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I. Judicial Commentary on BAPCPA

A. Venting

1. The relevant provisions of the post-Act Code are clumsily drafted. "Among other things, the phrase 'after notice and a hearing,' applied to a motion for an extension of the stay, inexplicably appears twice in the same sentence in § 362(c)(3)(B), with reference to the same stage in the same procedure." *In re Collins*, 334 B.R. 655 (Bankr. D. Minn. 2005) (Kishel, J.).

2. "To call the act a 'consumer protection' act is the grossest of misnomers… Those responsible for the passing of [BAPCPA] did all in their power to avoid the proffered input from sitting United States Bankruptcy Judges, various professors of bankruptcy law at distinguished universities, and many professional associations filled with the best of the bankruptcy lawyers in the country as to the perceived flaws in the Act. This is because the parties pushing the passage of the Act had their own agenda. It was apparently an agenda to make more money off the backs of the consumers in this country.... It should be obvious to the reader at this point how truly concerned Congress is for the individual consumers of this country. Apparently, it is not the individual consumers of this country that make the donations to the members of Congress that allow them to be elected and re-elected and re-elected and re-elected." *In re Sosa*, 336 B.R. 113 (Bankr. W.D. Tex. 2005) (Monroe, J.).

3. BAPCPA production of an "unpopular and perhaps even burdensome result" does not automatically necessitate courts to fashion a judicial remedy. *In re Rodriguez*, 336 B.R. 462 (Bankr. D. Idaho 2005) (Myers, J.).

4. The auto finance industry is the only winner from BAPCPA, and the "few extra bucks" earned by some creditors under BAPCPA's new laws "are way outweighed by costs to the system." Judge at the National Collections and Credit Risk Conference.

5. "The Court has no discretion to waive the credit counseling certificate requirement or to grant an exemption and extension unless a certification satisfying all three requirements is filed by the debtor…. It is a mystery to the Court why Congress granted the Court the authority to waive all filing fees for persons such as the Filer, but not waive the credit counseling requirement. The Filer qualified for a waiver of fees which means the Court and the chapter 7 trustee would have received no payment for the processing of the Filer's bankruptcy case. However, the credit counseling agency would still receive payment for a counseling session. Exactly what form of credit counseling could be useful, or necessary, to a person who qualifies for a waiver of fees under 28 U.S.C. § 1930(f) is even more of a mystery. The rationale for many of the provisions in BAPCPA, the language used in those provisions, and the coordination among them are likely to remain an enigma for a long time." *In re Raymond*, 2006 WL 1047033 (Bankr. D.N.H. 4/12/06) (Deasy, J.).

6. "As the House Report explains, BAPCPA is a comprehensive package of reform measures pertaining to both consumer and business bankruptcy cases. The purpose of the bill is to improve bankruptcy law and practice by restoring personal responsibility and integrity to the bankruptcy system and *ensure that the system is fair for both debtors and creditors.* [FN 4: This statement, in the context of BAPCPA's creditor-friendly language throughout, aptly illustrates the tone and substance of BAPCPA-it is to remedy a perceived imbalance in the Code favoring debtors. Regardless of whether that perception was accurate or not, Congress clearly adjusted the perceived

imbalance in favor of creditors.] With respect to the interests of creditors, the proposed reforms respond to many of the factors contributing to the increase in consumer bankruptcy filings, such as lack of personal financial accountability, the proliferation of serial filings, and the absence of effective oversight to eliminate abuse in the system. Congress noted, in particular, one academic's statement with respect to the new law: '[S]hoplifting is wrong; bankruptcy is also a moral act. Bankruptcy is a moral as well as an economic act. There is a conscious decision not to keep one's promises. It is a decision not to keep one's promises. It is a decision not to reciprocate a benefit received, a good deed done on the promise that you will reciprocate. Promise-keeping and reciprocity are the foundation of an economy and healthy civil society.' (Statement of Professor Todd Zywicki). It would seem it is with this lens that Congress viewed debtors - *as moral equivalents to "shoplifters"*- in enacting BAPCPA. In so doing, it created a law that is sometimes self-executing, inflexible, and unforgiving. 11 U.S.C. § 521(i) is just one of those provisions." *In re Ott,* 2006 WL 1152339 (Bankr. D. Colo. 4/12/06) (Brooks, J.).

7. "The limited automatic stay for repeat filers is a major feature of BAPCPA which was passed by Congress at the behest of the credit industry, and especially the mortgage servicing companies and the law firms they retain to represent them need to adapt their practices in order to deal with what they have created." In other words, the problems with the statute are of the lobby's own doing; they'll just have to deal with problems spawned from language that doesn't comport with what they may have intended. *In re Frazier*, 339 B.R. 516 (N.D. Fla. 2006) (Killian, J.).

8. "The language of Section 1325(b) is unambiguous in requiring that the expenses and deductions of above-median-income debtors be determined under section 707(b)(2)(A) and (B). When the language of a statute is plain, the sole function of the courts is to enforce the statute according to its terms unless the disposition required by the text is absurd. While many sources question whether sections 707(b)(2) and 1325(b) represent a fair and effective approach to catching the abusers of the bankruptcy system or to insuring that debtors who can pay do pay, the court does not believe that the result in this case of applying section 1325(b)(3) as written can be rejected as being absurd. Therefore, even if the Trustee's criticism of section 1325(b) is correct, this court is not free to ignore revised section 1325(b) or replace it with a standard pulled from section 1325(a)(3). To do so, the court believes, would impermissibly undermine policy choices made by Congress. 'There is a basic difference between filling a gap left by Congress and rewriting rules that Congress has affirmatively and specifically enacted.' *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978). While there may be sound reasons to rewrite section 1325(b), it is not the role of this court to do so." *In re Barr*, 2006 WL 1030242 (Bankr. M.D.N.C. 2006) (Stocks, J.).

B. <u>BAPCPA's "Plain Meaning" Not Followed</u>

1. "After reading the several hundred pages of text in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Reform Act"), one conclusion is inescapable. The new law is not a model of clarity. Implementing the changes will present a daunting challenge to judges, clerk's offices, attorneys and the parties who seek relief in the bankruptcy court after October 17, 2005, the date most of the provisions become effective." The plain meaning of the statute will be rebutted when a contrary legislative intent is clearly expressed. "In such cases, the intention of the drafters, rather than the strict language, controls." *In re Kaplan*, 331 B.R. 483 (Bankr. S.D. Fla. 2005) (Mark, J.).

2. In concluding that what appears to be true "at first blush" is actually incorrect, Judge Isgur rejects the Code section 362(c)(4)(B)'s apparent "plain meaning." To do otherwise, he concludes, would effectively render exactly 278 words in BAPCPA superfluous, a result Congress could not have intended. "Coincidentally," he notes, the Gettysburg Address (which is quoted in its entirety) was also 278 words. From this, he concludes: "Although the meaning of this subsection [of BAPCPA] cannot be compared to the importance of the Gettysburg Address, the Court presumes that Congress did not codify words of comparable length with no meaning whatsoever…. In *Lamie*, the Court was concerned that a single word--perhaps inadvertently included in the statute--would produce surplusage. In this case, the surplusage would constitute an entire section comprised of 278 words and multiple paragraphs. The Court is unable to locate any authority for such a wholesale disregard of the normal method of statutory construction…. After full consideration, the Court concludes that the "first blush" interpretation is incorrect. The Court will give meaning to the entirety of the statute." *In re Toro-Arcila*, 334 B.R. 224 (Bankr. S.D. Tex. 2005) (Isgur, J.).

3. Like Judges Mark and Riegle before him, Judge Markell was unwilling to find -- as Judge Haines did -- that the "legislative history is virtually useless as an aid to understanding the language and intent of BAPCPA" on such a fundamental issue as BAPCPA's "closing of the mansion loophole." Instead, he found that an important objective of BAPCPA was to prevent wealthy individuals from shielding millions of dollars from creditors by filing bankruptcy in one of a handful of states that have unlimited homestead exemptions. Whereas Judge Mark basically ignored the "as a result of electing" language of BAPCPA's new Code section 522(p) in favor of the clear and unambiguous legislative intent, and whereas Judge Riegle adopted a strained -- though theoretically plausible -- reading that enabled her to reconcile the seemingly contradictory "as a result of electing" language of Code section 522(p) with Congressional intent favoring the closing of the "mansion loophole," Judge Markell employed a different -- entirely logic-based -- construct. In so doing, he concluded that even a strict textualist like Justice Scalia would apply BAPCPA's homestead exemption cap to all states and ascribe the offending "as a result of electing" language in Code section 522(p) as merely "scrivener's error." Such a finding of "scrivener's error" was warranted, Judge Markell noted, because two necessary conditions were met: first, "the intended meaning to be used [is] obvious"; and second, "the plain meaning of the statute under consideration lack[s] any ... plausible congressional purpose." *In re Kane*, 336 B.R. 447 (Bankr. D. Nev. 2006) (Markell, J.).

4. Before BAPCPA's enactment, Bankruptcy Code section 1112(b) provided that the Court may dismiss or convert a case (but was not required to do so) for "cause." The old law identified 10 possible grounds for dismissal or conversion that may constitute "cause." Notably, these 10 possible grounds for dismissal or conversion were listed in the alternative or "disjunctive," connected only by the word "or," so that any one factor alone could have provided sufficient "cause" for dismissal or conversion. With BAPCPA, however, Congress made a change to Code section 1112(b) that -- if the "plain meaning" were followed -- would have produced absurd results as it would have required the Bankruptcy Court to dismiss or convert the case "for cause" only upon the confluence of 16 separate factors, all connected by the word "and." All these factors could never simultaneously exist within a corporate debtor. Indeed, if all factors were ever applicable to a single individual debtor, criminal prosecution of the individual -- rather than mere dismissal of its bankruptcy case -- would be the most appropriate remedy! *In re TCR of Denver, LLC*, 338 B.R. 494 (Bankr. D. Colo. 2006) (Brooks, J.).

5. "It would be irresponsible for this Court to rule that an amendment added to existing law after considerable debate is inoperative in circumstances that are not clearly spelled out either in the

statute itself or in its legislative history." *In re Landahl*, 338 B.R. 920 (Bankr. M.D. Fla. 2006) (May, J.).

C. Attempts at Uniformity

1. *En Banc Review*: *See* General Order 2006-03 (Bankr. N.D. Tex.) (Houser, J.) ("The Bankruptcy Judges believe that the bankruptcy bar desires consistency in the resolution of legal issues arising under BAPCPA among the Bankruptcy Judges where possible and appropriate. The Bankruptcy Judges also believe that judicial economy will be served, and the likelihood for uniformity in the resolution of BAPCPA legal issues will be enhanced, by the adoption of procedures for en banc consideration of such legal issues.") (*http://www.txnb.uscourts.gov/orders/2006-03.pdf*).

II. The Hanging Paragraph: Section 1325(a)(*) -- the "Car Loan Protection" Provision

A. The Law of Intended Consequences

1. Creditor's claim protected from modification by treating it as fully secured in chapter 13 plan. Debtors who plan to retain their 910 car must pay the full amount of the loan. Section 1325(a)(9) prevents strip down of secured claims on 910 cars. "To conclude otherwise would be inconsistent with the terms of the statute and the legislative history of the statute, sparse as it is." Section also does not require creditor to be secured "only" by vehicle. Thus, section applies even if creditor's claim was also secured by service contract bought by debtors. *In re Johnson*, 337 B.R. 269 (Bankr. M.D.N.C. 2006) (Waldrep, J.).

2. Debtor amends strip-down post-BAPCPA plan to treat the entire 910 claim as unsecured, stating that Section 506 does not apply to the hanging paragraph. Court declares claim of 910 auto lender as fully secured, stating: "Given the overall structure of the Bankruptcy Code and legislative history, which indicates that Congress did not intend to disfavor the class of secured creditors subject to the flush language of Section 1325(a), BAPCPA prevents strip-downs under Section 1325(a), and 910 creditors must be repaid in full through a chapter 13 plan if the debtors wish to retain the collateral securing the claim." *In re Turner* (Bankr. D.S.C. 2006).

3. Based on a Section 1325(a) provision indicating that bifurcation of undersecured claims does not apply to cramdown of chapter 13 plan of 910 lender, Court would not confirm plan providing for bifurcation and cramdown of 910 lender's claim, even if the lender didn't timely object to such treatment in the plan. 910 lender's objection sustained. *In re Montgomery*, No. 06-50043 (Bankr. E.D. Ky. 2006) (Howard, J.).

4. BAPCPA provision dealing with bifurcation of undersecured claims does not apply to cramdown of Chapter 13 plan over undersecured 910 creditor's objection. Thus, cramdown of the plan requires payment of 910 creditor the full value of vehicle securing its claim. Since enactment, majority of courts interpreting the hanging paragraph hold that it precludes a Chapter 13 debtor from using § 506 to cram down a 910-day vehicle. Were this Court to adopt the reasoning in *Carver*, Section 1325(a)(5) would be rendered completely inapplicable to 910-day vehicle claims. *In re Montoya*, 341 B.R. 41 (Bankr. D. Utah 2006) (Boulden, J.).

5. The Hanging Paragraph does not make § 1325(a)(5) inapplicable to certain secured claims. Even though the Hanging Paragraph makes § 506 inapplicable to certain secured claims, it does not mean that claims covered by the Hanging Paragraph are no longer secured. As the Hanging Paragraph does not strip otherwise secured claims of their secured status, § 1325(a)(5) continues to apply to those claims. *In re Shaw*, 341 B.R. 543 (Bankr. M.D.N.C. 2006) (Carruthers, J.).

B. The Law of Unintended Consequences

1. While chapter 13 debtor in cramdown of 910 creditor had to pay the full amount of the secured claim without regard to the value of the cars that are the collateral, the debtor did not have to pay cramdown interest at the contract rate. Instead, it could pay at the "prime-plus" formula rate established by the Local Rules and by *Till*. *In re Robinson*, 338 B.R. 70 (Bankr. W.D. Mo. 2006) (Federman, J.).

2. State law controls issue of whether creditor has purchase-money security interest in chapter 13 debtor's car for purposes of Section 1325(a)(5), which prevents bifurcation of the 910 creditor's claim. Here, the secured claim of a creditor that did not hold purchase-money security interest in the debtor's car under state law could be bifurcated into secured and unsecured portions by the chapter 13 plan. Under Alabama law, "purchase-money security interest" secures the money used to acquire the collateral and nothing else. Because the entire debt was not incurred as all or part of vehicle's purchase price, but rather represented money advanced for purchase of the car plus four separate future cash advances, the car secured more than debt for money used to acquire it, and hence the creditor's security interest lost its purchase-money character. *In re Horn*, 338 B.R. 110 (Bankr. M.D. Ala. 2006) (Williams, J.).

3. Debtors that surrender their cars pay nothing because lenders can't assert an unsecured deficiency claim on surrendered collateral. The lender must accept the car in full satisfaction of its claim. *In re Ezell*, 338 B.R. 330 (Bankr. E.D. Tenn. 2006) (Stair, J.).

4. Court notes that although this section "proscribes the application of Section 506 to the facts of the present case, the Amendment does not preclude the applicability of Section 1322(b)(2), which affords a debtor the ability to modify a secured claim (other than a secured claim secured by the debtor's principal residence); specifically, the ability to change the interest rate, change the number of payments, and change the amount of payments." Court refuses under this section, however, to hold that 910 creditor is not fully secured. *In re Parish*, 2006 WL 167910 (Bankr. M.D. Fla. 2006) (Funk, J.).

5. BAPCPA provision prohibiting application of Section 506 whenever chapter 13 debtor seeks to cramdown the claim of a 910 creditor did not simply prohibit bifurcation of such claims. It also foreclosed treatment of claims of such 910 lender as secured claims in context of cramdown of Chapter 13 plan. In essence, a 910-day vehicle claim is neither an unsecured claim nor an allowed secured claim. *In re Carver*, 338 B.R. 521 (Bankr. M.D. Ga. 2006) (Walker, J.). Court states:

   a. "Using § 1111(b) as a guide, with the understanding that Congress did not intend to use the hanging paragraph to punish 910 claim holders, the Court concludes as follows: In a Chapter 13 plan, a 910 claim must receive the *greater* of (1) the full amount of the claim without interest; or (2) the amount the creditor would receive if the claim were bifurcated and crammed down (i.e., secured portion paid with interest and unsecured portion paid pro rata)."

b. "The Court recognizes that this rule is awkward and cumbersome, but it has been fashioned to ensure that 910 claims are not punished under the new law. Of course, nothing prevents a debtor from proposing better treatment for a creditor with a 910 claim than required by the rule, just as nothing prevents such a creditor from accepting less than the rule requires. Bankruptcy practitioners should not lose sight of the fact that the process of plan confirmation involves give and take among debtors and creditors. In a case such as this, for example, the creditor likely would receive several thousand dollars more with cram down treatment due to payment of interest even if it received no distributions on its de minimus unsecured claim. Still, the debtor retains some leverage, such as his ability to surrender the collateral-especially when its value is substantially less than the claim. If nothing else, these circumstances offer creditors an opportunity to negotiate a payment accommodation that transcends any particular case and is reflected in the overall relationship between debtors and creditors."

c. "Before concluding, it is worth mentioning that this rule may open the door to questions regarding the valuation of collateral on 910 claims because such value is necessary to make the calculation required by the rule. The debtor can set a value in his schedules and in the Chapter 13 plan. However, that will not necessarily end the inquiry. Creditors also are free to indicate a value on their proof of claim forms. If the debtor's plan is silent as to valuation, there is no reason the Court cannot rely on the proof of claim if it is fully completed." *In re Carver*, 338 B.R. 521 (Bankr. M.D. Ga. 2006) (Walker, J.).

6. Court overrules fully secured creditor's objection to chapter 13 plan modifying the interest rate paid on the claim using *Till*. While post-BAPCPA debtors can't strip down undersecured purchase money liens, they may reduce per *Till* the interest rate paid on the secured claims. The plan called for the auto lender to get 7.75% interest, compared with the 17.9% rate in the contract. The Court rejected the lender's argument that *Till* applies only to cramdown plans and that since it was receiving full payment, *Till* didn't apply. Court ruled that *Till*, while interpreted in the context of a strip down, is broader and applies to all cramdowns (*i.e.*, whenever the plan is "confirmed over the objection of the secured creditor irrespective of the value of its collateral in relation to the amount of its claim"). Nothing in the hanging paragraph prevents the debtor from modifying other contractual rights, such as the interest rate. *In re Wright*, 338 B.R. 917 (Bankr. M.D. Ala. 2006) (Williams, J.).

7. The debtor has three choices: surrender the vehicle; provide treatment acceptable to the 910 creditor; or retain the car and provide the 910 creditor with a stream of payments. Each of the debtors has selected to retain the vehicle and therefore must provide the 910 creditor with a retained lien and a stream of monthly payments equal to present value, in equal monthly amounts, and sufficient to provide adequate protection. *In re Fleming*, 339 B.R. 716 (Bankr. E.D. Mo. 2006) (Schermer, J. & Surratt-States, J).

a. Court states: "Prior to BAPCPA, a debtor need only provide a secured creditor with lien retention and present value in order to retain its collateral under a Chapter 13 plan. BAPCPA expanded the lien retention requirement to specify the duration of the lien retention and to expressly state that the lien would remain in effect if the debtor failed to complete the plan. 11 U.S.C. § 1325(a)(5)(B)(i). BAPCPA added the requirements that periodic payments be in equal monthly amounts and that the payments be in an amount sufficient to provide adequate protection to the secured creditor. 11 U.S.C. § 1325(a)(5)(B)(iii). BAPCPA made no changes

to the language requiring that the secured creditor receive the present value of its claim. 11 U.S.C. § 1325(a)(5)(B)(ii). BAPCPA made an additional change to Section 1325 of the Bankruptcy Code applicable to the Car Creditors. At the end of subsection (a)(9) of Section 1325, BAPCPA added [the hanging paragraph]…. The Court must next address what impact, if any, the 910 Day Car Language [*i.e.*, the hanging paragraph] has on the permissible treatment of the Car Creditor's secured claim in the Chapter 13 plan."

b. Court disagrees with car creditors that the "910 Language" changes the present value requirement of Section 1325(a)(5)(B)(ii). Court states: that the 910 Language only renders Section 506 inapplicable to the claims and prohibits bifurcation and cram down by having their secured claims be the balance due on the filing date.

c. The 910 Language has no impact on the requirement to pay present value. *Till* still controls what interest rate is required to ensure present value under Section 1325(a)(5)(B)(ii).

d. Court rejects car creditors' argument that the 910 Language protects their claims from any modification in a Chapter 13 plan under the "plain meaning" doctrine. Court rejects argument, noting that Congress wanted to prohibit any modification in treatment of a secured creditor in a Chapter 13 plan. "In Section 1322(b)(2) of the Bankruptcy Code, Congress expressly prohibits a debtor from modifying the rights of a creditor whose claim is secured only by a security interest in real property that is the debtor's principal residence. Had Congress wanted to provide such treatment to Car Creditors in BAPCPA, they could have done so by using the language they used to provide such treatment to home mortgagees. Congress did not. Congress did not add any language to Section 1322(b)(2) mentioning 910 Day Car Creditors nor did it include such language in Section 1325 where it created the special treatment for 910 Day Car Creditors."

e. "State law determines rights in property only to the extent such rights are not modified by the Bankruptcy Code. Section 1322(b)(2) of the Bankruptcy Code expressly permits modification of the Car Creditor's rights subject to the limitations set forth in Section 1325 of the Bankruptcy Code. The Car Creditors also argue that they should receive payment at the contract rate because Congress intended to create a safe-harbor for automobile lenders. Congress did create a safe-harbor for automobile lenders which protects them from the cram down of their claims to the value of the vehicle as of the bankruptcy petition date. The safe-harbor does not extend to provide automobile lenders post-petition interest at the contract rate… [Thus, a] creditor whose claim comes within the 910 Language … of Section 1325(a)(9) … is entitled to receive post-petition interest at a current rate determined by an adjustment from the prime rate based on the risk of nonpayment under *Till.* BAPCPA did not change nor overrule *Till*." *In re Fleming*, 339 B.R. 716 (Bankr. E.D. Mo. 2006) (Schermer, J. & Surratt-States, J).

8. While chapter 13 debtors could not cram down plan over 910 creditor unless the creditor was paid the full amount of its allowed secured claim over time with appropriate interest, the cramdown interest rate was governed not by terms of the parties' contract but by the formula approach of *Till*. *DaimlerChrysler Financial Services Americas, LLC v. Brown (In re Brown)*, 339 B.R. 818 (Bankr. S.D. Ga. 2006) (Dalis, J.).

9. Provision of BAPCPA providing that section 506 does not apply whenever chapter 13 debtor seeks to cramdown its plan on a 910 creditor and thus does not prevent court from treating such claims as secured claims for chapter 13 cramdown purposes. Section merely rendered the § 506 definition of "secured" inapplicable in Chapter 13 cramdown context, thus requiring the court to resort to state law to determine whether the creditor's claims were "secured." *In re DeSardi*, 340 B.R. 790 (Bankr. S.D. Tex. 2006) (Isgur, J.).

10. "The Debtors' argument that [the 910 lender] does not have a secured claim because of the elimination of the application of section 506 to section 1325 has been rejected by most courts which have considered the issue…. The allowed secured claim does not bear any interest by the terms of the Retail Installment Sales Contract; therefore, the question is whether section 1325 requires that interest be paid if the contract itself does not call for the payment of interest…. Most courts agree that the amendments contained in BAPCPA did not overrule the Till decision, and that case is still binding precedent for establishing the proper interest rate even in cases where the creditor's debt is secured by a '910' vehicle." *In re Scruggs*, -- B.R. -- (Bankr. E.D. Ark. 2006) (Mixon, J.).

11. Given Congress's knowledge of the *Till* decision and Congress's decision not to change to the applicable statutory language when enacting BAPCPA, *Till* remains good law and is the proper interest rate at which secured claims must be paid to meet the requirements of § 1325(a)(5)(B)(ii). The interest rate that satisfies the "present value" requirement of cramdown is governed not by contract terms, but by *Till*. *In re Shaw*, 341 B.R. 543 (Bankr. M.D.N.C. 2006) (Carruthers, J.).

III. Attorneys as Debt Relief Agencies (DRA)

A. Court Decisions on Whether Attorneys Are DRA's

1. Attorneys who are members of the bar of that court, as well as those admitted *pro hac vice*, are not "debt relief agencies" within the meaning of BAPCPA so long as their activities fall within the scope of the practice of law and do not constitute a separate commercial enterprise. *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. 66 (Bankr. S.D. Ga. 2005). This case is on appeal to the District Court for the Southern District of Georgia, Savannah Division, *In re Attorneys at Law and Debt Relief Agencies*, Case No. 05-206, with the US Trustee as appellant, arguing for reversal based on (A) the absence of a "case or controversy," (B) the absence of jurisdiction in the bankruptcy court to enter the order, and (C) the fact that DRA's in fact do apply to licensed attorneys, and thus Judge Davis's ruling was incorrect as a matter of law.

2. Local bankruptcy attorney files "Motion to Determine Attorney Status" following his post-petition employment by joint *pro se* chapter 7 debtors. In the motion, attorney asked court to hold that attorneys who practice in the Middle District of Georgia are not "debt relief agencies" under Section 101(12)(A) of the Bankruptcy Code. The UST objects. Court rules no "case or controversy" exists and dismisses the case. Court states: "In the case at bar, no party has threatened to enforce against Movant the debt relief agency provisions of BAPCPA. Movant has not sustained any real, actual, or direct harm or injury. Movant has not shown that he is in danger of sustaining any immediately impending harm or injury. The Court can only conclude that Movant has failed to satisfy the case or controversy requirement. The Court is persuaded that

Movant's motion must be dismissed." *In re McCartney*, 336 B.R. 588 (Bankr. M.D. Ga. 2006) (Hershner, J.).

B. Other Prominent Challenges to Constitutionality of DRA Provisions

1. *Milavetz, Gallop & Milavetz v. United States*, No. 05-2626 (D. Minn.): Minnesota law firm, two of its attorneys, and two unnamed members file complaint seeking declaratory judgment that the DRA provisions of BAPCPA "unconstitutionally restrict attorneys from giving accurate, lawful information to their clients. The complaint challenges the DRA provisions under the First and Fifth Amendments. The complaint challenges BAPCPA's DRA provisions that: "limit attorneys' ability to ethically and competently advise and represent their clients and illegally restrict attorneys' First Amendment right[s]"; "illegally restrict the public's right to receive information from attorneys, a right presumptively protected under the First Amendment"; and they "also conflict directly with the Minnesota Rules of Professional Responsibility, which require attorneys to provide 'competent representation' to their clients." The complaint challenges the DRA provisions as unconstitutionally vague. It also challenges (A) Section 526(a)(4)'s prohibition of a DRA's advising consumer debtors to incur more debt in contemplation of filing a petition as violating the First Amendment and (B) Sections 528(a)(4) and 528(b)(2), which require DRA's to insert specified statements in its advertisements of bankruptcy assistance services or assistance with debts, violate the First Amendment.

