to limit or qualify the kinds of secured payments that are subtracted from current monthly income to reach a disposable income figure.” *Id.* at 1135.

431. *Egebjerg v. Anderson (In re Egebjerg)*, 574 F.3d 1045 (9th Cir. 2009).

432. See also *Seafort v. Burden (In re Seafort)*, 669 F.3d 662 (6th Cir. 2012) (in Chapter 13 cases, after loan on 401(k) accounts was repaid, former monthly loan amount was disposable income); *McCarty v. Lasowski (In re Lasowski)*, 575 F.3d 815 (8th Cir. 2009) (same).

and medical insurance.⁴³³ If there is a resulting presumption of abuse after all of the allowable calculations, a debtor may attempt to rebut it by “demonstrating special circumstances,” such as a serious medical condition or call to active military service. Special circumstances must be documented.⁴³⁴

5.3 Chapter 7 trustee

In each Chapter 7 case, a trustee is appointed by the U.S. trustee or bankruptcy administrator.⁴³⁵ Although election of trustees is possible under § 702, it is not common in consumer cases, with election of a trustee usually seen only in large asset cases, often those originally filed as Chapter 11 and then converted to Chapter 7. The trustee’s duties are described in § 704, but generally the trustee will evaluate whether assets are available for administration, including potential fraudulent transfer,⁴³⁶ preference,⁴³⁷ and other avoidable transfers or potential recoveries for the bankruptcy estate.⁴³⁸ The trustee may object to a debtor’s claimed exemptions,⁴³⁹ and may also object to a debtor’s discharge, under § 727(a).⁴⁴⁰ Assuming there are assets available for liquidation,⁴⁴¹ the trustee will distribute property of the bankruptcy estate to expenses and claims allowed under the procedure outlined in § 726. Chapter 7 trustees are compensated based on the statutory formula in § 326.⁴⁴²

433. 11 U.S.C. § 707(b)(2)(A)(ii)(I)–(V).

434. *Id.* § 707(b)(2)(B).

435. *Id.* § 701.

436. *See id.* § 548.

437. *See id.* § 547.

438. *See id.* §§ 542–552.

439. *See supra* Part 3 for discussion of exemptions.

440. *See* 11 U.S.C. § 727(c).

441. *See id.* § 363(b) for sales of estate property.

442. *See, e.g.,* Gold v. Robins (*In re Rowe*), 750 F.3d 392 (4th Cir. 2014); Hopkins v. Asset Acceptance LLC (*In re Salgado-Nava*), 473 B.R. 911 (B.A.P. 9th Cir. 2012).

5.4 Redemption and valuation

One of the options for Chapter 7 debtors is to redeem personal property from a secured consumer lien, “if such property is exempted . . . or has been abandoned, . . . by paying the holder of such lien the amount of the allowed secured claim . . . in full at the time of redemption.”⁴⁴³ In other words, redemption requires full payment of the allowed amount of the secured claim unless the creditor agrees otherwise. The difference between redemption and reaffirmation of a secured debt is the requirement of full payment at the time of redemption, whereas reaffirmation permits monthly payments in an amount agreed on by the parties. BAPCPA changed how the value of personal property secured by an allowed claim is determined, with § 506(a)(2) providing that for individuals in Chapters 7 and 13, the value is “replacement value . . . as of the date of the filing of the petition without deduction for costs of sale or marketing.”⁴⁴⁴ The statute goes on to specify that for property acquired for personal, family, or household purposes, the replacement value is “the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.”⁴⁴⁵

Section 348(f), as amended by BAPCPA, provides that upon conversion from Chapter 13 to Chapter 7, the allowed secured claim on property continues, unless the full amount of the claim, as determined under nonbankruptcy law, has been paid in full. Prior to the amendment, debtors often experienced a benefit on conversion, when the redemption value was reduced by the amount paid on a secured claim under a pre-conversion Chapter 13 plan.⁴⁴⁶ Under the amended Code, any value fixed on the property in the Chapter 13 plan would not be binding when the case is converted to Chapter 7. Redemption in Chapter 7 thus requires payment of the secured claim, as described above.

443. 11 U.S.C. § 722.

444. *Id.* § 506(a)(2).

445. *Id.*

446. *See, e.g., In re Cooke*, 169 B.R. 662 (Bankr. W.D. Mo. 1994).

5.5 Abandonment

If an asset has inconsequential value for the bankruptcy estate, the trustee may abandon it under § 554 because administering the asset would burden the estate. The debtor, or another party in interest such as a secured creditor, can move to compel the trustee to abandon the asset.⁴⁴⁷ If an asset is scheduled by the debtor, and the trustee does not administer it, that property is automatically abandoned to the debtor when the case is closed.⁴⁴⁸ In contrast, if property is not scheduled it is not abandoned, and the case is subject to reopening for the trustee's administration.⁴⁴⁹ Under the concept of judicial estoppel, a debtor's failure to schedule a cause of action may prevent him from pursuing the action, but it does not result in abandonment of the trustee's opportunity to pursue the action.⁴⁵⁰

5.6 Reaffirmation

A reaffirmation⁴⁵¹ is a written agreement between the debtor and creditor. The concept behind a reaffirmation is that, notwithstanding the dischargeability of an obligation, the debtor may need or want to retain the property securing the debt. The Code has built-in protections to prevent abuse. The agreement must be in writing and must be entered into before discharge is granted. The debtor must have received the required disclosures, as set forth in § 524(k), including a right to rescind the agreement.⁴⁵² The debtor must complete the Official Form 27 cover sheet for reaffirmation agreements, along with recommended Procedural Form

447. See 11 U.S.C. § 554(b).

448. See *id.* § 554(c).

449. See *id.* §§ 554(d) & 350.

450. See, e.g., *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380 (5th Cir. 2008). See also *supra* Part 3 for discussion of judicial estoppel.

451. For reaffirmation requirements, see 11 U.S.C. § 524(c), (d), & (j). BAPCPA amended § 524 to require more specificity.

452. For analysis of the 2005 amendments affecting reaffirmation, see David B. Wheeler & Douglas E. Wedge, *A Fully-Informed Decision: Reaffirmation, Disclosure and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 Am. Bankr. L.J. 789 (2005).

240A or 240A/B for the actual agreement. Forms 240A and 240A/B contain the required disclosure language. After the agreement is filed with the court, the debtor may rescind the agreement within sixty days by giving notice to the creditor.⁴⁵³ If the debtor is not represented by an attorney in the reaffirmation process, the court must hold a hearing on approval of the agreement to determine if the agreement is in the best interest of the debtor or would be an undue hardship for the debtor or a dependent of the debtor.⁴⁵⁴ Court approval is not required if the reaffirmation is for a consumer debt and secured by real property.⁴⁵⁵

Prior to BAPCPA, some courts had recognized an option for debtors—in addition to redemption or reaffirmation—called “ride-through.”⁴⁵⁶ Under ride-through, the debtor might maintain payment on a secured debt after discharge in a Chapter 7 case. Other courts did not agree, concluding that the debtor must either redeem or reaffirm, unless the debtor wished to surrender the collateral.⁴⁵⁷ As amended by BAPCPA, § 521(a)(2) requires the Chapter 7 debtor to file a statement of intention as to redemption, reaffirmation, or surrender of collateral.⁴⁵⁸ If a debtor does not timely perform the stated intention as to personal property, § 362(h) provides stay relief to the secured creditor.⁴⁵⁹ Ride-through has been held by some courts to continue as an option in real property secured claims.⁴⁶⁰

453. See 11 U.S.C. § 524(c)(4).

454. See *id.* § 524(c)(6).

455. See *id.* § 524(c)(6)(B).

456. See, e.g., *In re Belanger*, 962 F.2d 345 (4th Cir. 1992); *Lowry Fed. Credit Union v. West*, 882 F.2d 1543 (10th Cir. 1989).

457. See, e.g., *In re Taylor*, 3 F.3d 1512 (11th Cir. 1993); *In re Edwards*, 901 F.2d 1383 (7th Cir. 1990).

458. See, e.g., *In re Donald*, 343 B.R. 524 (Bankr. E.D.N.C. 2006). The 2005 amendments to § 521(a)(2) are reviewed *supra* Part 2.

459. See, e.g., *In re Miller*, 443 B.R. 54 (Bankr. D. Del. 2011) (although § 521(a)(2) didn't completely eliminate ride-through option, failure to redeem or reaffirm would lead to stay relief under § 362(h)).

460. See, e.g., *In re Covell*, 474 B.R. 702 (Bankr. W.D. Ark. 2012).

5.7 Discharge

A goal of Chapter 7 debtors is to obtain a discharge of *in personam* liability of “all debts that arose before the date of the order for relief.”⁴⁶¹ Upon entry of a discharge, a discharge injunction goes into place under § 524. The broad effect of discharge will be discussed later, but § 727(a) sets forth eleven grounds for denial of discharge, with an additional cause for delaying entry of discharge. Some of these grounds appear infrequently in the typical consumer Chapter 7, but each of the following may trigger a denial of the discharge of all prepetition debts. The case law on most § 727(a) grounds is extensive; so, for purposes of this monograph, only a cursory review of the statutory elements is possible.

- *Section 727(a)(1)*. Only individuals receive a discharge under Chapter 7.
- *Section 727(a)(2)*. Transfers of property within one year of filing bankruptcy, or property of the estate after filing, with intent to hinder, delay, or defraud creditors or the estate justifies denial of discharge. Concealment of assets that continues into the prepetition year may be sufficient to deny discharge of liability,⁴⁶² but actual intent is a required element.⁴⁶³ One of the points of disagreement among the circuits is whether a debtor who made an improper transfer may reverse the transfer and overcome § 727(a)(2).⁴⁶⁴
- *Section 727(a)(3)*. Acts such as concealment of, destruction of, or failure to keep financial information, including books and records, may be the basis for discharge denial, unless the debtor can show the act or failure was justified under the circumstances. Per case authority, the objecting party must first show the statutory

461. 11 U.S.C. § 727(b).

462. See, e.g., *In re Keeney*, 227 F.3d 679 (6th Cir. 2000) (adopting continuous concealment).

463. See, e.g., *In re Pratt*, 411 F.3d 561 (5th Cir. 2005).

464. Compare *In re Adeeb*, 787 F.2d 1339 (9th Cir. 1986) (property must remain transferred to trigger § 727(a)(2)), with *In re Davis*, 911 F.2d 560 (11th Cir. 1990) (rejecting *Adeeb*).

elements to demonstrate that relevant books and records (or other documents) don't exist.⁴⁶⁵ Then the burden shifts to the debtor to show circumstances justifying loss or lack of relevant records.⁴⁶⁶ A genuine consumer debtor would not be expected to have sophisticated financial records, and there is an overriding debtor-specific reasonableness inquiry involved in § 727(a)(3).⁴⁶⁷

- *Section 727(a)(4)*. Giving a false oath or claim is a ground for discharge denial if the falsehood is made knowingly or fraudulently in connection to the Chapter 7 case. A typical example is a debtor's omission of assets from the bankruptcy schedules.⁴⁶⁸ Either fraudulent intent or reckless disregard for truthfulness may be sufficient.⁴⁶⁹ The bankruptcy schedules are executed under penalty of perjury, so virtually any false statement or material omission may be the source of a § 727(a)(4) objection.⁴⁷⁰
- *Section 727(a)(5)*. Failure to sufficiently explain loss of assets may be a denial basis, for example, when a debtor's financial statement shows assets that are not on the bankruptcy schedules.⁴⁷¹ The issue is typically whether the debtor satisfactorily explains the discrepancy.⁴⁷²
- *Section 727(a)(6)*. The debtor's refusal to obey a lawful court order is a discharge denial ground, along with refusal to testify after the debtor has been given some grant of immunity. Obviously, self-incrimination issues are involved here, but the primary use of

465. See *In re French*, 499 F.3d 345 (4th Cir. 2007), for objecting party's initial burden.

466. See, e.g., *In re Wiess*, 132 B.R. 588 (Bankr. E.D. Ark. 1991).

467. See, e.g., *Meridian Bank v. Alten*, 958 F.2d 1226 (3d Cir. 1992); *Hussain v. Malik (In re Hussain)*, 508 B.R. 417 (B.A.P. 9th Cir. 2014).

468. See, e.g., *In re Phillips*, 476 F. App'x 813 (11th Cir. 2012); *In re Retz*, 606 F.3d 1189 (9th Cir. 2010).

469. See, e.g., *In re Khalil*, 478 F.3d 1167 (9th Cir. 2009). See also *Phillips*, 476 F. App'x 813 (debtor acted with fraudulent intent in omission of asset).

470. See, e.g., *In re Retz*, 606 F.3d 1189 (9th Cir. 2010).

471. See, e.g., *In re Perez*, 954 F.2d 1026 (5th Cir. 1992); *Kaler v. Charles (In re Charles)*, 474 B.R. 680 (B.A.P. 8th Cir. 2012) (undervaluing asset was material).

472. See, e.g., *In re Aoki*, 323 B.R. 803 (B.A.P. 1st Cir. 2005).

the statute is when a debtor has been ordered to do something, such as turn over an asset to the trustee, and the debtor has refused to comply.⁴⁷³ There is an intentional element to this statute.⁴⁷⁴

- *Section 727(a)(7)*. This objection addresses actions by the debtor in another case filed by an insider. This ground is rarely applicable in a consumer case.
- *Section 727(a)(8)*. If the debtor previously received a discharge in a Chapter 7 or 11 case that was “commenced within 8 years before the date of the filing of the [current] petition,” another Chapter 7 discharge is not available.⁴⁷⁵
- *Section 727(a)(9)*. If the debtor previously received a discharge in a Chapter 12 or 13 case that was “commenced within six years before the date of the filing of the [current] petition,” a Chapter 7 discharge is not available, unless in the prior case “allowed” unsecured claims had been paid 100%, or at least 70%, under a plan that was in good faith and that represented the debtor’s best effort.⁴⁷⁶
- *Section 727(a)(10)*. This statute permits a debtor to waive a discharge, a rare event. Any waiver must be in writing, executed by the debtor after the case was filed, and approved by the court. The underlying concept is that any prebankruptcy waiver of discharge is not enforceable.⁴⁷⁷
- *Section 727(a)(11)*. A debtor’s failure to complete a required course in personal financial management is a basis to deny a discharge. This requirement is separate from the eligibility requirement for filing bankruptcy, which refers to completion of credit briefing.⁴⁷⁸

473. See, e.g., *Moore v. Robbins*, No. CV 13-1122 (BAH), 2014 WL 930852 (D.D.C. Mar. 11, 2014).

474. See, e.g., *In re Jordan*, 521 F.3d 430 (4th Cir. 2008).

475. 11 U.S.C. § 727(a)(8).

476. *Id.* § 727(a)(9).

477. See, e.g., *In re Huang*, 275 F.3d 1173 (9th Cir. 2002).

478. See 11 U.S.C. § 109(h). Filing requirements are reviewed *supra* Part 2.

- *Section 727(a)(12)*. This provision is not actually a basis to deny discharge; rather, it is a delay in the granting of discharge to give the court an opportunity to first determine if the debtor is subject to the § 522(q) limitation on homestead exemption, a rarely applied limitation.⁴⁷⁹

The § 727(a) objections to discharge must be brought in an adversary proceeding. Bankruptcy Rule 4005 puts the burden of proof on the plaintiff. That burden is generally recognized to be preponderance of evidence.⁴⁸⁰ To be timely, Rule 4004(a) provides that a complaint objecting to a Chapter 7 discharge must be filed within sixty days after the first date set for the § 341 meeting of creditors. Under *Kontrick v. Ryan*,⁴⁸¹ this procedural time is not jurisdictional, and a debtor might waive the time-for-filing requirement.

5.8 Exceptions from general discharge

Most Chapter 7 debtors are not denied their discharge for any of the § 727(a) grounds; however, entitlement to an overall discharge does not mean that every debt is dischargeable. Section 523(a) exceptions from the general discharge come into play because of specific actions or failures by debtors. Following are brief illustrations of the various exceptions that regularly arise in consumer Chapter 7 cases.

- *Section 523(a)(1)*. This exception from discharge prevents the discharge of many tax obligations, including those described as priority taxes under § 507(a)(3) and (8), as well as taxes for a return that was not filed or was filed within the period “after two years before the date of the filing of the petition.”⁴⁸² The

479. See, e.g., *In re Larson*, 513 F.3d 325 (1st Cir. 2008). For discussion of § 522(q), see *supra* Part 3.

480. See, e.g., *In re Serafini*, 938 F.2d 1156 (10th Cir. 1991) (applying rationale of *Grogan v. Garner*, 498 U.S. 279 (1991), which adopted preponderance standard for § 523(a) exceptions from discharge).

481. 540 U.S. 443 (2004).

482. 11 U.S.C. § 523(a)(1)(B). For discussion of what constitutes a “return” for purposes of § 523(a)(1), see *McCoy v. Miss. State Tax Comm’n (In re McCoy)*, 666 F.3d 924 (5th Cir. 2012); *Pendergast v. Mass. Dep’t of Revenue (In re Pendergast)*, 510 B.R. 1 (B.A.P.

§ 507(a)(8) priority taxes are generally income taxes for which a return was due within three years before the bankruptcy petition filing; but § 507(a)(8) also includes certain property, trust-fund, employment, excise, and custom taxes, as well as penalties on those taxes.⁴⁸³ The § 507(a)(3) priority tax is uncommon in consumer cases, since it relates to income taxes accruing during the gap between an involuntary bankruptcy petition and the entry of an order for relief.⁴⁸⁴ Section 507(a)(8) also includes some taxes that were assessed within 240 days of the bankruptcy filing. The assessment period is tolled by the time an automatic stay is in effect in a prior case or by the time any nonbankruptcy law prevents the government from collecting a tax.⁴⁸⁵ Section 523(a)(1)(C) excludes from discharge tax debts that stem from a fraudulent return or willful tax evasion.⁴⁸⁶

- *Section 523(a)(2)*. This three-part exception is one of the more frequently litigated and applied, including in consumer cases. The first part prevents discharge of a debt when “money, property, services, or . . . refinancing of credit” was obtained by “false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s . . . financial condition.”⁴⁸⁷ Assuming the elements are proven, the Supreme Court has held that a creditor’s reliance on the falsity or fraud must be justifiable.⁴⁸⁸ The second part of the statute addresses the use of a writ-

1st Cir. 2014); *Gonzalez v. Mass. Dep’t of Revenue (In re Gonzalez)*, 506 B.R. 317 (B.A.P. 1st Cir. 2014); *Wogoman v. IRS (In re Wogoman)*, 475 B.R. 110 (B.A.P. 10th Cir. 2012).

483. 11 U.S.C. § 507(a)(8)(A)–(G). For discussion of tax penalties and the disagreement among circuit authority on dischargeability of penalties, see *In re Roberts*, 906 F.2d 1440 (10th Cir. 1990).

484. See 11 U.S.C. § 502(f).

485. *Id.* § 507(a)(8), as amended. See, e.g., *In re Jones*, 657 F.3d 921 (9th Cir. 2011), for discussion of the tolling period. See also *Young v. United States*, 535 U.S. 43 (2002), in which the Court held, prior to the 2005 amendment to § 507(a)(8), that the automatic stay tolled the three-year look-back period for §§ 523(a)(1) and 507(a)(8).