2. *Connecticut Bar Ass'n v. United States, et al.*, No. 06-729 (D. Conn.): National Association of Consumer Bankruptcy Attorneys (NACBA), the Connecticut Bar Association, six attorneys, and one law firm file complaint on May 11, 2006 seeking declaratory and injunctive relief against the US, the US Attorney General, and the local US Trustee, challenging the constitutionality of Sections 526, 527, and 528 of BAPCPA (the Debt Relief Agency provisions). The complaint states that "[t]he Defendants who are charged with the statute'senforcement have taken the official position that attorneys are subject to the requirements imposed upon debt relief agencies.[under Code Sections] 526, 527, and 528. Under this construction of the statute, these provisions censor attorneys and restrict their ability to give their clients complete and competent counsel; they limit attorneys' ability to describe the relative merits and consequences of various courses of action legally available to clients; they compel attorneys to provide false and misleading information to their clients; they restrict attorney advertising in a manner inconsistent with the First Amendment; they deter attorneys and clients from entering into attorney-client relationships when they otherwise would have done so; and they infringe upon the traditional power of the States to regulate the practice of law."

IV. Homestead Exemptions

A. Homestead cap applies in opt-out states

1. Phrase “as a result of electing” in Code Section 522(p) does not indicate an intent by Congress to homestead cap applicable only to debtors in states which have not opted out of federal bankruptcy exemptions, and who thus have choice between state and federal exemptions. Provision caps the homestead exemption available to debtors in opt-out states that don't opt-out, as well as in states, like Florida, that do opt-out. *In re Kaplan*, 331 B.R. 483 (Bankr. S.D. Fla. 2005) (Mark, J.).

2. Section 522(p) is applicable even though Nevada does not allow the choice of federal exemptions. Because the debtors acquired their homes within 1,215 days before the filing, they are limited to the $125,000 homestead set forth in that section notwithstanding the fact that the Nevada homestead is higher. *In re Virissimo,* 332 B.R. 201 (Bankr. D. Nev. 2005) (Riegle, J.).

3. "As a result of electing" language limiting the maximum state law homestead exemption to debtors who acquired homestead within 1,215 days of petition date and who have "elect[ed]" to claim state law exemptions could not be interpreted so as to limit this homestead cap only to debtors who reside in states that have not opted out of federal bankruptcy exemptions, and who thus have choice between state and federal exemptions.

4. BAPCPA's $125,000 cap on the homestead exemption (for properties obtained within 40 months of the filing) applies nationwide. *In re Kane,* 336 B.R. 447 (Bankr. D. Nev. 2006) (Markell, J.).

5. "The "result of electing" phrase does not, by its terms, compel the conclusion that Section 522(p) is inoperative in Florida and other opt-out states. That phrase can be read in harmony with applying the $125,000 in all states. Even if there is an ambiguity, the conclusion from the legislative history is inescapable–there is no expressed intent to make the $125,000 cap operative in some states, but not others." *In re Landahl,* 338 B.R. 920 (Bankr. M.D. Fla. 2006) (May, J.).

B. Homestead cap does not apply in opt-out states

1. The language in Code Section 522(p) "as a result of electing under subsection (b)(3)(A) to exempt property under State or local law" is plain and that there is no need to resort to legislative history. The "plain meaning" is that the $125,000 limitation only applies to debtors in those states that allow the debtors to elect between federal and state exemptions. It is not applicable to debtors that live in opt-out states such as Arizona and, by inference, Nevada. *In re McNabb,* 326 B.R. 785 (Bankr. D. Ariz. 2005) (Haynes, J.) (1st BAPCPA decision).

C. Section 522(o) Limitations

1. Debtor's sale of nonexempt assets and use of sales proceeds to pay off second mortgage on his home and increase equity in home on eve of bankruptcy went beyond mere bankruptcy estate planning and warranted denial of homestead exemption for any equity so created. While debtor may convert non-exempt assets into exempt assets on eve of bankruptcy, BAPCPA's Section 522(o) requires that conversion not be done with intent to defraud creditors, as manifested by extrinsic evidence. Since this case was filed on April 20, 2005 when BAPCPA was signed, Section 522(o) applies. *In re Maronde,* 332 B.R. 593 (Bankr. D. Minn. 2005) (Dreher, J.).

D. Section 522(p) Limitations

1. Term "previous principal residence," as used in "safe harbor" provision of Section 522(p)(2)(B) indicating that statutory cap on state law homestead exemption is available to debtors who acquire homestead within 1,215 days of petition date, will not apply to limit exemption that debtor can claim in value of debtor's present residence that is attributable to his accrual of equity through his ownership of previous residences located in same state that debtor acquired prior to start of this 1,215-day period. Limitation is not limited only to residence that debtor owned immediately prior to current residence. "The statute is clear that the limitation contained therein applies to that

portion of the value of a debtor's residence, acquired *within* 1215 days of the petition date, which ***exceeds*** $125,000. In addition, however, the extent of the limitation is determined *only after deducting* from the value of a debtor's current residence that portion of the property's value attributable to the debtor's ownership of a previous residence, provided that the previous residence is located within the same state as the current residence and was acquired in excess of 1215 days before the petition date…. The gravamen of § 522(p)(1) is to limit the ability of individuals desiring to take advantage of the lenient exemption provisions of 'debtor-friendly' states by relocating to such states. H.R. Rep. No. 190-31, pt. 1, at 102 (2005). To the contrary, the 'safe harbor' language of § 522(p)(2)(B) would appear to have been intended to afford protection to individuals like the Debtor who, rather than seeking to take advantage of Florida's exemption provisions to shelter illicitly- or improperly-obtained funds, simply have benefited as a result of their ownership of Florida real property and the general appreciation of property values attributable to previous intra-state transactions." (Emphasis in original.) *In re Wayrynen*, 332 B.R. 479 (Bankr. S.D. Fla. 2005) (Friedman, J.).

E. Section 522(q) Limitations

1. The phrase "criminal act" in BAPCPA's new Section 522(q) capping a state homestead claim at $125,000.00 if the debtor owes a debt based upon certain criminal acts, does not require a conviction or a certain level of culpability. "To read 11 U.S.C. § 522(q)(1)(B)(iv) in this way is also consistent with a second applicable rule of statutory construction. That is, where 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' Because Congress requires a conviction for purposes of § 522(q)(1)(A) and a criminal act for § 522(q)(1)(B)(iv), the latter cannot include the requirement of the former." *In re Larson*, 340 B.R. 444 (Bankr. D. Mass. 2006) (Hillman, J.).

F. Entireties Property

1. Bankruptcy Code's entireties exemption is not only a function of the value of the bankruptcy estate's equity in the entireties property claimed as exempt, but also amount of enforceable claims held by creditors against both debtor and spouse. Allowed exemption equals value of equity in undivided interest minus whatever debts are owed by the debtor jointly with his spouse. *In re Raynard*, 327 B.R. 623 (Bankr. W.D. Mich. 2005) (Hughes, J.).

G. Domicile

1. Trustee objected to claimed homestead exemption, arguing that debtor was limited to state law exemptions available under Colorado law, where the debtor resided before moving to Florida less than 730 days before petition date. Court finds debtor ineligible under 730 day rule to claim Florida state exemptions. Debtor also couldn't claim Colorado exemptions because debtor was not a Colorado resident anymore and Colorado state exemptions were enacted solely for benefit of Colorado residents. However, Debtor could claim federal bankruptcy exemptions despite the fact that both Colorado and Florida are opt-out states. *In re Underwood*, -- B.R. -- (Bankr. N.D. Fla. 2006) (Killian, J.).

H. Abandonment

1. Under Missouri law, debtor showed intent to not abandon by retaining connections with property, such as going on weekends and when school is out. Also, mortgage payments current and personalty left behind. Debtor intended to attempt to keep partial parcel for mobile home. *In re Seeley*, 341 B.R. 277 (Bankr. W.D. Ark. 2006) (Dow, J.).

I. Appreciation in Home Equity Value

1. Under BAPCPA's new Code section 522(p), a debtor's increasing equity in residential property from regular mortgage payments made during the 40 months preceding the debtor's bankruptcy filing is not an "interest" acquired during the period that would be subject to the BAPCPA's statutory homestead cap. Thus, the increased equity position remains exempt. "[O]ne does not actually 'acquire' equity in a home. One acquires title to a home. The Debtors acquired title and fee to their home in early 2000, about five years before Congress passed the BAPCPA, and two and half years prior to the start of the 1215 day period applicable to their bankruptcy case. The 'interest' the Debtors acquired was the actual purchase of the home, which was completed well before the 1215-day period. Thus, the 'interest' held by the debtors in their homestead is outside the 1215-day period and not subject to the $125,000 cap." *In re Blair*, 334 B.R. 374 (Bankr. N.D. Tex. 2005) (Hale, J.).

J. Intervening Statutory Changes

1. Increase in NY's homestead exemption applicable to debts existing when the exemption was amended. Creditor argued exemption could not be applied retroactively. Court holds that nothing in the amendment indicated whether it was to be applied retroactively. Court applies general rule of statutory construction that statutes designed to remedy defects in the common law have retroactive effect. According to the Court, the homestead exemption remedied the problem arising when people lost their homes to creditors with money judgments because the common law did not provide for a homestead exemption. Court holds that remedial statutes may be applied retroactively only to the extent they do not impair vested rights and that retroactive application of the increase in the homestead exemption did not impair the creditor's rights because the homestead exemption existed when the claim was created. All that changed, the court notes, was the amount of the exemption (from $10,000 to $20,000). Thus, while the original homestead exemption could not have retroactive effect, creditors should not assume that future amendments are limited to prospective effect only. *In re Little*, No.05-68281 (Bankr. N.D.N.Y. 4/24/06) (Gerling, J.).

2. "This Court adopts the reasoning and the decision in *Little*, that the Homestead Exemption Amendment is remedial and, therefore, is to be applied retroactively, and that such an application would not violate the United States Constitution." *In re Hayward*, 2006 WL 1455486 (Bankr. W.D.N.Y. 2006) (Ninfo, J.).

K. Preemption

1. Michigan exemption statute that unambiguously permitted debtors in bankruptcy to claim exemption for interests of co-debtor and any dependent, in addition to their own, was preempted by federal law. *In re Vinson*, 337 B.R. 147 (Bankr. E.D. Mich. 2006) (Tucker, J.).

L. Residency Requirements

1. Hungarian citizen in US on multiple entry business visa was barred from staying in US for more than 180 days. Court holds that to qualify for Florida homestead exemption, Debtor must be a permanent resident of the state and intend to make his home his permanent residence. An alien can only meet this residency requirement if he has obtained permanent resident status as of the petition date. Here, on the petition date, the application to adjust to permanent resident status was pending and the debtor did not acquire permanent resident status until more than three months after filing his petition. Consequently, the Debtor did not fulfill the residency requirement as of the petition date. *In re Fodor*, 339 B.R. 519 (Bankr. M.D. Fla. 2006) (Williamson, J.).

M. Revocable Trusts and Homestead Exemptions

1. Debtor transfers home to revocable trust, of which she is the owner and beneficiary. Though she was beneficial and *de facto* owner, homestead exemption could not be applied where trust held legal title to the property. *In re Estarellas*, 338 B.R. 538 (Bankr. D. Conn. 2006) (Krechevsky, J.).

2. Equitable interest of debtors in living, revocable trust, of which they were the sole beneficiaries sufficient under Kansas law to obtain protection under state's homestead exemption. *Redmond v. Kester (In re Kester)*, 339 B.R. 749 (Bankr. 10th Cir. 2006).

3. Asserting full amount of state's homestead exemption meant the entire cash value of the exemption would be preserved, but such declaration did not remove home from the bankruptcy estate, and trustee could sell property and secured creditor could amend proof of claim to seek value of appreciation beyond senior liens and exemption amount. Debtors need to make clear effort to remove property from estate based on exemptions. *In re Shorey*, No. 04-01116 (Bankr. D. Az. 2006) (Hollowell, J.).

N. Miscellaneous Homestead Exemption Rulings

1. Debtor's use of part of basement as office did not render his interest in that part of the house non-exemptible under District of Columbia law, and debtor's incidental renting of two bedrooms in his three-bedroom single-family dwelling to university students did not destroy the character of those rooms as part of real property used as debtor's residence. Thus, debtor entitled to exemption for whole residence. *In re Springmann,* 328 B.R. 251 (Bankr. D.D.C. 2005) (Teel, J.).

2. "Stacking" or doubling an exemption is permitted in a joint bankruptcy case under Code section 522(m), but not if joint debtor has no interest in property in spouse's name, and thus debtors can't stack their federal wild card exemptions. Contribution of payment of real estate taxes, if the only contribution of other spouse, is insufficient under Wisconsin law to establish other debtor's interest in property. *In re Czerneski*, 330 B.R. 240 (Bankr. E.D. Wis. 2005) (Kelley, J.).

3. Fact that $1.00 exemption claimed by chapter 7 debtors in timeshare, when added to indebtedness that timeshare secured, resulted in sum exceeding the timeshare's estimated fair market value on petition date did not mean that debtors' entire equity in property was exempt. Rather, having claimed exemption in specific amount of $1.00, debtors were limited to $1.00 exemption. Further, chapter 7 trustee's failure to object to $1.00 exemption in timeshare, whose estimated fair market value was equal to indebtedness secured by lien, did not prevent trustee (after time for objections

to exemptions passed) from seeking authority to sell timeshare free and clear of liens and to distribute sales proceeds. Sales motion was not belated objection to claimed exemption. *In re Einkorn*, 330 B.R. 570 (Bankr. E.D. Mich. 2005) (Rhodes, J.).

4. Michigan statute authorizing bankrupt debtors to exempt "interest of the debtor, the codebtor, if any, and the debtor's dependents, not to exceed $30,000," in homestead permitted couple to exempt from their separate bankruptcy estates an interest of up to $30,000 in the aggregate, not the $60,000 requested by stacking exemptions. *In re Lindstrom*, 331 B.R. 267 (Bankr. E.D. Mich. 2005) (Shefferly, J.).

5. Debtors' intent to move from home without intending to return does not destroy homestead rights on the basis of abandonment. Debtors intended to sell house and reinvest proceeds in new house, and thus exemption could still be claimed. *In re Huddleston*, 2005 WL 2271859 (Bankr. C.D. Ill. 2005) (Fines, J.).

6. Debtors who rented out portion of property as sites for mobile homes and recreational vehicles were not entitled to Florida homestead exemption for the entire 2.3 acre tract on which their home was located. Further, indivisible nature of property and mixed residential and commercial uses of it enabled trustee to sell entire property, with apportionment of sales proceeds. *In re Radtke*, 2006 WL 1359923 (Bankr. S.D. Fla. 2006) (Friedman, J.).

7. Postpetition appreciation in value of homestead above the amount at which it was implicitly valued when Chapter 13 plan was confirmed, which gave rise to some nonexempt equity in the property, was not property of chapter 7 estate following conversion. Hence, no proceeds from postconfirmation, preconversion sale of homestead had to be turned over to chapter 7 trustee. *In re Niles*, -- B.R. -- (Bankr. D. Ariz. 2006) (Case, J.).

8. Court states regarding pre-BAPCPA case. Question is whether under 11 U.S.C. § 522(b)(2)(B) the Debtor can properly claim exempt his interests in the Michigan Properties held in tenancy by the entirety, notwithstanding the fact that Illinois opted out of the federal exemptions and limits tenancy by the entirety to homestead property. The proper construction and application of § 522(b)(2) and the relevant Illinois exemption statute was an issue of first impression for the Court. Court finds that Illinois limits creation of tenancy by the entirety to homestead property. Because the Michigan Properties were not the homestead property of the debtor, Court finds that the debtor may not claim exemptions in those properties under § 522(b)(2)(B). *In re Giffune*, -- B.R. -- (Bankr. N.D. Ill. 2006) (Squires, J.).

V. Credit Counseling

A. Constitutionality of Credit Counseling Provisions

1. Requirement that individuals, but not other entities, obtain credit counseling to be eligible for bankruptcy does not violate the equal protection clause. Congress simply mandated that any natural person, as opposed to an artificial entity such as a partnership, corporation, or limited liability corporation, who seeks bankruptcy relief must either receive credit counseling or be exempt from the requirement. This mandate is imposed regardless of the extent of business or personal assets which such individual may own, or whether such individual even operates a

business. This "line-drawing" of the conditions of eligibility was not so devoid of rational justification that the court would substitute its personal notion of good public policy for that of Congress. *In re Watson*, 332 B.R. 740 (Bankr. E.D. Va. 2005) (St. John, J.).

2. "Congress may have imposed this [credit counseling] requirement specifically to discourage the practice of hastily filing for relief. Whether that is a wise policy decision is not a determination for this Court to make. In this case, the Debtor could not reasonably have expected the credit counseling service to accommodate her need for counseling given the time allowed between her request and the time of the pending foreclosure sale. The response she received was well within the parameters set by Congress and apparently consistent with voluntary industry standards on best practices. The seemingly harsh effect of the literal application of the statutory requirement is ameliorated in part as well by the opportunity, sanctioned by the terms of the statute, to obtain the required counseling via the internet or by telephone." *In re Talib*, 335 B.R. 417 (Bankr. W.D. Mo. 2005) (Dow, J.).

3. There is a rational basis for the BAPCPA's credit counseling requirement. Congress expected that debtors would be proactive with their financial problems. Thus, the provisions do not violate the Constitution. *In re Tomco*, 339 B.R. 15 (Bankr. W.D. Pa. 2006) (Deller, J.).

B. No Exigency and No Waiver

1. No exigency because chapter 7 filing will not affect the validity or enforceability of lien against car, but (for the vast majority of cases) only defer the enforcement of a consensual lien via the temporary automatic stay. The automatic stay can be terminated by motion of the secured creditor under Sectcion 362(d), and without some indication that the auto lender would make significant concessions to the debtor on delinquency, there is nothing to support a conclusion that the debtor must file now to gain some permanent benefit on the debtor-creditor dispute that she apparently considers to be her most serious credit-related problem. Further, the debtor never stated she actually requested credit counseling services or that she was unable to timely obtain such services after such a request. She only states she made a website search and concluded in isolation that she could not afford to travel to the approved agencies identified through the search for an in-person briefing and counseling. *In re LaPorta*, 332 B.R. 879 (Bankr. D. Minn. 2005) (Kishel, J.).

2. Allegations that putative debtor was defendant in sequestration suit and that the vehicle could be repossessed were themselves insufficient to establish exigency absent allegations in the motion of the date of the upcoming sequestration hearing, the defenses to the action, or other facts that would have permitted court to determine exigency. *In re Hubbard*, 333 B.R. 377 (Bankr. S.D. Tex. 2005) (Isgur, J.) (ruling in 5 separate debtor cases).

3. Court applies *Pioneer* test to determine if failure to file certification was due to excusable neglect. Court determines test not met because of inconsistencies in the testimony of Debtors' counsel, the lack of contemporaneous documentation, the inconsistent representations in the motion and at argument, and the multiplicity of documents filed in this case. Court not persuaded that Debtors actually received required briefing prepetition or that the Debtors or counsel were excusably negligent in failing to properly certify completion of the briefing requirement. "If the issues in this case were simply about computer software errors and counsel's excusably negligent efforts in reporting the Debtors' otherwise completed acts to the Court, the Court may have ruled differently; however, the real issues involve the Debtors' questionable prepetition actions and counsel's

inexcusable failure to reasonably inquire and verify before filing." *In re Sukmungsa*, 333 B.R. 875 (Bankr. D. Utah 2005) (Boulden, J.).

4. Court should base exigency finding not as much on imminence of a threat but on why debtor could not obtain the required credit counseling. Fact that prospective debtor waited until last day before foreclosure to get attorney and seek credit counseling isn't exigent because "as the court noted in *Wallert*, Congress may have imposed this requirement specifically to discourage the practice of hastily filing for relief. Whether that is a wise policy decision is not a determination for this Court to make. In this case, the Debtor could not reasonably have expected the credit counseling service to accommodate her need for counseling given the time allowed between her request and the time of the pending foreclosure sale. The response she received was well within the parameters set by Congress and apparently consistent with voluntary industry standards on best practices. The seemingly harsh effect of the literal application of the statutory requirement is ameliorated in part as well by the opportunity, sanctioned by the terms of the statute, to obtain the required counseling via the internet or by telephone." *In re Talib*, 335 B.R. 417 (Bankr. W.D. Mo. 2005) (Dow, J.).

5. Debtor receives certificate postpetition. *In re Childs, et al.*, 335 B.R. 623 (Bankr. D. Md. 2005) (*per curiam* ruling on 5 debtors*)*.

6. Debtor claims lack of time to obtain counseling. *In re Childs, et al.*, 335 B.R. 623 (Bankr. D. Md. 2005) (*per curiam* ruling on 5 debtors*)*.

7. Term “exigent circumstances” does not refer to debtor's problems or situation but to the circumstances preventing the person from obtaining the required credit counseling. Individual's ignorance of the law was not a valid excuse for failure to obtain counseling. Although “exigent circumstances” existed in the sense that individual was about to lose home at foreclosure, the putative debtor failed to demonstrate that such circumstances prevented her from obtaining credit counseling. *In re Valdez*, 335 B.R. 801 (Bankr. S.D. Fla. 2005) (Cristol, J.).

8. No exigency where debtors first met with bankruptcy attorney and was informed of upcoming changes in law one month before petition was filed. Also, exigency of impending garnishment of debtor-wife's wages had already occurred twice between debtors' meeting with counsel and filing of petition. *In re Rodriguez*, 336 B.R. 452 (Bankr. D. Idaho 2005) (Myers, J.).

9. Court's focus in deciding whether requisite exigent circumstances exist should be less imminence of threatened event and need for automatic stay, and should instead focus on why debtor couldn't get required credit counseling prior to filing. *In re DiPinto*, 336 B.R. 693 (Raslavich, J.).

10. Absent exigent circumstances, the credit counseling requirement must be fulfilled prior to filing. "Because the requirements of the statute are so clear and so exacting on their face, and because they dovetail with a rational divination of congressional intent, it simply is not open to the courts to depart from their express terms.” (Citation omitted.) All cases must be dismissed because none of the debtors met with a credit counselor, none of the debtors meet the express waiver exceptions set forth of Code section 109(h)(4), and none have filed a satisfactory certification showing that exigent circumstances prevented compliance with the requirement. Although this is a harsh result, the statute gives the court no discretion. *In re Fields*, 337 B.R. 173 (Bankr. E.D. Tenn. 2005) (Stair, J.).

11. *Pro se* debtor's petition dismissed where she argued she "did not know anything about the credit counseling class being a new requirement." Court rules that "[i]n the absence of such a certification, the waiver cannot be granted, even if the debtor … was honestly unaware of the requirement and is prepared to cure the deficiency promptly." *In re Ashley*, (Bankr. E.D. Va. 2006) (Mitchell, J.).

12. Threatened loss of debtor's home by foreclosure one day after petition was filed was not exigent circumstance because debtor had ample advance notice of foreclosure sale but waited until one day prior thereto to contact attorney. *In re Dixon*, 338 B.R. 383 (Bankr. 8th Cir. 2006) (Kressel, J.).

13. Debtor failed to obtain credit counseling until seven days after case filed and failed to file a certificate describing exigent circumstances. *In re Wallace*, 338 B.R. 399 (Bankr. E.D. Ark. 2006) (Mixon, J.).

14. Debtor who missed two credit counseling appointments in advance of filing showed lack of requisite diligence, despite pending foreclosure action. *In re Dansby*, 340 B.R. 564 (Bankr. D.S.C. 2006) (Waites, J.).

15. Debtor's attorney enrolls debtors in credit counseling on petition date, which is completed the following day. Petition was filed one day after meeting with attorney and two days before foreclosure sale. No certification was filed, nor was a hearing requested to determine eligibility. Case dismissed, with court stating that it lacks discretion to act otherwise. *In re Waggoner*, 2006 WL 705931 (Bankr. E.D. Ky. 2006) (Scott, J.).

16. Imminent foreclosure sale is not an exigency because the debtor waited to 6:30 pm on the day before the foreclosure sale to contact an attorney, even though he had 20 days' notice of the foreclosure sale. Debtor calls credit counseling agency prepetition and learned that personal interview is 2 weeks away and internet counseling is 24 hours away. BAP affirms bankruptcy court. *In re Anderson*, 2006 WL 314539 (Bankr. N.D. Iowa 2006) (Edmonds, J.)

17. If debtor fails to obtain credit counseling on basis that it was in negotiations with mortgagee, no exigency exists. Court further holds that it is not unconstitutional to restrict consumer eligibility in a way that is not done with corporations. *Hedquist v. Fokkena (In re Hedquist)*, 2006 WL 1042429 (Bankr. 8th Cir. 2006) (Federman, J.).

18. Elderly married couple owned 1986 mobile home in Orlando. Writ of possession served on day of filing. Debtors try to obtain credit counseling after meeting with attorney, but failed because of computer problems. Debtors otherwise comply with all reporting requirements. Court strikes case. *In re Carey*, No. 06-00490 (Bankr. M.D. Fla. 2006) (Briskman, J.).

19. Debtors not eligible for temporary waiver where debtors made no attempt to obtain credit counseling until one hour after petition was filed. Credit counseling requirement is not mere formality, but a substantive requirement designed to provide individual in financial distress with opportunity to evaluate his or her non-bankruptcy debt resolution options prior to filing for bankruptcy relief. Case stricken, and no bankruptcy case results from filing of petition. *In re Carey*, No. 06-00490 (Bankr. M.D. Fla. 2006) (Briskman, J.).

C. No Exigency, But Debtor Given Another Chance to Replead

1. Court denies request to extend credit counseling requirement, but grants 15 day extension to file amended motion complying with requirements. Court further states that, regarding the 5 day prerequisite period in Section 109(h)(3)(A)(ii) as to a debtor's inability to obtain counseling, there is no express requirement that debtor exhaust all credit counseling options or that debtor accept any offer of counseling, no matter how inconvenient or onerous. Rather, whether credit counseling could have been obtained by debtor within requisite five-day period should be judged by what debtor could reasonably accomplish in light of his particular, and likely exigent, circumstances. *In re Graham*, 336 B.R. 292 (Bankr. W.D. Ky. 2005) (Fulton, J.).