486. For discussion of § 523(a)(1)(C) and other authorities, see *United States v. Conney*, 689 F.3d 365 (5th Cir. 2012).

487. 11 U.S.C. § 523(a)(2)(A).

488. *Field v. Mans*, 516 U.S. 59 (1995).

ten financial statement that is “materially false” and given to a creditor with “intent to deceive.”⁴⁸⁹ The creditor’s reliance on the statement must be reasonable, rather than justifiable.⁴⁹⁰ In the distinction between these two parts of the exception, there is some disagreement about when a debtor’s representation becomes a “statement concerning . . . financial condition” for purposes of § 523(a)(2)(A).⁴⁹¹ The Supreme Court held, in *Cohen v. De La Cruz*,⁴⁹² that when actual fraud is proven, the nondischargeable debt may include all damages flowing from the fraud, such as treble damages and attorney fees under an applicable statute.⁴⁹³ The third part, § 523(a)(2)(C), excepts from discharge consumer debts incurred within ninety days of the petition filing or cash advances obtained within seventy days of the filing.

- *Section 523(a)(3)*. This is an exception for debts that were not scheduled by the debtor in time to permit the applicable creditor to file a proof of claim or a complaint to determine dischargeability of the debt, provided it is debt for which such a complaint must be timely filed under § 523(a)(2), (4), or (6).⁴⁹⁴ These three

489. 11 U.S.C. § 523(a)(2)(B). See, e.g., *Toye v. O’Donnell* (*In re O’Donnell*), 728 F.3d 41 (1st Cir. 2013).

490. *Id.* § 523(a)(2)(B)(iii). See, e.g., *In re Cohn*, 54 F.3d 1108 (3d Cir. 1995) (creditor’s reliance must be actual and reasonable).

491. See *In re Bandi*, 683 F.3d 671 (5th Cir. 2012) (discussing conflicting circuit authority on debtor’s false representation about specific property, and whether such representation concerns debtor’s financial condition).

492. 523 U.S. 213 (1998).

493. Courts of appeals agree that the bankruptcy court, when determining the dischargeability of a debt, may also determine the amount of money judgment. See *Hart v. S. Heritage Bank* (*In re Hart*), 564 F. App’x 773 (6th Cir. 2014); *Ray Cai v. Shenzhen Smart-In Indus. Co.* (*In re Ray Cai*), 571 F. App’x 580 (9th Cir. 2014); *In re Morrison*, 555 F.3d 473 (5th Cir. 2009); *In re McGavin*, 189 F.3d 1215 (10th Cir. 1999); *In re Kennedy*, 108 F.3d 1015 (9th Cir. 1997); *In re McLaren*, 3 F.3d 958 (6th Cir. 1993); *In re Hallahan*, 936 F.2d 1496 (7th Cir. 1991).

494. See, e.g., *Perle v. Fiero* (*In re Perle*), 725 F.3d 1023 (9th Cir. 2013) (unscheduled creditor without notice of petition can file § 523(a)(3) complaint for § 523(a)(6) cause of action); *Mahorn v. Petty* (*In re Petty*), 491 B.R. 554 (B.A.P. 8th Cir. 2013) (creditor not

types of exceptions are those for which a complaint must be filed no later than sixty days after the first date set for the § 341 meeting of creditors,⁴⁹⁵ a deadline that is discussed below. There is some disagreement among courts over the effect that failure to schedule in time to file a proof of claim has on relevance when the case is no-asset, in which creditors are notified that they do not need to file claims.⁴⁹⁶

- *Section 523(a)(4)*. Although this exception appears more frequently in business debtor cases, it may apply in a consumer case if the debtor, acting in a fiduciary capacity, committed fraud or defalcation, or embezzled. The most commonly litigated issue is whether the particular action was within a fiduciary capacity. Case law generally requires that the debtor acted within a technical or express trust, usually created under a specific statute.⁴⁹⁷ *In re Baylis*⁴⁹⁸ sets forth the elements of proving the § 523(a)(4) exception from discharge. Resolving a split of circuit authority on defalcation's mental state requirement, the Supreme Court held the following in *Bullock v. BankChampaign, N.A.*:⁴⁹⁹

[W]here the conduct at issue does not involve bad faith, moral turpitude, or other immoral conduct, the term requires an intentional wrong. We include as intentional not only conduct that the fiduciary knows is improper but also reckless conduct of the kind that the criminal law often treats as the equivalent. Thus, we include reckless conduct of the kind set forth in the Model Penal Code. Where actual knowledge of wrongdoing is lacking, we consider conduct as equivalent if the fiduciary "consciously disregards" (or is willfully blind to) a "substantial and unjustifiable risk" that his conduct will turn out to violate a fiduciary duty. . . . That risk "must be of such a nature and degree

given sufficient notice of petition filing to take meaningful action on § 523(a)(6) complaint, justifying § 523(a)(3) complaint).

495. See 11 U.S.C. § 523(c) and Fed. R. Bankr. P. 4007(c).

496. For a discussion of this issue, see, e.g., *In re Smith*, 582 F.3d 767, 778–79 (7th Cir. 2009).

497. See, e.g., *In re Harwood*, 637 F.3d 615 (5th Cir. 2011).

498. 313 F.3d 9 (1st Cir. 2002).

499. 133 S. Ct. 1754 (2013).

that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a *gross deviation* from the standard of conduct that a law-abiding person would observe in the actor's situation."⁵⁰⁰

- *Section 523(a)(5)*. This exception comes up a lot in consumer cases because marital separation or divorce often happens before or during a bankruptcy. As amended in 2005, the exception broadly covers all domestic support obligations,⁵⁰¹ as that term is defined in § 101(14A). In many instances, the bankruptcy courts are called on to determine whether a debt falls within the statutory definition. Although the term “domestic support obligation” is broader than traditional alimony or support, the concepts of alimony and support are included within the term, and every circuit has authority from before the 2005 amendments on factors that are traditionally used to determine whether an obligation is alimony or support.⁵⁰²
- *Section 523(a)(6)*. This exception covers debts for willful and malicious injury to someone else or someone else's property. Courts may have to distinguish between an intentional act that causes an injury and an action taken with intent to cause injury. The Supreme Court has held that reckless or negligent injury is not enough; rather, an intentional harm or injury standard applies.⁵⁰³ But as the Seventh Circuit pointed out, courts still struggle with defining “willful and malicious” injury with certitude:

[W]e imagine that all courts would agree that a willful and malicious injury, precluding discharge in bankruptcy of the debt created by the injury, is one that the injurer inflicted knowing

500. *Id.* at 1759–60 (quoting ALI Model Penal Code § 2.02(2)(c), p. 226 (1985)).

501. The priority of domestic support obligations is reviewed *supra* Part 4.

502. For in-depth discussion of domestic support obligations, including the extensive case law before and after the 2005 amendments, see *Bankruptcy & Domestic Relations Manual*, *supra* note 144. The *Manual* contains summaries of each circuit's authority on § 523(a)(5) debts.

503. *Kawaauhau v. Geiger*, 523 U.S. 57 (1998).

he had no legal justification and either desiring to inflict the injury or knowing it was highly likely to result from his act.⁵⁰⁴

- *Section 523(a)(7)*. Fines, penalties, or forfeitures to a governmental unit are excepted from discharge, provided they are not “compensation for actual pecuniary loss.”⁵⁰⁵ In addition, tax penalties are covered by this exception if the underlying tax obligation is not dischargeable. A significant Supreme Court decision, *Kelly v. Robinson*,⁵⁰⁶ held that § 523(a)(7) included a restitution obligation that was imposed as part of a criminal sentence.
- *Section 523(a)(8)*. This exception prevents the discharge of student loan obligations that are made, insured, or guaranteed by a governmental unit or nonprofit institution unless the debtor is able to prove that paying the obligation will impose an “undue hardship,” a term that is not defined in the Code.⁵⁰⁷ The most commonly used test for determining undue hardship was developed by the Second Circuit in *Brunner v. New York State Higher Education Services Corp.*⁵⁰⁸ The test requires proof that the debtor is unable to maintain a minimal standard of living for self and dependents if repayment is necessary; that the debtor’s current health, employment, or other circumstances are likely to continue throughout the contractual repayment period; and that the debtor has made a good-faith effort to repay the loan.⁵⁰⁹ The *Brunner* test has been adopted, sometimes with modification, in

504. *Jendusa-Nicolai v. Larsen*, 677 F.3d 320, 324 (7th Cir. 2012).

505. 11 U.S.C. § 523(a)(7). *See, e.g.*, *Disciplinary Bd. of Supreme Court of Penn. v. Feingold (In re Feingold)*, 730 F.3d 1268 (11th Cir. 2013).

506. 479 U.S. 36 (1986).

507. Section 523(a)(8) was amended in 2005 to increase the scope of the exception. *See, e.g.*, *Roth v. Educ. Credit Mgmt. Corp.*, 490 B.R. 908 (B.A.P. 9th Cir. 2013) (describing statutory changes).

508. 831 F.2d 395 (2d Cir. 1987).

509. *See, e.g.*, *Hedlund v. Educ. Res. Inst., Inc.*, 718 F.3d 848 (9th Cir. 2013) (good faith examined in light of debtor’s efforts to obtain employment, maximize income, and minimize expenses); *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882 (7th Cir. 2013) (under *Brunner* test, bankruptcy court’s finding of good-faith effort not clearly erroneous).

the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits, with the Eighth Circuit using a “totality of circumstances” evaluation.⁵¹⁰ One of the unresolved issues is the extent to which the undue hardship evaluation depends on a debtor’s participation in a nonbankruptcy repayment program that may be offered by the lender or government guarantor.⁵¹¹

- *Section 523(a)(9)*. This exception applies to debts resulting from death or personal injury caused by the debtor’s unlawful operation of a motor vehicle, vessel, or aircraft, when intoxicated.⁵¹²
- *Section 523(a)(10)*. Debts that were, or could have been, scheduled in a prior bankruptcy case and that were not discharged, either because of discharge waiver or under § 727(a)(2) through (a)(7) objections, are not dischargeable in the current case. Basically, once a discharge is denied, its effect is binding in subsequent cases. But there are deviations from this general rule for certain debts that were excepted from discharge in a prior case.⁵¹³
- *Section 523(a)(11) & (12)*. These exceptions rarely apply in consumer cases because they deal with fraud and defalcation, or failure to maintain capital, with respect to an insured depository institution.
- *Section 523(a)(13)*. A debt for restitution under Title 18 of the U.S. Code is not dischargeable.
- *Section 523(a)(14)*. A debt incurred for the purpose of paying a nondischargeable United States tax obligation is excepted from discharge.

510. See *In re Reynolds*, 425 F.3d 526 (8th Cir. 2005).

511. See, e.g., *Nielsen v. ACS, Inc. (In re Nielsen)*, 473 B.R. 755 (B.A.P. 8th Cir. 2012) (debtor eligible for income contingent repayment program not able to discharge student loan); but compare *Bene v. Educ. Credit Mgmt. Corp. (In re Bene)*, 474 B.R. 56 (Bankr. W.D.N.Y. 2012) (*Brunner* test did not require debtor to participate in nonbankruptcy repayment program, under totality of circumstances).

512. See, e.g., *In re Reese*, 91 F.3d 37 (7th Cir. 1996).

513. See 11 U.S.C. § 523(b).

- *Section 523(a)(14A)*. A debt incurred for the purpose of paying a nondischargeable tax obligation to a governmental entity, other than the United States, is excepted from discharge.
- *Section 523(a)(14B)*. A debt incurred to pay fines or penalties under federal election laws is excepted from discharge.
- *Section 523(a)(15)*. This provision excepts from discharge in Chapter 7 cases those marital obligations that are not within the domestic support category, but were incurred “in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order . . . or a determination.”⁵¹⁴ This exception is used typically for property division debts that arise in divorce or separation agreements and orders.⁵¹⁵
- *Section 523(a)(16)*. Fees or assessments of homeowner or condominium associations that arise after the filing of a Chapter 7 bankruptcy are excepted from discharge, so long as the debtor has legal, equitable, or possessory interests in the property.⁵¹⁶ Nevertheless, a debtor may have trouble ridding himself or herself of postpetition liability, for example, if the mortgagee declines to foreclose because it doesn’t want to assume homeowner association fees.⁵¹⁷
- *Section 523(a)(17)*. This exception only applies to prisoners who incur costs from court pleadings.
- *Section 523(a)(18)*. Loans from pension, profit-sharing, or bonus plans that are tax-sheltered under the Internal Revenue Code are excepted from discharge.

514. *Id.* § 523(a)(15), as amended in 2005.

515. See *Bankruptcy & Domestic Relations Manual*, *supra* note 144, for in-depth discussion of § 523(a)(15) obligations and the extensive case law before and after the 2005 amendments. The *Manual* contains summaries of each circuit’s authority on § 523(a)(15) debts.

516. See *In re Rosenfeld*, 23 F.3d 833 (4th Cir. 1994).

517. See, e.g., *In re Ames*, 447 B.R. 680 (Bankr. D. Mass. 2011). See also *In re Canning*, 706 F.3d 64 (1st Cir. 2013) (surrender of residence didn’t require creditor to foreclose or take possession; refusal to foreclose didn’t violate § 524 discharge injunction).

- *Section 523(a)(19)*. An exception rarely seen in consumer cases, a debt arising from a security law violation is not dischargeable.

Procedurally, the type of debt makes a difference as to when a complaint (adversary proceeding) to determine dischargeability must be filed. Under § 523(c), the debts covered by exceptions § 523(a)(2), (4), and (6) are treated as dischargeable unless a timely complaint is filed; and Bankruptcy Rule 4007(c) provides that these three categories of debts require a complaint to be filed no later than sixty days after the first date set for the § 341 meeting of creditors. All of the other excepted debts are automatically excepted from a Chapter 7 discharge, but a complaint may be filed at any time if there is a question about the discharge of that debt.⁵¹⁸ For example, although student loan debt is automatically excepted from discharge under § 523(a)(8), a debtor may file a complaint in an attempt to show undue hardship that would justify discharge of all or part of the debt.⁵¹⁹

5.9 Revocation of discharge

The Code allows for revocation of a Chapter 7 discharge, but under strict timing requirements. Grounds for revocation include debtor fraud in obtaining discharge (the party seeking revocation must have had no knowledge of the fraud before discharge was granted)⁵²⁰ and the debtor's failure to disclose acquisition of or entitlement to property of the estate.⁵²¹ Revocation must be sought within one year of the discharge or by the date the case is closed, depending on the grounds.⁵²²

518. Fed. R. Bankr. P. 4007(b) ("A complaint other than under § 523(c) may be filed at any time.").

519. See, e.g., *Educ. Credit Mgmt. Corp. v. Jorgensen (In re Jorgensen)*, 479 B.R. 79 (B.A.P. 9th Cir. 2012) (partial discharge of student loan proper under *Brunner* test). Cf. *Conway v. Nat'l Collegiate Trust (In re Conway)*, 559 F. App'x 610 (8th Cir. 2014) (partial discharge not available remedy under circuit's totality-of-circumstances test).

520. 11 U.S.C. § 727(d)(1). See *Jones v. U.S. Trustee (In re Jones)*, 726 F.3d 897 (9th Cir. 2013) (fraud that would have supported denial of discharge supports revocation); *Zedan v. Habash*, 529 F.3d 398 (7th Cir. 2008) (§ 727(d) requires no knowledge of fraud before discharge granted).

521. 11 U.S.C. § 727(d)(2). See, e.g., *In re Thunberg*, 641 F.3d 559 (1st Cir. 2011).

522. 11 U.S.C. § 727(e).

5.10 Discharge injunction

Upon entry of a § 727 discharge, a permanent injunction goes into place under § 524(a), voiding any judgment for personal liability on discharged debt, and enjoining the commencement or continuation of suits and collection efforts against the debtor personally. Valid liens, however, may remain subject to secured claims.⁵²³ The Supreme Court, in *Johnson v. Home State Bank*,⁵²⁴ underscored the typical survival of valid liens, holding that in a subsequent Chapter 13 case the *in rem* lien of a secured creditor was a claim, notwithstanding the debtor's discharge of *in personam* liability. Violations of the discharge injunction are frequent subjects of litigation. Although generally there is no private right of action under § 524, violations of the discharge injunction may be remedied through contempt proceedings,⁵²⁵ with the potential for monetary sanctions.⁵²⁶

5.11 Conversion of case to Chapter 13

A Chapter 7 debtor may decide to convert the case to Chapter 13. Although § 706(a) states that a case may be converted to Chapter 11, 12, or 13 “at any time,” the Supreme Court held, in *Marrama v. Citizens Bank of Massachusetts*,⁵²⁷ that the right to convert to Chapter 13 is good-faith dependent. Therefore, if a debtor seeks to convert for reasons like being caught by a Chapter 7 trustee for concealing assets, the conversion may be denied for lack of good faith.

523. See, e.g., *Lee v. Yeutter*, 917 F.2d 1104 (8th Cir. 1990).

524. 501 U.S. 78 (1991).

525. See, e.g., *Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186, 1191 (9th Cir. 2012) (agreeing with *Solow v. Kalikow (In re Kalikow)*, 602 F.3d 82, 93 (2d Cir. 2010), that contempt is by motion practice, citing Fed. R. Bankr. P. 9014 & 9020).

526. See, e.g., *Badovick v. Greenspan (In re Greenspan)*, 464 B.R. 61 (Table) (B.A.P. 6th Cir. 2011) (debtor's attorney fees for defending state court action after discharge awarded as sanction).

527. 549 U.S. 365 (2007).

5.12 Voluntary dismissal of Chapter 7 case

In addition to involuntary dismissal of a Chapter 7 case,⁵²⁸ § 707 may also permit the debtor to voluntarily dismiss a Chapter 7 case; but cause must be shown, after notice to all parties in interest and opportunity for a hearing.⁵²⁹ If the debtor's attempt to dismiss the case is in bad faith or would be prejudicial to creditors, voluntary dismissal likely will be denied.⁵³⁰

5.13 Lien avoidance and stripping

In *Dewsnup v. Timm*,⁵³¹ the Supreme Court rejected a Chapter 7 debtor's attempt to "strip down" or "strip off" a valid lien because of the collateral's decline in value, rendering the lien wholly or partially unsecured. The Court held that § 506(d) does not permit a Chapter 7 debtor to value the collateral of a secured creditor and redeem the property by paying only the value, thereby voiding the otherwise valid lien. The Court interpreted § 506(d)'s term "allowed secured claim" to include a lien that was valid under applicable state law, even though the lien had little or no value. As a result of *Dewsnup*, Chapter 7 debtors are not able to do what many debtors can do in Chapter 13—strip off the wholly unsecured lien, usually a second mortgage on a residence. For consumer debtors, this is a valuable distinction between Chapter 7 and 13 relief.⁵³²

528. See *supra* § 5.2.

529. 11 U.S.C. § 707(a).

530. See, e.g., *In re Zick*, 931 F.2d 1124 (6th Cir. 1991) (citing to opinions and factors in § 707(a) dismissal consideration).

531. 502 U.S. 410 (1992).

532. See *Woolsey v. Citibank, N.A. (In re Woolsey)*, 696 F.3d 1266 (10th Cir. 2012), for discussion of *Dewsnup* in a Chapter 13 context. The potential lien-stripping in Chapter 13 is discussed *infra* Part 6.

RELIEF UNDER CHAPTER 13

6.1 Overview

The following are major components of relief under Chapter 13:

- *Eligibility for relief under this chapter. § 109(e)*
- *Optional and required elements for plan proposals. § 1322*
- *Plan confirmation requirements and process, including objections to confirmation and effects of confirmation. §§ 1325 & 1327*
- *Plan modification, before and after confirmation. §§ 1323 & 1329*
- *Discharge issues. § 1328*
- *Effects of conversion or dismissal of a case. § 1307*

Chapter 13 relief is for an “individual with regular income,”⁵³³ sometimes referred to as “wage earner” bankruptcy. But it is not essential that a debtor’s income be from wages; rather, as discussed in the next section on eligibility, the requirement is that a debtor’s source of income be “regular.”⁵³⁴ The structure of the Code’s provisions for Chapter 13 debtors is directed toward the proposal and ultimate confirmation of a plan to reorganize prepetition debts, perhaps restructuring contractual terms of secured debts, and typically paying less than 100% of unsecured debts. Upon completion of a confirmed plan, a debtor hopes to obtain a discharge; but some long-term debt, such as a home mortgage, may continue after that discharge. Part 6 reviews the Code’s provisions for Chapter 13, the applicable Bankruptcy Rules, and representative case authority. In 2005, under BAPCPA, substantial changes were made to Chapter 13, and the discussion below emphasizes the current Code, as amended, and relevant judicial interpretations, including by the Supreme Court. Some of

533. 11 U.S.C. §§ 101(30), 109(e).

534. *See id.* § 109(e).

BAPCPA's impact has not been fully resolved on the appellate level, and relevant splits of authority are highlighted.⁵³⁵

6.2 Eligibility for Chapter 13 relief

Code § 109(e) establishes the basic requirements for Chapter 13 eligibility. Only individuals are eligible, and they must have regular income, with maximum limits for both secured and unsecured debt. Regular income does not necessarily mean that a debtor must have regular employment, and there is substantial case authority that the test is not the source of the income, but whether the income is stable and regular.⁵³⁶ Some examples of sufficiently regular income are retirement or pension income,⁵³⁷ welfare payments,⁵³⁸ and child support payments.⁵³⁹ If the regularity of income is put at issue—typically by a motion to dismiss the case—the facts of each case would be determinative, but “regular” does not mean that each month’s income is the same; rather, emphasis is more on the stability, or predictability, of the income, since the principal concern for confirmation purposes is that a debtor have sufficient income to fund a proposed plan.⁵⁴⁰

One of the “regular income” issues that has been litigated frequently is whether a loan from a family member or friend suffices, and, if that is

535. The sheer monthly volume of judicial opinions on Chapter 13 issues prevents complete case analysis in this monograph. For in-depth analysis and case summaries posted monthly, see Hon. Keith M. Lundin, *Chapter 13 Bankruptcy* (4th ed. 2009) [hereinafter *Chapter 13 Bankruptcy*], available at <http://www.ch13online.com>. For other sources of case law and statutory analysis, see Appendix B, *infra*.

536. See 11 U.S.C. § 101(30) for definition of “individual with regular income.” See, e.g., *In re Schauer*, No. 99-31918, 2000 WL 33792712, at *7 (Bankr. D.N.D. Aug. 14, 2000) (“The benchmark for determining whether an individual has ‘regular income’ for purposes of section 101(30) of the bankruptcy code is not the type or source of income, but ‘its stability and regularity.’”).

537. See, e.g., *Regan v. Ross*, 691 F.2d 81 (2d Cir. 1982).

538. See, e.g., *In re Hammonds*, 729 F.2d 1391 (11th Cir. 1984).

539. See, e.g., *In re Taylor*, 15 B.R. 596 (Bankr. D. Ariz. 1981).

540. See 11 U.S.C. § 1325(a)(6)’s plan confirmation requirement that “the debtor will be able to make all payments under the plan.” See also, e.g., *In re Mercado*, 376 B.R. 430 (Bankr. M.D. Fla. 1990) (regular income tested by ability to make plan payments). Feasibility and other confirmation requirements are discussed *infra* § 6.10.

the only source of income, whether it likely does not satisfy the threshold requirement.⁵⁴¹ On the other hand, regular contributions from a family member to assist plan funding may be regular income, provided the contributions are verified.⁵⁴² Another issue often raised is whether a debtor who has the necessary regular income may fund a plan when the primary funding source is a future sale of property. Some courts hold that a speculative sale is not a source of regular income.⁵⁴³ If a sale is reasonably reliable, it may constitute a plan funding source, if not solely, at least sufficiently, for regular income purposes.⁵⁴⁴ Issues like sales present mixed questions of regular income and plan funding requirements that are discussed *infra*.

Other than the regular income requirement, § 109(e) sets out specific monetary restrictions on eligibility, including conditions that the debts be “noncontingent [and] liquidated,” as well as within statutory limits. There are judicial interpretations of the statutorily undefined terms “noncontingent” and “liquidated.” A typical concept of a contingent liability is one “in which the obligation to pay does not arise until the occurrence of a ‘triggering event or occurrence . . . reasonably contemplated by the debtor and creditor at the time the event giving rise to the claim occurred.’”⁵⁴⁵ Whether a debt is “liquidated” typically depends on the ability to determine the amount “by reference to an agreement or by a simple computation.”⁵⁴⁶

The statute’s monetary limits are subject to automatic, periodic adjustment every three years for inflation.⁵⁴⁷ Currently, noncontingent, liq-

541. See, e.g., *Pellegrino v. Boyajian (In re Pellegrino)*, 423 B.R. 586 (B.A.P. 1st Cir. 2010) (\$8,000 loan to fund plan not regular income when plan would be required to last thirty-six months).

542. See, e.g., *In re LaVictoire*, Nos. 10-10076 & 10-10325, 2011 WL 1168288 (Bankr. D. Vt. Mar. 25, 2011) (contributions from debtor’s mother were sufficiently stable).

543. See, e.g., *In re Nealen*, 407 B.R. 194 (Bankr. W.D. Pa. 2009).

544. See, e.g., *In re Van Winkle*, No. 11-13861-j13, 2012 WL 404956 (Bankr. D.N.M. Feb. 8, 2012) (citing 11 U.S.C. § 1322(b)(8), a plan may provide for payment of all or part of claims from property of estate).

545. *Barcal v. Laughlin (In re Barcal)*, 213 B.R. 1008, 1013 (B.A.P. 8th Cir. 1997).

546. *Mazzeo v. United States (In re Mazzeo)*, 131 F.3d 295, 305 (2d Cir. 1997).

547. See 11 U.S.C. § 104. The next adjustment is scheduled for April 2016.

uidated secured debt must be less than \$1,149,525, and noncontingent, liquidated unsecured debt must be less than \$383,175 “on the date of the filing of the petition.”⁵⁴⁸ Under this statutory reference, whether either class of debt falls outside of the limits is normally determined as of the petition date,⁵⁴⁹ and courts typically look primarily to a debtor’s schedules of debt, unless there is some issue of lack of good faith in preparing those schedules.⁵⁵⁰ There is authority that the statutory debt limits are not jurisdictional and are subject to waiver if not timely asserted, typically in a motion to dismiss.⁵⁵¹

In many instances, an issue arises as to whether a debt that is actually less than fully secured—because of collateral value—should be bifurcated, with the portion supported by value treated as secured for eligibility purposes and the balance unsecured.⁵⁵² While all courts do not agree that bifurcation is necessary for eligibility purposes, the majority have concluded that bifurcation is required.⁵⁵³ The result can be harsh, since in today’s real estate markets many debtors’ home values result in undersecured mortgages, with substantial unsecured portions pushing debtors over the unsecured limit.⁵⁵⁴ The issue of bifurcating undersecured home

548. *See id.* § 109(e).

549. *See, e.g.,* Scovis v. Henrichsen (*In re Scovis*), 249 F.3d 975 (9th Cir. 2001).

550. *See, e.g.,* Martindale v. Meenderinck (*In re Meenderinck*), 256 F. App’x 913, 914 (9th Cir. 2007) (citing Scovis v. Henrichsen (*In re Scovis*), 249 F.3d 975, 982 (9th Cir. 2001), “eligibility should normally be determined by the debtor’s originally filed schedules, checking only to see if the schedules were made in good faith”); *accord*, NCI Building Sys. LP v. Harkness (*In re Harkness*), 189 F. App’x 311 (5th Cir. 2006); Comprehensive Accounting Corp. v. Pearson (*In re Pearson*), 773 F.2d 751 (6th Cir. 1985).

551. *See, e.g.,* Gen. Lending Corp. v. Cancio, 505 B.R. 63 (S.D. Fla. 2014), *aff’d*, No. 14-10838, 2014 WL 4099739 (11th Cir. Aug. 21, 2014) (creditor’s motion to dismiss for exceeding eligibility amounts barred by laches when filed after plan confirmed).

552. *See* 11 U.S.C. § 506(a).

553. *See, e.g.,* Scovis v. Henrichsen (*In re Scovis*), 249 F.3d 975, 983–84 (9th Cir. 2001) (stating that this is majority view); Ficken v. United States (*In re Ficken*), 2 F.3d 299 (8th Cir. 1993); Brown & Co. Sec. Corp. v. Balbus (*In re Balbus*), 933 F.2d 246 (4th Cir. 1991). *Contra* Comprehensive Accounting Corp. v. Pearson (*In re Pearson*), 773 F.2d 751 (6th Cir. 1985).

554. *See, e.g.,* Santos v. Dockery (*In re Santos*), 540 F. App’x 622 (9th Cir. 2013) (amount of unsecured junior liens made debtor ineligible); Smith v. Rojas (*In re Smith*),

loans runs into § 1322(b)(2)'s antimodification protection for claims secured only by a security interest in the debtor's principal residence.⁵⁵⁵ Some courts conclude that an undersecured first mortgage may not be bifurcated for eligibility purposes, while a wholly unsecured junior mortgage—one not entitled to § 1322(b)'s protection—is treated as completely unsecured for eligibility purposes.⁵⁵⁶

A related eligibility issue is whether a Chapter 13 debtor must include in the calculation debt that was discharged in a prior Chapter 7 case. *In re Scotto-DiClemente* is illustrative.⁵⁵⁷ In that case, the bankruptcy court referred to the holding of *Johnson v. Home State Bank*,⁵⁵⁸ that an *in rem* claim remaining after Chapter 7 discharge of a debtor's *in personam* liability was still a claim in a subsequent bankruptcy case. The *Scotto-DiClemente* court concluded that such a claim must be included in, and counted for, eligibility purposes in a subsequent Chapter 13 case.

General eligibility requirements (discussed *supra* Part 2), including completion of prebankruptcy credit briefing, apply in Chapter 13 cases as they do in Chapter 7.⁵⁵⁹

6.3 Good-faith filing and conversion eligibility

Underlying every Chapter 13 petition and proposed plan is the debtor's good faith or lack thereof. Section 1325(a)(3) requires that a plan be "proposed in good faith." Also, for confirmation purposes, "the action of the debtor in filing the petition [must have been] in good faith."⁵⁶⁰ The debtor's good faith frequently is a factor in an early motion to dismiss the case.⁵⁶¹ The grounds for dismissal under § 1307 are examined in more

435 B.R. 637, 646–49 (B.A.P. 9th Cir. 2010) (pointing out that resolving this difficulty is an issue for congressional action).

555. *See infra* § 6.9.2

556. *See, e.g., In re Munoz*, 428 B.R. 516 (Bankr. S.D. Cal. 2010) (distinguishing *Scovis*, 249 F.3d at 983–84).

557. 463 B.R. 308 (Bankr. D.N.J. 2012).

558. 501 U.S. 78 (1991).

559. *See, e.g., In re Arkuszewski*, 507 B.R. 242 (Bankr. N.D. Ill. 2014) (dismissing case for failure to complete credit briefing before filing petition).

560. 11 U.S.C. § 1325(a)(7), as amended 2005.

561. *See, e.g., Brown v. Gore*, 742 F.3d 1309 (11th Cir. 2014) (good-faith determination made case-by-case).

detail later, but good faith may be thought of as an element of eligibility, with motions to dismiss on bad-faith grounds perhaps joined with an attack on the debtor's eligibility under the statutory debt limits or separately with allegations of specific abuse.⁵⁶²

Because Chapter 7 debtors often convert voluntarily to Chapter 13, eligibility for conversion may be questioned early in the Chapter 13 phase. Section 348(a) treats a case converted from one Chapter to another as the same case. But the Supreme Court emphasized, in *Marrama v. Citizens Bank of Massachusetts*,⁵⁶³ that eligibility for Chapter 13 relief is fundamental for conversion to Chapter 13. In *Marrama*, the Chapter 7 debtor tried to convert to Chapter 13, asserting that § 706(a) provides "that the debtor may convert . . . at any time."⁵⁶⁴ The Court affirmed the First Circuit's interpretation of that language as conditioned on eligibility:

[W]e can discern no evidence that the Congress intended to override the presumptive power and responsibility of the bankruptcy court to weed out abuses of the bankruptcy process at any stage in the bankruptcy proceedings. . . . The word "may" has at least two connotations. It can simply denote that a debtor has the option to convert, or not convert. On the other hand, "may" often suggests conditionality, signifying that the event or status described is in no sense to be considered a foregone conclusion.⁵⁶⁵

Thus good faith is a threshold eligibility issue, as well as a factor throughout a Chapter 13 case.

There is a question whether a Chapter 13 case may be filed soon after a Chapter 7 case, in what is called a "Chapter 20." As a result of the Supreme Court's holding in *Johnson v. Home State Bank*⁵⁶⁶ that the *in rem* lien on a home survives a Chapter 7 discharge, and can be treated in a subsequent Chapter 13 case and plan, most courts have found *no per se*

562. See, e.g., *In re Myers*, 491 F.3d 120 (3d Cir. 2007) (debtor acted in bad faith by fraudulent prepetition transfers to evade state court judgment).

563. 549 U.S. 365 (2007).

564. 11 U.S.C. § 706(a).

565. *Marrama v. Citizens Bank of Mass. (In re Marrama)*, 430 F.3d 474, 478 (1st Cir. 2005).

566. 501 U.S. 78 (1991).

rule against “Chapter 20” cases; but good faith is an important factor. However, when a debtor files the second case too quickly, resulting in simultaneous Chapter 7 and 13 cases—two pending at the same time—some courts conclude that there is a rule against such simultaneous cases.⁵⁶⁷ Other courts, while assessing good faith and whether there is a justifiable reason for the simultaneous filings, have not found a per se rule.⁵⁶⁸

6.4 Property of Chapter 13 estate

Under § 541, the broad concept of property of the bankruptcy estate (discussed *supra* Part 3) applies in Chapter 13 cases. However, that concept is broader still in Chapter 13. Section 1306 includes in the estate property “that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted” to another chapter, as well as “earnings from services performed by the debtor after the commencement of the case.”⁵⁶⁹ This inclusion of postpetition acquisitions and earnings is understandable when placed in context of funding for a plan. Courts have taken different views of how much remains in the bankruptcy estate after confirmation, as contrasted with what reverts in a debtor at that point; but at the preconfirmation stage of a case, the Chapter 13 estate includes postpetition assets. With some exceptions listed in § 362(b), the automatic stay (discussed *supra* Part 2) protects not only the debtor but also the bankruptcy estate property, at least until confirmation, when some property may revert in the debtor, depending on the provisions of the order confirming the plan.

The broadened property concept poses tricky questions: Do § 541(a)(5)’s limitations on property of the estate also apply in Chapter 13? Or does § 1306 overcome them? As a particular example, § 541(a)(5)(A) provides that the bankruptcy estate includes inheritances that a debtor acquires within 180 days of the petition filing. Judicial authority is split on the effect of this 180-day limitation in Chapter 13. The

567. See, e.g., *Turner v. Citizens Nat’l Bank (In re Turner)*, 207 B.R. 373 (B.A.P. 2d Cir. 1997).

568. See, e.g., *Sood v. Bus. Lenders, LLC*, No. MJG-11-2528, 2012 WL 2847613 (D. Md. July 10, 2012) (remanding for good-faith determination).

569. 11 U.S.C. § 1306(a) & (b).

Tenth Circuit Bankruptcy Appellate Panel held, in *Vannordstrand v. Hamilton (In re Vannordstrand)*,⁵⁷⁰ that an inheritance received two years after the Chapter 13 petition filing was property of the estate under § 1306(a)(1), but the decision hangs on that court's view that property of the estate did not revert in the debtor upon confirmation of the plan. A more recent decision simply concluded that "not applying the 180-day limitation under § 541(a)(5), when determining what is included within a chapter 13 estate under § 1306(a), is consistent with a major distinction between chapters 13 and 7."⁵⁷¹ Other courts have read § 1306's reference to "property specified in section 541" as including § 541(a)(5)'s 180-day restriction, and have concluded that inheritances received more than 180 days postpetition do not come into the bankruptcy estate.⁵⁷²

6.5 Codebtor stay

One of the distinctions between Chapter 13 and 7 is that § 1301 provides a stay of most actions against an individual who cosigned or is obligated with the Chapter 13 debtor on a consumer debt.⁵⁷³ The statute has the following exceptions: (1) the codebtor became liable on the debt in the ordinary course of the codebtor's business, and (2) the case has been closed, dismissed, or converted to one under Chapter 7 or 11.⁵⁷⁴ The latter exception simply means that the codebtor stay terminates on one of those events. Also, the party seeking to proceed against the codebtor may move for relief, showing that the codebtor actually received the consideration underlying the claim; that the Chapter 13 plan does not propose to

570. 356 B.R. 788 (B.A.P. 10th Cir. 2007). *Accord* Carroll v. Logan, 735 F.3d 147 (4th Cir. 2013); Dale v. Maney (*In re Dale*), 505 B.R. 8 (B.A.P. 9th Cir. 2014); *In re Roberts*, 514 B.R. 358 (Bankr. E.D.N.Y. 2014).

571. *In re Tinney*, No. 07-42020-JJR13, 2012 WL 2742457, at *3 (Bankr. N.D. Ala. July 9, 2012) (citing dicta from *In re Waldron*, 536 F.3d 1239 (11th Cir. 2008)).

572. See, e.g., *In re McAllister*, 510 B.R. 409 (Bankr. N.D. Ga. 2014); *In re Key*, 465 B.R. 709 (Bankr. S.D. Ga. 2012).

573. See *In re Sarnier*, No. 10-17487-JNF, 2011 WL 5240200 (Bankr. D. Mass. Oct. 31, 2011) (§ 1301 applies only to consumer debts). See *supra* Part 2.