2. Inability to "get a good attorney to advise [her] of [her] rights" was insufficient. Court notes that the standards are not high for *pro se* debtors, but that some showing must be made to prove that the debtor "was confronted with an urgent situation that rendered [it] unable to comply" with the credit counseling requirement. Situations that call for an immediate response, such as impending sale of putative debtor's home or means of transportation, are examples of potentially "exigent circumstances" that might warrant a temporary exemption the credit counseling requirement. Still, because putative debtor, with counsel's assistance, might be able to set forth requisite exigent circumstances, court would not dismiss case, but would allow putative debtor ten days to obtain counsel and to file proper certificate of exigent circumstances. *In re Henderson*, 339 B.R. 34 (Bankr. E.D.N.Y. 2006) (Stong, J.).

3. Incarcerated debtor files without completing credit counseling, asserting that prisoners are not required to get counseling because they are "incapacitated or disabled" under Section 109(h). Court grants debtor an extension of time to receive credit counseling under Section 109(h)(3), which permits a court to defer the credit counseling requirement for 30 days, or an additional 15 days for cause shown, from the date of the filing of the petition upon the debtor's submission that describes exigent circumstances meriting a waiver of the requirements of § 109(h)(1). The court agrees to treat debtor's motion to proceed and his response to the U.S. Trustee's objection as the required submission and for good cause shown ordered an additional 15 days for completion of the requirement. Court concludes that debtor must complete credit counseling within 45 days of the filing of petition. *In re Star,* 2006 WL 1409098 (Bankr. E.D. Va. 2006) (Tice, J.).

D. Exigent Circumstances Found, But Not Enough to Prevent Dismissal

1. Chapter 13 debtor not entitled to a waiver of credit counseling requirement where neither debtor's original certification of exigency nor motion to vacate demonstrated that debtor had requested credit counseling services prior to filing her petition and that he was unable to obtain such services during the five-day period after making the request. *In re Gee*, 332 B.R. 602 (Bankr. W.D. Mo. 2005) (Dow, J.).

2. Debtor had a business subject to an "unlawful detainer" action that was scheduled to be heard on the petition date. Debtor files 20 minutes before start of unlawful detainer action. Debtor admits that he didn't seek counseling earlier, and thus case must necessarily be dismissed because the debtor didn't allege he was unable to obtain credit counseling within 5 days of asking for one. *In re Watson*, 332 B.R. 740 (Bankr. E.D. Va. 2005) (St. John, J.).

3. Appears to be the first case interpreting the credit counseling provisions. Court states: "The language of § 109(h)(3) is conjunctive. Accordingly, the debtor must satisfy each of the elements set forth in that subparagraph. The debtor's motion does describe exigent circumstances that merit a waiver of the credit counseling requirement. If the motion were certified and if exigent circumstances were sufficient, the motion would be satisfactory. But, that is not the structure of the statute. The debtor must additionally demonstrate that the debtor requested credit counseling services, but was unable to obtain the services during the five day period beginning on the date on which the debtor made the request. The motion makes no such allegation. Because the statute requires that all of the requirements be satisfied, the debtor's motion must fail." *In re Hubbard*, 333 B.R. 373 (Bankr. S.D. Tex. 2005) (Isgur, J.).

4. Possible loss of the family home or sole means of transportation unless immediate relief is granted is an "exigent circumstance" for credit counseling purposes. *In re Hubbard*, 333 B.R. 373 (Bankr. S.D. Tex. 2005) (Isgur, J.) (containing rulings on 5 separate debtor cases).

5. Need to file to save residence from sheriff's sale was "exigent circumstance," but failure to certify or mention anything regarding prepetition attempts to obtain credit counseling prevented motion for temporary waiver of credit counseling requirement from qualifying as sufficient "certification." *In re Cleaver*, 333 B.R. 430 (Bankr. S.D. Ohio 2005) (Walter, J.).

6. Assertion that creditor was about to repossess family's only transportation was "exigent circumstance." Under BAPCPA, however, to become a "debtor," an individual must show that request was made before the petition was filed. *In re Davenport*, 335 B.R. 218 (Bankr. M.D. Fla. 2005) (May, J.).

7. Petitions filed on eve of foreclosures or evictions reflect exigent circumstances, but not sufficient alone to prevent dismissal of petitions. *In re Childs, et al.*, 335 B.R. 623 (Bankr. D. Md. 2005) (*per curiam* ruling on 5 debtors*)*.

8. Court finds that "based on the common understanding of exigency and exigent circumstances, the imminent loss of one's home qualifies as an exigent circumstance, and, therefore, [the filer] meets the first requirement of the § 109(h)(3) exception. However, [she] has not satisfied the second requirement of § 109(h)(3), and, therefore, [she] is not eligible to be a debtor under the Bankruptcy Code." *In re Calderon*, 2006 WL 871477 (Bankr. S.D. Fla. 2006) (Isicoff, J.).

E. Requirement Waived / Counseling Unavailable

1. Credit counseling requirement does not necessarily impose mandatory 5 day waiting period after debtors first requested services before they can file bankruptcy petition. If credit counseling agency states it can't provide counseling within 5 days of debtor's request, then debtor doesn't need to wait five days before filing. However, they must wait to receive such services, regardless of the exigency, if the agency indicates that such counseling can be provided within the five-day period. *In re Rodriguez,* 336 B.R. 462 (Bankr. D. Idaho 2005) (Myers, J.).

2. No local counseling agency could speak Creole. "Since the credit counseling is a new provision and it is provided for a particular purpose, the position could be taken that it should be strictly construed and that, if the credit counseling agency cannot provide the counseling in the debtor's language and the debtor cannot afford to hire a translator, there is no possibility the debtor can get

the credit counseling. Therefore, this Court grants the waiver of the credit counseling requirement in this case because of the inability of any of the certified credit counseling agencies to provide pre-bankruptcy counseling in Creole." *In re Petit-Louis*, 338 B.R. 132 (Bankr. S.D. Fla. 2006) (Cristol, J.).

F. Requirement Not Waived Based on Type of Debtor

1. Prisoners required to seek credit counseling. Conclusory statement of counseling's unavailability is insufficient to satisfy statutory requirement. Section 109 "does not excuse incarceration and requires the court to dismiss the case if the debtor has not obtained credit counseling before filing." *In re Loving* (Bankr. W.D. Va. 2006) (Stone, J.).

2. Family farmers must receive credit counseling before filing for chapter 12 relief. 7 of 8 local agencies said they could provide such counseling to the farmer. Also, Section 109(h) applies to individuals and Section 101(18)(A) defines family farmer as individuals engaged in farming. *In re Bogedain* (Bankr. E.D. Mich. 2006) (Rhodes, J.).

G. Timing of Obtaining Credit Counseling

1. Counseling can be obtained on the same day, as long as it precedes the filing. *In re Warren*, 339 B.R. 475 (Bankr. E.D. Ark. 2006) (Mixon, J.).

2. Debtor must request credit counseling at least five days prior to petition date. Court rejects possibility that debtor could request credit counseling on the very day of his bankruptcy filing and be able to obtain a waiver as long as the credit counselor was unable to provide counseling within five days. This would lead to arbitrary results that Congress could not have intended. *In re Dansby*, 340 B.R. 564 (Bankr. D.S.C. 2006) (Waites, J.).

3. Credit counseling requirement does not require the debtor merely to obtain credit counseling some hours, minutes or seconds prior to filing the petition. It requires that such counseling must have been obtained at least one calendar day prior to the petition date. *In re Mills*, 341 B.R. 106 (Bankr. D.D.C. 2006) (Teel, J.).

H. Court's Duty Upon Presentation of Colorable Claim to Credit Counseling

1. Court considers nature and scope of independent duty to investigate whether a debtor has received the requisite credit counseling in order to determine whether the debtor has commenced a case over which the court has subject matter jurisdiction. Court concludes that a debtor need only make a colorable claim that it has received such counseling for the court to assert jurisdiction. If party in interest files motion to dismiss case for failure to comply with § 109(h), the court would need to decide whether debtor actually received such counseling. Here, "the debtor has presented a colorable claim that she received pre-petition credit counseling, and the court sees no need to pursue this matter further on its own initiative." *In re Hawkins*, 340 B.R. 642 (Bankr. D.D.C. 2006) (Teel, J.).

I. Nature of Certification

1. Certification Requires Declaration under Penalty of Perjury

[*See In re Wallert,* 332 B.R. 884 (Bankr.D.Minn.2005) (Kishel, J.); *In re LaPorta,* 332 B.R. 879 (Bankr. D. Minn. 2005) (Kishel, J.); *In re Cobb*, -- B.R. -- (Bankr. E.D. Ark. 2006) (Mixon, J.); *In re Rodriguez,* 336 B.R. 462 (Bankr. D. Idaho 2006) (Myers, J.).]

2. Certification Does Not Require Declaration under Penalty of Perjury

[*See In re Talib,* 335 B.R. 417 (Bankr. W.D. Mo. 2005); *In re Nash,* No. 05-40061 (Bankr. W.D. Tenn. 2005); *In re Cleaver,* 333 B.R. 430 (Bankr. S.D. Ohio 2005) (requiring, at a minimum, a written statement that the signer affirms or attests to be true); *In re Davenport,* 335 B.R. 218 (Bankr. M.D. Fla. 2005) (requiring only that the debtor file a verified motion, an affidavit, or testify at the hearing on the Section 109(h) motion); *In re Graham,* 336 B.R. 292 (Bankr. W.D. Ky. 2005) (Fulton, J.).]

3. Attorney's Signatures / Inquiries

a. Attorney's request for credit counseling services on behalf of a debtor satisfies credit counseling requirement if attorney requested services on behalf of a particular debtor. Attorney's general inquiries about the availability of credit counseling, however, are insufficient to satisfy the requirement as to each individual debtor that attorney may represent. *In re Hubbard,* 333 B.R. 377 (Bankr. S.D. Tex. 2005) (Isgur, J.) (ruling on 5 separate debtors).

b. Statement signed only by debtor's attorney, and not by debtor, did not qualify as requisite certification. *In re DiPinto,* 336 B.R. 693 (Bankr. E.D. Pa. 2006) (Raslavich, J.).

c. Certification must be made by a filing debtor. It may not be made by debtor's attorney. *In re Anderson,* 2006 WL 314539 (Bankr. N.D. Iowa 2006) (Edmonds, J.).

d. Motion to extend time to obtain certification, filed after trustee moves to dismiss case, which motion was signed by attorney but did not contain the debtor's certification or signature was an invalid request. *In re Miotta* (Bankr. N.D. Ill. 2006) (Barbosa, J.).

4. Other Certification Requirements

a. BAPCPA only requires prospective debtor to contact a single agency before filing a certification of exigent circumstances. Debtor need not "scour the field" for other providers. *In re Hubbard,* 333 B.R. 377 (Bankr. S.D. Tex. 2005) (Isgur, J.) (ruling on 5 separate debtors).

b. Individual debtor may allege that she could not get counseling services even though the US Trustee found them to be adequately available. However, debtor may not rely on her attorney's general determination that counseling services are not available. *In re Hubbard,* 333 B.R. 377 (Bankr. S.D. Tex. 2005) (Isgur, J.) (ruling on 5 separate debtors).

c. If approved counseling service can't provide services during 5 days beginning on date putative debtor made request for services, then the putative debtor has two choices: (1) contact

additional providers and obtain the services prepetition, or (2) if the debtor faces exigent circumstances, elect to file an appropriate certification and, after obtaining a temporary exemption, receive the credit counseling services postpetition. Regardless, the putative debtors' certifications were not satisfactory where they failed to provide the level of specificity required for a meaningful review by the court. *In re Hubbard*, 333 B.R. 377 (Bankr. S.D. Tex. 2005) (Isgur, J.) (ruling on 5 separate debtors).

d. One debtor, on his third try, stated that he requested credit counseling and that it was not made available to him within five days of the request. Court doesn't require that the debtor state the date the credit counseling services were requested, merely the fact that they were requested and that they could not be obtained within five days of the request. *In re Childs, et al.*, 335 B.R. 623 (Bankr. D. Md. 2005) (*per curiam* ruling on 5 debtors).

J. US Trustees Take Hard Line on Credit Counseling Requirement

1. US Trustee moved to dismiss prisoner's *pro se* chapter 7 petition based on failure to comply with credit counseling requirements. Prisoner moved to correct filing date stamped on his petition so that under "prisoner mailbox rule," the petition would be deemed filed before BAPCPA went effective. Court holds that petition was deemed "filed" not on date it was received by bankruptcy clerk and stamped as filed, but on date that prisoner delivered his petition to prison officials for mailing. Neither the Code (which indicates that case is commenced by the filing of a petition) nor the Bankruptcy Rules (which specify that a petition shall be filed with clerk of court) define when a "filing" occurs. Thus, the "prisoner mailbox rule" applies, and the case could not be dismissed based on prisoner's failure to obtain requisite prepetition credit counseling. *In re Looper*, 334 B.R. 596 (Bankr. E.D. Tenn. 2005) (Stair, J.).

2. The debtor -- who couldn't understand English -- requested a waiver of the credit counseling requirement on the basis that none of the approved counseling agencies could speak to him in his native Creole. Alternatively, he asked the Assistant US Trustee to provide a Creole translator, or to otherwise decertify the approved counseling agencies for failure to provide Creole speaking counselors. The Assistant US Trustee, for her part, stuck close to the party line and maintained several different reasons as to why she lacked authority to waive the pre-bankruptcy counseling requirement, decertify any counseling agencies approved for the district, or provide a free translator. *In re Petit Louis*, 338 B.R. 132 (Bankr. S.D. Fla. 2006) (Cristol, J.).

VI. Chapter 7

A. Means Testing: A Non-Issue?

1. First case interpreting "means test" standards under § 707(b)(2)(A) and its application in the chapter 13 plan confirmation form context for determining the debtor's "projected disposable income." *In re Hardacre*, 338 B.R. 718 (Bankr. N.D. Tex. 2006) (Nelms, J.). For other cases, see Section on Chapter 13, *infra*, and discussion of "projected disposable income" test. Court holds:

a. Any determination of the debtor's "projected disposable income," such as when debtor is required to devote to payments under plan, must be based on debtor's anticipated income over term of plan;

b. In applying "means test" for "projected disposable income," the debtor could not double-count housing and transportation expenses;

c. In determining "projected disposable income," the debtor may deduct a sum equal either to standard allowances or actual housing and transportation expenses, whichever is greater;

d. Debtor could not deduct standard expense for vehicle owned free and clear; and

e. Section 707(b)(2)(A)(ii)(I) precludes debtor from claiming expenses under both the Local Standards and the debtor's actual average monthly expense, but the debtor can claim the greater of the two. *In re Hardacre*, 338 B.R. 718 (Bankr. N.D. Tex. 2006) (Nelms, J.)

2. Debtors failed to rebut presumption of abuse under means test because circumstances did not present special circumstances such as those identified by the statute (*e.g.*, serious medical condition or call to active duty). Here, the debtors checked the box on the means test calculation form indicating the presumption of abuse. The US Trustee even withdrew the motion to dismiss. The US Trustee, however, did object to the debtors' inclusion of future payments on secured claims on two vehicles which were surrendered after the bankruptcy filing. "The potential payback of zero percent to unsecured creditors in a Chapter 13 is not a special circumstance contemplated under § 707(b)(2)(B)." *In re Johns*, -- B.R. -- (Bankr. E.D. Okl. 2006) (Cornish, J.).

B. Challenges to Discharge

1. Finding that chapter 7 debtor exhibited "careless and reckless approach" to duty of disclosure in sworn filings did not establish knowing misconduct. Bankruptcy court did not make requisite finding that debtor acted "knowingly" in failing to disclose rental income and proceeds from sale of horse on his statement of financial affairs, thus precluding denial of discharge on grounds that debtor knowingly and fraudulently made false oath or account in course of bankruptcy proceedings. *Roberts v. Erhard (In re Roberts)*, 331 B.R. 876 (Bankr. 9th Cir. 2005) (Bufford, J.).

2. Discharge denied of debtors whose explanation for absence of financial records to document what happened to hundreds of thousands of dollars in funds acquired through three different business was that records had been lost when debtors were twice evicted for nonpayment of rent. This explanation would not prevent denial of debtors' discharge under "recordkeeping" discharge exception. Standard of proof in proceeding to deny debtor a discharge is proof by preponderance of evidence. Substantially accurate and complete records of debtor's financial affairs are prerequisite to debtor's discharge in bankruptcy. *Bodenstein v. Wasserman (In re Wasserman)*, 332 B.R. 325 (Bankr. N.D. Ill. 2005) (Schmetterer, J.).

3. To bar discharge, chapter 7 debtor's false oath must be "material" in that its subject matter must concern discovery of assets or existence and disposition of estate property. Bankruptcy Court's finding that failure to list diamond ring on original schedules is knowing falsehood that warrants denial of discharge was clearly erroneous and would be reversed. Noncontradictory reasons given by debtor for omission were consistent with innocent intent. Further, ring had only trivial value. *Ellsworth v. Bauder (In re Bauder)*, 333 B.R. 828 (Bankr. 8th Cir. 2005) (Venters, J.).

4. Discharge denied due to uncorrected material mistakes in schedules and statement of affairs, including various business and partnership interests, which the Court inferred were knowingly and fraudulently made because of the failure to correct. Discharge denied under Section 727(a)(4). Discharge also denied under Section 727(a)6) for failure to comply with Court order requiring production of financial documents for trustee's case administration. *In re Foster*, 335 B.R. 709 (Bankr. W.D. Mo. 2006) (Dow, J.).

5. Court denies American Express's challenge to discharge of low income creditor who ran up credit cards within months of filing. Denial based on creditor's inability to admit electronic records on evidentiary grounds because of lack of requisite foundation to admission of these records (even after given opportunity to supplement record). Court states that where there is no paper trail, the authentication process requires that the records custodian be certain that the printed documents are what they purport to be. Court states: "[T]he focus is not on the creation of the record, but on the circumstances of the preservation of the record during the time it is in the file so as to assure that the document being proferred is the same as the document that originally was created." The custodian here failed to supply the requisite authentication because it merely declared its familiarity with the company's computers, software and record keeping systems, which alone was insufficient to supply the requisite authentication. Absent the business records, the creditor could not prove that the claim should be excepted from discharge. *American Express Travel Related Servs. Co., Inc. v. Vinhnee (In re Vinhnee)*, 336 B.R. 437 (Bankr. 9th Cir. 2005).

6. Debtors with sufficient disposable income to fund a three-year chapter 13 plan that fully repaid their creditors were not entitled to a chapter 7 discharge. *In re Delarosa* (Bankr. N.D. Tex. 2005) (Felsenthal, J.).

7. Court denies trustee's request to permit debtor's parents to settle Section 727 discharge litigation by making a cash payment to the trustee. Court states: "A compromise in which a party agrees, in exchange for the payment of money, to dismiss an action to deny a debtor's discharge is tantamount to allowing a debtor to purchase a discharge…. Allowing the dismissal of an action to deny a debtor's discharge to be conditional upon Debtor's payment of money encourages the use of an objection to discharge as a weapon to induce the debtor to accede to demands which may be otherwise excessive." *In re Delco* (Bankr. N.D. Ga. 2005) (Murphy, J.).

8. Chapter 7 debtor's fraudulent transfers of money to relatives, former wives, and girlfriend justified denial of discharge. While property transferred belonged to debtor's plumbing business, debtor was the business's sole officer, director, and corporate shareholder. Thus, the property was effectively property of the estate. Further, debtor intended to hinder, delay, or defraud creditors given relationship to recipients of payments and lack of documentary evidence that consideration was received in exchange. Also, the debtor's business was struggling, the debtor personally guaranteed company debt, and a creditor hounding the debtor for payment. *In re Lort*, -- B.R. -- (Bankr. M.D. Fla. 2006) (Proctor, J.).

9. Debtor's failure to report or turn over proceeds received postpetition from payment of undisclosed promissory note held on petition date from undisclosed sale was "knowing" and "fraudulent," thus warranting revocation of discharge. Even if debtor's initial failure to disclose was based on good faith belief that assets were worthless since parties were unable to obtain requisite development permits, debtor should have known when advised that promissory note would be paid that he was wrong in his belief, yet he failed to remedy earlier nondisclosures or to report or turn over the

note's proceeds. *Grossman v. Foster (In re Foster),* 2006 WL 1418684 (Bankr. D. Mass. 5/24/06) (Somma, J.).

C. Conversion to Chapter 13

1. Debtor did not act with improper purpose or abuse motive in seeking to convert to chapter 13 in order to regain control over litigation of her equitable distribution claim in pending divorce action and thereby preclude chapter 7 trustee's proposed settlement of her divorce proceeding. Conversion is warranted also given that debtor adequately disclosed equitable distribution claim and husband's disputed claim against chapter 7 estate and cooperated with trustee's investigation of claim. Debtor believed claim worth $1,000,000, which would result in full payment to creditors. Also, debtor had obtained employment providing funding source for chapter 13 plan and had made three timely payments under her plan. *In re Porreco,* 333 B.R. 310 (Bankr. W.D. Pa. 2005) (Bentz, J.).

2. Sixth Circuit notes split of authority on whether Section 706 confers absolute right to convert from chapter 7 to chapter 13 where the case had not been previously converted. Court holds that a debtor's right to convert from chapter 7 to chapter 13 is subject to the bad-faith exception. The court finds support in prior ruling that courts may dismiss a chapter 13 petition that is not filed in good faith. Also, court notes that BAP found that that the motion to convert was filed to avoid a determination that the debtor was not entitled to a discharge and not by a desire to repay its creditors. Thus, the motion to convert was an improper attempt to manipulate the system and the Code's requirements. Court further rejects debtor's contention that §706 mandates an absolute right to convert "regardless of circumstances." Court further notes that if Congress intended to divest bankruptcy court of discretion, it would have used the mandatory phrase "shall be able to convert," as found in 11 U.S.C. §1307(b). *Copper v. Copper* (*In re Copper),* 426 F.3d 810 (6th Cir. 2005) (Norris, J.).

3. Following *Copper*, Court holds that Section 706(a), which authorizes a chapter 7 debtor to convert to another chapter if it's eligible for relief under that chapter and case has not previously been converted does not confer absolute right to convert if these two conditions are met. Bankruptcy court may deny motion to convert where court determines that debtor engaged in bad faith conduct. [NB: The US Supreme Court has granted a petition for *certiorari* in this case, and will hear it in the 2006-07 term.] *In re Marrama,* 430 F.3d 474 (1st Cir. 2005) (Cyr, J.).

4. Section 706(a) precludes debtors from converting cases from chapter 7 to chapter 13 if case was previously converted to chapter 7. *In re Breckow* (Bankr. E.D. Mich. 2005) (Tucker, J.).

D. Dismissal Under Totality of Circumstances Test - Section 707(b)(3)(B)

1. There is no statutory presumption of abuse under Section 707(b)(3)(B)'s "totality of circumstances" test for a debtor whose "current monthly income" is less than or equal to the applicable state median. Debtor's actual ability to repay nonpriority unsecured debts in a hypothetical chapter 13 plan is part of "totality of circumstances" consideration, and in such instance the court must consider the debtor's actual and anticipated future income (as opposed to "current monthly income'). Case here dismissed as abusive because debtor could pay a 19% dividend (which equaled about $33,000), was making over $100,000 annually, and certain expenses were excessive. Case reviews the debate between Culhane/White and Judge Wedoff

regarding whether "an above-median debtor's case may be dismissed based on his ability to pay under either section 707(b)(2) or (3)." As regards this debate, the Court states:

a. "The rationale of the Culhane-White Article is as follows: Section 707(b)(2) represents an attempt to remedy two pre-BAPCPA problems, as perceived by Congress. First, section 707(b)(2) establishes definitely that ability to pay, standing alone, is a sufficient ground for dismissal as an abuse. Some courts had previously taken a contrary view. Second, section 707(b)(2) establishes a "bright line" test for a debtor's "ability to pay." One of the problems perceived by Congress in this context was the lack of uniformity of bankruptcy courts' decisions on this issue. According to the Culhane-White Article, part of this "bright line" test is the establishment of the median income as the dividing line for debtors whose ability to pay may serve as the basis for dismissal. According to the Culhane-White Article, "[t]o say that judges are free under section 707(b)(3) to substitute their own can-pay standards for Congress' means test would render the means test superfluous." It would also go against the canons of statutory construction, requiring statutes to be interpreted so as to be consistent with each other and to give meaning to all parts.

b. The Debtor does not cite the Culhane-White Article. However, he argues along similar lines. He notes that the "means test" was established by Congress to eliminate the lack of uniformity in judicial decisions on motions to dismiss under section 707(b). By providing that the "means test" applies only to debtors whose "current monthly income" exceeds the median, according to the Debtor, Congress created a "safe harbor" for all other debtors. Any other view would reintroduce the very judicial discretion that BAPCPA sought to eliminate. The Debtor also quotes various statements by members of Congress, predicting that BAPCPA will have no effect on debtors whose income is not above the median.

c. The Debtor recognizes that, but for the timing of his unemployment and the statutory definition of "current monthly income," he would fall into the category of debtors that Congress wished to subject to the "means test." However, he notes that this potentiality was "absolutely predictable to legislators." If Congress had wished to prevent such debtors from falling through the statutory cracks, it could have provided an express provision preventing them from doing so. Courts may not remedy what Congress failed to do….

d. The Debtor relies heavily on Congress's stated intention, in enacting BAPCPA, to severely limit judicial discretion with respect to section 707(b) motions so as to establish more uniformity. He argues that, by construing section 707(b)(3) as including a consideration of the debtor's ability to repay, Congressional intent is subverted and judicial discretion is reintroduced into the system. He also cites statements from the Congressional Record, assuring the public that the below-median-income debtor's right to obtain bankruptcy relief will not be affected. The Court is not persuaded by these arguments. First, while BAPCPA did severely limit judicial discretion for above-median-income debtors, judicial discretion has not been entirely eliminated. As noted above, the presumption of abuse may be rebutted by evidence of "special circumstances." As to equal to or below-median-income debtors, clearly, judicial discretion will have to be applied to consider the "totality of the circumstances" whether or not those circumstances include consideration of a debtor's ability to pay. Finally, a debtor earning over $100,000 a year cannot fairly complain of being misled by Congressional statements that low income debtors' rights to bankruptcy relief will not be affected by BAPCPA. For all of these reasons, the Court concludes that the Debtor's actual ability to repay

his nonpriority unsecured debts may be considered as part of the totality of circumstances of his financial situation pursuant to section 707(b)(3)." *In re Pak*, -- B.R. -- (Bankr. N.D. Cal. 2006) (Tchaikovsky, J.).