574. There is a codebtor stay also in Chapter 12 cases. See 11 U.S.C. § 1201.

pay the debt in full; or that the creditor's interest would be "irreparably harmed by continuation of the stay."⁵⁷⁵

6.6 Chapter 13 trustee

Section 1302 describes the duties and powers of a Chapter 13 trustee, who is principally the one receiving plan payments from the debtor (or from the debtor's employer by payroll deduction) and making disbursements to creditors over the life of the plan, which may be up to five years.⁵⁷⁶ The trustee's role is much broader than simple receipt and disbursement: the trustee has authority to, among other powers, examine and object to proofs of claim,⁵⁷⁷ recommend for or against confirmation or modification of a plan,⁵⁷⁸ ensure that the debtor makes timely plan payments,⁵⁷⁹ and pursue avoidance actions when appropriate.⁵⁸⁰

6.7 Debtor's duties and powers

The consumer debtor duties (discussed *supra* Part 2), in regard to commencement of a case and filing of certain documents after commencement, apply to Chapter 13 debtors. More specific obligations are imposed on Chapter 13 debtors, including the requirement to begin to make payments to the trustee before a plan is confirmed. Section 1326(a)(1) provides that "unless the court orders otherwise, the debtor shall commence making payments not later than 30 days after the filing of the plan or the order for relief, whichever is earlier." The feasibility of a proposed plan and the debtor's intentions to carry out that proposal are tested early in the case by the commencement of payments.⁵⁸¹ Only the debtor may pro-

575. 11 U.S.C. § 1301(d).

576. *See id.* § 1322(d). *See Nardello v. Balboa*, 514 B.R. 105 (D.N.J. 2014), for discussion of the Chapter 13 trustee's percentage commission on distributions to creditors.

577. *Id.* § 1302(b)(1) (incorporating 11 U.S.C. § 704(5)).

578. *Id.* § 1302(b)(2).

579. *Id.* § 1302(b)(5).

580. *See id.* § 103(a) (making Chapter 5 avoidance powers applicable in Chapter 13).

581. *See* 11 U.S.C. § 1307(c)(4). Failure to commence plan payments is cause for case dismissal.

pose and file a plan.⁵⁸² Bankruptcy Rule 3015(b) sets the time for filing a plan, if not with the petition, within fourteen days; failure to timely comply with this requirement may in itself be cause for dismissal of a case.⁵⁸³ The Chapter 13 debtor must file tax returns and supply the trustee with copies of postpetition returns, if they are requested.⁵⁸⁴ Section 1308 specifically requires the debtor to file all prepetition tax returns that were required during the four years before the bankruptcy; and the returns must be filed “not later than the day before the date on which the meeting of the creditors is first scheduled to be held.”⁵⁸⁵ Section 1307(e) provides that failure to comply with this requirement is cause for dismissal.⁵⁸⁶

Most Chapter 13 debtors are not engaged in business; but if they are self-employed, § 1304 imposes reporting duties concerning the business.⁵⁸⁷ Pursuant to § 1303, debtors generally have the rights and powers to exercise control over property of the estate.⁵⁸⁸ Essentially, a Chapter 13 debtor remains in possession and control of property, with the obligation to dedicate income as required to fund the confirmed plan.

There are questions about a Chapter 13 debtor’s authority to exercise trustee powers that are not specified in § 1303 or elsewhere in the Code. For example, the extent of a Chapter 13 debtor’s power to pursue avoidance that a trustee could exercise is not always clear. As discussed *supra* Part 3, § 522(g) and (h) restrict a debtor’s avoidance power to recovery that would permit an allowable exemption; but to exercise that power, the trustee must have declined to pursue avoidance, or the transfer at issue must have been involuntary. Although this statutory authority has been recognized in Chapter 13 cases,⁵⁸⁹ most courts have limited the

582. *Id.* § 1321 (“The debtor shall file a plan.”).

583. *Id.* § 1307(c)(3).

584. *Id.* § 521(f). *See supra* § 2.4.

585. 11 U.S.C. § 1308(a).

586. *See, e.g.,* United States v. Cushing (*In re Cushing*), 401 B.R. 528 (B.A.P. 1st Cir. 2009).

587. *See also* Fed. R. Bankr. P. 2015(c).

588. *See* 11 U.S.C. § 363(b), (d), (e), (f) & (l).

589. *See, e.g.,* Dickson v. Countrywide Home Loans (*In re Dickson*), 655 F.3d 585 (6th Cir. 2011).

debtor to that power, finding no statutory authority to allow a Chapter 13 debtor to broadly exercise such avoidance powers as preference and fraudulent transfer.⁵⁹⁰ Outside of the avoidance powers, there is authority that a Chapter 13 debtor has standing to pursue causes of action that would benefit the bankruptcy estate and creditors.⁵⁹¹ Chapter 13 debtors are often plaintiffs in actions related to validity of home mortgages.⁵⁹²

6.8 Plan requirements

Section 1322(a) sets out the requirements for a proposed Chapter 13 plan, followed by § 1322(b)'s optional provisions. The mandatory provisions of a plan proposal include: (1) that the debtor submit future earnings as necessary to execute the plan; (2) that all priority claims be paid in full, unless the creditor agrees otherwise, although these claims may be paid in deferred cash payments; and (3) that if the plan classifies claims, it shall provide the same treatment for each class member.⁵⁹³ The most common examples of priority claims in Chapter 13 cases are domestic support obligations and taxes.⁵⁹⁴ Under § 1322(a)(4), priority domestic support obligations assigned prebankruptcy to a governmental entity for purposes other than collection, or such obligations owed directly to a

590. See, e.g., *Lee v. Anasti (In re Lee)*, 461 F. App'x 227 (4th Cir. 2012) (Chapter 13 debtor lacked § 544(a) avoidance power); *Realty Portfolio, Inc. v. Hamilton (In re Hamilton)*, 125 F.3d 292 (5th Cir. 1997) (debtor's § 544 power limited to involuntary transfer when recovery would be exempt).

591. See, e.g., *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337 (4th Cir. 2013) (agreeing with Third, Fifth, Seventh, Tenth, and Eleventh Circuits, Chapter 13 debtor had standing to bring nonbankruptcy causes of action for benefit of estate, here Americans with Disabilities Act claim); *Smith v. Rockett (In re Smith)*, 522 F.3d 1080 (10th Cir. 2008) (debtor had standing to pursue Fair Debt Collection Practices Act cause of action); *Thomas v. Ind. Oxygen Co.*, No. 1:14-cv-00476-JMS-DKL, 2014 WL 3509693 (S.D. Ind. July 15, 2014) (debtor had concurrent standing with trustee to pursue employment discrimination suit).

592. See *infra* § 6.16.

593. 11 U.S.C. § 1322(a)(1)–(3).

594. See, for example, *In re Burnett*, 656 F.3d 575 (8th Cir. 2011), for discussion of priority domestic support obligations. See generally *Bankruptcy & Domestic Relations Manual*, *supra* note 144, for in-depth discussion of domestic support obligations and summaries of each circuit's authority. Priority claims are discussed *supra* Part 4.

governmental entity, may be paid less than 100% in a plan only if the debtor devotes all disposable income to the plan for a full five years.⁵⁹⁵

There is no Official Form for a Chapter 13 plan, although the Advisory Committee on the Bankruptcy Rules has proposed Official Form 113, a form plan, and related amendments to the Bankruptcy Rules for public comment.⁵⁹⁶ Chapter 13 practice involves local plan forms that vary around the country, with each bankruptcy court having discretion to require specific provisions,⁵⁹⁷ and thus the potential for disagreement about whether a particular plan term violates a Code provision or rights of some party in interest.⁵⁹⁸

6.9 Optional plan provisions

Section 1322(b) describes optional plan provisions, although there are conditions for use of some of these provisions.

6.9.1 Separate classification

One of the frequently litigated optional terms deals with classification. If the plan classifies different types of unsecured creditors, it may not “discriminate unfairly against any class so designated.”⁵⁹⁹ But § 1322 of the Code specifically permits separate treatment of claims for consumer debt on which there is a codebtor. Section 1322(b)(1) works in conjunction with § 1301’s codebtor stay.⁶⁰⁰ The Ninth Circuit Bankruptcy Appellate Panel analyzed the separate classification and preferred treatment of a

595. See 11 U.S.C. § 507(a)(1)(B). See also *In re Penaran*, 424 B.R. 868 (Bankr. D. Kan. 2010) (discussing burden of proof on governmental entity to show claim not subject to this lower priority and treatment).

596. Proposed Official Form 113 is available at <http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx>. If adopted, the form and related amendments to Bankruptcy Rules would become effective December 1, 2016.

597. See, e.g., *In re Herrera*, 650 F.3d 1300 (9th Cir. 2011) (bankruptcy court had authority to establish form plan for district); *McIntosh v. LeBarge* (*In re McIntosh*), 491 B.R. 905 (B.A.P. 8th Cir. 2013) (upholding district’s local plan provisions).

598. See, e.g., *In re Gordon*, 471 B.R. 614 (D. Colo. 2012) (discussing local plan provisions and compliance with Code requirements).

599. 11 U.S.C. § 1322(b)(1).

600. See *supra* § 6.5.

consumer debt on which the debtor's mother was a co-obligor, holding that plan confirmation could not be denied solely because the plan discriminated by paying that claim 100%.⁶⁰¹ The Code appears to allow this type of separate classification and favorable discrimination; but there is less clarity when the separate classification and preferred treatment are for other types of claims, such as taxes and student loan obligations that are excepted from discharge under § 1328(a)(2), incorporating §§ 523(a)(1) and 523(a)(8).⁶⁰²

When separate classification is contested, the courts have used various tests to determine if it would lead to “unfair discrimination” in favor of that separate class. A basic test was set forth in *In re Wolf*:⁶⁰³ (1) A rational basis for the discriminatory treatment must be shown, (2) tested against whether the debtor could carry out the proposed plan without the proposed discrimination, (3) with the discrimination proposed in good faith, and (4) requiring that the degree of discrimination be directly tied to the reason for the separate classification. This test and its modifications demand a case-by-case analysis.⁶⁰⁴ Demonstrated need for the separate and preferred treatment, as well as the debtor's good faith, are crucial elements, no matter how the test is expressed. As the Seventh Circuit pointed out, the rights of all creditors must be considered.⁶⁰⁵

Although some courts have found that separate classification and preferred treatment of nondischargeable student loan claims pass the test,⁶⁰⁶ most courts have concluded that paying 100% of student loan debt or other nondischargeable claims, while paying a smaller percentage to

601. *In re Renteria*, 470 B.R. 838 (B.A.P. 9th Cir. 2012).

602. *See, e.g., Copeland v. Fink (In re Copeland)*, 742 F.3d 811 (8th Cir. 2014) (plan unfairly discriminated by paying 100% of nondischargeable tax debt).

603. 22 B.R. 510 (B.A.P. 9th Cir. 1982). *See also In re Crawford*, 324 F.3d 539 (7th Cir. 2003) (refining *Wolf* test).

604. *See, e.g., In re Stella*, No. 05-05422-TLM, 2006 WL 2433443 (Bankr. D. Idaho June 28, 2006). *See also Copeland*, 742 F.3d 811 (applying four-part test of unfair discrimination in *In re Lesser*, 939 F.2d 669 (8th Cir. 1991)).

605. *See Crawford*, 324 F.3d 539.

606. *See In re Boscaccy*, 442 B.R. 501 (Bankr. N.D. Miss. 2010) (reviewing conflicting authority). *See also In re Knowles*, 501 B.R. 409 (Bankr. D. Kan. 2013) (monthly payment of student loan from discretionary income did not unfairly discriminate).

other unsecured claims, is unfair discrimination.⁶⁰⁷ Under § 1322(b)(10), added by the 2005 amendments, a plan may propose to pay interest on a nondischargeable claim only if the debtor has disposable income sufficient to pay all allowed claims in full. This prohibition against interest payment in a plan undercuts the justification for treating a nondischargeable claim more favorably in a separate classification.⁶⁰⁸

6.9.2 Modification of secured and unsecured claims

Section 1322(b)(2) broadly permits modification of secured claims, subject to the exception for “a claim secured only by a security interest in real property that is the debtor’s principal residence,” and it permits modification of unsecured claims, without statutory restriction.⁶⁰⁹ Plans typically include some modification, especially of unsecured claims, by paying less than 100% and by extending payments. For secured claims, the power to modify may include reducing the amount of the claim to the value of the collateral, by use of § 506. Section 506(a) provides that “an allowed claim . . . secured by a lien . . . is a secured claim to the extent of the value of such creditor’s interest in the estate’s interest in such property.” There are Code limitations on this broad confinement of a secured claim to the value of its collateral.⁶¹⁰ Section 1322(b)(2)’s antimodification protection for home mortgages prevents a plan from stripping down the value of the collateral or changing other essential contractual terms, but it does not prevent the curing of prepetition defaults to bring the loan current.⁶¹¹

607. See, e.g., *Gorman v. Birts* (*In re Birts*), No. 1:12cv427 (LMB/TCB), 2012 WL 3150384 (E.D. Va. Aug. 1, 2012); *In re Jordahl*, 516 B.R. 573 (Bankr. D. Minn. 2014). See also Susan Hauser, *Separate Classification of Student Loan Debt in Chapter 13*, 32 Am. Bankr. Inst. J. 38 (2013).

608. See *In re Kubeczko*, No. 12-13766 HRT, 2012 WL 2685115 (Bankr. D. Colo. July 6, 2012) (denying separate classification and discriminatory treatment of student loan debt).

609. 11 U.S.C. § 1322(b)(2).

610. See discussion *infra* this subsection. See also *supra* Part 5 for discussion of valuation in Chapter 7 cases.

611. See 11 U.S.C. § 1322(b)(5), discussed *infra* § 6.9.3.

In *Dewsnup v. Timm*,⁶¹² the Supreme Court held that § 506(d) does not permit a Chapter 7 debtor to value collateral of a secured creditor and redeem the property by paying only the value, thereby voiding the otherwise valid lien. There was some uncertainty whether *Dewsnup* applied equally to Chapter 13 modifications, but in *Nobelman v. American Savings Bank*,⁶¹³ the Court held that § 506(d) could not be used to strip down an undersecured home mortgage to current market value, because that would contravene § 1322(b)(2)'s protection from modification. *Nobelman*'s reach has thus far been limited to the undersecured mortgage on a debtor's principal residence.⁶¹⁴ For junior mortgages that are wholly unsecured, with no value above a prior mortgage or lien to secure them, the majority view is that § 1322(b)(2) does not prevent modification by stripping off that unsecured lien and rendering the lien an unsecured claim.⁶¹⁵ A distinction has been made in Chapter 13 cases between the use of § 506(a) to determine if a lien has any value to support a secured claim and the *Nobelman*-prohibited use of § 506(d) to strip down a partially secured lien.⁶¹⁶

Although the clear majority of bankruptcy and appellate courts allow Chapter 13 debtors to avoid unsecured liens,⁶¹⁷ the issue of modification of the wholly unsecured junior mortgage has not reached the Supreme Court. Moreover, BAPCPA's amendments to the Code in 2005 introduced lien modification issues that have not yet been fully examined by

612. 502 U.S. 410 (1992), discussed *supra* § 5.13.

613. 508 U.S. 324 (1993).

614. See *Woolsey v. Citibank, N.A. (In re Woolsey)*, 696 F.3d 1266 (10th Cir. 2012) (holding § 506(d) applied in Chapter 13, but suggesting debtors could use combination of §§ 506(a) & 1322(b)(2) to strip off wholly unsecured junior lien).

615. See, e.g., *Minn. Hous. Fin. Agency v. Schmidt (In re Schmidt)*, 765 F.3d 877 (8th Cir. 2014) (agreeing with other courts of appeals, *Nobelman* does not prohibit modification of wholly unsecured junior mortgage); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002) (agreeing with five other courts of appeals and two bankruptcy appellate panels that wholly unsecured second mortgage on debtor's principal residence not protected from modification).

616. See *Woolsey*, 696 F.3d 1266. *Accord Ryan v. United States (In re Ryan)*, 725 F.3d 623 (7th Cir. 2013).

617. See *Chapter 13 Bankruptcy*, *supra* note 535, Appendix M, for compilation of case authority from all circuits on modification of wholly unsecured liens.

all appellate courts. Section 1325(a)(5)(B)'s plan confirmation requirement gives three choices for "each allowed secured claim provided for by the plan": (1) acceptance by the secured creditor, (2) surrender of the collateral, or (3) lien retention, with the amended lien retention providing that the allowed secured creditor retain its lien until the debt is fully paid or the debtor receives a discharge.⁶¹⁸ The conditioning of lien retention on either payment under applicable nonbankruptcy law or entry of discharge, coupled with a change to § 1328(f), has created a disagreement among courts, specifically in cases of debtors who are attempting to strip off wholly unsecured junior liens but are unable to obtain discharge. Section 1328(f) added a restriction on discharge:

(f) Notwithstanding [§ 1328(a) and (b)], the court shall not grant a discharge of all debts provided for in the plan or disallowed under section 502, if the debtor has received a discharge—

(1) in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter, or

(2) in a case filed under chapter 13 of this title during the 2-year period preceding the date of such order.⁶¹⁹

Some bankruptcy courts have read the combination of §§ 1325(a)(5)(B) and 1328(f) as prohibiting a debtor ineligible for a Chapter 13 discharge from modifying a wholly unsecured junior lien.⁶²⁰ The majority of bankruptcy courts, including some appellate courts, have held otherwise—primarily looking to the prefatory language of § 1325(a)(5)—to conclude that the lien retention and triggering of § 1328(f) only come into play for an "allowed secured claim."⁶²¹ By definition, under this latter view a claim that has no value to support it is not a secured claim.⁶²² The Fourth and Eleventh Circuits, and the Sixth and Eighth Circuit Bankruptcy Appellate Panels, agreed that a debtor ineligi-

618. 11 U.S.C. § 1325(a)(5)(B), as amended in 2005. This section also provides that if the case is dismissed or converted before plan completion, the lien is retained.

619. *Id.* § 1328(f), as amended in 2005.

620. *See, e.g., In re Geradin*, 447 B.R. 342 (Bankr. S.D. Fla. 2011) (en banc), *overruled by* *Wells Fargo Bank, N.A. v. Scantling (In re Scantling)*, 754 F.3d 1323 (11th Cir. 2014).

621. *See, e.g., In re Okosisi*, 451 B.R. 90 (Bankr. D. Nev. 2011).

622. *See* 11 U.S.C. § 506(a).

ble for discharge was not prohibited from stripping off a wholly unsecured lien.⁶²³

Since the Chapter 13 debtor is not eligible for discharge because of a recent prior discharge, typically in a Chapter 7 in which *in personam* liability was erased but an *in rem* lien claim survived, good faith understandably becomes an issue. A fact-intensive examination of the reasons for the subsequent Chapter 13 case and why a debtor wants to modify a wholly unsecured lien may be required.⁶²⁴ Good faith for plan-confirmation purposes will be examined in more detail later; but simply because a debtor is ineligible for discharge does not mean that a Chapter 13 is filed in bad faith. As the Fourth Circuit held, § 1328(f)'s restriction on discharge is not an eligibility requirement for Chapter 13 relief.⁶²⁵

Section 1322(b)(2)'s reference to a claim "secured *only* by a security interest in . . . the debtor's principal residence" raises other modification issues. There are many examples of additional security, or use of the property for other than principal residential purposes, which may deprive a creditor of the antimodification protection. For instance, when the property is income-producing and not exclusively the debtor's principal residence, the mortgage is subject to modification.⁶²⁶ There is not complete agreement among the courts on the time for determining the use of the property for § 1322(b)(2) purposes. If the property was used as the debtor's principal residence at the time of the mortgage transaction, but the use had changed to nonresidential, the Ninth Circuit Bankruptcy Appellate Panel concluded that the appropriate date for purposes of

623. *Scantling*, 754 F.3d 1323; *Branigan v. Davis (In re Davis)*, 716 F.3d 331 (4th Cir. 2013); *In re Cain*, 513 B.R. 316 (B.A.P. 6th Cir. 2014); *Fisette v. Keller (In re Fisette)*, 455 B.R. 177 (B.A.P. 8th Cir. 2011). *Cf. Fisette v. Keller (In re Fisette)*, 695 F.3d 803 (8th Cir. 2012) (holding that this was not final order subject to appeal, since BAP remanded for consideration of other confirmation issues). *See also Rogers v. E. Sav. Bank (In re Rogers)*, 489 B.R. 327 (D. Conn. 2013) (stripping of wholly unsecured lien was available in no-discharge case).