E. Dismissal for Substantial Abuse

1. In calculating chapter 7 debtor's disposable income and ability to fund a Chapter 13 plan, for purpose of deciding whether to dismiss Chapter 7 case as "substantial abuse," court will assume that debtor with documented history of working overtime will continue to do so, and consider such overtime as bearing on debtor's income, unless debtor demonstrates why such overtime work will not be available to him or that he will be unable to take advantage of available overtime. Case dismissed where debtor had sufficient disposable income to make significant payment on unsecured debt in hypothetical, 36-month Chapter 13 plan, even without the belt-tightening that expenditure of $72 per month on cable television suggested as possibility. Also, debtor showed lack of honesty in significantly underreporting his income when he filed his petition and accompanying schedules. *In re Reeves*, 327 B.R. 436 (Bankr. W.D. Mo. 2005) (Dow, J.).

2. "Although Chapter 7 is not exclusively for persons who have suffered adversity, it is not a financial planning device to ensure that only sacrifices that ever need to be suffered in order to accomplish debtor's life-style choices will be sacrifices that are to be suffered only by debtor's creditors…. Platitudes abound to the effect that bankruptcy affords the 'honest but unfortunate' debtor a 'fresh start,' but not a 'head start.' These Debtors are honest, but not unfortunate. They don't need a 'fresh start.' What they hope for from the Court is a 'head start' on their children's higher education. That this case is distinguishable from cases involving calamity is obvious. But this case is also distinguishable from the hypothetical case of people just starting out in life who, having made unwise or naive decisions in the course of trying to establish themselves in an occupation or career, face the choice of putting their future on hold for three to five years in Chapter 13, or of availing themselves of the 'fresh start' Congress envisioned. The distinction between such a hypothetical case and the case at bar rests in the otherwise trite phrase, 'What did you expect?' When the expectation had been of a good-paying job at the end of course of study or apprenticeship, and those expectations have been dashed, a 'fresh start' in Chapter 7 may be appropriate. But not where, as here, a long course of calculated conduct turns out to present an inconvenience once it turns out that there is more one wants to do for one's child, or parent, or community. It is also distinguishable from the hypothetical case of persons who, at any stage of life, made a terrible mistake that put them at risk for keeping body and soul together for the future. The enormous increase in filing by the elderly in this Court in recent years has been a source of alarm and sadness for this writer." *In re Godios*, 333 B.R. 644 (Bankr. W.D.N.Y. 2005) (Kaplan, J.).

3. Use of contested matter rather than adversary proceeding to resolve motion to dismiss Chapter 7 case as "substantial abuse" of provisions of that chapter did not deprive debtor of opportunity for discovery or for trial. Also, debtor's filing of chapter 7 petition 17 months after accumulating about $120,000, or twice his annual household income, in credit card debt was not "substantial abuse." Nothing in record suggested that debtor contemplated filing for chapter 7 relief at time he incurred this credit card debt. Also, debtor's subsequent loss of employment and separation from wife were intervening changes in circumstances. Further, when chapter 7 petition was filed, debtor did not have ability to repay his debts. *Khachikyan v. Hahn (In re Khachikyan)*, 335 B.R. 121 (Bankr. 9th Cir. 2005) (Klein, J.).

4. Chapter 7 debtor's ability to fund Chapter 13 plan is primary factor for court to consider in deciding whether case should be dismissed as "substantial abuse" of provisions of Chapter 7. The debtor's ability to pay creditors is measured, for "substantial abuse" dismissal purposes, by evaluating debtor's financial condition in hypothetical chapter 13 proceeding. Here, debtor who was seeking to discharge $95,000 in credit card debt, and had $1,500 in discretionary expenditures (including $700 per month as home schooling expense for child performing at average level in public school and $500 per month for skating lessons and competitions). Court dismissed case as "substantial abuse," where debtor, by trimming expenses, could pay over $29,000–or roughly 30%–of his unsecured creditors in hypothetical three-year Chapter 13 plan. *In re Stout*, 336 B.R. 138 (Bankr. N.D. Iowa) (Kilburg, J.).

F. 341 Meetings

1. Meeting not "held" until conclusion of 341 meeting. Virginia law defines exemption by reference to when 341 meeting "held." *In re Stewart* (Bankr. E.D. Va. 2006) (Adams, J.).

2. FRBP 2003(e), which permits first meeting of creditors to be adjourned "by announcement at the meeting of the adjourned date and time without further written notice" does not require announcement at meeting as to the date when meeting will be adjourned to as exclusive manner for such an adjournment. Rule merely relieves trustee of need to provide written notice if such an announcement is made. First meeting does not automatically conclude, so as to start 30-day deadline for objecting to debtor's claimed exemptions, merely because trustee fails to announce on the record at meeting a specific date on which meeting will continue. Rather, after meeting adjourns, trustee may continue the meeting by written notice. Such notice may be appropriate where debtor fails to appear at initial meeting, or where debtor's financial affairs are complex and require further investigation or review before trustee is able to determine whether further examination of debtor is required. Chapter 7 debtors waived right to object to trustee's continuance by continuing to cooperate with trustee, never contesting trustee's authority, and appearing and cooperating at reconvened meeting. Accordingly, objections to debtors' claimed exemptions, which were filed within 30 days of date that reconvened meeting of creditors was concluded, were also timely on waiver theory. *In re Cherry*, 2006 WL 1302272 (Bankr. S.D. Tex. 2006) (Isgur, J.).

G. Involuntary Petition

1. Putative debtor's admissions at crime scene that he had fatally shot party whose probate estate was asserting wrongful death claim, and whose children were asserting emotional distress and support and personal injury claims through their conservator, in conjunction with other evidence included in state court's decision on putative debtor's motion to suppress evidence, established *prima facie* claims purposes of joining in involuntary chapter 7 petition. Burden thus shifts to putative debtor to establish that probate estate's and children's claims were subject to *bona fide* dispute that would disqualify them from joining in the involuntary petition. *Metz v. Dilley (In re Dilley)*, 339 B.R. 1 (Bankr. 1st Cir. 2006) (Rosenthal, J.).

H. Pre-Discharge Financial Management Course

1. The financial management course must be completed "after filing the petition" in order to be eligible to receive a discharge. A prepetition course does not satisfy the requirement. *In re Skarbek*, 2005 WL 3348879 (Bankr. W.D. Pa. 12/6/05) (Bentz, J.); *In re Granda*, 2005 WL 3348878 (Bankr. W.D. Pa. 12/6/05) (Bentz, J.).

2. Completion of prepetition counseling class doesn't satisfy requirement of postpetition financial management training. *In re Fuller*, 2005 WL 3454699 (Bankr. W.D. Pa. 2005) (Bentz, J.) (*see also In re Rodgers*, 2005 WL 3454702 *and In re Stidham*, 2005 WL 3454709 (Bankr. W.D. Pa. 2005) (companion opinions of Judge Bentz)).

3. Section 727(a)(11) requires a course be completed before discharge. Rule 1007 requires certification that the course was completed no later than 45 days after the first meeting of creditors. If not obtained, case will be closed without the discharge. Case can be reopened upon request, but reopening fee must be paid. *In re Martinez*, 2006 WL 681068 (Bankr. N.D. Iowa 2006) (Kilburg, J.).

4. Chapter 7 debtors who fail to submit statement of completion of financial management court not entitled to discharge. Cases are to be closed without discharge and should they later complete course, they may seek to reopen case to enter discharge. *In re Smiley* (Bankr. E.D. Mich. 2006) (Shefferly, J.).

I. Simultaneous Filings

1. The courts are divided on the question whether, pre-BAPCPA, a simultaneous "Chapter 20" filing is ever permissible. The majority has endorsed a *per se* rule prohibiting a debtor from having more than one bankruptcy case open at any time. Although courts have differed on the permissibility of "simultaneous Chapter 20" cases, there is general agreement that a debtor may not maintain two or more concurrent actions with respect to the same debts, with only the Tenth Circuit holding otherwise. *In re Sidebottom*, 430 F.3d 893 (7th Cir. 2005) (Wood, J.).

VII. Debtor Reporting Requirements

A. Dismissal for Failure to Comply with § 521 Requirements

1. Court denies request to extend time to file § 521(a)(1) requirements if motion is filed more than 45 days postpetition. Such motion must be filed within the 45 day limit or case will be dismissed by law under § 521(i). *In re Fawson*, 338 B.R. 505 (Bankr. D. Utah 2006) (Boulden, J.).

2. Court has no discretion to enlarge the time limitations set forth in the section of the Bankruptcy Code governing a debtor's failure to file all required information, after expiration of those time limitations, regardless of any "excusable neglect" on the part of debtor or debtor's counsel. Bankruptcy Rule 9006(b) governing enlargement of time cannot be used to enlarge statutory deadlines. *In re Ott*, 2006 WL 1152339 (Bankr. D. Colo. 2006) (Brooks, J.).

3. Where debtor fails to file the required payment advices within 45 days of the petition filing date, the case must be automatically dismissed as of the 46th day unless (A) the debtor requests an extension of time within the 45-day period, and the court finds justification to extend exists or (B)

the trustee files motion within the 45-day period, and the court finds that the debtor attempted in good faith to file the required information and that the interest of creditors would be best served by administration of the case. After the 45th day, however, the court has no discretion to fashion any reasonable or equitable solution, or to allow the debtor additional time within which to file the required advices. *In re Lovato*, 2006 WL 1236713 (Bankr. D.N.M. 2006) (McFeeley, J.).

4. Dismissal of debtor's case under § 521(e)(2)(B) inappropriate when debtor's counsel was at fault for not filing tax returns by the deadline set in § 521(e)(2)(A). *In re Merrill*, 340 B.R. 671 (Bankr. D.N.H. 2006) (Vaughn, J.).

B. No Dismissal Despite Failure to Comply with § 521 Requirements

1. Tax returns turned less than 7 days prior to meeting of creditors. Trustee sought dismissal and then opposed the motion. Court rules that chapter 7 trustee has "prosectorial discretion" to decline to pursue a motion that would contravene primary obligation of trustee to maximize recoveries and distributions. *In re Duffus*, 339 B.R. 746 (Bankr. D. Or. 2006) (Alley, J.).

2. "Ordinarily, the failure of a debtor to comply with the requirements of the Bankruptcy Code due to ignorance of the requirements of the law, whether on the part of the debtor or her counsel, is not sufficient to excuse the failure to meet the requirements of the law. However, on the facts of this case, and the provisions of the Bankruptcy Code, the Court finds that the Debtor's failure to comply with the requirements of § 521(e)(2)(A) was due to circumstances beyond her control within the meaning of § 521(e)(2)(B). The Debtor's petition was filed only five months after BAPCPA was fully effective. Prior to the filing of the Debtor's bankruptcy petition, less than 200 petitions under BAPCPA had been filed in this district. Throughout the country, bankruptcy practitioners and the courts alike are struggling to comprehend the innuendos and new procedural requirements of BAPCPA. In this case, Counsel, an experienced bankruptcy attorney, admitted he did not realize § 521(e)(2)(A) set a deadline but that he acted immediately to rectify the situation once he realized his oversight. During the hearing, Counsel, a former chapter 7 trustee, made an offer of proof that the Debtor provided him with her tax returns as soon as he requested them and, thereby, did everything within her control to comply with the requirements of § 521(e)(2)(A). He asserted that her failure to strictly comply was due to his error. Counsel explained that because he has not yet mastered the multitude of new requirements under BAPCPA, he did not realize § 521(e)(2)(A), a new section of the Bankruptcy Code, set a deadline to file the Debtor's tax returns until after the deadline had passed. The Trustee and the Court accepted Counsel's offer of proof. The fact that BAPCPA was newly enacted when the Debtor's petition was filed contributed to the Debtor's failure to comply with the § 521(e)(2)(A) deadline. Additionally, at the hearing, the Trustee stated he would not have filed the Motion if he believed he had the discretion not to, because he suffered no harm from receiving the Debtor's tax returns three days rather than seven days before the 341 Meeting. Finally, the Court notes that compliance with the procedures of BAPCPA is difficult because it is replete with new, technical and procedural deadlines and requirements. Consequently, now more than ever, it is in the best interests of debtors and the bankruptcy court for debtors to engage an attorney when filing for bankruptcy protection, which is what the Debtor did in this case. Accordingly, the Court finds a dismissal under § 521(e)(2)(B) is not warranted due to the Debtor's failure to comply with § 521(e)(2)(A) as that failure was due to circumstances beyond her control." *In re Grasso*, 2006 WL 1390397 (Bankr. D.N.H. 2006) (Deasy, J.).

3. Chapter 7 debtor's failure to provide the trustee with a copy of his latest tax return "not later than 7 days before the date first set for the first meeting of creditors," was due to "circumstances beyond the control" of the debtor. The debtor provided his counsel with a copy of the return in advance of the statutory deadline, and it was solely due to the attorney's fault that this return was not timely delivered to the trustee. *In re Merrill*, 340 B.R. 671 (Bankr. D.N.H. 2006) (Vaughn, J.).

4. When debtor fails to provide trustee with copy of most recent federal income tax return at least seven days prior to first meeting of creditors, trustee has discretion to pursue dismissal, to excuse noncompliance, or to accept tardy compliance if he or she so chooses. *In re Ring*, 2006 WL 1171984 (Bankr. D. Me. 2006) (Haines, J.).

5. Chapter 7 debtor submitted copies of tax returns to trustee three days before the meeting of creditors, not 7 days as required by BAPCPA. Trustee filed alternative motion to dismiss case or for order determining debtor has complied or was exempt from compliance. Error caused by "circumstances beyond the control of the debtor," within the meaning of Section 521(e)(2)(A), (B). BAPCPA was newly enacted when debtor's petition was filed and compliance difficult because of all new technical and procedural deadlines and requirements. No harm resulted. *In re Grasso*, 2006 WL 1390397 (Bankr. D.N.H. 2006) (Deasy, J.).

C. Stay Terminated for Failure to Comply with § 521(a)(6) "Retain and Maintain" Requirement

1. Stay terminates for personal property if the debtor fails to file any statement of intention as to collateralized consumer loans regarding whether debtor will surrender or redeem / reaffirm / assume. § 362(h)(1)(A) requires termination of stay in event where intention not disclosed. *In re Craker*, 337 B.R. 549 (Bankr. M.D.N.C. 2006) (Carruthers, J.).

2. Applies not only to consumer debts, but to business and agricultural debts also. Rule 9006(b)(2), which allows for extension of time for cause if request for additional time made before the time expires, applies here. But if request made after the time expires, the movant must prove the failure to act was result of excusable neglect. *In re Root*, 2006 WL 1050687 (Bankr. N.D. Iowa 2006) (Kilburg, J.).

3. Three months following bankruptcy filing, lender seeks comfort order that the automatic stay had been terminated since the debtor had not redeemed, reaffirmed or surrendered the collateral within 45 days after first meeting of creditors, as required by Section 521(a)(6). Court notes that only Sections 362(c)(4)(A) and 362(j) permit entry of such comfort orders. Section 521(a)(6), however, does not. *In re Woods* (Bankr. E.D. Mich. 2006) (Shefferly, J.).

D. Other Section 521 Reporting Requirements

1. Tax Returns

a. Tax return only due for the preceding year if the return was in fact due. Tax return due for filing in advance of April 15 deadline is tax return for the next preceding year (*i.e.*, 2004, not 2005). *In re Merrill*, 340 B.R. 671 (Bankr. D.N.H.) (Vaughn, J.).

b. Debtors' failure to provide trustees with copies of their most recent federal income tax returns at least seven days prior to first meeting of creditors was "due to circumstances beyond their

control," and did not require dismissal of their Chapter 7 or Chapter 13 cases, where none of debtors had been under obligation to file tax return for more than ten years, and copies of their most recent tax returns were not available from the IRS. *In re Ring*, 2006 WL 1171984 (Bankr. D. Me. 2006) (Haines, J.).

2. Payment Advices

a. Code requirement trumps a local administrative order that required payment advices received within 60 days of the filing to be filed within 45 days of petition date. *In re Merrill*, 340 B.R. 671 (Bankr. D.N.H.) (Vaughn, J.).

b. Pay stub filing requirement can't be waived, but may be satisfied without all documents. Debtor moves on first day of case for order waiving pay stub requirement and permitting filing of only most recent pay stub, as prior ones serve no useful purpose and were reported on his current stub. "All of the information" is recorded in the current pay stub, so more isn't required. Court suggests that debtor file a motion, with notice to all creditors, asking for a determination that the case is not subject to automatic dismissal. *In re Bartholomew* (Bankr. W.D.N.Y. 2005) (Bucki, J.).

c. The Debtor files chapter 13 petition along with most required documents, but fails to file required payment advices or other evidences of payment received within 60 days before the petition date from its employer, as required by Section 521(a)(1)(B)(iv). The case was dismissed by operation of law on the 46th day. Debtor late files employee income records the day following the automatic dismissal and seeks the court to set aside the dismissal, arguing that it was "due to a misunderstanding regarding the recent changes in the bankruptcy law" and that none objected or would be prejudiced. Court states: "There is no provision that allows reinstatement of a Debtor's case upon that Debtor's tardy compliance with the filing requirements of § 521(a)(1). Accordingly, the Debtor's case must stand dismissed." *In re Conner,* 2006 WL 1548620 (Bankr. N.D. Fla. 5/31/06) (Killian, J.).

3. § 521(a)(1)(B)(v) Requirements for Individual Business Debtors

a. Individual debtor not required to file statement of current monthly income where debts are primarily business debts. Schedules I & J sufficient to meet § 521(a)(1)(B)(v) requirements. No automatic dismissal for failure to comply. UST agrees that individual debtor with primarily non-consumer debts is not required to complete Form B22A. *In re Moates*, 338 B.R. 716 (Bankr. N.D. Tex. 2006) (Jones, J.).

E. Schedules and Statements

1. "Bad faith" on debtor's part, such as may warrant denial of debtor's motion to amend his schedules, may include intentional misconduct that, in retrospect, was not in debtor's best interest. Here, in pre-BAPCPA case, finding that chapter 7 debtor acted in bad faith in initially valuing homestead at only $135,000, whereas in proposed amendment to his exemption schedules sought to increase homestead to $300,000, was not clear error by bankruptcy court, even though maximum homestead exemption available to debtor under Massachusetts law was far in excess of $135,000 value initially placed on property, and that this initial undervaluing may have been quite misguided

and not in debtor's best interests. *Hannigan v. White (In re Hannigan)*, 409 F.3d 480 (1st Cir. 2005) (Campbell, J.).

VIII. Automatic Stay

A. Effect of Case Dismissal/Striking for Lack of Credit Counseling

1. Automatic Stay Intact During Interim Period

a. Chapter 13 petition of ineligible debtor because of lack of credit counseling was not void *ab initio*, though it was subject to being dismissed. Petition commenced "case," which would count against debtor in determining whether a subsequent filing gave rise to automatic stay. Petition also protects debtor's property from creditors' collection efforts until case was dismissed. *In re Ross*, 338 B.R. 14 (Bankr. N.D. Ga. 2006) (Bonapfel, J.).

b. Court recognizes that "most courts have chosen to simply dismiss a case filed by an ineligible debtor." Court "also recognizes that a minority of other courts have instead implemented the practice of 'striking' the petitions (*i.e.*, having an effect of voiding the petition *ab initio*) in an effort to avoid the 'one strike' consequences [relating to serial filers]." Court finds that proper remedy is to dismiss the case, not strike the petition as void *ab initio.* "This Court is unable to accept the notion that Section 109(h) ineligibility impacts a determination of whether a case was 'commenced' and whether the Court's subject matter jurisdiction has been invoked. This Court holds that the operative event which triggers the commencement of a bankruptcy case, and this Court's jurisdiction, is the filing of a petition. This conclusion is consistent with the fact that neither Sections 109 and 301 of the Bankruptcy Code, nor any other provisions in the Bankruptcy Code, make mention of jurisdiction. Jurisdiction is 'granted' to bankruptcy courts through title 28, not title 11, of the United States Code. This Court's conclusion is also consistent with the decisions reached in other courts which hold that Section 109 of the Bankruptcy Code is not jurisdictional." *In re Tomco*, 339 B.R. 149 (Bankr. W.D. Pa. 2006) (Deller, J.).

c. Stay annulled in case improperly filed for lack of credit counseling and court would validate the judgment of eviction obtained by a foreclosure sale purchaser that had successfully moved for relief from stay in a separate bankruptcy case filed by the debtor's husband where creditor did not have knowledge of the debtor's bankruptcy case before the judgment was entered. Court finds that foreclosure sale purchaser would likely have been granted relief from stay in the debtor's case if such relief had been requested, and the debtor had exhibited a lack of good faith. Further, the foreclosure sale purchaser would be put to unnecessary expense if the stay were not annulled. Court reviews factors to consider in annulling stay. *In re Anderson*, 2006 WL 1071669 (Bankr. D.D.C. 2006) (Teel, J.).

d. *Pro se* debtor found ineligible for failure to meet credit counseling requirements. Court holds that until the court determines that a petitioner is ineligible to be a debtor, a case is commenced by the filing of a petition and cannot be a nullity. Court looks to Section 109(e) case law, under which, with apparent unanimity, courts have concluded that when a chapter 13 petitioner is ineligible under Section 109(e), the case should be either voluntarily converted or dismissed. Courts have similarly dismissed, not stricken, bankruptcy cases filed by petitioners who are

ineligible for bankruptcy relief by virtue of their corporate or entity status or because they are not eligible under Section 109(g). Court also looks to cases where documents not filed results in dismissal, not striking of the petition. Court reviews cases under Section 109(h). Of the six, four have dismissed and two have stricken. Court determines to dismiss case because:

i. Eligibility under Section 109(h) is not jurisdictional.

ii. Dismissal comports with other sections of the Code and BAPCPA, such as Section 109 generally.

iii. As the US Trustee argues, striking petitions could result in abuse of the automatic stay, shielding the bad-faith petitioner from creditor action from the time of filing to the time the petition is stricken, with no bar to that petitioner repeating the process over and over again.

iv. Striking rather than dismissing a bankruptcy case filed by an ineligible petitioner may well not provide the petitioner with the opportunity to realize all of the benefits of a bankruptcy case provided by Congress in a second filing if the protections of the automatic stay are not triggered by the first case.

v. The district provides notice to petitioners that failure to file certain documents, including those required by Section 109(h), may be grounds for dismissal. *In re Seaman,* 2006 WL 988271 (Bankr. E.D.N.Y. 2006) (Stong, J.).

e. Case filed 11/25/05 and dismissed 3/15/06. Court follows *Seaman* (and not *Salazar*) in holding that filing of a petition by a debtor ineligible to do so for whatever reason nevertheless commences a case, requiring that the petition be dismissed instead of stricken. Still, Section 362(c) requires a debtor to establish that filing of present case made in good faith and to rebut with clear and convincing evidence a presumption that the present case has been filed "not in good faith." Court will examine this issue by statute, even in the absence of objection. A note of consolation to the debtors, however, is that Section 362(c)(3) is limited in scope to attacks on property of the debtor, not property of the estate. *In re Bell,* 2006 WL 1132907 (Bankr. D. Colo. 2006) (Brown, J.).

f. Failure to obtain credit counseling prepetition or to file satisfactory certificate of exigent circumstances did not render case a mere nullity, but gave rise to automatic stay that remained in effect until bankruptcy court denied debtor's request for waiver of prepetition credit counseling requirement and dismissed case. Creditor not entitled to annulment of automatic stay *sua sponte* either in order to retroactively validate foreclosure sale conducted while stay was in effect where trustee had not requested such relief and had proceeded with foreclosure sale with knowledge of debtor's bankruptcy filing. Creditor must reimburse debtor for any consequential damages, but Court would not impose punitive damages. Though violation was willful, it did not result from intentional misconduct by trustee. *In re Brown*, 2006 WL 1302619 (Bankr. D. Md. 2006) (Keir, J.).

g. Prior chapter 13 case filed by debtors who had not received credit counseling and thus were ineligible to file, was not mere nullity that could be stricken and not treated as prior case for purpose of deciding what type of stay arose in second chapter 13 case filed the same date that

prior case was dismissed. Prior case was administered for almost 90 days: trustee was appointed, meeting of creditors held, order entered requiring debtors to begin making plan payments, and motion for relief from stay was filed. Thus, prior case was a real case, not a mere nullity. *In re Hassett*, 2006 WL 1391319 (Bankr. E.D. Va. 2006) (Tice, J.).

h. "Although the Debtors' theory of striking the petition rather than dismissing the case has found limited acceptance, especially in the earliest days of BAPCPA, most of the courts who have considered the issue have ruled that the case should be dismissed rather than declared a nullity. The majority view is the better reasoned. Although the credit briefing requirement is new, § 109 has been part of the Bankruptcy Code since its enactment in 1978, and for the most part, debtors who failed to meet eligibility requirements under prior law had their cases dismissed, not declared nullities. Also, BAPCPA created a new exception to the automatic stay, § 362(b)(21), to clarify that the stay does not apply to the enforcement of a mortgage lien 'if the debtor is ineligible under section 109(g).' If an ineligible debtor's petition did not result in a case, presumably there would be no automatic stay, and no need for this stay exception. This new exception strongly suggests that a case has indeed been commenced by an ineligible debtor. Perhaps the most compelling reason to dismiss the case rather than strike the petition is the confusion that would ensue." *In re Racette*, 2006 WL 1389839 (Bankr. E.D. Wis. 2006) (Kelley, J.).

i. "Because Congress singled out § 109(g) for exemption from the automatic stay only with respect to liens or security interests in real property, the court must infer that bankruptcy cases commenced in violation of the other sub-parts of § 109 or cases commenced in violation of § 109(g) that do not involve liens or security interests in real property give rise to the automatic stay. Section 362(b)(21)(A) could therefore be read as suggesting that debtor 'eligibility' is not a jurisdictional requirement at all…. Section 362(b)(21) must be read as implying that the automatic stay is in effect while the court makes this threshold determination of jurisdiction. A petition by an ineligible debtor gives rise to a case in this limited sense and to an automatic stay until the case is dismissed. In other words, § 362 must be read as giving rise to an automatic stay when a petition is asserted to be filed under §§ 301, 302, or 303." Still, however, the "pre-petition credit counseling described in § 109(h) is a prerequisite to the court's assertion of subject matter jurisdiction." *In re Hawkins*, 340 B.R. 642 (Bankr. D.D.C. 2006) (Teel, J.).