624. *See, e.g., In re Renz*, 476 B.R. 382 (Bankr. E.D.N.Y. 2012). *But see In re Lepe*, 470 B.R. 851 (B.A.P. 9th Cir. 2012) (plan proposed by debtor ineligible for discharge to strip off wholly unsecured junior mortgage in good faith).

625. *Branigan v. Bateman (In re Bateman)*, 515 F.3d 272, 281 (4th Cir. 2008).

626. *See, e.g., Scarborough v. Chase Manhattan Corp. (In re Scarborough)*, 461 F.3d 406 (3d Cir. 2006).

§ 1322(b)(2)'s application was the petition date. Its opinion, in *Benafel v. One W. Bank, FSB (In re Benafel)*,⁶²⁷ discusses the split of authority: a minority of courts, including an earlier Third Circuit opinion,⁶²⁸ look at the loan transaction time.

Another restriction on modifying a particular type of secured claims is found in the confirmation provisions of § 1325(a), known as the “910” car loan protection provision. As amended in 2005, § 1325(a) prevents debtors’ use of § 506 to value a motor vehicle that was acquired and financed by a purchase money security interest, within 910 days of the petition filing, for the personal use of the debtor. The clause also prohibits use of § 506 to value other collateral acquired within one year of the petition, but the primary application of the restriction has been for these “910 cars.” A significant issue was whether this protection against modifying such loans extended to the “negative equity” resulting from a purchase by a buyer still owing a balance on the trade-in vehicle. All circuits but one addressing this issue adopted the view that the negative equity that was financed along with the 910 vehicle was a part of the purchase price included in the statute’s protection.⁶²⁹ However, despite the protection against modifying the value of the collateral or the amount of the secured claim, courts have interpreted the statute as still permitting a plan to modify other contractual terms, such as interest rate.⁶³⁰

6.9.3 Curing defaults

Section 1322(b)(3) states that a plan may “provide for the curing or waiving of any default.” Section 1322(b)(5) adds that “notwithstanding” § 1322(b)(2)'s restriction on modification, a plan may “provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending.” Subsection (b)(5)'s cure provision is directed toward debt that contractually extends beyond the life of the

627. 461 B.R. 581, 588–91 (B.A.P. 9th Cir. 2011). *Accord* TD Bank, N.A. v. Landry, 479 B.R. 1 (D. Mass. 2012) (citing *Benafel*).

628. *Scarborough*, 461 F.3d 406.

629. *See* AmeriCredit Fin. Servs., Inc. v. Penrod (*In re Penrod*), 611 F.3d 1158 (9th Cir. 2010) (adopting minority position, and citing eight circuits adopting majority view).

630. *See, e.g., In re Velez*, 431 B.R. 567 (Bankr. S.D.N.Y. 2010).

plan—i.e., “long-term” debt—such as a home mortgage.⁶³¹ Because “reasonable time” to cure default is not defined in the Code, the bankruptcy court has discretion to determine what is reasonable under the particular circumstances of a case, but the allotted time cannot exceed the life of the plan.⁶³² The combination of these “cure” provisions allows a plan to do such things as cure prepetition default on secured automobile loans and home mortgages, with the loan restored to a position of being current when the default has been paid. As to home mortgages in particular, § 1322(b)(5) essentially divides the debt into two segments, constituting a “cure and maintain” plan, with prepetition default to be cured within a reasonable time, and the ongoing, or maintenance, payments on the debt continuing after the plan is complete.⁶³³ Under this concept, the curing of default is not a prohibited modification of a mortgage on the debtor’s principal residence, although issues may be presented on how far the plan may go before its terms constitute a modification. The First Circuit indicated that a plan must be specific if a debtor is trying to direct what a mortgage creditor can and cannot do, since § 1322(b)(2) does not impose specific duties on the creditor.⁶³⁴ Subsequent decisions have delved into what are called “best practices” plan provisions, in attempts to differentiate plan provisions that are prohibited loan modifications from those provisions that properly carry out the Code’s “cure and maintain” opportunity.⁶³⁵ The effect of a recently amended Bankruptcy Rule on mortgage claim litigation is discussed *infra* § 6.16.

631. 11 U.S.C. § 1322(b)(5).

632. *See, e.g., In re Hence*, 225 F. App’x 28 (5th Cir. 2007) (discussing factors, and bankruptcy court’s discretion on length-of-cure period). *See also In re deLone*, 205 F. App’x 964 (3d Cir. 2006) (finding thirty-six months to cure reasonable, and discussing case authority on reasonable times).

633. *See, e.g., Ameriquest Mortg. Co. v. Nosek (In re Nosek)*, 544 F.3d 34 (1st Cir. 2008) (§ 1322(b)(2) & (b)(5) divide home mortgage into two claims for treatment: one for prepetition arrearage and one for ongoing maintenance payments).

634. *Id.*

635. *See, e.g., Greenpoint Mortg. Funding, Inc. v. Herrera (In re Herrera)*, 422 B.R. 698 (B.A.P. 9th Cir. 2010), *aff’d and adopted sub nom.*, *Home Funds Direct v. Monroy (In re Monroy)*, 650 F.3d 1300 (9th Cir. 2011).

Another recurring issue is whether a debtor's opportunity to cure a prepetition default has terminated before the bankruptcy filing, for example by foreclosure. Section 1322(c)(1) permits curing "until the residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law."⁶³⁶ Despite this provision, ascertaining when a foreclosure sale is final may present questions of fact and interpretation of applicable state law.⁶³⁷ Section 1322(c)(2) permits a short-term home mortgage, one on which the last contractual payment is due within the life of the plan, to be modified and paid within the life of the plan, so long as the proposed modification otherwise complies with § 1325(a)(5)'s confirmation requirements.⁶³⁸

An interesting issue presented by the potential for curing and modifying home mortgages is whether a claim that is subject to modification may be paid beyond the plan's life. In other words, may the provisions of §§ 1322(b)(2) and 1322(b)(5) be combined or "stacked" to modify contractual terms and pay the modified mortgage over a new long term? Most courts follow the Ninth Circuit's *Enewally v. Washington Mutual Bank (In re Enewally)*,⁶³⁹ holding that a modified mortgage must be paid within the plan life, which can be no longer than five years under § 1322(d).⁶⁴⁰

Section 1322(e) provides that when a plan proposes to "cure a default, the amount necessary to cure the default shall be determined in

636. 11 U.S.C. § 1322(c)(1).

637. See, e.g., *In re Connors*, 497 F.3d 314 (3d Cir. 2007) (adopting "gavel rule" for finality of prepetition foreclosure sale); *TD Bank, N.A. v. LaPointe (In re LaPointe)*, 505 B.R. 589 (B.A.P. 1st Cir. 2014) (under New Hampshire law, foreclosure complete when auctioneer's hammer fell). A different issue may be presented when the home mortgage foreclosure actually resulted in a judgment of foreclosure. See, e.g., *In re Tynan*, 773 F.2d 177 (7th Cir. 1985) (foreclosure judgment left no default available for curing under § 1322(b)(5)).

638. See, e.g., *In re Hubbell*, 496 B.R. 784 (Bankr. E.D.N.C. 2013); *Geller v. Grijalva (In re Grijalva)*, No. 4:11-bk-25386-EWH, 2012 WL 1110291 (Bankr. D. Ariz. Apr. 2, 2012).

639. 368 F.3d 1165 (9th Cir. 2004).

640. See, e.g., *Bullard v. Hyde Park Sav. Bank (In re Bullard)*, 752 F.3d 483 (1st Cir. 2014), *aff'd* 494 B.R. 92 (B.A.P. 1st Cir. 2013); *In re Hinkle*, 474 B.R. 460 (Bankr. M.D. Pa. 2012). For the minority position, see *In re Gilbert*, 472 B.R. 126 (Bankr. S.D. Fla. 2012).

accordance with the underlying agreement and applicable nonbankruptcy law.” This section was added to the Code in 1994, in reaction to *Rake v. Wade*⁶⁴¹ holding that, under § 506(b), an oversecured home mortgage creditor was entitled to interest accruing postpetition on the arrearage claim that was being cured in the plan. Under § 1322(e), whether a creditor is entitled to interest on the arrearage claim is dependent on the parties’ contract and applicable nonbankruptcy (typically state) law.⁶⁴²

6.9.4 Vesting of property of estate

Under § 1322(b)(9), a plan can allow property of the estate to vest in the debtor, or another entity, at confirmation or a later date. Practice varies from district to district. Many local plans do not allow estate property to vest in the debtor until completion of the plan and entry of discharge; but absent such a provision, § 1327(b) states that “except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.” If estate property vests in the debtor at confirmation, it affects, for example, the automatic stay’s protection of estate property, since the stay terminates as to property when it is no longer property of the estate.⁶⁴³ There are questions about the bankruptcy court’s jurisdiction over property if it is no longer part of the bankruptcy estate.⁶⁴⁴

Assuming that there is no specific provision in a plan for the timing of vesting, the courts have adopted five approaches toward what remains in the bankruptcy estate after confirmation: (1) estate termination, under which the bankruptcy estate completely terminates, with all property, whether acquired pre- or post-confirmation, vesting in the debtor;⁶⁴⁵

641. 508 U.S. 464 (1993).

642. See, e.g., *In re Hence*, 255 F. App’x 28 (5th Cir. 2007) (interest on arrearage not required when contract ambiguous).

643. See 11 U.S.C. § 362(c)(1).

644. See, e.g., *In re Heath*, 115 F.3d 521 (7th Cir. 1997) (bankruptcy court lacked jurisdiction over property that was not necessary to plan implementation).

645. See, e.g., *Cal. Franchise Tax Bd. v. Jones (In re Jones)*, 420 B.R. 506 (B.A.P. 9th Cir. 2009), *aff’d on other grounds*, 657 F.3d 921, 928–29 (9th Cir. 2011) (finding it unnecessary to adopt one of approaches, instead reading § 1327(b)’s plain language to vest all property in debtor unless plan provided otherwise).

(2) estate transformation, under which only that property necessary to implement the confirmed plan remains in the estate, with other property vested in the debtor;⁶⁴⁶ (3) estate replenishment, under which the estate terminates at confirmation but is replenished by post-confirmation property, as described in § 1306;⁶⁴⁷ (4) estate preservation, under which the bankruptcy estate continues to exist after confirmation, and property remains in the estate until the case is closed, dismissed, or converted to another chapter;⁶⁴⁸ and (5) conditional vesting, under which the debtor acquires use and control over property at confirmation, but property does not fully vest until plan completion and entry of discharge.⁶⁴⁹

6.9.5 Miscellaneous

A plan may provide that unsecured claims be paid concurrently with payment on other unsecured or secured debt.⁶⁵⁰ The timing of payments of unsecured claims is flexible, with the potential to pay secured claims before any distribution to unsecured creditors, or concurrently. Allowed priority claims must be paid in full, although deferred cash payments, rather than lump sum distribution, are permitted.⁶⁵¹

A plan may propose to pay postpetition claims that are allowed under § 1305.⁶⁵² Treatment of postpetition claims under Chapter 13 differs from Chapter 7 relief, in which claims are thought of as tied to prepetition debt. Whether a postpetition claim is allowed largely depends on the creditor's choice.⁶⁵³ Section 1305(a)(1) provides that a governmental unit may file a proof of claim for taxes that "become payable . . . while the case

646. *See, e.g., Telfair v. First Union Mortg. Corp.*, 216 F.3d 1333 (11th Cir. 2000), *cert. denied*, 531 U.S. 1073 (2001).

647. *See, e.g., Barbosa v. Soloman*, 235 F.3d 31 (1st Cir. 2000).

648. *See, e.g., Annese v. Kolenda (In re Kolenda)*, 212 B.R. 851 (W.D. Mich. 1997).

649. *See, e.g., Woodard v. Taco Bueno Rests., Inc.*, No. 4:05-CV-804-Y, 2006 WL 3542693 (N.D. Tex. Dec. 8, 2006).

650. 11 U.S.C. § 1322(b)(4).

651. *Id.* § 1322(a)(2). *See supra* § 6.8. *See also supra* Part 4 (priority claims).

652. 11 U.S.C. § 1322(b)(6).

653. *See, e.g., CenturyTel of Nw. Ark., LLC v. Laymon (In re Laymon)*, 360 B.R. 902 (Bankr. E.D. Ark. 2007) (postpetition creditor could not be forced to file proof of claim or participate in plan).

is pending,” and § 1305(a)(2) permits a creditor to file a claim for a consumer debt arising postpetition when it is for “property or services necessary for the debtor’s performance under the plan.” However, there is a condition for the § 1305(a)(2) claim requiring disallowance if the claimant knew or should have known that prior approval from the Chapter 13 trustee—or perhaps from the bankruptcy court—for incurring the consumer debt was “practicable and was not obtained.”⁶⁵⁴

The provision for potential treatment of taxes that “become payable . . . while the case is pending,” under § 1305(a)(1), has raised questions about when the taxes first became payable; that answer may drive whether the claim is pre- or postpetition. If the tax claim is prepetition, the debtor may be authorized by § 501(c) and Bankruptcy Rule 3004 to file a proof of claim on behalf of the creditor who does not file a timely claim. If, on the other hand, the tax is a postpetition debt, the creditor controls whether a proof of claim may be filed. In *Michigan Department of Treasury v. Hight (In re Hight)*,⁶⁵⁵ the debtor filed Chapter 13 in 2009, owing income taxes for 2008; the return was not due until April 2009. A combination of §§ 501(i) and 507(a)(8) led the Sixth Circuit to conclude that this tax obligation was treated as a prepetition claim, and the debtor could file a proof of claim for the government, forcing it to participate in the plan’s treatment of the claim.

Circuits are split as to whether “becomes payable” means “legally due.” In *Joye v. Franchise Tax Board (In re Joye)*,⁶⁵⁶ the Ninth Circuit concluded that a tax for the year 2000 became payable for purposes of § 1305(a)(1) when it was capable of being paid, rather than when the tax return was timely filed in 2001. In so holding, the Ninth Circuit agreed with a Tenth Circuit Bankruptcy Appellate Panel,⁶⁵⁷ but disagreed with the Fifth Circuit’s decision in *United States v. Ripley (In re Ripley)*.⁶⁵⁸ In *Joye*, the government had an opportunity to file a proof of claim for its

654. 11 U.S.C. § 1305(c). See, e.g., *In re Key*, 465 B.R. 709 (Bankr. S.D. Ga. 2012) (permission to incur postpetition debt denied when debt unnecessary for plan performance).

655. 670 F.3d 699 (6th Cir. 2012).

656. 578 F.3d 1070 (9th Cir. 2009).

657. *Dixon v. IRS (In re Dixon)*, 218 B.R. 150 (B.A.P. 10th Cir. 1998).

658. 926 F.2d 440 (5th Cir. 1991).

prepetition tax claim, but did not; therefore, in a case filed on March 7, 2001, in which the debtor scheduled an estimated \$10,000 state income tax debt, the government lost its opportunity to collect the actual tax debt by failing to file a proof of claim or object to treatment of the estimated taxes in the plan.

Another optional plan provision may address the assumption, rejection, or assignment of executory contracts or unexpired leases under § 365.⁶⁵⁹ Questions are often presented on whether a particular obligation is an executory contract.⁶⁶⁰ Assumption or rejection of such contracts or leases may be accomplished either through the plan confirmation process or by separate motion.⁶⁶¹

Section 1322(b)(10) permits a plan to pay interest on nondischargeable unsecured claims, but only if the debtor has sufficient disposable income available to pay both the proposed interest and all allowed claims in full.⁶⁶² As a practical matter, very few Chapter 13 debtors would have that potential income.⁶⁶³

Finally, § 1322(b)(11) states that a plan may “include any other appropriate provision not inconsistent with this title.” The Supreme Court pointed out the bankruptcy court’s responsibility to ensure that plans do not contain provisions inconsistent with general Code requirements, since § 1325(a)(1)’s confirmation prerequisite is that a plan “complies with the provisions of this chapter and with the other applicable provisions of this title.”⁶⁶⁴ In practice, the bankruptcy court relies on the Chapter 13 trustee’s recommendation for or against confirmation;⁶⁶⁵ the bankruptcy court also relies on interested parties, including the trustee, ob-

659. 11 U.S.C. § 1322(b)(7). See also Fed. R. Bankr. P. 6006.

660. See, e.g., *Johnson v. Smith (In re Johnson)*, 501 F.3d 1163 (10th Cir. 2007) (completed contract for purchase of vehicle not executory).

661. See Fed. R. Bankr. P. 6006(a) & 9014.

662. See *supra* § 6.8.

663. See, e.g., *In re Kubezko*, No. 12-13766 HRT, 2012 WL 2685115 (Bankr. D. Colo. July 6, 2012).

664. See *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010).

665. See 11 U.S.C. § 1302(a)(2).

jecting to confirmation of plans that contain terms with which they do not agree.⁶⁶⁶

6.10 Plan confirmation requirements

After the debtor files a proposed plan, the plan is “noticed” to the trustee and creditors. A hearing on confirmation may be held within twenty to forty-five days after the § 341 meeting of creditors has been held; the time may be shortened if the court finds it to be in the best interests of creditors and the bankruptcy estate.⁶⁶⁷ A party in interest may object to confirmation; an objection is essential if an interested party, including the trustee, wishes to compel a confirmation hearing.⁶⁶⁸ The Chapter 13 trustee typically recommends for or against confirmation and is required to attend a confirmation hearing.⁶⁶⁹

Section 1325(a) establishes the basic requirements for plan confirmation, beginning with the condition that the proposed plan comply with all of Chapter 13 and any other applicable Title 11 provisions.⁶⁷⁰ Although good faith is fundamental, both in the proposal of the plan and in the filing of the case itself,⁶⁷¹ it is not defined in the Code. As a result, courts have developed a variety of factors to measure the debtor’s good faith—factors that typically encompass a totality-of-circumstances test, including both pre- and postpetition conduct.⁶⁷² These factors include the debtor’s prepetition actions toward creditors, the motivation in filing the case and plan, the degree of effort toward paying creditors, and the truthfulness and accuracy of statements made in the schedules.⁶⁷³ BAPCPA

666. *See id.* § 1325(b).

667. *Id.* § 1324(b).

668. *See id.* § 1324(a), and Fed. R. Bankr. P. 2002(b), which requires at least twenty-eight days’ notice of opportunity to object to confirmation.

669. *See* 11 U.S.C. § 1302(b)(2).

670. *Id.* § 1325(a)(1). *See also* *Espinosa*, 559 U.S. 260 (discussing bankruptcy court’s responsibility to ensure compliance with Code requirements).

671. 11 U.S.C. § 1325(a)(3), (7), as amended in 2005.

672. *See, e.g., In re Love*, 957 F.2d 1350 (7th Cir. 1992).

673. *See, e.g., United States v. Estus (In re Estus)*, 695 F.2d 311 (8th Cir. 1982); *Kitchens v. Georgia Railroad Bank & Trust Co. (In re Kitchens)*, 702 F.2d 885 (11th Cir. 1983),

added § 1325(a)(7), requiring as a confirmation consideration that the case was filed in good faith, although courts had already considered this good-faith factor as a part of the implicit grounds for dismissing a case under § 1307(c).⁶⁷⁴ Whether the plan and case were carried out in good faith is one of the commonly litigated issues in the bankruptcy courts. Inquiry has included whether it is good faith to file the case and propose a plan that essentially pays only the debtor's attorneys' fees and trustee fees,⁶⁷⁵ and whether it is bad faith to file a Chapter 13 case when the debtor is not eligible for discharge.⁶⁷⁶

Section 1325(a)(4) establishes what is called the "best interests of creditors" test, requiring that a plan's distribution to allowed unsecured claims be no less than those claimants would have received in a Chapter 7 liquidation. This requires comparison of the plan's distribution to a hypothetical liquidation, taking into consideration factors like the costs of the hypothetical Chapter 7 case administration and any exemptions or exclusions from the bankruptcy estate that would occur in such a case.⁶⁷⁷

For allowed secured claims, three different tests apply under § 1325(a)(5): the creditor must have accepted the plan's proposed treatment;⁶⁷⁸ or the creditor's lien is retained while present value (appropriate interest rate) of the claim is paid, with the secured claim's periodic payments in equal monthly amounts and providing adequate protection;⁶⁷⁹ or the debtor surrenders the collateral securing the claim.⁶⁸⁰ In actuality, the plan's terms often are accepted by default because the creditor had

for two of the early good-faith factors. See also *Chapter 13 Bankruptcy*, *supra* note 535, Appendix F, for compilation of case authority from all circuits on good faith.

674. See *Rocco v. King* (*In re King*), No. AZ-07-1317-PaJuk, 2008 WL 8444814 (B.A.P. 9th Cir. Mar. 12, 2008).

675. See *Sikes v. Crager* (*In re Crager*), 691 F.3d 671 (5th Cir. 2012) (holding not per se bad faith to propose attorney-fee-only plan); *In re Puffer*, 674 F.3d 78 (1st Cir. 2012) (same). Cf. *Brown v. Gore* (*In re Brown*), 742 F.3d 1309 (11th Cir. 2014) (affirming dismissal of case filed for purpose of paying debtor's attorneys' fees).

676. See *Branigan v. Bateman* (*In re Bateman*), 515 F.3d 272 (4th Cir. 2008) (holding § 1328(f) not an eligibility requirement for filing case).

677. See, e.g., *Mallon v. Keenan* (*In re Keenan*), 431 B.R. 308 (B.A.P. 10th Cir. 2009).

678. 11 U.S.C. § 1325(a)(5)(A). "Acceptance" is not a defined term in the Code.

679. *Id.* § 1325(a)(5)(B)(i), (ii), & (iii).

680. *Id.* § 1325(a)(5)(C).

sufficient notice of the plan and did not object.⁶⁸¹ The Supreme Court underscored this acceptance potential in *United Student Aid Funds, Inc. v. Espinosa*,⁶⁸² which involved an unsecured creditor. In *Espinosa*, a student loan creditor had notice of a plan's provisions for paying less than 100% of the claim and did not object or otherwise contest confirmation, becoming bound by the plan under § 1327(a). "Surrender," although typically clear-cut, is not a defined term and may create contested issues when, for example, a debtor proposes to surrender less than all of the collateral.⁶⁸³ When a debtor proposes surrender, questions may arise as to whether the court has authority to force an unwilling creditor to accept the collateral. Based on precedent, the surrender option does not include power to compel a mortgage creditor to foreclose.⁶⁸⁴

The more frequently litigated options for dealing with secured claims are § 1325(a)(5)(B)'s provisions for lien retention, present value, and payment. As explained in the context of lien modification,⁶⁸⁵ BAPCPA enhanced the lien retention language of § 1325(a)(5)(B), leading to some disagreement among bankruptcy courts as to whether a debtor who is ineligible for a discharge, because of § 1328(f), may modify a lien. The amended Code also provides that if the case is dismissed or converted before the plan is completed, a secured creditor's lien is retained "to the extent recognized by applicable nonbankruptcy law."⁶⁸⁶ This change to the Code works along with an amendment to § 348(f)(C), which says that for cases converted from Chapter 13, the claim of a secured creditor retains its value unless the claim was paid in full in the Chapter 13 phase, "notwithstanding any valuation or determination of the amount of an

681. See, e.g., *In re Castleberry*, 437 B.R. 705 (Bankr. M.D. Ga. 2010).

682. 559 U.S. 260 (2010).

683. See, e.g., *In re Snyder*, No. 10-62052, 2012 WL 1110119 (Bankr. N.D.N.Y. Apr. 2, 2012) (§ 1325(a)(5)(C) did not permit partial surrender).

684. See, e.g., *Pratt v. GMAC (In re Pratt)*, 462 F.3d 14 (1st Cir. 2006). See also *In re Canning*, 706 F.3d 64 (1st Cir. 2013) (creditor's refusal to foreclose didn't violate § 524 discharge injunction); *In re Rose*, 512 B.R. 790 (Bankr. W.D.N.C. 2014) (mortgage creditor not required to accept surrendered property).

685. See *supra* § 6.9.

686. 11 U.S.C. § 1325(a)(5)(B)(i)(II).

allowed secured claim” for any Chapter 13 purposes, such as claim modification in a plan.⁶⁸⁷

Section 506(a)(2) governs valuation of collateral in Chapter 13 cases. It specifies that value of personal property collateral is “determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing,”⁶⁸⁸ statutorily adopting but expanding the replacement value standard for “cram-down” plans in the Supreme Court’s *Associates Commercial Corp. v. Rash*.⁶⁸⁹ The *Rash* standard was expanded to define “replacement value” as “the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.”⁶⁹⁰ Section 1325(a), as amended by BAPCPA, makes valuation under § 506 inapplicable, for confirmation purposes, to certain personal property (primarily vehicles) that were financed by purchase money security interests within 910 days of the bankruptcy filing.⁶⁹¹

In addition to valuation and lien retention, § 1325(a)(5)(B) also requires that secured claims be paid at present value—in other words, with interest to compensate for the delay resulting from monthly payments.⁶⁹² The Supreme Court addressed this in *Till v. SCS Credit Corp.*,⁶⁹³ adopting a requirement that the interest rate be based on a formula, starting with the current national prime rate, with the potential addition of a risk factor if appropriate under the particular facts of each case. The Court did not establish the floor or ceiling for the risk adjustment, and, absent consent of the parties, a creditor would be required to prove the need for a specific risk enhancement to the prime rate.⁶⁹⁴ Disputes over appropriate

687. *Id.* § 348(f)(C). *See, e.g., In re McGregor*, 449 B.R. 468 (Bankr. D.S.C. 2011).

688. 11 U.S.C. § 506(a)(2). *See Santander Consumer USA, Inc. v. Brown (In re Brown)*, 746 F.3d 1236 (11th Cir. 2014) (§ 506(a)(2)’s replacement value standard applied when collateral is surrendered).

689. 520 U.S. 953 (1997).

690. 11 U.S.C. § 506(a)(2). *See, e.g., In re Henry*, 457 B.R. 402 (Bankr. E.D. Pa. 2011).

691. *See supra* § 6.9.

692. 11 U.S.C. § 1325(a)(5)(B)(ii).

693. 541 U.S. 465 (2004).

694. *See, e.g., Oliver v. Samadi (In re Oliver)*, 306 F. App’x 458 (11th Cir. 2008).

interest rates typically arise in personal property collateral claims, rather than home mortgage claims, since § 1322(b)(2) generally prohibits modification of contractual terms for security interests in the debtor's principal residence.⁶⁹⁵

For allowed secured claims, any "periodic" payments must be in equal monthly amounts,⁶⁹⁶ and if a claim is secured by personal property, the monthly payments must adequately protect the creditor from any loss of security during the life of the plan.⁶⁹⁷

As a general confirmation requirement, the plan must be feasible, expressed in the Code as the debtor's ability "to make all payments under the plan and to comply with the plan."⁶⁹⁸ When inability to make the proposed plan payments is put at issue by an objection to confirmation, it becomes a practical test of whether there is sufficient income to meet the proposed obligations, including normal living expenses that are not part of the plan payments.⁶⁹⁹

If a debtor has domestic support obligations, as defined in § 101(14A), and if those obligations first became payable after the filing of the Chapter 13 petition, the debtor must have fully paid those obligations prior to confirmation.⁷⁰⁰ These postpetition domestic support obligations are distinct from the prepetition obligations, which may be treated in a plan but must be paid as a condition of receiving a discharge.⁷⁰¹ The final confirmation requirement is that any tax returns mandated under § 1308 must have been filed.⁷⁰²

695. See *supra* § 6.9 for discussion of § 1322(b)(2).

696. 11 U.S.C. § 1325(a)(5)(B)(iii)(I), as amended by BAPCPA. See, e.g., *Hamilton v. Wells Fargo Bank, N.A.* (*In re Hamilton*), 401 B.R. 539 (B.A.P. 1st Cir. 2009).

697. 11 U.S.C. § 1325(a)(5)(B)(iii)(II). See, e.g., *DaimlerChrysler Fin. Servs. Ams., LLC v. Rivera* (*In re Rivera*), No. 1:08-CV-21-TS, 2008 WL 1957896 (N.D. Ind. May 2, 2008).

698. 11 U.S.C. § 1325(a)(6).

699. See, e.g., *In re Scarborough*, 457 F. App'x 193 (3d Cir. 2012).

700. 11 U.S.C. § 1325(a)(8). See, e.g., *In re Bailey*, No. 09-2564, 2010 WL 3813847 (Bankr. N.D. W. Va. Sept. 24, 2010) (debtor must be current in postpetition obligations).

701. See 11 U.S.C. § 1328(a).

702. *Id.* § 1325(a)(9). See *supra* § 6.7.

6.11 Objections to confirmation; disposable income test and applicable commitment period

Although creditors do not vote on confirmation, they may object. Unsecured creditors enjoy an opportunity to contest whether a debtor is devoting sufficient disposable income to a proposed plan. Pursuant to § 1325(b), the trustee or a holder of an allowed unsecured claim may object, and if he or she does, the court may not confirm unless the plan either distributes no less than the amount of the claim or devotes the debtor's "projected disposable income" to unsecured creditors for the "applicable commitment period" of the plan.⁷⁰³ These two terms became a source of litigation and conflicting judicial interpretation. Under BAPCPA, the term "disposable income" is defined in § 1325(b)(2) by reference to § 101(10A)'s "current monthly income," which is a "look-back" to the debtor's average income for the six months prior to filing bankruptcy. "Current monthly income" is a part of the means test in § 707(b)(2).⁷⁰⁴ The means test becomes a factor in the "projected disposable income" analysis for Chapter 13 debtors who fall above the median income for a comparable-size family in their state.⁷⁰⁵ The Supreme Court recognized in *Ransom v. FIA Card Services, N.A.*⁷⁰⁶ that the congressional purpose of having the means test apply in Chapter 13 is to ensure that debtors who are able to pay their creditors do, in fact, pay. Because the means test in Chapter 13 includes the prepetition "current monthly income," it was not surprising that courts disagreed on whether "projected disposable income" was a look-back to the prepetition income or a "look-forward" to what a debtor's income would actually be after filing bankruptcy. The Supreme Court resolved that disagreement by adopting the forward-looking approach. In *Hamilton v. Lanning*,⁷⁰⁷ the Court held that bankruptcy courts should begin their disposable income inquiry with the statutory framework, but, when appropriate in particular cases,

703. 11 U.S.C. § 1325(b)(1).

704. *See supra* § 5.2.

705. 11 U.S.C. § 1325(b)(3).

706. 131 S. Ct. 716 (2011).

707. 560 U.S. 505 (2010).

should then look “further and take into account other known or virtually certain information about the debtor’s future income or expenses.”⁷⁰⁸ In other words, if there are changes in a debtor’s financial situation from what had occurred in the six-month “current monthly income” period, and those changes are “known or virtually certain,” the bankruptcy court should consider those changes. Although *Lanning* involved a substantial change in the debtor’s present income from what had been earned in the six months before bankruptcy, such “known or virtually certain” changes can apply to either income or expenses. For example, the Fourth Circuit applied *Lanning* in *Morris v. Quigley (In re Quigley)*,⁷⁰⁹ in which the debtor was surrendering some collateral and would not have the secured payments to deduct as a monthly expense.

Assume, for example, the trustee or unsecured creditor files an objection to confirmation, which triggers the disposable income test because less than 100% of unsecured claims are proposed to be paid (which would be the typical case).⁷¹⁰ For all Chapter 13 debtors, the plan must devote disposable income, which is the current monthly income, after deducting the amounts reasonably necessary for maintenance and support of the debtor and dependents, as well as any charitable contributions or normal business expenses if the debtor is engaged in business.⁷¹¹ For debtors below the median family income for their state, the meaning of a “reasonably necessary” expense is subject to judicial interpretation and discretion, and is thus often litigated.⁷¹² For Chapter 13 debtors whose current monthly income is above the median income for a similar size

708. *Id.* at 519.

709. 673 F.3d 269 (4th Cir. 2012).

710. *But see In re Johnson*, No. 10-03184C, 2011 WL 1671536 (Bankr. N.D. Iowa May 3, 2011) (for plan paying 100% of unsecured claims, disposable income test not triggered).

711. 11 U.S.C. § 1325(b)(2)(A)–(B).

712. *See, e.g., Dow Chem. Emps. Credit Union v. Collins*, No. 10-20718, 2011 WL 2746210 (E.D. Mich. July 14, 2011) (issues included reasonable necessity of \$300 monthly cigarette expense); *In re Nicholas*, 458 B.R. 516 (Bankr. E.D. Ark. 2011) (issue was reasonableness of home mortgage monthly amount).

family in their applicable state, reasonably necessary expenses are determined by applying the § 707(b)(2)'s means test.⁷¹³

Courts have differed on the method of determining family size for purposes of the means test.⁷¹⁴ The Fourth Circuit addressed this issue in *Johnson v. Zimmer*.⁷¹⁵ After examining the various approaches taken by bankruptcy courts (heads-on-bed, income-tax dependent, and economic unit), the court adopted the economic unit approach in a case with a debtor who had part-time custody of two minor children, and a spouse who had part-time custody of three minor children. The court recognized that a fractional application of each individual's time spent in the home was relevant to the economic impact of actual time in the home on family expenses.

The deductible expenses are set forth in the IRS National and Local Standards, as well as in "other necessary expenses" recognized by the IRS for its purposes in tax collection.⁷¹⁶ The variety and amount of litigation over what is an appropriately deductible expense under the IRS Standards are too extensive to cover in this monograph, but the Supreme Court established a baseline, in *Ransom v. FIA Card Services, N.A.*,⁷¹⁷ that what is "reasonably necessary" for above-median income debtors should be based on "applicable" expenses under § 707(b)(2)(A)(ii)(I). "If a debtor will not have a particular kind of expense during his plan, an allowance to cover that cost is not 'reasonably necessary' within the meaning of the statute."⁷¹⁸ Following the *Ransom* rationale, if a debtor does not have an expense, for example, because of surrendering collateral, there may be no deductible expense, even though the applicable IRS Standards would allow an expense to a taxpayer.⁷¹⁹

713. 11 U.S.C. § 1325(b)(3).

714. *See supra* § 5.2.

715. 686 F.3d 224 (4th Cir. 2012).

716. *See supra* § 5.2.

717. 131 S. Ct. 716 (2011).

718. *Id.* at 725.

719. *See, e.g.,* *Morris v. Quigley (In re Quigley)*, 673 F.3d 269 (4th Cir. 2012); *In re Turner*, 574 F.3d 349 (7th Cir. 2009); *Kramer v. Bankowski (In re Kramer)*, 505 B.R. 614 (B.A.P. 1st Cir. 2014); *Zeman v. Liehr (In re Liehr)*, 439 B.R. 179 (B.A.P. 10th Cir. 2010).

On the other hand, assuming the debtor would have a contractual secured payment that continued after the bankruptcy filing, appellate authority holds that if a debtor is above the applicable median income, § 707(b)(2)'s means test is triggered. Under § 707(b)(2)(A)(iii), actual contractually due secured debt payments are deductible expenses, regardless of whether that expense is reasonably necessary.⁷²⁰

Among the many issues litigated is whether the exclusions from “current monthly income” found in § 101(10A)'s definition are always excluded for Chapter 13 plan purposes, and the best example is Social Security income. Those benefits are expressly excluded in the statute's description of “current monthly income,” and appellate authority has applied that exclusion in Chapter 13 disposable income inquiry.⁷²¹ The reality is that a debtor with only Social Security income will have to devote a portion to a proposed plan or the plan will not be feasible.⁷²²

Another issue involves a debtor's proposal to continue to make voluntary contributions to a retirement account. Section 541(b)(7)(A) excludes from property of the bankruptcy estate withholdings by an employer for contributions to specific retirement accounts. Authority is split on whether this exclusion permits a Chapter 13 debtor from continuing to make retirement contributions that would be deducted for purposes of disposable income.⁷²³ The Sixth Circuit held that such voluntary, postpetition retirement contributions are not excluded from the disposable in-

720. *Parks v. Drummond* (*In re Parks*), 475 B.R. 703 (B.A.P. 9th Cir. 2012) (home mortgage payment, although above IRS housing allowance, was deductible under § 707(b)(2)(A)(iii)). *Accord Drummond v. Welsh* (*In re Welsh*), 711 F.3d 1120 (9th Cir. 2013).

721. *See, e.g., Mort Ranta v. Gorman*, 721 F.3d 241 (4th Cir. 2013); *Welsh*, 711 F.3d 1120; *Beaulieu v. Ragos* (*In re Ragos*), 700 F.3d 220 (5th Cir. 2012); *Anderson v. Cranmer* (*In re Cranmer*), 697 F.3d 1314 (10th Cir. 2012); *Baud v. Carroll*, 634 F.3d 327 (6th Cir. 2011); *Fink v. Thompson* (*In re Thompson*), 439 B.R. 140 (B.A.P. 8th Cir. 2010).

722. *See* 11 U.S.C. § 1325(a)(6).