2. Automatic Stay Not Intact During Interim Period

a. No "case" was commenced by the filing of their petitions based on lack of credit counseling. Accordingly, the petitions are stricken. *In re Hubbard*, 333 B.R. 377 (Bankr. S.D. Tex. 2005) (Isgur, J.) (ruling in 5 cases).

b. "It is therefore apparent that Congress did not intend the credit-counseling requirement to limit the availability or extent of bankruptcy relief for debtors, which dismissal would accomplish, and thus, dismissal is inappropriate. The Court instead finds that because the Debtor was ineligible for bankruptcy relief; the bankruptcy case was never properly commenced and is therefore stricken. In rendering this opinion, the Court is not unmindful of the decision in [*Flores* (291 B.R. 44) (petition filed in violation of Section 109(g) did not render the filing *void ab initio*)]…. In writing this opinion, the Court considers that under the BAPCPA version of § 362, the stay is considerably "less automatic." The Court therefore cautions all debtors and

creditors to carefully read all applicable provisions of the Bankruptcy Code to determine if the stay is in effect. A party in interest, including a debtor, can only be certain that a case has not been commenced because of a failure to comply with § 109(h) after a court has ruled that the filing is *void ab initio.*" *In re Rios*, 336 B.R. 177 (Bankr. S.D.N.Y. 2005) (Morris, J.).

c. *[I]t is implausible to believe that Congress specifically identified people to exclude from the bankruptcy process, yet permitted those same people to benefit from bankruptcy's most powerful protection: the automatic stay.* Both logic and the statute dictate that no automatic stay arises on the filing of a petition by an ineligible person…. [T]he relevant statutory language leaves no room for discretion. (Emphasis in original). Court finds that (i) individuals who have not received credit counseling and who do not qualify for a waiver are not eligible to be debtors under § 109, (ii) only eligible individuals may file a petition under § 302, and (iii) without the filing of a petition under § 302, the automatic stay provisions set forth in § 362 are not invoked. Regardless of what terminology is used–strike, dismiss, *etc*.–no stay arose if the petition did not satisfy §§ 301, 302 or 303.... The Court is aware that the practical implications of this ruling are problematic in determining whether a stay exists…. Nevertheless, the Court is unaware of any reason that precludes Congress from creating a level of uncertainty pending a final determination by the Court…. Because the Court sees no distinction between 'dismissing the petition' (as described in chapter 9) and 'striking the petition' (as described in the order pending reconsideration), the Court declines to modify its order for any semantic reasoning." *In re Salazar*, 339 B.R. 622 (Bankr. S.D. Tex. 2006) (Isgur, J.).

d. Court strikes petition of debtor found ineligible because of lack of credit counseling. No case resulted from the filing of their petition pursuant to § 301(a), and there is no case to dismiss. *In re Carey*, 2006 WL 1321419 (Bankr. M.D. Fla. 2006) (Briskman, J.).

B. Serial/Multiple Filings

1. Problematic Language: § 362(c)(3)(A) / § 362(c)(4)(A)

a. § 362(c)(3)(A): "the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case."

b. § 362(c)(4)(A): "the stay under subsection (a) shall not go into effect upon the filing of the later case" for debtors with 2 or more cases pending during the prior year].

2. Burdens / Presumptions Generally

a. "There are no published opinions analyzing the good faith requirement in § 362(c)(3)." The Court "therefore adopts the test set forth in a chart [referenced therein and described hereinafter] to determine whether the new case was filed in good faith as to a creditor." Case is presumed under Section 362(c)(3)(C)(ii) to not be filed in good faith as to any creditor that sought relief from the stay in a previous case if upon dismissal of the previous case the stay relief motion was still pending or the action had been resolved by terminating, conditioning, or limiting the stay as to the actions of the creditor. Under Section 362(c)(3)(B), debtor may only rebut the presumption that case wasn't filed in good faith by clear and convincing evidence. *In re Charles*, 334 B.R. 207 (Bankr. S.D. Tex. 2005) (Isgur, J.).

i. "The clear and convincing standard only arises if there is a presumption (based on one of the foregoing factors) that the case was not filed in good faith. The statute does not address what standard of proof applies in determining whether one of the presumption factors exists and the statute does not address which party has the burden of proof with respect to the presumption factors. Absent a statute or rule to the contrary, the burden of proof in a bankruptcy case is by a preponderance of the evidence…. Absent exceptional circumstances, a debtor fails to sustain her burden of demonstrating good faith as to the creditors to be stayed if the case lacks a reasonable likelihood of success."

ii. "However, upon a showing that the new case has a reasonable probability of success, the Court continues the analysis and considers the totality of the circumstances in determining whether subjective good faith exists under Section 362(c)(3). In reviewing the totality of the circumstances, the Court considers (i) the nature of the debts; (ii) the nature of any collateral; (iii) eve of bankruptcy purchases; (iv) the debtor's conduct in the present case; (v) reasons why the debtor wishes to extend the stay; and (vi) any other circumstances that weigh on the wisdom of an extension."

iii. "Nonetheless, because the focus of § 362(c)(3) is on a debtor's good faith 'as to the creditors to be stayed,' the Court holds that a new case is conclusively filed in good faith as to a creditor that so stipulates."

iv. The Court provides a tidy three column, four row chart analyzing who has the burden of proof on each of the following four issues:

(A) Whether a rebuttable presumption arises under § 362(c)(3)(C) that the case was not filed in good faith as to the creditor to be stayed. (Evidentiary Std: Preponderence; burden on debtor re change in circumstances; burden on opponent of extension re (A) prior case pending, (B) whether prior case dismissed for one of 4 reasons set forth in Section 362(c)(3)(C)(i)(II), or (C) result of filing of Section 362(d) motion in prior case).

(B) If a rebuttable presumption arises, whether the case was filed in good faith as to the creditors to be stayed. (Evidentiary Std: Clear and convincing; burden on debtor).

(C) If a rebuttable presumption does not arise, whether the case was filed in good faith as to the creditors to be stayed. (Evidentiary Std: Preponderence; burden on debtor).

(D) Whether the Court should exercise its discretion to extend the automatic stay. (Evidentiary Std: Preponderence; burden on debtor). *In re Charles*, 334 B.R. 207 (Bankr. S.D. Tex. 2005) (Isgur, J.).

v. Court also sets forth three part test to determine whether the new case was filed in good faith as to a creditor:

(A) Whether the creditor to be stayed agrees that the new case was filed in good faith with respect to that creditor. If so, the inquiry ends and stay is extended.

(B) Whether the new case is likely to result in a bankruptcy discharge (i.e., the objective test). If not, the inquiry ends absent exceptional circumstances. If so, the Court must proceed to the next inquiry.

(C) Whether other factors show that the case was filed in good faith with respect to the creditor to be stayed (i.e., the subjective test). The following listed sub-factors should be considered on the totality of the circumstances, with no one factor determinative: (1) Nature of the debt; (2) Nature of the collateral; (3) Eve of bankruptcy purchases; (4) Debtor's conduct in the present case; (5) Reasons why the debtor wishes to extend the stay; (6) Other circumstances that weigh on the wisdom of the extension. *In re Charles,* 334 B.R. 207 (Bankr. S.D. Tex. 2005) (Isgur, J.).

b. Court asks: "[I]f the single serial filer fails to get the stay extended under Code section 362(c)(3), can the debtor move under Code section 362(c)(4)(B) for reimposition of the stay despite the fact that this Code section appears "at first blush" to be for the benefit only of multiple serial filers?" Court rejects the statute's apparent "plain meaning," stating: "At first blush, § 362(c)(4) appears to apply only to multiple repeat filers and not to first-time repeat filers.... The problem with the "first blush" interpretation is that it renders virtually all of § 362(c)(4)(D) to be meaningless surplusage…. Subsection (D) provides a rebuttable presumption that certain cases have not been filed in good faith. Read together with subsections (B) and (C), the Court concludes that Congress intended for subsection (B) to apply to cases in which there is a timely request that the stay be imposed, whether the case is the first repeat filing or a subsequent repeat filing. This interpretation gives meaning to subsection (D) and provides a more consistent application of §§ 362(c)(3) and (4)…. After full consideration, the Court concludes that the "first blush" interpretation is incorrect. The Court will give meaning to the entirety of the statute and will not incorporate an exclusive reference to subparagraph (A) that Congress did not choose to insert." *In re Toro-Arcila*, 334 B.R. 224 (Bankr. S.D. Tex., 12/12/2005) (Isgur, J.).

c. If presumption arises that debtor's case was not filed in good faith, in determining whether to grant motion to continue the 30-day stay for multiple filers in the past year, debtor's burden is more onerous with respect to the fourth requirement for an extension (*i.e.*, that debtor prove the filing of new case was in good faith as to the creditors to be stayed). Standard is a "preponderance of the evidence," although the party upon which the burden falls varies. The burden rests on the opponent of the stay extension as to whether (i) more than one previous case was pending within the one-year period preceding the current case, (ii) a prior case was dismissed for one of the reasons specified in the statute, and (iii) the particular creditor filed a stay relief motion in a previous case. Burden rests with debtor as to whether there is a change in circumstances or other reason to believe the new case will result in discharge. *In re Collins*, 335 B.R. 646 (Bankr. S.D. Tex. 2005) (Isgur, J.).

d. Request by serial filer for extension of limited automatic stay should be liberally granted when surrounding circumstances do not give rise to statutory presumption that debtor's current case was filed in bad faith. "Where no presumption of bad faith arises under Section 362(c)(3)(C),

the party seeking to extend the automatic stay is required to affirmatively 'demonstrate' that the case is filed in good faith as to the creditors to be stayed." Here, debtors had only one prior case dismissed within 1 year of latest case. Prior case dismissed prior to confirmation of plan, and debtors experienced substantial "change in circumstances" through willingness of debtors' children to contribute $1,500 per month to plan. Hence, circumstances surrounding filing did not trigger statutory presumption that current case was filed in bad faith. *In re Warneck*, 336 B.R. 181 (Bankr. S.D.N.Y. 2006) (Morris, J.).

e. Where circumstances surrounding commencement of repeat filer's current bankruptcy case don't give rise of statutory presumption of bad faith, repeat filer bears burden of establishing good faith only by preponderance of evidence. Burden of establishing that repeat filer's current case was presumptively filed in bad faith rests on party opposing debtor's motion for extension of temporary 30-day stay. Court would employ "totality of circumstances" test to assist its determination of whether debtor filed current case in good faith as to creditors that she sought to stay. Court granted extension of temporary 30-day stay where debtor made all payments under plan confirmed in her prior Ch. 13 case until case dismissed for personal reasons, plan proposed in current case increased dividend, no creditor opposed motion, and debtor testified that she was determined to complete current plan and had made necessary financial changes to improve her financial situation and increase her ability to do so. *In re Montoya*, 2006 WL 1134486, Bankr. S.D. Cal. 2006) (Adler, J.).

3. Scope / Limitations

a. Section restricts duration of stay only as to "debts" or "property of the debtor," and not as to "property of the estate," which is protected by stay until debtor's case is dismissed or discharged or until court orders otherwise. *In re Johnson*, 335 B.R. 805 (Bankr. W.D. Tenn 2006) (Boswell, J.).

b. Section restricts duration of stay regarding only "debts" or "property of the debtor," and not the "property of the estate," which is protected by stay until debtor's case is dismissed or discharged or until court orders otherwise. *In re Johnson*, 335 B.R. 805 (Bankr. W.D. Tenn 2006) (Boswell, J.).

c. No prior case is "pending" within one year of second filing because debtor's prior case was dismissed more than one year prior to commencement of present case, even though case remained open until trustee filed a final report and accounting. *In re Moore*, 337 B.R. 79 (Bankr. E.D.N.C. 2005) (Small, J.).

d. If Congress wanted to terminate the stay in § 362(c)(3)(A), it could have used the same language as § 362(c)(4)(A). It didn't, and so the termination of the 30-day stay only applies to legal actions pending against the debtor at the time of the bankruptcy filing and to actions against the debtor's property. The stay, however, doesn't terminate as to property of the estate. *In re Paschal*, 337 B.R. 274 (Bankr. E.D.N.C. 2006) (Small, J.); *In re Jones*, 339 B.R. 360 (Bankr. E.D.N.C. 2006) (Small, J.).

e. 30-day stay limitation further limited to formal proceedings, such as judicial proceedings, in existence at time of bankruptcy filing. *In re Paschal*, 337 B.R. 274 (Bankr. E.D.N.C. 2006) (Small, J.).

f. For the one-time repeat filer, the temporary stay terminates only as to (1) any action taken with respect to a debt of debtor, (2) any action taken with respect to property of the debtor, and (3) any action taken with respect to any lease of the debtor. Stay does not terminate as to property of the estate. *In re Harris*, 2006 WL 1195396 (Bankr. N.D. Ohio 2006) (Shea-Stonum, J.).

g. Stay terminates only as to debtor, not as to property of the estate. *In re Branch* (Bankr. W.D. Tenn 2006) (Brown, J.).

4. Stay Extended

a. Court extends 30 day stay where debtors' prior Chapter 13 case was dismissed only after debtors had paid 45% of amounts that were to be paid under their confirmed plan and medical emergency prevented debtors from continuing with their plan payments. Among factors court may consider to extend temporary, 30-day stay are: (1) timing of latest petition; (2) how debtor's debt(s) arose; (3) debtor's motive in filing petition; (4) how debtor's actions affected creditors; (5) why prior case was dismissed; (6) likelihood that debtor will have steady income throughout bankruptcy case and will be able to properly fund plan; and (7) whether trustee or creditors oppose debtor's motion to extend stay. Here, court extends 30 day stay where case is re-filed less than 2 weeks after first case dismissed because the debtors' lawyer had failed to respond to the chapter 13 trustee's dismissal motion despite the debtors' efforts to cure the payment delinquencies that resulted in the trustee's motion. *In re Galanis*, 334 B.R. 685 (Bankr. D. Utah 2005) (Thurman, J.).

b. "Clear and convincing evidence," is level of proof above a "preponderance," but below "beyond reasonable doubt." Normal rule of statutory construction is that, if Congress intends for legislation to change interpretation of judicially created concept, it makes that intent specific. Court would look to factors previously considered in assessing whether chapter 13 plan has been proposed in good faith, as well as to "objective futility" and "subject intent" standards applied in deciding whether to dismiss case as having been filed in bad faith. Standards met here where debtor's failure to make plan payments in prior case was due to loss of source of income that would have funded plan, where debtor since obtained a better paying job, and where the second plan proposed a 100% payout. *In re Mark*, 336 B.R. 260 (Bankr. D. Md. 2006) (Keir, J.).

c. Court adopts "totality of the circumstances" test for determining whether case filed in good faith under Section 362(c)(3)(B). Court examines the factors developed by *Gier*, as modified by *Galanis*, in applying test. In deciding whether repeat filer's current case was in good faith, court doesn't just count factors in favor of, and against, good faith finding. Court finds debtors satisfied burden and were entitled to extension of temporary stay, where pertinent factors favoring good faith finding included fact that (i) mortgage arrearage arose from debtor-wife's loss of income arising from serious medical condition, (ii) prior chapter 13 case was dismissed for same reason, and (iii) debtors established feasibility of proposed plan. *In re Bell*, 336 B.R. 268 (Bankr. M.D.N.C. 2006) (Waldrep, J.).

d. Proof that debtor's inability to complete plan payments in previous case were beyond her control, combined with evidence that debtor had stable job after prior chapter 13 case

dismissed, sufficient to rebut statutory presumption of bad faith filing. *In re Phillips,* 336 B.R. 818 (Cornish, J.).

e. "Good faith" determined from developed jurisprudence on "good faith" under those provisions of the pre-BAPCPA Bankruptcy Code that required debtor to show it, such as Section 1325(a)(3). Some articulated theory of feasibility, grounded in admissible evidence, is key requirement of "good faith," both for an initial filing under chapter 13 and for proposed plan. In this new section, Congress clearly intended to make debtors in successor cases under chapter 13 prove early that they can perform through the end of term of plan, and to establish this by compelling evidence. Here, where debtor's circumstances had not changed significantly since prior case was dismissed, where debtor's total net household income, after adjusting for seasonal drop in husband's income during summer months was 20% below that necessary to sustain performance under debtor's proposed plan, and where debtor, over the eight-year period when she was obligated to pay for mobile home securing claim of creditor as to which she sought to have stay extended, had shown little ability to do so. *In re Kurtzahn*, 337 B.R. 356 (Bankr. D. Minn. 2006) (Kishel, J.).

f. Court grants conditional extension of 30-day stay under § 362(c)(3) on condition the debtor makes timely payments to foreclosing creditor who objected to continuation of stay. *In re Baldassaro*, 338 B.R. 178 (Bankr. D.N.H. 2006) (Deasy, J.).

g. Tests of whether chapter 13 plan was proposed in good faith or of whether case should be dismissed for debtor's lack of good faith had no application in deciding whether repeat chapter 13 filers had rebutted statutory presumption that current case was filed other than in good faith in order to obtain extension of temporary 30-day stay. To determine if statutory presumption rebutted, court only had to decide whether debtors met statutory requirements. *Whitaker v. Baxter (In re Whitaker),* 341 B.R. 336 (Bankr. S.D. Ga. 2006) (Dalis, J.).

h. Repeat Chapter 13 debtor rebutted statutory presumption of bad faith filing after prior case dismissed for failure to make payments under confirmed plan, where debtor had made payments under plan for more than two years, substitute renter was found, debtor was not repeat filer in traditional sense, and no evidence of any fact misrepresentations, unfair manipulation of the Code, or any other inequitable or egregious behavior existed. Court exercises discretion to continue stay. *In re Castaneda*, 2006 WL 1318599 (Bankr. S.D. Cal. 2006) (Adler, J.).

5. Stay Not Extended

a. Whether petition filed in good faith should be viewed from perspective of those creditors who would be subject to the stay. "To determine the substance of what it means to file a case in good faith as to the creditors to be stayed, the Court must draw upon prior cases interpreting the phrase 'good faith' because Congress was presumptively aware of such case law when it used the term in BAPCPA. It has long been the rule that absent clear Congressional intent to the contrary, judicial interpretations of prior law are determinative when concepts, words, or statutory sections are adopted in an amended law on the same subject. But the standard used to determine if a case is filed in good faith may differ depending upon the chapter involved. In Chapter 13, a good faith filing standard is applied to § 1307 conversion or dismissal. A review of the factors stated in *Gier* indicates that the BAPCPA has changed the applicability of some

of the factors, but when applied to the totality of the facts of the case, the standard can still be useful to determine whether the Debtor has filed this case in good faith as to the creditors to be stayed. Because of the burden shifting contained in § 362(c)(3) it is as though a moving party has come forward and presented evidence that proves each of the *Gier* factors, and it is now the Debtor's burden to present evidence on each of the factors sufficient to rebut the presumption by clear and convincing evidence. It is, however, important to note that although *Gier* articulates certain factors to examine, these factors are not necessarily weighted, nor are they exhaustive, and in the end this Court is looking at the totality of the circumstances." Debtor failed to meet burden in chapter 13 case filed six days after prior dismissal for failure to make payments required by terms of confirmed plan. Even assuming that recent improvement in medical condition was requisite change of circumstance indicating success, because debtor's repeat filings prevented creditors from exercising rights in collateral for 15 months without payment or adequate protection, creditors' collateral had depreciated significantly. Stay not extended. *In re Montoya*, 333 B.R. 449 (Bankr. D. Utah 2005) (Boulden, J.). *But see Whitaker v. Baxter (In re Whitaker)*, 341 B.R. 336 (Bankr. S.D. Ga. 2006) (Dalis, J.) (*"Montoya* and others struggle to identify 'totality of the circumstances' factors that might apply, discard those that obviously cannot, and also add new factors not indicated by § 362(c)(3).").

6. Timeliness of Request for Extension of Stay

a. Filing / mailing to creditors within 8 / 5 days of hearing provides insufficient notice for requested relief. Due process requires that motion be filed in compliance with local bankruptcy rule require filing and delivery of motion at least 10 days, and 14 days by mail, in advance of hearing date. *In re Taylor*, 334 B.R. 660 (Bankr. D. Minn. 2005) (Kishel, J.).

b. Motions not served at least 20 days prior to hearing were insufficient to satisfy creditors' due process rights. Also, mere statements of good faith aren't enough. To rebut presumption and obtain extension of limited 30-day stay, debtor must file affidavit with facts relied upon to rebut presumption. *In re Wilson*, 336 B.R. 338 (Bankr. E.D. Tenn. 2005) (Stair, J.).

c. Notice of hearing on extension motion sent 28 days after filing of petition, with hearing set for date more than 60 days after filing. Hearing continued another 4 weeks because of service issues. This case prompts Court to create "event" in CM/ECF system under motions called "extend automatic stay" to assure timely scheduling of hearing. Clerk's error, however, doesn't relieve debtors of statutory compliance with timing. Court's hands tied by statute. Automatic stay terminated. *In re Ziolkowski*, 338 B.R. 543 (Bankr. D. Conn. 2006) (Weil, J.).

d. Abbreviated three-day notice debtors received regarding foreclosure hearing mortgagee's emergency motion for relief from stay in their fourth successive Chapter 13 case was sufficient to satisfy their Fifth Amendment due process rights. Court, in granting mortgagee relief from automatic stay arising in debtors' fourth successive Chapter 13 case, could *sua sponte* accord *in rem* status to such relief, so as to prevent foreclosure action from being stayed by any future bankruptcy case filed by debtors or other party. Court had authority to make dismissal with prejudice to debtors' ability to re-file for bankruptcy relief and exercised that authority in appropriate manner by imposing 180-day bar on refiling. *Gonzalez-Ruiz v. Doral Financial Corp. (In re Gonzalez-Ruiz)*, 2006 WL 1174410 (Bankr. 1st Cir. 2006) (*per curiam).*

e. Motion must be filed within 30 days but can be heard after 30 days. Motions filed after 30 days are too late to impose the stay. *In re Beasley*, 339 B.R. 472 (Bankr. E.D. Ark. 2006) (Evans, J.); *In re Wright*, 339 B.R. 474 (Bankr. E.D. Ark. 2006) (Evans, J.).

f. In multiple serial filer case where stay was not imposed at outset of case, emergency motion on one day's notice adequate to obtain stay relief from foreclosure sale. Court states that "[w]hile Section 362(c)(4)(B) requires notice and hearing before the court can impose the stay, the Bankruptcy Code's definition of 'notice and hearing' as contained in Section 102(1) leaves it to the Court to determine what is appropriate in the particular circumstance." *In re Frazier*, 339 B.R. 516 (N.D. Fla. 2006) (Killian, J.).

g. Stay not extended where debtor waited until 30th day after filing of petition to bring motion seeking extension. Stay terminated despite apparent grounds warranting extension if hearing not held within 30 days of filing. *In re Cartledge* (Bankr. D.S.C. 2006) (Waites, J.); *In re Berry*, 340 B.R. 636 (Bankr. M.D. Ala. 2006) (Sawyer, J.).

h. Court permits expedited hearing on stay continuation after first motion denied for failure to provide 15 days' notice and second motion denied because hearing scheduled to be heard after 30 day was set to expire. Court admonishes counsel to file these motions timely and follow Court rules. *In re Pratt* (Bankr. D.S.C. 2006) (Waite, J.).

i. Motion filed 21 days after petition date is too late, and must be filed within 7 days of filing of petition. Stay terminated automatically. *In re Thomas*, 2006 WL 278544 (Bankr. E.D. Mich 2006) (Shefferly, J.).

j. Motion filed within 7 days, served in 11 days. No hearing scheduled on motion, and debtor took no additional action through 30th day, other than file a certificate of no objection. Motion denied because debtor didn't contact court for a hearing date. *In re Balitzky* (Bankr. E.D. Mich. 2006) (Tucker, J.).

k. Motion filed more than 30 days after filing denied as untimely. "It is obviously impossible to complete a hearing on Debtor's motion to continue the stay within the required 30-day period, so the motion must be denied." *In re Bobb* (Bankr. E.D. Mich. 2006) (Tucker, J.).

l. Distinguish between filers with one vs. two or more prior filings in same year. If two or more, simply must file motion within 30 days and hearing can be held any time thereafter. Conversely, if only one prior filing, matter must be filed and heard within 30 days before stay expiration. Court finds that no provision specifically allows reinstatement of the 30 day stay, but that one can be inferred. *In re Gray* (Bankr. E.D. Wis. 2006) (Pepper, J.).

m. Court provides creditor with comfort order under § 362(j) that stay is not in effect. 30 days had passed for single serial filer, and Court found that there was no stay to lift, and hence a comfort order was appropriate. *In re Bernsten* (Bankr. E.D. Wis. 2006) (Pepper, J.).

n. Because debtor's motion seeking an extension of the automatic stay was not even filed until 33 days after her case was filed, such motion is not timely. *In re Harris*, 2006 WL 1195396 (Bankr. N.D. Ohio 2006) (Shea-Stonum, J.).

o. Court cannot extend stay that has already expired. *Whitaker v. Baxter (In re Whitaker)*, 341 B.R. 336 (Bankr. S.D. Ga. 2006) (Dalis, J.).

7. Reinstatement for Multiple Filers

a. Court uses authority to enter "necessary or appropriate" orders under Section 105(a) to re-impose automatic stay as to all creditors in serial chapter 13 case where court could not decide whether to extend temporary 30-day stay until after stay had already expired. Here, the debtors successfully rebutted statutory presumption that current case was filed other than in good faith and would have been entitled to extension of stay if motion had been timely decided. Also, motion was served on trustee and all creditors, and no party objected. Further, plan proposed by debtors in current case was 100% payment plan, and creditors would benefit from re-imposition of stay. *Whitaker v. Baxter (In re Whitaker)*, 341 B.R. 336 (Bankr. S.D. Ga. 2006) (Dalis, J.).

8. Service Issues

a. Motion to extend stay had to be served on individual creditors affected, and thus must be denied here because only a US Trustee and interim trustee were served. At very least, motion must be served on those individual creditors that debtor seek to have extended stay applied, and most prophylactically should be sent to all creditors. It can't be extended by *ex parte* request. *In re Collins*, 334 B.R. 655 (Bankr. D. Minn. 2005) (Kishel, J.).

9. Stay Terminated Though No Party Objects to Extension Based on Lack of Feasibility

a. Debtor fails to provide clear and convincing evidence to establish feasibility. *In re Havner*, 336 B.R. 98 (M.D.N.C. 2006) (Waldrep, J.).

10. Pleading Requirements

a. "[T]he motion seeks an extension of the automatic stay as to all creditors, but does not set forth a reasoned basis to extend the stay as to any creditor other than [the mortgage lender]. Congress has authorized this Court to extend the automatic stay "as to any or all creditors." The relief can be granted only on motion and only after notice and hearing. The present motion gives inadequate notice as to why the automatic stay should be extended against all creditors. Conversely, notice is given of the basis for the relief against [the mortgage lender]. Accordingly, the debtor will receive a hearing on that portion of the request. If the debtor believes an extension of the stay is warranted against additional creditors, the debtor must replead with sufficient allegations to place those creditors on fair notice of the issues that will be addressed at the hearing. *In re Charles*, 332 B.R. 538 (Bankr. S.D. Tex. 2005) (Isgur, J.).