723. *See Parks*, 475 B.R. 703 (discussing split of authority, but concluding voluntary postpetition contributions not deducted from disposable income). *Cf. In re Drapeau*, 485 B.R. 29 (Bankr. D. Mass. 2013) (good-faith, postpetition contributions excluded from disposable income).

come calculation.⁷²⁴ Under § 1322(f), a “plan may not materially alter the terms of a loan” owed to a retirement account, as defined in § 362(b)(19), and the amounts required to repay such loan are excluded from disposable income.⁷²⁵ The Sixth Circuit and courts in agreement hold that once the debtor had repaid such a loan, contributions to a retirement account would be disposable income.⁷²⁶

Finally, once the disposable income test is triggered, there is an “applicable commitment period” (ACP) to consider. The ACP is an expression of how long the debtor’s plan must last—either three or five years—depending on where the debtor’s current monthly income falls within median family income applicable to the particular debtor. Under § 1325(b)(1)(B), disposable income for the ACP must be devoted to the plan. ACP is defined in § 1325(b)(4) as three years for debtors who fall below the applicable median family income, and as not less than five years for debtors who fall above the applicable median-family income.⁷²⁷ If the plan provides for full payment of allowed unsecured claims, it may be for less than the three- or five-year period, but most plans stipulate less than 100% unsecured distribution. The interpretive disagreement is whether there is an ACP for a debtor who has no actual projected disposable income after calculation under the means test. For example, a debtor with higher than median-family income whose combined actual income and substantial secured debt payments resulted in negative projected disposable income under the means test would be required to remain in a plan for five years under a literal application of the ACP.⁷²⁸

724. *Seafort v. Burden (In re Seafort)*, 669 F.3d 662 (6th Cir. 2012). *Accord Parks*, 475 B.R. 703.

725. 11 U.S.C. § 1322(f). Section 362(b)(19)’s exception from the automatic stay permits the continued withholding from a debtor’s wages to repay a loan from a pension, profit-sharing, stock bonus, or other plan, as defined in that section.

726. *Seafort*, 669 F.3d 662. *See also* *Nowlin v. Peake (In re Nowlin)*, 576 F.3d 258 (5th Cir. 2009); *McCarty v. Lasowski (In re Lasowski)*, 575 F.3d 815 (8th Cir. 2009).

727. *See also* 11 U.S.C. § 1322(d) for similar provision for maximum length of plans, depending on debtors’ median family income.

728. *See, e.g., Pliler v. Stearns*, 747 F.3d 260 (4th Cir. 2014); *Danielson v. Flores (In re Flores)*, 735 F.3d 855 (9th Cir. 2013); *Baud v. Carroll*, 634 F.3d 327 (6th Cir. 2011); *Whaley v. Tennyson (In re Tennyson)*, 611 F.3d 873 (11th Cir. 2010); *Coop v. Frederickson (In re Frederickson)*, 545 F.3d 652 (8th Cir. 2008).

6.12 Plan modifications

A debtor's proposed plan may be modified prior to confirmation; if so, all of the § 1322 requirements for a proposed plan must be incorporated.⁷²⁹ A confirmed plan may also be modified, in which event there is a split of judicial authority on whether all of § 1325's requirements apply. Under § 1329(b)(1), when a plan is modified after confirmation, the statute specifically incorporates the requirements of §§ 1322(a) and (b), 1323(c), and 1325(a), leaving a question of whether § 1325(b)'s disposable income test comes into play.⁷³⁰ First, it should be noted that modification of a confirmed plan is only possible prior to completion of payments under that plan.⁷³¹ Second, a confirmed plan is only subject to modification on motion of the debtor, trustee, or holder of an allowed unsecured claim.⁷³² And third, a confirmed plan may be modified for the following: to increase or reduce the amount of payments on a claim; to extend or reduce the time for payments; to alter the amount of distribution to a creditor to take into account payments made other than under the plan; or to reduce payments to permit a debtor to purchase health insurance.⁷³³

Courts disagree about whether § 1329(a) permits a previous secured creditor's status and treatment to be changed to unsecured, taking into account, for example, that the debtor has surrendered a vehicle to the secured creditor and changing the creditor's remaining claim to unsecured deficiency. The Sixth Circuit held, in *Chrysler Financial Corp. v. Nolan (In re Nolan)*,⁷³⁴ that modification was not permitted to change the classification of a secured creditor to unsecured. Other courts have concluded that § 1329(a) is broad enough to permit actions such as surren-

729. 11 U.S.C. § 1323(a).

730. Compare *Freeman v. Schulman (In re Freeman)*, 86 F.3d 478, 481 (6th Cir. 1996) (disposable income test applied), with *Mattson v. Howe (In re Mattson)*, 468 B.R. 361, 370 (B.A.P. 9th Cir. 2012) (disposable income test did not apply).

731. See, e.g., *Brown v. Brown (In re Brown)*, 378 B.R. 416 (B.A.P. 6th Cir. 2007).

732. 11 U.S.C. § 1329(a).

733. *Id.*

734. 232 F.3d 528 (6th Cir. 2000).

der and have altered the classification and treatment of a previously secured creditor.⁷³⁵

Another unsettled issue is whether § 1329 requires a change in circumstances as a condition for moving to modify a confirmed plan. The theory behind requiring a demonstrated change in circumstances is that it is necessary to overcome the *res judicata* effect of the prior confirmation order.⁷³⁶ Other courts have not discerned a change of circumstances test in § 1329.⁷³⁷ In reality, a debtor or other party moving to modify will not be able to relitigate matters that were, or could have been, tried at the original confirmation.⁷³⁸

Good faith is an overriding factor in modifications, allowing the court to consider a full range of issues, including whether a debtor proposing modification is attempting to pay less to creditors than the debtor is able.⁷³⁹

An issue that has arisen because of the applicable commitment period (ACP) requirements in § 1325(b) is whether a confirmed plan may be shortened by lump sum payment through the modification process.⁷⁴⁰ A split of judicial authority exists, one that is not easily resolved because § 1329 does not specifically refer to an ACP in modified plans.⁷⁴¹

6.13 Effects of confirmation

Section 1327 addresses the effects of confirmation. The Supreme Court has emphasized the significance of § 1327(a)'s provision that “a con-

735. See, e.g., *Bank One, NA v. Leuellen* (*In re Leuellen*), 322 B.R. 648 (S.D. Ind. 2005).

736. See, e.g., *Murphy v. O'Donnell* (*In re Murphy*), 474 F.3d 143 (4th Cir. 2007); *Johnson v. Fink* (*In re Johnson*), 458 B.R. 745, 749 (B.A.P. 8th Cir. 2011) (change of circumstance required for postconfirmation modification).

737. See, e.g., *Mattson*, 468 B.R. 361 (discussing circuit split).

738. See *Storey v. Pees* (*In re Storey*), 392 B.R. 266 (B.A.P. 6th Cir. 2008).

739. See, e.g., *King v. Robenhorst*, No. 11-C-573, 2011 WL 5877081 (E.D. Wis. Nov. 23, 2011).

740. See, e.g., *Fridley v. Forsythe* (*In re Fridley*), 380 B.R. 538 (B.A.P. 9th Cir. 2007) (discussing this issue).

741. See *In re Tibbs*, 478 B.R. 458 (Bankr. S.D. Fla. 2012) (discussing split of authority).

firmed plan bind[s] the debtor and each creditor.” In *United Student Aid Funds, Inc. v. Espinosa*,⁷⁴² the issue was whether a plan that did not comply with Code or Rule requirements about an adversary proceeding to determine discharge of student loan debt was nevertheless binding on the creditor.⁷⁴³ The creditor was given adequate notice of the plan, which contained a warning that it impaired the creditor’s rights by a provision to pay the principal debt but discharge the accruing interest. The creditor did not object or appeal confirmation. Although the creditor was deprived of the procedural protections of an adversary proceeding to determine undue hardship, the plan became binding when the creditor did not pursue remedies to contest the confirmation’s effect. A plan that is not adequately “noticed” will not have binding effect.⁷⁴⁴ Section 1327(a) states that the binding effect applies not only to the creditor, but also to the debtor.⁷⁴⁵ Although the statute does not mention the trustee, the trustee is bound by confirmation as well.⁷⁴⁶

Section 1327(b) states that unless the plan or its related order provides otherwise, confirmation vests property of the estate in the debtor.⁷⁴⁷

Section 1327(c) provides that a confirmed plan’s vesting of property in the debtor effectively frees the property of claims and interests, unless stated otherwise in the plan or confirmation order. It is the statutory recognition that a plan’s provision for whether liens survive is binding. However, § 1327(c) must be read in conjunction with §§ 1322(b)(2) and 1325(a)(5), the lien modification and retention provisions.⁷⁴⁸ Moreover, § 1327(c) is restricted by the requirement that the claim or interest of an

742. 559 U.S. 260 (2010).

743. See 11 U.S.C. §§ 523(a)(8) & 1328(a)(2), and Fed. R. Bankr. P. 7001(6).

744. The Supreme Court disapproved future plan provisions that would accomplish discharge of student loans without the filing of an adversary proceeding to determine undue hardship. *Espinosa*, 559 U.S. at 276–78.

745. See, e.g., *In re Darden*, 474 B.R. 1 (Bankr. D. Mass. 2012) (debtor bound by plan’s provision for what creditors would receive).

746. See, e.g., *Boyajian v. Vargas (In re Vargas)*, No. 10-13103-ANV, 2012 WL 2450170 (B.A.P. 1st Cir. June 8, 2012).

747. See *supra* § 6.9.4.

748. See *supra* § 6.10.

affected creditor must be “provided for by the plan.” A plan must be specific enough in its provisions to support a particular claim.⁷⁴⁹

6.14 Case conversion and dismissal

Pursuant to § 1307(a), a Chapter 13 “debtor may convert a case under this chapter to a case under chapter 7 at any time.” In *Marrama v. Citizens Bank of Massachusetts*,⁷⁵⁰ the Supreme Court stressed the need for good faith on the part of a debtor who wants to convert from Chapter 7 to Chapter 13. As a result, the question arose after *Marrama* as to whether good faith was a threshold requirement for voluntary conversion the other way—from Chapter 13 to 7. Appellate authority then distinguished *Marrama*, concluding that § 1307(a) voluntary conversion to Chapter 7 is not conditioned on a good-faith analysis, with the debtor remaining before the court and remedies available in the Chapter 7 phase to deal with any bad faith.⁷⁵¹ In contrast, when a Chapter 13 debtor seeks to voluntarily dismiss a case under § 1307(b), there is a split of authority as to whether good faith is required.⁷⁵²

Section 1307(c) sets out nonexclusive grounds for involuntary dismissal or conversion of Chapter 13 cases, on motion of a party in interest, and whether the remedy is dismissal or conversion is based on “the best interests of creditors and the estate.”⁷⁵³ The list of causes ranges from “unreasonable delay by the debtor that is prejudicial to creditors”⁷⁵⁴ to

749. See, e.g., *Taumoepeau v. Mfrs. & Traders Trust Co. (In re Taumoepeau)*, 523 F.3d 1213 (10th Cir. 2008) (plan did not adequately provide for postpetition default).

750. 549 U.S. 365 (2007). The importance of good faith was discussed *supra* § 6.3 in the context of converting a case from Chapter 7 to Chapter 13.

751. See, e.g., *Nady v. DeFrantz (In re DeFrantz)*, 454 B.R. 108 (B.A.P. 9th Cir. 2011). Accord *In re Taylor*, 472 B.R. 570 (C.D. Cal. 2012).

752. In *Jacobsen v. Moser (In re Jacobsen)*, 609 F.3d 647, 660–63 (5th Cir. 2010), the Fifth Circuit held that *Marrama*’s good-faith analysis was a required condition before allowing dismissal. Accord *Rosson v. Fitzgerald (In re Rosson)*, 545 F.3d 764 (9th Cir. 2008); *In re Mitrano*, 472 B.R. 706 (E.D. Va. 2012). Cf. *In re Darden*, 474 B.R. 1 (Bankr. D. Mass. 2012).

753. 11 U.S.C. § 1307(c).

754. *Id.* § 1307(c)(1). See, e.g., *Paulson v. Wein (In re Paulson)*, 477 B.R. 740 (B.A.P. 8th Cir. 2012).

failure to pay any postpetition domestic support obligation.⁷⁵⁵ Although lack of good faith is not a specific statutory factor, it has been found implicitly to be a basis for dismissal or conversion.⁷⁵⁶

Section 348 sets forth the effects on a case when converting from one bankruptcy chapter to another. A secured creditor's lien remains intact on conversion, and any valuations of property in the Chapter 13 phase are ineffective in the Chapter 7 phase.⁷⁵⁷ The Third Circuit held, in an application of § 348(f), that when a confirmed case is converted from Chapter 13 to Chapter 7, funds held by the trustee that were not yet distributed to creditors must be returned to the debtor rather than turned over to the Chapter 7 trustee for distribution to creditors.⁷⁵⁸ The court's rationale was based on § 348(f)(1)'s provisions that property of the estate relates back to the time of petition filing, and that the debtor remained in control of the funds that had been paid postpetition but were undistributed to creditors at conversion. The Fifth Circuit disagreed: in *Viegelahn v. Harris (In re Harris)*,⁷⁵⁹ it found that congressional intent to pay creditors outweighed arguments in favor of returning the funds to the debtor.

When conversion occurs before confirmation, § 1326(a)(2) stipulates, in part, that “the trustee shall return any such payments not previously paid and not yet due and owing to creditors . . . to the debtor, after deducting any unpaid [administrative] claim allowed under section 503(b).”⁷⁶⁰

755. 11 U.S.C. § 1307(c)(11).

756. See, e.g., *In re Mondelli*, 558 F. App'x 260 (3d Cir. 2014); *In re Myers*, 491 F.3d 120 (3d Cir. 2007).

757. See, e.g., *In re Airhart*, 473 B.R. 178 (Bankr. S.D. Tex. 2012).

758. *In re Michael*, 699 F.3d 305 (3d Cir. 2012). See also *In re Hamilton*, 493 B.R. 31 (Bankr. M.D. Tenn. 2013) (on case dismissal § 347(b)(3) requires that undistributed funds held by trustee be returned to debtor). But see § 1326(a)(2): “If a plan is confirmed, the trustee shall distribute [plan payments] in accordance with the plan as soon as practicable.”

759. 757 F.3d 468 (5th Cir. 2014) (reviewing conflicting authority).

760. 11 U.S.C. § 1326(a)(2). But see *In re Clements*, 495 B.R. 74 (Bankr. E.D. Pa. 2013) (§ 348(f)(1) requires that preconfirmation funds held by trustee be refunded to debtor, before paying administrative expenses, including debtor's attorneys' fee).

6.15 Discharge

Section 1328(a)(2) incorporates into Chapter 13 most of the § 523(a) exceptions for discharges⁷⁶¹ that are granted on completion of a plan. Another type of discharge, called a “hardship discharge,” may be granted before plan completion, but only if the debtor shows that failure to complete the plan is because of circumstances beyond the debtor’s control, that modification is not practicable, and that allowed unsecured claims have received at least as much as they would have received in a Chapter 7 liquidation.⁷⁶² For those rare hardship discharges, all of the § 523(a) exceptions from discharge apply.⁷⁶³ In the plan completion discharges, the primary debts that are not excepted from discharge are willful and malicious injuries under § 523(a)(6) and the § 523(a)(15) debts, which are typically for property divisions related to marital separation or divorce.⁷⁶⁴

In addition to the § 523(a) exceptions, a Chapter 13 discharge excludes restitution and criminal fines and excludes damages awarded in a civil action related to personal injury or death resulting from the debtor’s willful and malicious action.⁷⁶⁵ The discharge also does not include § 1322(b)(5) long-term debts (e.g., home mortgages) that continue after the plan is concluded in three to five years.⁷⁶⁶ Thus, if the plan provides that certain debts will be cured of default and payments maintained for the contractual terms, those continuing debts are not discharged. The prefatory language of § 1328(a) and (b) states that a discharge only applies to “debts provided for by the plan or disallowed under section 502.” This requirement presents issues of whether a plan addressed treatment of a specific claim, as well as whether the plan was properly “noticed” to

761. See *supra* § 5.7 in context of Chapter 7.

762. 11 U.S.C. § 1328(b).

763. *Id.* § 1328(c)(2).

764. For in-depth discussion of § 523(a)(15) debts, and summaries of each circuit’s case authority, see *Bankruptcy & Domestic Relations Manual*, *supra* note 144.

765. 11 U.S.C. § 1328(a)(3)–(4). This willful and malicious injury is different from the § 523(a)(6) exception, which may apply to property, as well as personal, injury.

766. *Id.* § 1328(a)(1), (c)(1).

the affected creditor—issues closely related to whether § 1327(a)'s binding effect is triggered.⁷⁶⁷

Section 1328(f)'s restriction on discharge concerning the effect on liens when a debtor is not eligible for discharge was discussed *supra* § 6.9.2. Section 1328(f) also limits how quickly a Chapter 13 debtor may obtain a discharge following a prior discharge. If a debtor obtained a discharge in a prior Chapter 7, 11, or 12 case that was filed within four years of the current Chapter 13, or a discharge in a prior Chapter 13 case filed within two years of the current case, then a discharge in the current Chapter 13 case is not permitted.⁷⁶⁸

The § 524 discharge injunction goes into effect upon entry of a Chapter 13 discharge, just as it does in Chapter 7.⁷⁶⁹ Violations of the discharge injunction are frequent topics of litigation in the bankruptcy courts.⁷⁷⁰

6.16 Claim and home mortgage litigation

Claim allowance and objections to claims⁷⁷¹ form a significant portion of bankruptcy litigation. Because many debtors are trying to retain some collateral (e.g., vehicles, homes), it is not surprising that claim issues often are at the forefront of plan confirmation. Litigation over the amount of a secured claim and its treatment is common.⁷⁷² The bankruptcy courts have ruled on a wide range of home mortgage claims, including potential class actions related to mortgage lenders or mortgage servicers.⁷⁷³

Home mortgage claim litigation may be related to whether the mortgage creditor had standing to move for stay relief.⁷⁷⁴ The authority of a

767. See, e.g., *Ellett v. Stanislaus (In re Ellett)*, 506 F.3d 774 (9th Cir. 2007) (plan didn't provide for specific tax claim).

768. 11 U.S.C. § 1328(f).

769. See *supra* § 5.10.

770. See, e.g., *Fla. Dep't of Rev. v. Diaz (In re Diaz)*, 647 F.3d 1073 (11th Cir. 2011); *Hann v. Educ. Credit Mgmt. Corp. (In re Hann)*, 476 B.R. 344 (B.A.P. 1st Cir. 2012).

771. See *supra* Part 4.

772. See *supra* § 6.10 (discussing § 1325(a)(5) confirmation requirements for liens).

773. See, e.g., *Rodriguez v. Countrywide Home Loans, Inc. (In re Rodriguez)*, 695 F.3d 360 (5th Cir. 2012).

774. See *supra* § 2.7.5. See also, e.g., *Miller v. Deutsche Bank Nat'l Trust Co. (In re Miller)*, 666 F.3d 1255 (10th Cir. 2012).

particular party to enforce a mortgage is also an issue.⁷⁷⁵ The Third Circuit addressed inappropriate representations by a creditor and its attorney in moving for stay relief, illustrating that potential sanctions are available for violations of Bankruptcy Rule 9011.⁷⁷⁶ Fact and legal issues of whether a mortgage creditor violated the automatic stay, subjecting itself to damages, are often litigated.⁷⁷⁷

Home mortgage lawsuits are often connected to the bankruptcy issue of whether the creditor complied with the terms of the plan. This, in turn, presents related issues of whether the plan improperly modified the home mortgage.⁷⁷⁸ Many of the issues that trigger mortgage litigation relate to postpetition charges by the creditor, for expenses like attorneys' fees, late charges, and inspections.⁷⁷⁹ To help manage the high volume of this type of litigation, Federal Bankruptcy Rule 3002.1 was adopted by the Supreme Court, effective December 2011.⁷⁸⁰ Rule 3002.1 applies only in Chapter 13 cases that have claims secured by the debtor's principal residence, and the plan proposes to use § 1322(b)(5)'s provisions to cure default and maintain ongoing mortgage payments. The rule requires the creditor to give notice to the debtor, debtor's attorney, and trustee of payment changes resulting from things such as interest rate or escrow adjustments, as well as notice of postpetition charges and fees. Opportunity is provided for objection to those notices and for court determination in the event of objection. Rule 3002.1 also provides for a procedure to determine, at the conclusion of a plan, that the secured claim has been cured.