C. Stay Termination for Real Property Under BAPCPA's Section 362(d)(4)

1. This provision requires termination of the stay for creditors with mortgages on real property if the court finds that the petition "was part of a scheme to delay, hinder, and defraud creditors" that involved either transfers without the secured creditor's consent (without court approval) or involved multiple bankruptcy filings affecting such property. In the event the stay is lifted based on such finding, there is 2 year prospective *in rem* relief. Here, three separate cases were

dismissed, and the Court determined whether relief could be granted under Section 362(d)(4). Court here finds that the word "and" had to be read in the conjunctive. Thus, the filing must have been part of a scheme, the object of the scheme must have been "to delay, hinder and defraud" creditors, and the scheme must have involved either the transfer of some interest in the property without consent of secured creditor or court approval, or multiple bankruptcy filings affecting the property. Requiring all three elements to be present by use of the conjunctive "and" was neither absurd nor shocking to common sense, especially since the stay relief provided under the subject section of the Code extended for two years. Here, the creditor movants proceeded based on multiple filings, yet none has carried its burden of going forward to establish a *prima facie* basis for concluding the multiple filings was part of a scheme to defraud creditors. None of them alleged all the elements of fraud. Consequently, although none of the respondents offered proof, the risk of non-persuasion on the elements required for BAPCPA § 362(d)(4) relief never passed to the respondents. *In re Abdul-Muhaimin,* 2006 WL 1153898 (Bankr. D. Md. 2006) (Derby, J.).

2. In enacting BAPCPA, Congress did not intend to overrule implicitly the judicial doctrine adopted by the Maryland bankruptcy court in *In re Yimam*, 214 B.R. 463 (Bankr. D. Md. 1997), which imposed a 180 day equitable servitude on real property co-owned by a serial bankruptcy filer in order to prevent abuse of the bankruptcy process. Although there were parallels between *Yimam* and the new section of BAPCPA, the statutory language of the Code section and the *Yimam* doctrine were focused on different abuses and each imposed a penalty that was materially different in duration. Because Congress did not make specific reference to *Yimam* when it enacted the subject section of the Code, it was not overruled or superceded. As such, the secured creditor was entitled to imposition of an equitable servitude for 180 days against the real property owned by chapter 13 debtor under *Yimam* in order to prevent a continuing abuse of the bankruptcy process where the debtor or her husband had filed three bankruptcy cases over a period of 17 months, two of which were filed on the day of or the day prior to a scheduled foreclosure sale, coupled with the debtor's failure to obtain credit counseling. *In re Abdul-Muhaimin,* 2006 WL 1153898 (Bankr. D. Md. 2006) (Derby, J.).

D. Cashing Checks Postpetition

1. Check tendered prepetition does not violate the stay if cashed postpetition. *Thomas v. Money Mart Financial Services, Inc. (In re Thomas),* No. 05-1176 (8th Cir. 2005).

E. Repossessions

1. Chapter 13 debtor's ownership interest in two vehicles passed to secured creditor upon repossession after dismissal of debtor's chapter 13 case. Debtor's remaining right to redeem vehicles did not render vehicles property of the estate upon reinstatement of debtor's case under Florida law. *In re Johnson*, 328 B.R. 324 (Bankr. M.D. Fla. 2005) (Briskman, J.).

2. Debtor retains legal interest in motor vehicle repossessed prepetition as long as debtor continues to hold legal title to vehicle under applicable state law. Creditor that lawfully repossessed motor vehicle two to three days before filing violated automatic stay when it unilaterally determined it was not adequately protected and refused to return this vehicle to debtor after being notified of her bankruptcy filing and offered proof that vehicle was insured. Turnover statute creates affirmative obligation on part of party holding estate property to turn that property over, and obligation is not dependent upon the holding of hearing or entry of order by bankruptcy court. However, no

punitive damages were warranted for creditor's willful violation of stay in refusing to return repossessed car since bankruptcy court had historically permitted creditors to retain vehicles repossessed prepetition, and significant weight of minority cases supporting the conclusion that such conduct did not violate automatic stay. *Rutherford v. Auto Cash, Inc. (In re Rutherford)*, 329 B.R. 886 (Bankr. N.D. Ga. 2005) (Drake, J.).

3. Creditor willfully violates stay if it retains repossessed car and does not return it to the chapter 13 debtors, instead waits for the debtors to file a turnover motion. *In re Hundley* (Bankr. D. Kan. 2006) (Nugent, J.); *Unified People's F.C.U. v. Yates (In re Yates)*, 332 B.R. 1 (Bankr. 10th Cir. 2005) (Thurman, J.).

4. Secured creditor repossessed car of debtor who filed a chapter 13 case while their chapter 7 case was still pending. Debtor didn't list the secured creditor as a creditor in its chapter 13 case. Court finds that repossession did not violate the automatic stay or the discharge injunction by filing a proof of claim in the chapter 13 case or when it sought relief from the stay to sell the repossessed vehicle. All the secured creditor's action were taken within the jurisdiction of the bankruptcy court. The remedy for the debtor was to file an objection to the creditor's proof of claim in the chapter 13 case. *In re Surprise*, -- B.R. -- (Bankr. N.D.N.Y. 2006) (Gerling, J.).

F. Other Stay Violations

1. A willful violation of the stay does not require a specific intent to violate it. Rather, willfulness will be found if the defendant knew of the stay and its actions were intentional. Chapter 13 creditor violated automatic stay when, without first seeking relief from court, it foreclosed on real property that debtor's wife contended was her separate property since the debtor had an arguable claim of right in such property (despite district court's post-foreclosure determination that the debtor had no interest in property). Risks of unilateral seizure of arguable property interests without process were especially of concern given that the substantial risk of error in the decision to foreclose and the potential effect on other creditors outweigh the slight burden and cost of waiting for the creditor. *Brown v. Chesnut (In re Chesnut)*, 422 F.3d 298 (5th Cir. 2005).

2. Creditors enforcing prepetition obligations postpetition without stay relief proceed at their own peril. *Ozenne v. Bendon (In re Ozenne)*, 337 B.R. 214 (Bankr. 9th Cir. 2006).

G. Other Cases with No Stay Violations

1. Grant of Chapter 7 debtor's motion for determination of creditor's unsecured status, based on creditor's failure to respond to motion, was not determination that creditor never had security interest in debtor's property or that creditor, in previously sending letter to debtor to inquire about whether debtor would be reaffirming debt, had violated automatic stay. In ruling on debtor's motion for damages based on creditor's alleged violation of stay, bankruptcy court could consider creditor's undisputed evidence that its credit card agreement with debtor gave it a purchase money security interest in any goods which debtor purchased using creditor's card. *In re Holloway*, 337 B.R. 6 (Bankr. D. Mass. 2006) (Rosenthal, J.).

H. Section 362(h)(2) - Effect of Untimely Section 521(a)(2) Filing re Liens

1. Automatic termination of stay for failure to file statement of intention required by Section 521(a)(2) doesn't apply in chapter 13 cases. *In re Schlitzer*, 323 B.R. 856 (Bankr. W.D.N.Y. 2005) (Ninfo, J.).

2. Amendment also permits trustee to intervene to preserve valuable assets for the benefit of the estate. Trustee intervenes and stay maintained. *In re Squires*, 2006 WL 1119227 (Bankr. M.D. Fla. 2006) (Funk, J.).

3. So-called "fourth option" previously available to debtor who was current on secured debt (3 others being surrender or redeem collateral, or reaffirm debt) to retain property while making regular payments to secured creditor is not available under BAPCPA. Rather, if debtor fails to file statement of intention and elects one of the three statutory options, debtor loses protections of stay 30 days after petition date, and property is no longer property of the estate. This provision, however, does not mandate turnover or empower the court to grant such relief. Rather, the provision only returns the creditor to its state law remedies (which in this case had no repossession rights). *In re Rowe*, 2006 WL 1446181 (Bankr. D. Kan. 2006) (Somers, J.).

I. Automatic Termination under Section 365(p)

1. Section 365(p) provides for automatic termination of stay for leased personal property when the debtor fails to timely assume the lease. The section does not authorize courts to issue orders confirming that the stay has been terminated. *In re Sanders* (Bankr. E.D. Mich. 2006) (Shefferly, J.).

J. Stay Inapplicable to Postpetition Transfers by the Debtor

1. Trustee's remedy is to avoid the transfer under § 549, not seek rescission as a void *ab initio* violation of the stay. *Herrington v. Grant (In re Paxton)*, 440 F.3d 233 (5th Cir. 2006).

K. Retroactive Termination / Annulment

1. Mortgage foreclosure sale after unstayed dismissal of chapter 13 case but before appellate reversal of dismissal did not violate automatic stay. Further, retroactive restoration of stay was not warranted though reversal was on ground dismissal order had been entered in violation of debtors' due process rights absent showing that debtors were denied opportunity to seek stay pending appeal. *Lomagno v. Salomon Bros. Realty Corp. (In re Lomagno)*, 429 F.3d 16 (1st Cir. 2005).

2. Where creditor inadvertently violates stay based on lack of knowledge of bankruptcy, or where debtor acted in bad faith, are examples of when cause may exist for retroactive stay relief. In deciding whether to retroactively annul stay, courts are especially concerned with question of debtor's bad faith. Also, intervention of the rights of innocent third parties may warrant the granting of retroactive stay relief, as in case of purchaser twice removed (innocent purchaser of purchaser in foreclosure sale). Debtor acted in bad faith by not disclosing interest in property sold at foreclosure, by not informing court or trustee of her claim to surplus proceeds, and by not asserting stay violation for two years. Even if debtor told attorney of interest in property and he failed to include it in the schedules, debtor had to bear the burden of that error and her choice of counsel. *Bright v. Washington Mutual Bank F.A. (In re Bright)*, 338 B.R. 530 (Bankr. 1st Cir. 2006) (Votolato, J.).

3. Section 349(b) dismissal of two prior cases did not have the effect of validating actions taken during the pendency of those cases. "The bankruptcy court correctly recognized that the dismissal of a bankruptcy proceeding does not necessarily retroactively validate actions taken in violation of an automatic stay. Rather, the retroactive validation of actions taken in violation of an automatic stay is reserved to the discretion of bankruptcy courts, and they are cautioned to use this discretion sparingly because of the adverse impact that validation could have on other creditors who honored the stay. *See, e.g., In re Cueva,* 371 F.3d 232, 236 (5th Cir.2004) (stating that bankruptcy courts have "broad discretion" to grant or to deny retroactive annulment or modification of an automatic stay); *In re Thornburg,* 277 B.R. 719, 731 (Bankr.E.D.Tex.2002) (stating that bankruptcy courts should grant retroactive relief for actions that violated an automatic stay only in exceptional circumstances)." *In re Brown,* 2006 WL 1210789 (5th Cir. 5/1/06) (*per curiam*).

L. Arbitration

1. Chapter 13 debtor-borrower brought action against lender to enforce a prepetition rescission of her home equity loan. Where arbitration clause exists, bankruptcy court lacks authority or discretion to deny enforcement of clause unless the party opposing arbitration can establish congressional intent to preclude waiver of judicial remedies for the statutory rights at issue. Such congressional intent lacking in debtor's federal and state consumer protection claims, and thus court lacked discretion to deny enforcement of arbitration clause. *Mintze v. Am. Gen. Fin. Servs., Inc. (In re Mintze),* 434 F.3d 222 (3d Cir. 2006) (Roth, J.).

2. Stay would be modified to allow investors injured by misrepresentations allegedly made by a bankrupt investment advisor in connection with his sale of securities to establish the debtor-advisor's liability for such alleged misrepresentations in arbitration despite contention that arbitration would interfere with the "fresh start" policies of the Code and with the jurisdiction of the court to resolve regarded fraud-based nondischargeability claims. These nondischargeability claims included one under a recently added dischargeability exception for debts resulting (Section 523(a)(19)), which expressly contemplated that creditors could pursue such liability claims postpetition in a nonbankruptcy forum. Thus, allowing the liability, but not the dischargeability, claims to be arbitrated would not conflict with the policies of the Code. *In re Zimmerman*, 341 B.R. 77 (Bankr. N.D. Ga. 2006) (Bonapfel, J.).

3. Chapter 7 debtor filed class action adversary proceeding against creditor bank that had extended consumer loan to debtor, alleging that creditor continued monthly withdrawals from debtor's bank account after Chapter 7 filing constituted willful violation of automatic stay. The bankruptcy court denied the creditor's motion to stay or dismiss adversary proceeding in favor of arbitration, pursuant to credit account agreement's arbitration clause. 2d Circuit reverses, holding: (i) party opposing arbitration has burden of showing that Congress intended to preclude arbitration in that case; (ii) bankruptcy courts generally can't refuse to compel arbitration of non-core or matters "related to" matters; and (iii) in core bankruptcy proceedings, arbitration agreement should be disregarded only if arbitration would jeopardize objectives of Bankruptcy Code. *MBNA America Bank, N.A. v. Hill (In re Hill),* 436 F.3d 104 (2d Cir. 2006) (Gibson, J.).

4. Arbitration panel before which broker-dealer initiated action for indemnity against chapter 7 investment advisor had concurrent jurisdiction to determine whether unscheduled debt was dischargeable and its decision was to be given preclusive effect following investment advisor's

reopening of case to seek to enforce discharge injunction against broker-dealer whose claim had originally been unscheduled. *In re Toppin*, -- B.R. -- (Bankr. S.D. Fla. 2006) (Friedman, J.).

M. Setoff

1. IRS' right to setoff does not constitute "cause" to lift the automatic stay after confirmation of the debtors' chapter 13 plan. Tax refund remains in the IRS' possession, and thus its interests were adequately protected. *United States v. Shultz (In re Shultz)*, 2006 WL 1407466 (6th Cir. 5/19/06) (Gregg, J.).

2. IRS's right of setoff does not constitute *per se* "cause" to lift the stay to permit setoff to be taken against the debtor-taxpayer's tax refund. *In re Vargas*, -- B.R. -- (Bankr. N.D. Ohio 2006) (Speer, J.).

N. Police Powers

1. Chapter 13 debtor moved to hold public parking authority in contempt for willful stay violation. Court holds that even if authority took possession of car postpetition and sold it at public auction solely to collect debt that arose postpetition, stay was violated when it sought to collect on that debt by seizing and selling car that was part of chapter 13 debtor's estate. *In re Jester*, -- B.R. -- (Bankr. E.D. Pa. 2006) (Weiss-Sigmund, J.).

IX. Exemptions

A. Avoidance

1. Judicial and Statutory Liens

a. Mechanics' liens, materialmen's liens, warehousemen's liens, and tax liens are types of statutory liens that debtor may not avoid on exemption impairment grounds under Section 522(f). Lien held by New Jersey Motor Vehicle Commission (MVC) on chapter 13 debtor's residence for unpaid motor vehicle surcharges and interest was not a "judicial lien" that could be avoided on exemption impairment grounds, but was "statutory lien," even though surcharge statute lacked explicit lien-creating language and MVC obtained lien only after having filed certificate of debt with Clerk of Superior Court. Surcharge statute read together with another statute explicitly provided for lien, and clerk's ministerial act of docketing debt was insufficient to render lien as one arising from judicial process or to proceed as needed to find judicial lien. Accordingly, lien arose solely by force of statute. *In re Schick*, 418 F.3d 211 (3d Cir. 2005) (Fuentes, J.).

b. Judicial lien that partially impairs debtors' homestead exemption results in avoidance of the entire lien. *Saal and Brones v. Helping People Succeed, Inc. (In re Saal)*, 338 B.R. 501 (Bankr. D. Colo. 2006) (Brooks, J.).

c. Judicial lien that impaired the debtor's homestead exemption on property that otherwise had no equity would be avoided. *In re May*, 340 B.R. 633 (Bankr. W.D. Ark. 2006) (Mixon, J.).

d. Judgment liens remaining on property and not avoided on exemption-impairment grounds ride through bankruptcy. Court can't stop postpetition interest from accruing or modify judgment creditor's unaffected judgment liens by virtue of debtor's avoidance action. Value of judgment liens measured on petition date in determining, for lien avoidance purposes, the extent to which they impair debtor's exemptions. *In re Kanakaris*, 341 B.R. 33 (Bankr. S.D. Cal. 2006) (Hargrove, J.).

e. Though state law controlled question of whether debtor was entitled to homestead exemption, bankruptcy law determined extent to which state law exemptions rights were impaired. Nondischargeable nature of student loan debt that judicial lien secured did not affect debtor's ability to avoid judicial lien on exemption-impairment grounds. There was no suggestion that student loans were fraudulently obtained, as required for debtor's exempt property to be liable for prepetition debt. *In re Lawson*, 2006 WL 1313186 (Bankr. W.D. Okl. 2006) (Cornish, J.).\

f. Judicial lien recorded before debtors acquired residence could be avoided to extent that it impaired the debtors' homestead exemption regardless of whether judicial lien attached simultaneously with debtors' acquisition of their property interests. The time of the attachment of the judicial lien was irrelevant to lien avoidance under Section 522(f) provided that the lien did not arise together with or as a direct result of the acquisition. *In re Pacheco*, -- B.R. -- (Bankr. D.N.M. 2006) (McFeeley, J.).

2. § 544 Not Appropriate for Challenge to Exemption in Entireties Property

a. Chapter 7 trustee cannot use § 544 to object to a debtor's exemption, as it "would be in direct contravention of intent behind § 522(b)(2)(B) that an exemption for property held in tenancy by the entirety be treated the same in bankruptcy as it is under state law." The trustee's attempt to create a "fictitious" joint creditor to defeat the entireties exemption of joint filers would violate § 522(b)(2)(B) "because debtors outside bankruptcy do not face a similarly empowered hypothetical 'joint creditor.'" *In re Eichhorn*, 338 B.R. 793 (Bankr. S.D. Ill. 2006) (Meyers., J.)

3. New Value Extended on Eve of Filing Despite Fact that Proceeds Are Claimed as Exempt

a. Debtor repays loan to parents, which would have been avoidable, but parents reloan money to son within 9 days of bankruptcy filing. Debtor claims money as exempt. Court sustains new value exception because debtor received value, and there was no requirement that the value be available for distribution to creditors. *In re Schabel*, 338 B.R. 376 (Bankr. E.D. Wis. 2005) (McGarity, J.).

4. Judicial Estoppel and *Res Judicata* Preclude Strip-Down of Lien Where Stay Was Lifted

a. Court refuses on basis of judicial estoppel and *res judicata* to permit debtor to avoid a lien under § 522(f) as to which the stay had been lifted. *In re Ginter*, 339 B.R. 493 (Bankr. W.D. Mo. 2006) (Dow, J.).

5. No Exemption for IRA Deposits within Three Years of Filing

a. Missouri law prohibited "fraudulent" transfers under state law into IRAs. Debtors deposit 1/5 of claimed $30,000 IRA exemption within 30 days of filing. Court finds that funds are not

exempt if deposited within 3 years of filing. *In re Orgeron*, 2006 WL 335438 (Bankr. W.D. Mo. 2006) (Federman, J.).

6. *Rooker - Feldman* Doctrine Applied

   a. Creditor obtains judgment against debtor, granting "a purchase money resulting trust" against the debtor's home. Judgment provided that effect would be to "vest in Respondent title to an undivided twenty percent (20%) of the Property." Debtor files petition and seeks to avoid resultant trust as an impairment of the homestead exemption. Court rules that the *Rooker-Feldman* doctrine deprived Court of jurisdiction, stating: "In the Texas state court proceeding, the respondent was awarded an undivided 20 percent interest in the property. The debtor's motion seeks to void the respondent's interest. If the debtor's motion is granted, the respondent would lose his 20 percent interest in the property. The relief requested in the debtor's motion would effectively reverse the judgment of the Texas state court; it would vitiate the ruling that the respondent owns 20 percent of the property. It is clear that issues presented in the debtor's motion are inextricably intertwined with the issues previously adjudicated by the Texas state court." *In re Anderson* (Bankr. S.D. Tex. 2006) (Bohm, J.).

7. Section 522(g): Exemptions in Recovered Property

   a. For trustee to "recover" property under Section 522(g), which permits the debtor to exempt recovered property in which the debtor could have claimed an exemption but for the transfer, trustee need not initiate formal adversary avoidance proceeding, but can recover the property in a various ways. Still, where the recovery is based on an unperfected security interest, debtors' voluntary grant of security interest in car barred them from claiming exemption, except to the extent the car had value in excess of the creditor's unperfected security interest. *In re Hicks*, -- B.R. -- (Bankr. W.D. Mo. 2006) (Federman, J.).

B. Trustee Sales of Exempt Property

1. Trustee's failure to object to homestead exemption doesn't stop trustee from attempting to sell property for its excess value. Court finds that Rule 4003 doesn't fix a time to object to the value of exempt property, only to the right to an exemption itself. *In re Farthing*, 340 B.R. 376 (Bankr. D. Ariz. 2006) (Haines, J.).

C. Objections to Claimed Exemption

1. Court denies debtor's request to dismiss case in order to re-file and benefit from increase in state homestead exemption in the interim. *In re Harper*, 2005 WL 2972968 (Bankr. W.D.N.Y. 10/25/05) (Bucki, J.).

2. Debtor's purported fraud in obtaining credit is no basis for denying debtor's claimed exemption in asset standing as security for the debt. *In re Vuong*, No. 06-01048-SSM (Bankr. E.D. Va. 2006) (Mitchell, J.).

3. Debtors' failure to schedule interest in class action lawsuit or to disclose it at creditors' meeting in response to specific questioning about causes of action which debtors might have warranted denial

of state law exemption which they belatedly attempted to claim. *In re Keith*, 336 B.R. 746 (Bankr. W.D. Ky. 2006) (Cooper, J.).

4. Though chapter 7 trustee's failure to file timely objection to exemptions claimed by debtor-husband and debtor-wife in debtor-wife's prepetition personal injury cause of action under Sections 522(d)(5) and (d)(11), and joint debtors' right to exemptions claimed was now unassailable, trustee still retained right to contest whether any of proceeds arising from settlement of debtor-wife's personal injury claim were property "of the kind" that debtors had exempted. Debtor-husband's exemption was "empty" exemption and did not entitle him to payment of any portion of proceeds from settlement of wife's personal injury claim. Husband was not identified as party in debtor-wife's complaint, *ad damnum* clause of complaint asserted no claim for any injury sustained by husband, and husband had no property interest in debtor-wife's action at time petition was filed. Further, there was no evidence that any of the settlement proceeds were compensation for injuries covered by Section 522(d)(11) because all of the net proceeds were for her actual pecuniary loss. *In re Kelin*, 2006 WL 1314667 (Bankr. W.D. Pa. 2006) (Markovitz, J.).

5. Order sustaining objection to federal homestead exemption did not bar debtors from amending schedules to claim the state's homestead exemption. The issue in the first case is not whether the debtors were entitled to any homestead exemption, it was whether they were entitled to claim the federal homestead exemption. The court noted that there are significant differences in the exemption statutes, with the state's homestead exemption being based on acreage while the federal exemption is based on monetary value. *Ladd v. Ries (In re Ladd)*, 2006 WL 1192953 (8th Cir. 2006) (Beam, J.).

D. Tax Refunds

1. Equitable marhshalling doctrine permits estate to receive full share of debtor's tax refund though debtor's share was reduced by the amount offset by the state and federal governments for the payment of a nondischargeable child support obligation. Estate's interest in debtor's tax refunds should be based on the gross refund amount. *Morris v. Steele (In re Steele)* (Bankr. D. Kan. 2005) (Nugent, J.).

2. Federal and state income tax refunds that chapter 7 debtors received postpetition, including those portions attributable to federal child tax credit, were "property of the estate," being contingent interests in future payments possessed on the petition date. *Law v. Stover (In re Law)*, 336 B.R. 780 (Bankr. 8th Cir. 2006) (Mahoney, J.).

3. Federal and state tax refunds are exempt from bankruptcy proceedings. Here, a Missouri statute deemed to allow debtor to exempt property not subject to attachment and execution under Missouri or federal law. Court holds, however, that the federal and state government may reach a tax refund under limited circumstances, such as when the IRS is allowed to use the refund to pay certain past-due debts. *Benn v. Cole (In re Benn)*, 340 B.R. 905 (Bankr. 8th Cir. 2006).

E. Head of Household Exemption

1. A woman who lives with her same-sex partner and her partner's two children, may claim the "head of household" exemption provided under Missouri state law. *In re Townsend*, 2006 WL 1109407 (Bankr. W.D. Mo. 2006) (Garner, J.).

F. Motor Vehicles

1. 1979 Swiss Army Condor motorcycle exempt under Missouri law as a qualifying "motor vehicle." *In re Lund*, 2005 WL 3620335 (Bankr. W.D. Mo. 2005) (Federman, J.).

2. School bus is a "motor vehicle," not a "tool" of the trade, under the clear language of Louisiana's exemption statute. The legislature drafted a specific exemption for motor vehicles and, pursuant to the canon of statutory construction that allows specific language to trump general language, that provision must apply to all motor vehicles, including school buses. *In re Belsome*, 434 F.3d 774 (5th Cir. 2005).

3. Creditor moved for relief from stay to exercise its rights in chapter 7 debtor's car while debtor moved to avoid lien on exemption-impairment grounds. Court states that for debtor to be entitled to exemption in car as "tool of the trade," debtor must do more than show that vehicle is needed to travel to and from place of employment. Vehicle need not be specially outfitted for debtor's trade, however. Court finds that car used in trade as milliner to transport hats she made to festivals and other "vending" events was "tool of the trade." Court further holds that nonpossessory, non-purchase-money security interest in motor vehicle that debtor could exempt as tool of trade could be avoided in its entirety, as impairing bankruptcy exemption where value of vehicle was equal to exemption amount. *In re Giles*, 340 B.R. 543 (Bankr. E.D. Pa. 2006) (Frank, J.).

G. Pensions / IRAs / Retirement Plans

1. Individualized annuity alternative plan in which teacher was allowed to participate did not qualify as "retirement account" under Texas statute prohibiting assignment of rights or benefits from such accounts. The debtor's assignment of interest in plan to secure his alimony obligation to his divorced wife was in nature of deemed taxable distribution of that portion of plan which he assigned, and resulted in loss of that portion's exempt status under Texas law. *Collola v. Beeson (In re Coppola)*, 419 F.3d 823 (5th Cir. 2005).