775. See, e.g., *Allen v. US Bank, Nat'l Ass'n (In re Allen)*, 472 B.R. 559 (B.A.P. 9th Cir. 2012) (discussing standing to enforce note and mortgage).

776. *In re Taylor*, 655 F.3d 274 (3d Cir. 2011).

777. See, e.g., *Jacks v. Wells Fargo Bank, N.A. (In re Jacks)*, 642 F.3d 1323 (11th Cir. 2011).

778. See 11 U.S.C. §§ 1322(b)(2), 1327(a). See, e.g., *Ameriquest Mortg. Co. v. Nosek (In re Nosek)*, 544 F.3d 34 (1st Cir. 2008) (discussing need for plan specificity).

779. Compare, e.g., *Padilla v. Wells Fargo Home Mortg., Inc.*, 379 B.R. 643 (Bankr. S.D. Tex. 2007) (holding Rule 2016 applied to both pre- and postpetition creditor's fees and charges), with *Padilla v. GMAC Mortg. Corp.*, 389 B.R. 409 (Bankr. E.D. Pa. 2008) (discussing creditor's obligation to disclose and obtain court approval before assessing postpetition charges).

780. Federal Bankruptcy Rule 3002.1 is reproduced *infra* Appendix A.

An Official Form, Supplement S1 to Official Form 10 for claims, implements Rule 3002.1, which addresses the need for notice of a change in the amount of the ongoing mortgage payments. Supplement S2 to Official Form 10 further implements Rule 3002.1, providing the required notice of postpetition fees, charges, and expenses related to the Chapter 13 debtor's home mortgage. Over time, Rule 3002.1 and related forms should reduce the amount of litigation over postpetition charges by home mortgage creditors, although questions that arise may require interpretation of the rule.⁷⁸¹

Separate from the claims process, there is frequent litigation in the bankruptcy courts over alleged violations of the Truth in Lending Act, as well as applicable state and federal consumer protection statutes.⁷⁸² The Real Estate Settlement Procedures Act (RESPA) and other federal and state statutes related to home mortgages often raise issues in bankruptcy litigation.⁷⁸³ In many instances, the bankruptcy court must decide whether it has authority to hear a cause of action, for example, when a foreclosure has already occurred under state law.⁷⁸⁴ The Supreme Court's decision in *Stern v. Marshall*⁷⁸⁵ requires an examination of the bankruptcy court's authority, including in those Chapter 13 cases in which the plan

781. See, e.g., *In re Sheppard*, No. 10-33959-KRH, 2012 WL 1344112 (Bankr. E.D. Va. Apr. 18, 2012) (prior plan modification approved by court included postpetition fees and charges, providing an exception from creditor's compliance with Rule 3002.1); *In re Carr*, 468 B.R. 806 (Bankr. E.D. Va. 2012) (creditor not permitted to charge \$150 fee for notice required by Rule 3002.1); *Pompa v. Wells Fargo Home Mortg., Inc.* (*In re Pompa*), No. 06-31759, ADV 11-3651, 2012 WL 2571156 (Bankr. S.D. Tex. June 29, 2012) (notwithstanding rule's sanction, court could sanction creditor, under 11 U.S.C. § 105, for violating terms of confirmed plan).

782. See, e.g., *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014); *DiVittorio v. HSBC Bank USA, NA* (*In re DiVittorio*), 670 F.3d 273 (1st Cir. 2012); *Option One Mortg. Corp. v. Sterten* (*In re Sterten*), 546 F.3d 278 (3d Cir. 2008).

783. See, e.g., *Campbell v. Countrywide Home Loans, Inc.*, No. 07-20499, 2008 WL 3906382 (5th Cir. Aug. 26, 2008), *opinion withdrawn & superseded by* *Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348 (5th Cir. 2008); *Knowles v. Bayview Loan Servicing, LLC* (*In re Knowles*), 442 B.R. 150 (B.A.P. 1st Cir. 2011).

784. See, e.g., *Stewart v. Chase Bank* (*In re Stewart*), 473 B.R. 612 (Bankr. W.D. Pa. 2012) (bankruptcy court lacked jurisdiction after foreclosure).

785. 131 S. Ct. 2594 (2011), discussed *supra* § 1.1.

has been completed and the debtor is attacking validity of the mortgage claim. But § 524(i) specifically recognizes a discharge injunction violation for a creditor's "willful failure . . . to credit payments received under a [confirmed] plan."⁷⁸⁶

786. See, e.g., *Mattox v. Wells Fargo, NA (In re Mattox)*, No. 07-51925, 2011 WL 3626762 (Bankr. E.D. Ky. Aug. 17, 2011).

~ APPENDIX A ~

FEDERAL BANKRUPTCY RULE 3002.1

Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

(a) IN GENERAL. This rule applies in a chapter 13 case to claims that are (1) secured by a security interest in the debtor's principal residence, and (2) provided for under § 1322(b)(5) of the Code in the debtor's plan.

(b) NOTICE OF PAYMENT CHANGES. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest rate or escrow account adjustment, no later than 21 days before a payment in the new amount is due.

(c) NOTICE OF FEES, EXPENSES, AND CHARGES. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.

(d) FORM AND CONTENT. A notice filed and served under subdivision (b) or (c) of this rule shall be prepared as prescribed by the appropriate Official Form, and filed as a supplement to the holder's proof of claim. The notice is not subject to Rule 3001(f).

(e) DETERMINATION OF FEES, EXPENSES, OR CHARGES. On motion of the debtor or trustee filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.

(f) NOTICE OF FINAL CURE PAYMENT. Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the holder of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim. The notice shall also inform the holder of its obligation to file and serve a response under subdivision (g). If the debtor contends that final cure payment has been made and all plan payments have been completed, and the trustee does not timely file and serve the notice required by this subdivision, the debtor may file and serve the notice.

(g) RESPONSE TO NOTICE OF FINAL CURE PAYMENT. Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).

(h) DETERMINATION OF FINAL CURE AND PAYMENT. On motion of the debtor or trustee filed within 21 days after service of the statement under subdivision (g) of this rule, the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required postpetition amounts.

(i) FAILURE TO NOTIFY. If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:

- (1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or
- (2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

~ APPENDIX B ~

FOR FURTHER REFERENCE

Bankruptcy and Debt Under the Servicemembers Civil Relief Act (2009)

Susan H. Seabury & Jack F. Williams

Handbook explaining protections under the Code and SCRA for debtors in the armed forces; includes sample forms and letters.

Bankruptcy and the Supreme Court (2009)

Kenneth N. Klee

An examination of Supreme Court bankruptcy decisions since 1898.

Bankruptcy Best Practices Discussion Forum

<http://cwn.fjc.dcn/bbp/home.nsf>

Access available only to members of the federal judiciary.

Bankruptcy Law: Principles, Policies, and Practice (3d ed. 2010)

Charles J. Tabb

An examination of bankruptcy law in the context of history and policy.

Chapter 13: Practice and Procedure (2013–2014 ed., published biannually)

Hon. W. Homer Drake, Hon. Paul W. Bonapfel & Adam M. Goodman

A two-volume examination of Chapter 13 issues, with specific case examples (available on Westlaw).

Collier Consumer Bankruptcy Practice Guide (2014)

Henry J. Sommer

A transaction-based guide to consumer bankruptcy.

Collier Family Law and the Bankruptcy Code (2013)

Hon. Margaret Dee McGarity & Henry J. Sommer

A comprehensive, practice-oriented examination of the interface between bankruptcy and family law.

Collier on Bankruptcy (2013, updated regularly)

Alan N. Resnick & Henry J. Sommer eds.

A multivolume analysis of the Bankruptcy Code, with specific chapters discussing Code sections affecting Chapter 7 and 13 relief.

Consumer Bankruptcy: Fundamentals of Chapter 7 and Chapter 13 of the U.S. Bankruptcy Code (3d ed.)

William A. McNeal & Alane A. Becket

An introduction to consumer bankruptcy issues, with a focus on the general practitioner.

The Consumer Bankruptcy Creditor Distribution Study (2013)

Lois R. Lupica (Reporter & Principal Investigator), Maine Law Foundation Professor of Law, University of Maine School of Law, *available at* <http://www.abiworld.org/e-news/Creditor.Distributions.ABI.Final.pdf>

Empirical examination of unsecured creditor distribution data from Chapter 7 and 13 cases filed pre- and post-BAPCPA's, and effect of BAPCPA's efficacy on debt recovery.

Consumer Bankruptcy Manual (2d ed. 2013–2014, published annually)

Hon. Michael B. Kaplan, Stacey L. Meisel & Michael Sousa

An examination of consumer bankruptcy issues (available on Westlaw).

The Evolution of U.S. Bankruptcy Law: A Time Line (Federal Judicial Center 2012)

[http://cwn.fjc.dcn/public/pdf.nsf/lookup/BKTimeLine2012.pdf/\\$file/BKTimeLine2012.pdf](http://cwn.fjc.dcn/public/pdf.nsf/lookup/BKTimeLine2012.pdf/$file/BKTimeLine2012.pdf)

Two-page pamphlet maps evolution of bankruptcy law from inception through 2011; provides statistics on bankruptcy caseloads and historical snapshots of select sociopolitical events.

Graduating with Debt: Student Loans under the Bankruptcy Code (2013)

Daniel A. Austin & Susan E. Hauser

An introduction to student loans and the difficulty of discharging them under the Bankruptcy Code.

When Worlds Collide: Bankruptcy and Its Impact on Domestic Relations and Family Law (4th ed.)

Michaela M. White

An introductory examination of the interface of bankruptcy and family law issues; available to judges at no cost.

General bankruptcy statistics are available at

<http://www.uscourts.gov/Statistics/BankruptcyStatistics.aspx>

GLOSSARY

Bankruptcy practice is filled with specialized terms, some of which may be alien to those not regularly involved in this area of law. Section 101 of the Bankruptcy Code defines many terms, but the following terms used in consumer bankruptcies may be useful to review. These definitions are based on the glossary of the Administrative Office of the U.S. Courts, available at <http://www.uscourts.gov>.

Abuse: Under § 707(b), abuse of the provisions of Chapter 7 is cause for dismissal of the case or conversion to Chapter 11 or 13.

Adversary proceeding: A lawsuit arising in or related to a bankruptcy case that is commenced by filing a complaint with the court. A nonexclusive list of adversary proceedings is set forth in Fed. R. Bankr. P. 7001.

Automatic stay: An injunction that automatically stops lawsuits, foreclosures, garnishments, and all collection activity against the debtor the moment a bankruptcy petition is filed.

Bankruptcy estate: All legal or equitable interests of the debtor in property at the time of the bankruptcy filing. The estate includes all property in which the debtor has an interest, even if it is held by another person.

Claim: A creditor's assertion of a right to payment from the debtor or to the debtor's property.

Confirmation: The bankruptcy judge's approval of a plan of reorganization filed by the debtor in Chapter 13.

Contested matter: Those matters, other than objections to claims, that are disputed but are not within the definition of adversary proceeding contained in Rule 7001. Basically, this refers to motion practice.

Credit counseling: Generally refers to two events in individual bankruptcy cases: (1) the "individual or group briefing" from a nonprofit budget and credit counseling agency that individual debtors must attend prior to filing under any Chapter of the Bankruptcy Code; and (2) the "instructional course in personal financial management" in Chapters 7 and 13 that an individual debtor must complete before a discharge is entered.

There are exceptions to both requirements for certain categories of debtors, exigent circumstances, or if the U.S. trustee or bankruptcy administrator determines that there are insufficient approved credit counseling agencies available for the necessary counseling.

Creditor: One to whom the debtor owes money or who claims to be owed money or property by the debtor.

Current monthly income: The average monthly income received by the debtor over the six calendar months before commencement of the bankruptcy case, including regular contributions to household expenses from nondebtors and income from the debtor's spouse if the petition is a joint petition, but not including Social Security income and certain other payments made because the debtor is the victim of certain crimes. 11 U.S.C. § 101(10A).

Debtor: A person seeking bankruptcy relief in a case under Chapter 7 or 13 of Title 11.

Discharge: A release of a debtor from personal liability for certain debts known as dischargeable debts, which prevents the creditors owed those debts from taking any action against the debtor to collect the debts. The discharge also prohibits creditors from communicating with the debtor about the debt, including telephone calls, letters, and personal contact.

Dischargeable debt: A debt for which the Bankruptcy Code allows the debtor's personal liability to be eliminated.

Equity: The value of a debtor's interest in property that remains after liens and other creditors' interests are considered. (Example: If a house valued at \$100,000 is subject to an \$80,000 mortgage, there is \$20,000 of equity.)

Executory contract or lease: This generally includes contracts or leases under which both parties to the agreement have duties remaining to be performed. If a contract or lease is executory, a debtor may assume it or reject it, subject to conditions set forth in 11 U.S.C. § 365.

Exemptions or exempt property: Certain property owned by an individual debtor that the Bankruptcy Code or applicable state law permits the debtor to keep from unsecured creditors. For example, in some states the

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debtor may be able to exempt all or a portion of the equity in the debtor's primary residence (homestead exemption), or some or all "tools of the trade" used by the debtor to make a living (e.g., auto tools for an auto mechanic or dental instruments for a dentist). The availability and amount of property the debtor may exempt depends on the state the debtor lives in.

Joint administration: A court-approved mechanism under which two or more cases can be administered together. Assuming no conflicts of interest, these separate businesses or individuals can do such things as pool resources and hire the same professionals.

Joint petition: A bankruptcy petition that the Code or law permits to be filed by two individuals, typically spouses.

Lien: The right to take and hold or sell the property of a debtor as security or payment for a debt or duty.

Liquidation: A sale of a debtor's property, often by a bankruptcy trustee, with the proceeds to be used for the benefit of creditors.

Means test: Section 707(b)(2) of the Bankruptcy Code applies a "means test" to determine whether an individual debtor's Chapter 7 filing is presumed to be an abuse of the Bankruptcy Code, requiring dismissal or conversion of the case (generally to Chapter 13). Abuse is presumed if the debtor's aggregate current monthly income (see definition above) over five years, net of certain statutorily allowed expenses, is more than (1) \$11,725 or (2) 25% of the debtor's nonpriority unsecured debt, as long as that amount is at least \$7,025 (these amounts are subject to periodic adjustment for inflation, with the next adjustment on April 1, 2016). The debtor may rebut a presumption of abuse only by a showing of special circumstances that justify additional expenses or adjustments of current monthly income.

Meeting of creditors: The meeting held under 11 U.S.C. § 341 soon after a bankruptcy petition is filed, with the debtor required to attend.

No-asset case: A Chapter 7 case where there are no assets available to satisfy any portion of the creditors' unsecured claims.

Nondischargeable debts: A debt that cannot be eliminated in bankruptcy. Examples include debts for alimony or child support, certain taxes, debts for most government-funded or guaranteed educational loans or benefit overpayments, debts arising from death or personal injury caused by driving while intoxicated or under the influence of drugs, and debts for restitution or a criminal fine included in a sentence on the debtor's conviction of a crime. Some debts, such as debts for money or property obtained by false pretenses and for fraud or defalcation while acting in a fiduciary capacity, may be declared nondischargeable only if a creditor timely files and prevails in a nondischargeability action.

Petition: The Official Form 1 that the debtor must use to commence a bankruptcy case. It is executed under penalty of perjury.

Petition preparer: A business that prepares bankruptcy petitions but is not authorized to practice law. *See* 11 U.S.C. § 110.

Prebankruptcy planning: The arrangement (or rearrangement) of a debtor's property to allow the debtor to take maximum advantage of exemptions. Prebankruptcy planning typically includes converting nonexempt assets into exempt assets.

Priority and priority claims: The Bankruptcy Code's statutory ranking of unsecured claims that determines the order in which unsecured claims will be paid if there is not enough money to pay all unsecured claims in full. For example, under the Bankruptcy Code's priority scheme, money owed to the case trustee or for prepetition alimony and/or child support must be paid in full before any general unsecured debt (i.e., trade debt or credit card debt) is paid. *See* 11 U.S.C. § 507.

Proof of claim: A written statement and verifying documentation filed by a creditor that describes the reason the debtor owes the creditor money. There is an Official Form 10 for this purpose. *See* 11 U.S.C. § 501.

Property of the bankruptcy estate: All legal or equitable interests of the debtor in property as of the commencement of the case. *See* 11 U.S.C. § 541.

Reaffirmation: An agreement by a Chapter 7 debtor to continue paying a dischargeable debt (such as an auto loan) after the bankruptcy, usually for the purpose of keeping collateral (such as a car) that would otherwise

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be subject to repossession. *See* 11 U.S.C. § 524(c). There is an Official Form 27 cover sheet for reaffirmation agreements, and Procedural Forms B240A and B240AB.

Schedules and statements of financial affairs: Detailed lists filed by the debtor along with (or shortly after filing) the petition showing the debtor's assets, liabilities, and other financial information. The debtor must use Official Forms 6 and 7, also executed under penalty of perjury.

Secured creditor: A creditor holding a claim against the debtor, who has the right to take and hold or sell certain property of the debtor in satisfaction of all or a portion of the claim.

Statement of intention: A declaration made by a Chapter 7 debtor about plans for dealing with consumer debts that are secured by property of the estate. The debtor must use Official Form 8.

Trustee: The representative of the bankruptcy estate who exercises statutory powers, principally for the benefit of the unsecured creditors, under the general supervision of the court and the direct supervision of the United States trustee or bankruptcy administrator. The trustee is a private individual or corporation appointed in all Chapter 7, 12, and 13 cases and some Chapter 11 cases. The trustee's responsibilities include reviewing the debtor's petition and schedules and bringing actions against creditors or the debtor to recover property of the bankruptcy estate. In Chapter 7, the trustee liquidates property of the estate and makes distributions to creditors. Trustees in Chapters 12 and 13 have similar duties to a Chapter 7 trustee, plus the additional responsibilities of overseeing the debtor's plan, receiving payments from debtors, and disbursing plan payments to creditors.

Undersecured or underwater claim: A claim or debt for which the creditor's collateral is worth less than the total claim.

United States trustee: An officer of the Justice Department responsible for supervising the administration of bankruptcy cases, estates, and trustees; monitoring plans and disclosure statements; monitoring creditors' committees; monitoring fee applications; and performing other statutory duties. In a few districts, the role of the U.S. trustee is fulfilled by a bankruptcy administrator.

Unsecured claim: A claim or debt for which a creditor holds no special assurance of payment, such as a mortgage or lien; a debt for which credit was extended based solely on the creditor's assessment of the debtor's future ability to pay.

Wholly unsecured claim: A claim that has security, but the collateral has no actual value, rendering the claim unsecured.

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