2. IRA claimed as exempt under Sections 522(d)(5) and (d)(10) not exempt under 522(d)(10) because it was not reasonably necessary for support of chapter 7 debtors aged 52 and 49 in good health. Court finds they could replenish IRA's in their remaining working years and that they were able to exempt about 40% of it under Section 522(d)(5). Also, Court notes they discharged about $77,000 of debt. *In re Gosnell*, 336 B.R. 133 (Bankr. W.D. Ark. 2005) (Mixon, J.).

3. Debtor need not be receiving, or presently be entitled to receive, payments under a pension / retirement plan or contract, as long as plan or contract is one of types identified in 522(d)(10)(E) and as long as it provides right to receive payment, now or in future, on account of illness, disability, death, age or length of service. *In re Wiggins*, 2006 WL 1094569 (M.D. Pa. 2006) (Caldwell, J.).

4. Non-debtor wife who, prior to commencement of her husband's Chapter 7 case, had obtained distribution of funds from her 401(k) and deposited them on day before filing into joint checking account that was only account used by she and husband for payment of their debts, failed to rebut presumption arising under Illinois law that debtor husband had interest in funds. *In re Cloe*, 336 B.R. 762 (Bankr. C.D. Ill. 2006) (Gorman, J.).

H. Community Property

1. Upon filing of bankruptcy petition by debtor-spouse, all community property, including non-filing spouse's interest in community property, becomes property of the estate, provided that such property is under sole, equal or joint management and control of debtor or is liable for allowable claim against debtor or against debtor and debtor's spouse. *In re Victor*, 2006 WL 1169806 (Bankr. D.N.M. 2006) (McFeeley, J.).

2. Community property included in estate though only one spouse is a debtor. The debtor's interest in the property is an undivided one-half interest in the whole. Here, however, the property included in the estate was exempt in its entirety, and so the trustee's motion for turnover was denied by the Court. *In re Xiong*, 2006 WL 1277129 (Bankr. E.D. Wis. 5/3/06) (Kelley, J.).

I. Household Furnishings

1. Pool tables are not household goods or furnishings. Security interest in same can't be avoided under Section 522(f)(1)(B). *In re Thomas* (Bankr. C.D. Ill. 2005) (Gorman, J.).

X. Chapter 13

A. Good Faith Plans

1. Proposed chapter 13 plan in which debtor sought to make up shortfall in monthly disposable income to make plan payments by borrowing $50,000 from another creditor, whom he would repay after completing plan, was not in "good faith" where such borrowing was 70% of payments under plan. Plan would not provide "fresh start", but with new debt which, with debtor's meager disposable income, he'd spend another several years in repaying. *In re Paasch*, 331 B.R. 919 (Bankr. C.D. Cal. 2005) (Bufford, J.).

2. Chapter 13 debtor's fraudulent prepetition asset transfers in attempt to manufacture equity in his exempt residence on eve of bankruptcy filing prevented proposed plan from satisfying "good faith" confirmation requirement under BAPCPA's new Section 522(o) and Section 1325(a)(3). *In re Maronde*, 332 B.R. 593 (Bankr. D. Minn. 2005) (Dreher, J.).

3. Mother and siblings object to chapter 13 plan proposing 100% payout on basis of claimed concealment and fraudulent transfer of assets. Court finds that true motive of relatives is to force dismissal of case because they failed to file timely proofs of claim and wanted their claims revived. Allegations of prepetition misconduct and errors on schedules and statement of affairs didn't justify dismissal either. Creditors following rules won't be prejudiced by those that don't. *In re Reinicke*, 338 B.R. 292 (Bankr. N.D. Tex. 2006) (Lynn, J.).

4. Church deacon debtor proposed $416 as a monthly charitable contribution on a $4,073 gross income and a 36 month plan offering 1% to unsecured creditors. Chapter 13 trustee objects to the plan as not in good faith. Court approves plan based on proof that contributions were consistent with past practice. *In re Petty*, 338 B.R. 805 (Bankr. E.D. Ark. 2006) (Taylor, J.).

5. Serial filer unable to obtain extension of stay for lack of good faith because of presumption against it, able to confirm chapter 13 plan and satisfy good faith standard. § 362(c)(3)'s focus is on creditors; § 1325(a)(7)'s is on the debtor and only requires a showing of preponderance of the evidence (as compared with § 362(c)(3)'s requirement of clear and convincing evidence to overcome the statutory presumption of bad faith). *In re Tomasini*, 339 B.R. 773 (Bankr. D. Utah. 2006).

B. Treatment of Secured Claims

1. 12 days after the foreclosure sale of residence where mortgagee acquired property, debtors filed chapter 13 and filed plan seeking to cure their home mortgage default. Mortgagee objected to confirmation of plan and bankruptcy court sustained objection. 6th Circuit holds that appeal was not moot because property had not been resold, and even if it had been, purchaser would have had at least constructive notice of the court proceedings and thus taken title subject to debtors' equitable interest. Thus, property could have been returned to debtors and the mortgage reinstated. Regardless, Section 1322(c)(1) permitting chapter 13 plan to provide for the curing of debtor's home mortgage default until the residence is sold at a foreclosure sale unambiguously provides that the sale itself terminates the debtor's right to cure the default in a plan that calls for repayment outside the redemption period. Foreclosure sale is a single, discreet event, and the statutory phrase "conducted in accordance with applicable non-bankruptcy law" does not expand the meaning of "foreclosure sale" to encompass a state-law redemption period, but does no more than require that the sale adhere to procedures mandated by state law. *Cain v. Wells Fargo Bank (In re Cain)*, 423 F.3d 617 (6th Cir. 2005).

2. Ban against post-confirmation reclassification applied equally to case in which chapter 13 debtor's default provided cause for secured creditor to have automatic stay lifted so that creditor could repossess collateral. Thus, debtor's obligation for remaining portion of creditor's allowed secured claim following sale of vehicle, after claim had been reduced by application of sales proceeds, had to be paid on secured basis. Because all issues addressed during plan confirmation are given preclusive effect, bifurcation of creditor's claim into secured and unsecured claim is likewise given preclusive effect. Thus, if a creditor has an allowed secured claim of x dollars, which must be paid during the life of the plan, that issue has been litigated and cannot be altered. In sum, postconfirmation repossession of a car doesn't require the reclassification of the creditor's claim from secured to unsecured. *Ruskin v. Daimler Chrysler Servs. N.A., LLC (In re Adkins)*, 425 F.3d 296 (6th Cir. 2005) (Caldwell, J.).

3. While undersecured mortgagee might have contractual right to attorney fees, it could not recover such fees as addition to its secured claim or as part of cure amount to which it was entitled under chapter 13 plan. *In re Evans*, 336 B.R. 749 (Bankr. S.D. Ohio 2006) (Aug., J.).

4. Valuation of claim at time of confirmation governs. *Res judicata* prevents court from reclassifying valuation of van that was valued at amount of secured claim at confirmation despite subsequent totaling of van in accident (for which the secured creditor received the insurance proceeds and filed an amended proof of claim). *In re Torres*, 336 B.R. 839 (Bankr. M.D. Fla. 2005) (Jennemann, J.).

5. Secured creditor repossessed and sold car because of debtor's postconfirmation default under plan. Court holds creditor is not entitled to payment on its remaining deficiency as secured claim. To

avoid disincentivizing creditor for failing to act diligently in repossessing and selling vehicle, Court would reconsider the fully secured claim filed under totality of circumstances. While debtor won't be permitted to default and effect an effective *pro forma* surrender of the car, the secured creditor also wouldn't be permitted, after first asserting that it was fully secured to shift risk of loss by failing to protect vehicle's value through repossession and sale and then assert a deficiency claim for the balance. Rather, to compensate the creditor for the eight-month period when the debtor used the vehicle without making the monthly payments promised in the plan, creditor would be granted administrative expense claim for that time period. Court disagrees with holding in *In re Adkins*. *In re McBride*, 337 B.R. 451 (Bankr. N.D.N.Y. 2006) (Gerling, J.)

6. In the absence of evidence of the markup for services or the profit margin which might be included in the NADA tables for the Debtors' vehicles, under pre-BAPCPA case law, Court finds that 5% discount from the NADA retail values presented would be appropriate to determine the vehicles' replacement value for purposes of cramdown. However, opinion should not be construed as limiting presentation of appraisals of vehicles which differ from the NADA published values. Here expert doesn't survive *Daubert*_challenge. *In re McElroy*, 339 B.R. 185 (Bankr. C.D. Ill. 2006) (Gorman, J.).

7. (Pre-BAPCPA) Where chapter 13 debtor's car is totaled, and insurance proceeds turned over to lender, deficiency can be recharacterized as unsecured. Disagrees with *In re Adkins*. *In re Bell*, 339 B.R. 309 (Bankr. W.D.N.Y. 2006).

8. Adequate protection payments to mortgagee are not "payments made under a proposed plan," that chapter 13 trustee is statutorily required to hold until plan is confirmed. Thus, requirement of trustee to hold such payments until plan is confirmed does not bar trustee from making preconfirmation adequate protection payments to mortgagees. *In re Perez*, 339 B.R. 385 (Bankr. S.D. Tex. 2006) (Bohm, J.).

9. "Chapter 13 plans should be structured to ensure that whenever possible, secured creditors receive payments that keep pace with the anticipated rate of depreciation on collateral so that the creditor does not be come undersecured." *Americredit Fin. Servs. v. Nichols (In re Nichols)*, 440 F.3d 850 (6th Cir. 2006).

10. "Equal payment" provision of Chapter 13, which requires that, if the property to be distributed to secured creditor under a plan takes the form of periodic payments, then such payments "shall be in equal monthly amounts," requires payments to be equal once they begin, and to continue to be equal until they cease, but does not require that such payments start as of the effective date of the plan or that they continue over the life of the plan. Exactly when these equal payments should begin requires a case-specific inquiry. These payments need not be in same amount as adequate protection payments, which debtor must begin to make in month one of plan. *In re DeSardi*, 340 B.R. 790 (Bankr. S.D. Tex. 2006) (Isgur, J.).

11. "Since the enactment of Section 1322(e) courts have consistently recognized that the *Rake* decision was technically overruled, as Section 1322(e) has the effect of overriding Section 1325(a)(5) when arrears on a long term debt are cured. Based upon the historical analysis of the interplay between Section 1322(b)(5) and Section 1325(a)(5) (under which Section 1325(a)(5)(b)(iii) falls), the Court finds that equal monthly payments are not required as the claim at issue is one in which arrears on long term debt are being cured. Thus, Creditor's claim falls outside the ambit of requirements

contained under Section 1325(a)(5). As the Court has found Section 1325(a)(5)(b)(iii) to be inapplicable, there is no need for the Court to reach a determination as to the parameters of what qualifies as 'equal monthly payments.'" *In re Davis*, 2006 WL 1234924, (Bankr. M.D. Fla. 2006) (Proctor, J.).

12. Because discharge of debtor's personal liability on mortgage debt in previous chapter 7 case did not extinguish mortgage lien, debtor could include repayment of mortgage lien as "claim" against property of debtor in subsequent chapter 13 plan. However, where the proposed c hapter 13 plan provided for payment of mortgagee's surviving *in rem* claim with 23 payments of $728 per month and a balloon payment in 24th month of plan, the plan failed to provide for periodic payments in "equal monthly amounts," as required by the confirmation requirement added by Section 1325(a)(5)(B)(iii)(I) of BAPCPA. Thus, plan could not be confirmed. *In re Wagner*, -- B.R. -- (Bankr. E.D. Tenn. 2006) (Stair, J.).

C. Chapter 13 Eligibility under BAPCPA for Serial Filers

1. Section 1328(f) is not eligibility provision. Mere fact that debtors are barred from getting discharge does not, standing alone, affect debtors' eligibility for relief under chapter 13. Debtors' inability under Section 1328(f) to obtain discharge in current cases did not mean that chapter 13 filings and stay of collection of debts that could not be discharged subjected creditors to "unreasonable delay" warranting dismissal, particularly where debtors proposed 100%-payment plans. However, even in Chapter 13 case that will result in less than 100% distribution on general unsecured claims, lack of available discharge does not establish "unreasonable delay" to creditors, of kind warranting dismissal of case, if debtor's proposed plan is otherwise confirmable. *Baxter v. Lewis (In re Lewis)*, 339 B.R. 814 (Bankr. S.D. Ga. 2006) (Dalis, J.).

2. Chapter 13 debtors who had received discharge in chapter 7 case filed less than four years before current chapter 13 case were not eligible to receive chapter 13 discharge under new BAPCPA Section 1328(f). Inability to obtain discharge, however, doesn't affect eligibility for chapter 13 and doesn't require dismissal as bad faith filing. Court should not rely exclusively on debtors' ineligibility for discharge, but should considered factors in *In re Alt*. *In re McGehee*, -- B.R. -- (Bankr. W.D. Ky. 2006) (Fulton, J.).

D. Cram-Down

1. While BAPCPA literally forecloses treatment of claims of 910 lenders as secured claims in context of cram down of Chapter 13 plan, court will avoid interpretation that disadvantages such creditors contrary to Congress' probable intent and would require Chapter 13 debtors, in seeking to cram down claim of 910 creditor, to provide creditor with greater of (1) payments equal to full amount of its claim without interest; or (2) amount that creditor would receive if its claim were bifurcated and crammed down. *In re Carver*, 338 B.R. 521 (Bankr. M.D. Ga. 2006) (Walker, J.).

E. Unfair Discrimination

1. Married debtors' chapter 13 plan unfairly discriminated between joint unsecured creditors and individual unsecured creditors by offering a 100% dividend to joint creditors and a much smaller dividend to individual creditors. Michigan statute providing bankruptcy debtors an exemption for interests in entireties property except with regard to claims based on joint debt conflicted with the

Bankruptcy Code and was therefore unconstitutional under the Supremacy Clause. Debtor's interest in entireties property becomes property of his bankruptcy estate, even if the debtor's spouse does not join him in his petition for bankruptcy relief. Bankruptcy Code establishes distribution priorities for all property of the estate without distinction between entireties interests and other property and without distinction between joint claims and other claims. *In re Raynard*, 327 B.R. 623 (Bankr. W.D. Mich. 2005) (Hughes, J.).

F. Avoidance Actions

1. Chapter 13 debtors lack standing to commence a § 544 avoidance action. *Hansen v. Green Tree Servicing LLC (In re Hansen)*, 332 B.R. 8 (Bankr. 10th Cir. 2005).

2. Even if chapter 13 debtor would not have had standing to pursue strong-arm avoidance claim to set aside unrecorded lien, lender was bound by provision in debtor's confirmed plan expressly providing that debtor had standing to prosecute such strong-arm claims postconfirmation. Lender failed to object to provision before plan was confirmed. Provision permitting such action is not illegal, nor does it affect lender's property rights without due process. *Hearn v. Bank of New York (In re Hearn)*, 337 B.R. 603 (Bankr. E.D. Mich 2006) (Shefferly, J.).

G. Modification

1. Trustee's motion to modify debtor's confirmed plan in order to increase dividend to unsecured creditors was not filed prior to "completion of payments" under plan, and was thus untimely. Language in chapter 13 debtor's model plan, specifying that plan would conclude prior to end of initial plan term at such time as all allowed claims were paid in full was only one circumstance in which the plan might conclude early, but early conclusion doesn't require 100% payout on allowed claims. Trustee's motion untimely because prior to trustee's motion, debtor had already obtained leave from the bankruptcy court to refinance home and made lump sum payment to trustee from proceeds of refinancing in amount sufficient to satisfy her remaining obligations under plan. *In re Forte*, 2005 WL 2998530 (Bankr. N.D. Ill 2005) (Black, J.).

2. "Disposable income" requirement is not incorporated in requirements that any modified plan must satisfy. Local bankruptcy rule requiring that all Chapter 13 plans presented for confirmation in district include provision stating "[u]nless all allowed claims are paid in full," plan will not be completed in fewer than 36 months was invalid. Debtor did not waive his right to object to requirements of model plan, as purporting to deny him the right to modify plan in order to conclude it in fewer than 36 months without paying all claims in full, by failing to challenge legality of this provision in court-mandated form at time of plan confirmation. *Sunahara v. Burchard (In re Sunahara)*, 326 B.R. 768 (Bankr. 9th Cir. 2005) (Smith, J.).

3. Calls *Sunahara* into doubt. "The *Sunahara* majority explained its conclusion that section 1325(b) does not apply to modifications under section 1329 as follows: 'Section 1329(b) expressly applies certain specific Code sections to plan modifications but does not apply § 1325(b). Period. The incorporation of § 1325(a) is not, as has been posed by some courts, the functional equivalent of an indirect incorporation of § 1325(b). Under § 1329(b), only the "requirements of Section 1325(a)' apply to modifications under § 1329(a). As previously noted, § 1325(a) requires that 'except as provided in [1325]b, the court shall confirm a plan if....' Thus, the 1325(a) confirmation requirements incorporated into § 1329(b) exclude the provisions of § 1325(b)." This logic of

*Sunahara*is debatable and is contrary to the weight of authority. While it is true that section 1329(b) does not mention section 1325(b), it does not "exclude the provisions of section 1325(b)…. The omission of section 1325(b) from section 1329(b) should not be taken to mean that section 1325(b) is not applicable to modified plans. The holding in ***Sunahara*** once again threatens to place chapter 13 debtors at the mercy of a good faith standard that is sure to produce disparate results and be arbitrary in its application." Thus, in seeking to complete their confirmed Chapter 13 plan early with accelerated lump-sum payment acquired through refinancing their home, debtors either had to pay unsecured claims in full or show, in connection with plan modification, that, in light of their particular economic circumstances, making payments for less than three years without paying unsecured claims in full satisfied Section 1325(a)(3) requirement that all chapter 13 plans be proposed in good faith. *In re Keller, 329 B.R. 697* (Bankr. E.D. Cal. 2005) (McManus, J.).

4. Chapter 13 trustee has standing to seek post-confirmation modification to increase payments into plan based on increase in debtor's disposable income even though trustee did not raise a disposable income objection to confirmation of original plan. Section 1329 governing post-confirmation plan modification, in addition to the doctrine of *res judicata,* does not require a minimal showing of a change in circumstances to permit plan modification. Rather, trustee has absolute right to seek modification of plan after confirmation but before completion of the plan payments. When modification of confirmed Chapter 13 plan is proposed, the "best interests of creditors" test or liquidation test is applied on the effective date of the modification. Chapter 13 debtor, who refinanced property post-confirmation, not required to remit refinance proceeds to trustee as additional lump-sum payment to unsecured creditors. No showing that refinancing of debtor's residence increased net worth for purposes of the liquidation test. *In re Brown*, 332 B.R. 562 (Bankr. N.D. Ill. 2005) (Hollis, J.).

5. Court refuses to confirm plan permitting early payouts without obtaining court approval for plan modification. *In re Schiffman*, 338 B.R. 422 (Bankr. D. Or. 2006) (Dunn, J.) (declining to extend *In re Sunahara*).

6. Single plan modification after three years of substantial compliance should be condoned. *Americredit Fin. Servs., Inc. v. Nichols (In re Nichols)*, 440 F.3d 850 (6th Cir. 2006).

7. Trustee argued that the debtor's home was property of the estate and that all non-exempt proceeds must be paid into the plan and distributed to creditors as an extra lump sum payment in addition to the 36 payments of $600 each required under the plan. The court stated that it agreed with the *Forte* court's conclusion that Paragraph D2(b) merely describes one possible way in which the plan can end before its initial term expires, not the *only* way in which the plan can end early. Therefore, to the extent that the trustee argues that Paragraph D of the plan requires that the debtor's case stay "open" in some manner for at least 36 months, the court rejects that argument. Court also rejects argument that pre-BAPCPA debtor must pay actual disposable income over the course of the three years following the filing of the petition to satisfy § 1325(b)(1), or that if it is paid in advance, the case must nonetheless stay open for 36 months to satisfy § 1325(b)(1). The court concludes that the debtor is entitled to discharge and a prompt refund of the remaining proceeds from the sale of her home that the trustee is holding. In a Chapter 13 case, a debtor may keep certain assets, such as her home and her car, if she can cure any default on the loans secured by those assets and maintain current monthly payments due on the loans through the course of the plan. Chapter 13 allows a debtor to keep her equity in those assets if she pays her unsecured creditors in accordance

with the requirements of § 1325. The "chapter 13 deal" is that the debtor keeps prepetition assets instead of postpetition income. *In re Mangum*, 2006 WL 1388423 (Bankr. N.D. Ill. 2006) (Doyle, J.).

H. Executory Contracts

1. Contracts for deed under Texas law are executory contracts, and a chapter 13 debtor who desires to remain in house being purchased under a contract for deed must assume the contract under Section 365. Here, the debtor fell behind in payments by four months and the debtor filed for chapter 13 when the creditor threatened termination. *In re Gonzalez* (Bankr. N.D. Tex. 2006) (Lynn, J.).

I. "Projected Disposable Income" Test

1. Debtor's non-filing spouse's income is included in the calculation of disposable income if it is regularly spent on household expenses. *In re Quarterman*, 2006 WL 1234902 (Bankr. M.D. Fla. 2006) (Proctor, J.).

2. Court had to determine whether an above-median-income debtor was committing sufficient income to her Chapter 13 plan without regard to actual expenses listed on her bankruptcy schedules, based solely on application of Internal Revenue Service (IRS) standards, and mere fact that debtor's actual expenses were less than standard expenses that she could claim based on these IRS standards, and that debtor had actual "excess" income that could have been used to increase dividend to unsecured creditors above the 0% dividend promised in her plan, did not permit court to require commission of this "excess" income to plan, upon theory that failure to do so prevented plan from satisfying statutory "good faith" requirement; "good faith" requirement could not be used to supplement IRS standards, which were sole determiners of what income had to be devoted to plan. Court states: "Instead of simply looking at the debtor's actual income and expenses, BAPCPA attempts to create a bright line test to determine whether a debtor's plan is committing all disposable income. By creating a bright line test, Congress even more clearly indicated that it intended that Section 1325(b) rather than the good faith test, to be the measure of whether the debtor was committing sufficient income to the plan. The result is that Congress has created a set of rules under which-as here-a debtor may be left with uncommitted income that the debtor is not required to commit to the debtor's plan under the new Section 1325(b) analysis. Rather, the controversy is about and derives from the result of applying the language in the statute as written. Depending upon whether a debtor's actual expenses and deductions are greater or less than those specified in section 707(b)(2), an above-median-income debtor may have 'excess' income that such debtor is not required to commit to the payment of unsecured creditors. The Trustee argues that such a result is unfair and contrary to the way that Chapter 13 should work and has worked in the past. While many sources question whether sections 707(b)(2) and 1325(b) represent a fair and effective approach to catching the abusers of the bankruptcy system or to insuring that debtors who can pay do pay, the court does not believe that the result in this case of applying section 1325(b)(3) as written can be rejected as being absurd. Therefore, even if the Trustee's criticism of section 1325(b) is correct, this court is not free to ignore revised section 1325(b) or replace it with a standard pulled from section 1325(a)(3). To do so, the court believes, would impermissibly undermine policy choices made by Congress. 'There is a basic difference between filling a gap left by Congress and rewriting rules that Congress has affirmatively and specifically enacted.' While there may be sound reasons to rewrite section 1325(b), it is not the role of this court to do so. For the foregoing reasons, the court concludes that with an above-median-income Chapter 13 debtor,

the debtor's ability to pay and whether the proposed plan commits all of the debtor's disposable income must be determined under section 1325(b) rather than as an element of good faith under section 1325(a)(3). Accordingly, since the Debtor does not have disposable income under section 1325(b), the Debtor's plan will be confirmed even though the plan does not provide for a payment to unsecured creditors." *In re Barr*, 2006 WL 1030242 (Bankr. M.D.N.C. 2006) (Stocks, J.).

3. A determination of "projected disposable income" must be based on anticipated income over the term of the plan rather than on an average of the debtor's prepetition income, such as the court was required to use in calculating the debtor's "disposable income" based on his/her "current monthly income." Congress' use of the word "projected" required a forward-looking inquiry to ascertain the amount of disposable income the debtor would be able to contribute over the term of the plan. *In re Kibbe*, 2006 WL 1300993 (Bankr. D.N.H. 2006) (Vaughn, J.).

4. Section 1325(b)(4) requires 60-month plans for debtors with incomes in excess of the state's median income. Court states: "It appears that the sense of Congress, in amending the Bankruptcy Code, was that debtors were abusing the system and paying creditors less than what they are able to pay. Congress amended the Bankruptcy Code by reducing the availability of Chapter 7 and requiring a mandatory repayment period in a Chapter 13." Court further noted that the relevant amendment was captioned "Chapter 13 Plans To Have a 5-Year Duration in Certain Cases. Further, Court notes that the House Report on Section 1325(b) posits the "terms of the duration of a Chapter 13 plan, not in terms of a formula for the amount of a plan repayment." *In re Cushman* (Bankr. D.S.C. 2006).

5. Projected, not historical, expenses are used in calculating "disposable income" of Chapter 13 debtors if debtors' income is above the median family income for the state. Thus, above-median-income chapter 13 debtors could not use historic mortgage expense to reduce monthly income to establish that proposed plan satisfied "disposable income" test under BAPCPA where debtors no longer owned home which had provided them with this mortgage expense. Debtors also failed to submit any documentation to support extraordinary monthly housing, car or telecom expenses claimed, which exceeded IRS standards, and thus was not entitled to them. *In re Renicker*, 2006 WL 1331487 (Bankr. W.D. Mo. 2006) (Venters, J.).

6. The Debtors' plan cannot be confirmed under because it proposes a monthly payment far in excess of the Debtors' disposable income, as calculated under BAPCPA, and so is not feasible. Also, it proposes a plan length of less than 36 months in violation of Section 1325(b)(4). "On its face, BAPCPA's only apparent change to minimum plan length is the creation of a two-tiered system based on a debtor's income. But some bankruptcy commentators, as well as the Debtors and Trustee in this case, suggest that BAPCPA's revisions to § 1325(b)(1) and (4) may have opened the door to chapter 13 plans that run less than 3 (or 5) years. The theory posited is that ACP is a multiplier rather than a time period, a 'monetary' versus 'temporal' requirement, if you will. Those who advance the "monetary" interpretation of ACP, suggest that the language in § 1325(b)(1)(B) requiring that "all of the debtor's projected disposable income *to be received in the* applicable commitment period ..." be devoted to a plan contemplates the projection and calculation of a fixed sum based on a debtor's disposable income multiplied by the length of the ACP, which would be "3 years" (36 months) for below-median income debtors and "5 years" (60 months) for above-median income debtors. And that the applicable commitment "amount" (for lack of a better term) can supposedly be paid off in less than 36 (or 60) months without violating § 1325(b)(4)(B).... The Court rejects the monetary interpretation of ACP for three reasons. First and foremost, the plain

language of § 1325(b)(1) and (4) supports a temporal interpretation of ACP…. Second, a monetary interpretation of ACP renders § 1325(b)(4)(B) awkward, if not meaningless…. Finally, as a practical matter, a monetary interpretation of ACP represents a gross departure from pre-BAPCPA practice that is not justified by the language or structure of the statute. *In re Schanuth*, 2006 WL 1515851 (Bankr. W.D. Mo. 2006) (Venters, J.).

7. Determination of Chapter 13 debtor's "disposable income" is mere starting point in determining if debtor is devoting all "projected disposable income" to payments under the plan, as required for confirmation of a plan that will pay an objecting unsecured creditor less than the full amount of its allowed unsecured claim. Under Section 1325(b), "projected disposable income" is future-oriented, and differs from the statutory definition of "disposable income," which is based on historical figures. To determine whether the debtor's proposed chapter 13 plan satisfies the "projected disposable income" requirement of Section 1325(b)(1)(B), the Court will presume that debtor's "disposable income," calculated based on actual income in the six months preceding the bankruptcy filing is also debtor's "projected disposable income," unless the debtor shows a substantial change in circumstances suggesting that the historical income does not fairly project the debtor's projected future budgeted income and expenses. To rebut this presumption, the debtor must present documentation similar to that required under amended "substantial abuse" dismissal provision of Section 707(b)(2)(B). Here, the chapter 13 debtor-wife testified that the debtor-husband had recently been hospitalized and incurred substantial medical bills. Court finds this insufficient, absent evidence as to how the husband's illness would affect projected income or expenses, to rebut the presumption that the debtors' "disposable income" (based on actual income in six months preceding petition date) fairly projected the debtors' future budgetary needs. *In re Jass*, 340 B.R. 411 (Bankr. D. Utah 2006) (Thurman, J.).

J. Determination of "Applicable Commitment Period"

1. Debtor and wife were Chapter 13 debtors with current monthly income (CMI) of $3,637.40 (based on Part I of Form B22C). Multiplying the CMI by 12, as calculated on Part II of Form B22C meant an annualized income of $43,648.40. The couple had one child, so annualized income was compared with median income for three-member households in his state. Median income for a family of three in Illinois is $62,178. Thus, debtor's household income was below the state's median income and the debtor was allowed to propose a three-year plan under BAPCPA. The trustee objected that the debtor was required to file a five-year plan because the debtor's wife understated her income. She was a teacher with a $63,000 annual salary in the months she worked. However, since the six-month lookback for determining CMI included July and August, the trustee argued that her income was improperly calculated. The trustee claimed the debtor had approximately $1,700 of monthly Social Security income which was not required to be included in the income calculation under Form B22C but should be considered in determining the "applicable commitment period." The court disagrees, accepting the debtor's calculations under Sections 101(10A) and 1325(b)(4) and does not impose five-year commitment period. Court states: "In making this finding, the Court is cognizant of the fact that strict compliance with the definition of 'current monthly income' means that some debtors with high but irregular income may be able to avoid the imposition of the longer payment period by the timing of their filings, while debtors with lower incomes are forced to pay for five years. That may be unfair, but that is what the statute requires as it is currently written. The remedy for that problem is legislative, not judicial." Court further notes: "The *Hardacre* analysis is not germane to the issues here because the statutory formulas and Form B22C do not lead to a fully-dispositive calculation of projected disposable

income. The formulas and Form lead only to a calculation of disposable income. To give meaning to the term 'projected,' the Court must consider the 'income that the debtor reasonably expects to receive during the term of her plan.' *Hardacre, supra*, 338 B.R. at 723. In contrast, the statutory formulas and Form B22C do lead to a fully-dispositive calculation of the applicable commitment period. When the calculation is complete, a debtor is directed to a three-year or five-year commitment period, and no further analysis is suggested, required, or allowed by any portion of the relevant statutes. If Congress had desired to build flexibility into the determination of the applicable commitment period, it could have done so. In Chapter 7 cases, BAPCPA requires a similar calculation on a similar form for the determination of whether a presumption of abuse arises. 11 U.S.C. § 707(b); Official Form B22A (Chapter 7). By use of the term 'presumption,' Congress provided for some judicial discretion to review the actual income and expenditures of Chapter 7 debtors before finding that abuse exists. Congress could have drafted § 1325(b)(4) so that the statutory calculation of the applicable commitment period would raise only a presumption of what the period should be, reserving discretion in the bankruptcy courts to review actual figures and make the final determination. Congress chose, however, not to make the calculation set forth in § 1325(b)(4) and on Form B22C merely presumptive and this Court has no choice but to follow the law as written." *In re Beasley*, 2006 WL 1228924 (Bankr. C.D. Ill. 2006) (Gorman, J.).

K. Priorities

1. Though prepetition domestic support obligations have first, even prior to admin expenses, nothing in Code requires they be paid in full under plan before distribution is made on lower priority claims. *In re Sanders*, 341 B.R. 47 (Bankr. N.D. Ala. 2006) (Caddell, J.).

L. Mode and Timing of Payments

1. There are at least 21 factors court should consider in determining if plan providing for direct payments to creditors by debtor should be confirmed, and debtor's counsel should consider each of them in arguing debtor should be permitted to make home mortgage payments directly, including: (1) degree of responsibility of debtor as evidenced by his past dealing with creditors; (2) reasons contributing to debtor's need to file his Chapter 13 petition and plan; (3) any delays that trustee might make in remitting monthly payments to targeted creditor; (4) whether proposed plan modifies debt; (5) sophistication of targeted creditor; (6) creditor's ability and incentive to monitor payments; (7) whether debt is commercial or consumer debt; and (8) ability of debtor to reorganize absent direct payments. *See* Section 1326(c) and Bankr. S.D. Tex. Local Rule 3015(b). It is improper for Court to allow Chapter 13 debtor to make home mortgage payments directly to mortgagee solely to avoid trustee's percentage fee. *In re Perez*, 339 B.R. 385 (Bankr. S.D. Tex. 2006) (Bohm, J.).

2. Chapter 13 debtors not be allowed to make direct payments on their home mortgage debt, though some of debtors might not reorganize if they have to pay fee to Chapter 13 trustee (even absent mortgagee objection), where debtors failed to show ability to responsibly make their mortgage payments, debts were consumer debts, and direct payment was vigorously opposed by trustees, whose resources would be taxed by having to monitor payments over the 57 to 60 months required under plans. *In re Perez*, 339 B.R. 385 (Bankr. S.D. Tex. 2006) (Bohm, J.).

3. Debtors' chapter 13 plan could not be confirmed because it provided that plan payments were to be made for "a period of up to five years from the date of confirmation." This violated the maximum

five-year limit upon term of a plan under Section 1322(d). *In re Musselman* 2005 WL 4014437 (Bankr. N.D. Ind. 2005) (Dees, J.).

M. *Res Judicata* Effect of Plan / Setoff

1. Pre-BAPCPA Chapter 13 debtors objected to deficiency claim following postpetition sale of car securing claim on grounds that the deficiency claim was not timely filed and that clause in debtors' confirmed plan, which provided that creditor would be allowed to repossess the motor vehicle securing its claim in full satisfaction thereof, barred such claim. Court holds that deficiency claim was in nature of amendment to creditor's original proof of claim, and related back to filing of this original proof of claim. Further, notice to undersecured creditor first amended chapter 13 plan, which provided that creditor could repossess car in full satisfaction of its claim, was insufficient to satisfy due process or to bind it to similar "claim satisfaction" clause included in second amended chapter 13 plan filed at last minute without adequate notice to creditor, where "claim satisfaction" clause had no effect on creditor's rights under first amended plan (with no distribution to unsecureds), but in second amended plan, creditors were to be paid in full. *In re Tessier*, 333 B.R. 174 (Bankr. D. Conn. 2005) (Krechevsky, J.).

2. Court sustained a Chapter 13 trustee's objection to tax claims for amounts exceeding amounts provided for in confirmed plan. Court holds that confirmed plan entitled to *res judicata* effect as to amount of tax agency's claim. *In re Ayre*, 339 B.R. 684 (Bankr. C.D. Ill. 2006) (Gorman, J.).

3. "This Court agrees with those courts that hold that the plain language of the statute controls and that setoff is not affected by the confirmation process under § 1327. Thus, the fact that Debtor's plan had already been confirmed under § 1327 does not affect the ability of the IRS to exercise its right to offset the debts under § 553 and § 6402 of the Internal Revenue Code." *In re Robinson*, 2006 WL 1522688 (Bankr. W.D. Mo. 2006) (Dow, J.).

N. Dismissal of Case

1. Chapter 13 debtor could not modify his confirmed plan after debtor failed to complete sale of restaurant property by "drop dead" date specified in plan either for completion of this sale and payment of creditors or for entry of order dismissing case. Proposed alternative modified plan did not provide for payment of other creditors, did not explain how debtor could service new monthly debt arising from refinancing, and did not itself satisfy requirements for confirmation. Also, debtor failed to demonstrate any change in circumstances that prevented him from performing under plan as originally confirmed; thus, in accordance with "drop dead" language in confirmed plan, case had to be dismissed. *In re Gallagher*, 332 B.R. 277 (Bankr. E.D. Pa. 2005) (Weiss-Sigmund, J.).

2. Eligibility for chapter 13 based on Section 109(e), which requires that the debtor's total noncontingent, liquidated, unsecured debt not exceed a statutory ceiling, is based on what the debtor owes on date of filing, not on what debtor in good faith thinks he owes. Thus, if proofs of claim demonstrate that, as of petition date, total noncontingent, liquidated, unsecured debt was even $800 in excess of the statutory maximum debt, then chapter 13 case had to be dismissed. Debtors' good faith in filing schedules showing they qualified for chapter 13 relief not relevant to ultimate determination of eligibility. *In re Steffens*, -- B.R. -- (Bankr. M.D. Fla. 2005) (Paskay, J.).

3. Chapter 13 debtor's unpaid debt for filing fees in prior bankruptcy case was insufficient basis for dismissal of current Chapter 13 case for "cause" based on "nonpayment of any fees and charges required under chapter 123 of title 28." Words "any fees and charges," as used in dismissal provision only referred to fees and charges in current case. *In re Howard*, 333 B.R. 826 (Bankr. W.D. Wis. 2005) (Martin, J.).

4. Court in matter of first impression addressed four cases presenting an identical issue: whether a debtor may be a debtor in a case under Chapter 13 when that debtor may not receive a discharge upon consummation of a confirmed plan. BAPCPA's new Section 1328(f) prevents the court from granting Chapter 13 debtors a discharge if the debtors had received a discharge in another case within two- or four-year "lookback" periods. Court finds that this is not an eligibility provision, and that the fact that debtors may be barred from obtaining discharge does not make them ineligible for chapter 13 relief. "[T]he court is mindful of the fact that Congress just completed a massive renovation of the Bankruptcy Code. If it had intended to make ineligibility for a discharge a further bar to filing a bankruptcy case under § 109, it would have done so." *In re Bateman*, 2006 WL 1233889 (Bankr. D. Md. 2006) (Mannes, J.).

5. In one of the four cases heard, the Debtor filed the bankruptcy case under chapter 13 on December 12, 2005 and received a discharge in a case filed in 2001 on September 30, 2005. The Chapter 13 trustee urged that § 1328(f) bars the discharge. The US Trustee for disagreed, stating that measurement begins with the date the Debtor received the discharge. Court states that the US Trustee's interpretation is symmetrical with the analogous discharge provision under Chapter 7, § 727(a)(8) and (a)(9), that refers to a case commenced within the applicable period. Court also notes the US Trustee's reliance on the report of the House Judiciary Committee on S.256, which notes that the amendment "prohibits the issuance of a discharge in a subsequent Chapter 13 case if the debtor received a discharge in a Chapter 13 case filed during the 2-year period preceding the date of the filing of the subsequent Chapter 13 case." Court doesn't decide issue, but states that "the position of the United States Trustee appears far more persuasive. *In re Bateman*, 2006 WL 1233889 (Bankr. D. Md. 2006) (Mannes, J.).

6. Policy underlying one element of test for "cause" to convert or dismiss case following denial of plan confirmation, when faced with a request to try a plan again, is an "iterative" one. A debtor who wishes to submit to the rigors of living for a number of years in the straightjacket of a plan that represents one's "best efforts" to pay creditors should, in principle, be permitted the latitude to correct perceived deficiencies in proposed plans. *Nelson v. Meyer (In re Nelson)*, -- B.R. -- (Bankr. 9th Cir. 2006) (Jaroslovsky, J.).

7. Creditor has failed to establish debtor's ineligibility because proof of claims upon which it relies was filed as secured claim and thus can't be added to the debtor's other unsecured debt for eligibility purposes under § 109(e). Further, if the creditor instead has an unsecured claim, the evidence submitted by the creditor fails to establish the debt was noncontingent and liquidated at the time the debtor filed for chapter 13. Hence, no evidence is before the court to rebut the debtor's assertion that, as of the petition date, the debt in question was both contingent and unliquidated. Thus, the debtor is eligible for chapter 13 relief. *In re Schwartz*, 2006 WL 1367440 (Bankr. C.D. Ill. 5/17/06) (Fines, J.).

O. Reinstatement of Case

1. Dismissed Chapter 13 case based on failure to make plan payments may be reinstated under Rule 60(b)(6). Court states: "Absent a history of bankruptcy abuse, a debtor is not generally precluded from filing a new chapter 13 case. Reinstatement is a pragmatic response to a dismissal that occurs late in the bankruptcy case when it often makes more sense to effect a cure of the arrears in the present case than pay them over another 5 years. *In re Kwiatkowski*, 2005 WL 2860329 (Bankr. E.D. Pa. 2005) (Weiss-Sigmund, J.).

P. Conversion from Chapter 7

1. Chapter 7 debtor's request for conversion to Chapter 13 may be denied in absence of good faith. Statute governing conversion uses "may" not "shall." Thus, statute does not grant absolute right to convert. Further, common sense dictates that bankruptcy court should have authority to police the integrity of its proceedings. *Copper v. Copper (In re Copper)*, 426 F.3d 810 (6th Cir. 2005).

2. Code provision permitting Chapter 7 debtor to convert case to another chapter if he's eligible for relief under that chapter does not confer absolute right to convert if the two conditions are met. They only permit court to deny debtor's motion to convert where court determines that debtor engaged in bad faith conduct. *Marrama v. Citizens Bank of Mass. (In re Marrama)*, 430 F.3d 474 (1st Cir. 2005) (Cyr, J.).

3. Chapter 7 debtor has absolute, one-time right to convert a previously unconverted case to case under another chapter, but only in absence of extreme circumstances sufficient to deny conversion. Debtor's presumptive one-time right to so convert is not so unconditional and absolute that debtor can act in bad faith, abuse bankruptcy process, propose patently unfeasible chapter 13 plan, and yet still have right to convert. "Extreme circumstances" permitting denial of motion by debtor to exercise one-time presumptive right to convert previously unconverted case must at minimum involve finding of bad faith on part of debtor. *Neely v. Smith (In re Neely)*, 334 B.R. 863 (Bankr. S.D. Tex. 2005) (Lake, J.).

Q. Petition Filing Date

1. Even though the debtor's counsel, as an authorized electronic filer of case papers, electronically opened a docket reflecting this case as commenced on January 17, 2006, she did not file the debtor's petition until January 18, 2006. The court will treat the petition as effective to commence a bankruptcy case at the time of its filing, and as not relating back to the opening of the docket on the previous day. *In re Murphy*, 2006 WL 1071153 (Bankr. D.D.C. 2006 (Teel, J.).

R. Debtor's Professionals

1. Section 327, governing employment of professionals, does not apply to Chapter 13 debtor seeking to employ professional, even though statute would apply to a trustee's application to employ a professional. *In re Tirado*, 329 B.R. 244 (Bankr. E.D. Wis. 2005) (Kelley, J.).

XI. Secured Claims

A. Strip Downs

1. Creditor's failure to file timely objection to homestead exemption claimed by Chapter 7 debtors did not bar creditor, after time for objecting to debtors' exemptions passed, from challenging debtors' homestead exemption as defense to debtors' motion to avoid its lien on exemption impairment grounds. However, debtors' postpetition actions in entering into contract for sale of their homestead to third party and in moving from premises prior to closing did not result in abandonment of their homestead under New Hampshire law, and did not affect their ability to avoid creditor's lien on property on exemption impairment grounds. *In re May*, 329 B.R. 789 (Bankr. D.N.H. 2005) (Vaughn, J.).

2. Chapter 7 debtor claimed Ohio $1.00 "wildcard" exemption on six different parcels that, even without judgment lien, were fully encumbered by mortgages or tax liens was entitled. Based on exemption rights in each of the parcels, judgment creditor's lien would be avoided in its entirety under Section 522(f) because amount of exemption impairment exceeded total amount of judgment creditor's lien, regardless of whether statutory formula for calculating impairment amount was applied to all parcels collectively or on parcel-for-parcel basis. *In re Oglesby*, 333 B.R. 788 (Bankr. S.D. Ohio 2005) (Waldron, J.).

3. In complaint to strip off second mortgage, Court holds that antimodification clause of § 1322(b)(2) does not apply to the holder of a wholly unsecured second mortgage claim. *In re Griffey*, 335 B.R. 166 (Bankr. 10th Cir. 2005) (Bohanon, J.).

4. *Dewsnup* Precludes Use of §§ 506(a) & (d) to Strip Off Nonconsensual Unsecured Judgment Liens. Creditor of guarantor obtains judgment lien and levies on rental property. Debtors filed for bankruptcy and get discharge. Two years later, creditor seeks stay relief to foreclose on lien. The debtors object and seek valuation and avoidance under §§ 506(a) & (d). Court lifts stay without valuing lien, simply allowing it to pass through the bankruptcy unimpaired. BAP affirms, holding that claim was allowed and secured as it did not impair an exemption, and that *Dewsnup* prevents debtors from stripping off judgment lien under §§ 506(a) & (d). *Concannon v. Imperial Capital Bank (In re Concannon)*, 338 B.R. 90 (Bankr. 9th Cir. 2006) (Carroll, J.).

B. <u>*Rash* Interpreted</u>

1. *Rash* found inapplicable to requests for redemption of property, which is governed by the liquidation value standard. *Weber v. Wells Fargo Auto Finance, Inc. (In re Weber)*, 332 B.R. 432 (Bankr. 10th Cir. 2005).

2. Court notes *Rash* requirement that replacement value, rather than liquidation value, be the appropriate valuation standard for cramdown in Chapter 13's. This is not necessarily synonymous with retail value. Market to which debtors may look to replace a vehicle is not limited to the retail market. Many courts use as their starting point for determining a vehicle's replacement value the average of a car's wholesale and retail values, subject to appropriate adjustments according to other evidence of value introduced by the parties. One court has a local rule that says that the value of a vehicle is 95% of the NADA retail value for the first three years of age if neither party presents any conflicting evidence. Court notes that "to the extent cramdown remains available under Chapter 13, [BAPCPA] provides a definition of replacement value, which 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.'" This definition doesn't cover old cases, though. *In re McElroy*, 339 B.R. 185 (Bankr. C.D. Ill. 2006) (Gorman, J.).

3. "In an apparent effort to codify the *Rash* decision, Congress stated that, in individual cases, the amount of allowed claims secured by personal property shall be determined by using a 'replacement value.' Moreover, if the personal property was acquired by the debtor for 'personal, family, or household purposes,' then 'replacement value' is defined to be the price that a retail merchant would charge for similar property…. New Section 506(a)(2) makes clear that it is applicable in both Chapter 7 cases and Chapter 13 cases. Thus, it effectively overrules those cases that found that a liquidation standard was the proper valuation standard for redemption purposes in a Chapter 7 case. Replacement value is now the standard for valuing claims for redemption purposes in Chapter 7 cases as well as Chapter 13 cases." *In re Mayland*, 2006 WL 1476927 (Bankr. M.D.N.C. 5/26/06) (Waldrep, J.).

C. Avoidance Actions

1. Oklahoma statute providing an exception to the homestead exemption for work performed to construct a home was preempted by Section 522(f) and creditor cannot use a state exemption exception to prevent lien avoidance. Chapter 7 debtor entitled to an Oklahoma homestead exemption where judgment creditor, who performed construction work on home prepetition, had no statutory lien, but only judicial lien that could be avoided. *Willis v. Strother (In re Strother)*, 328 B.R. 818 (Bankr. 10th Cir. 2005) (Brown, J.).

2. Chapter 7 debtor that satisfied judicial lien against residence and then filed a motion to avoid the lien would not be able to avoid lien, since the lien was no longer "fixed" on debtor's property, and thus it was too late for debtor to avoid the lien. Though it was not clear when the creditor received the funds from debtor, the key was that the payment was made before the debtor moved to avoid the lien. *Wilding v. Citifinancial Consumer Fin. Servs., Inc. (In re Wilding)*, 332 B.R. 487 (Bankr. 1st Cir. 2005) (*per curiam*).

3. Under Michigan law, transfer of mortgage "took effect" not on date mortgage signed, but when mortgagee first advanced funds. *Lim v. Chase Home Finance LLC (In re Comps)*, 334 B.R. 235 (Bankr. E.D. Mich. 2005) (McIvor, J.).

4. Refinanced lender who failed to timely perfect within 90 days of filing to be treated as continuation still not subject to avoidance of mortgage as a preferential transfer because of earmarking doctrine. *Collins v. Greater Atlantic Mortgage Corp (In re Lazarus)*, 334 B.R. 542 (Bankr. D. Mass. 2005) (Boroff, J.).

5. Loan servicer who in error released lien on debtor's real estate prepetition by signing and recording deed of release did not have perfected lien at the commencement of case and thus was prohibited by automatic stay from pursuing any action to perfect or reinstate its lien. Chapter 13 trustee became hypothetical lien creditor, and its interest in debtor's real estate was senior to any subsequently perfected interest, which was all that servicer could achieve by perfecting or reinstating its lien postpetition. *In re Sommerville*, 334 B.R. 918 (Bankr. E.D. Mo. 2005) (Surratt-States, J.).

6. Judgment creditor's release of alleged lien was not "contemporaneous exchange for new value" where at time of creditor's receipt of payment from debtors, it was not a secured creditor because debtors' homestead property had no excess value above amount of debtors' homestead exemption

to which judgment lien could attach. While lien may have clouded title, it was not "new value." *Ellis v. Ford Motor Credit Co. (In re DeLavern),* 337 B.R. 239 (Bankr. W.D. Wash. 2005) (Snyder, J.).

7. *Rooker-Feldman* doctrine prevents court from exercising subject matter jurisdiction over adversary initiated to avoid state foreclosure and sheriff's sale as violating debtor's due process rights. Additionally, strong-arm powers cannot be invoked. As a matter of law, a sheriff's sale cannot constitute a fraudulent transfer that is avoidable under strong-arm powers. *Knapper v. Bankers Trust (In re Knapper),* 407 F.3d 573 (3d Cir. 2005) (McKee, J.).

8. Under Wisconsin law, holder of perfected, prepetition lien on debtor's car not required to reperfect lien within four months of debtor's relocation to Wisconsin in order to retain its secured position where debtor did not attempt to retitle vehicle in Wisconsin. Statutory reperfection requirement did not apply to already-titled goods. *In re Baker*, 430 F.3d 858 (7th Cir. 2005) (Evans, J.).

9. Mortgagee's mistake in releasing lien enforceable as it was properly recorded. Also, mortgage could be avoided under Section 544(a)(3) because nothing in chain of title put *bona fide* purchaser on notice that the release was in error. *Szilagyi v. Johnson (In re Johnson),* 2006 WL 1075417 (Bankr. N.D. Ill., 4/18/06) (Wedoff, J.).

10. Trustee's avoidance recoveries on lien as to which payments to secured creditor are complete limited to collateral's value at time of bankruptcy filing. *In re Haberman* (Bankr. D. Kan. 2006) (Somers, J.).

11. Where creditor's lien is preferential, debtor's surrender of collateral prepetition is also avoidable and recoverable. Further, contemporaneous exchange preference defense is not available to a purchase money lender who doesn't perfect his lien within 20 days of the debtor taking possession of the collateral. *In re Alton* (Bankr. D. Kan. 2006) (Somers, J.).

D. Valuation

1. Mobile home has value in current location, not on storage lot, because the seller under state law had the statutory right to sell the debtors' mobile home where it was located. *In re Valdez*, 338 B.R. 97 (Bankr. N.D. Cal. 2006) (Carlson J.).

E. Attorneys' Fees

1. Oversecured creditor permitted to include itemized claim for $150 in attorneys' fees in proof of claim. Claim limited to normal charge to clients of lawyer of $150 even though NFMA would permit $350 payment. *In re Madison*, 337 B.R. 99 (Bankr. N.D. Miss. 2005) (Houston, J.).

2. Legal fees of $700.00 for the routine, uncontested prepetition mortgage foreclosure action against a Chapter 13 debtor were reasonable, not the $1,250 requested. Case law indicated that a routine, uncontested foreclosure action may reasonably require three to four hours of attorney time prior to attendance at the sheriff's sale. Finally, the court drew upon its own experience in employing $200.00 as a reasonable hourly rate. The court used the lodestar method in its analysis and declined to use the industry-based fee schedule often suggested by lenders. *In re Gordon-Brown*, 340 B.R. 751 (Bankr. E.D. Pa. 2006) (Frank, J.).

F. *Till* Interpreted

1. Court overrules fully secured creditor's objection to Chapter 13 plan modifying the interest rate paid on the claim. *In re Wright*, 338 B.R. 917 (Bankr. M.D. Ala. 2006) (Williams, J.) (*see also, supra*).

2. Cramdown interest would be calculated using prime-plus approach, though this resulted in lesser rate of interest than that to which lenders were contractually entitled. *In re DeSardi*, 340 B.R. 790 (Bankr. S.D. Tex. 2006) (Isgur, J.).

3. Prime-plus formula of *Till* applied in pre-BAPCPA case (hence Section 511 doesn't apply) to taxing authority's claim for delinquent property taxes. *In re Tandy*, 2006 WL 1044463 (Bankr. W.D. Ky. 2006) (Cooper, J.).

4. Chapter 13 plan proposing to pay secured creditor's claim on unmodified basis per terms of contract is not a "cramdown plan," and debtor proposing such a plan, and creditor receiving payments, will be stuck with contract rate of interest no matter how high or low the contract rate of interest is. However, any Chapter 13 plan modifying the secured creditor's rights seeks confirmation over creditor's objection is "cramdown plan," which triggers creditor's right to interest per *Till's* "prime plus" formula approach. Court agrees with *In re Wright, supra*, which rejected the creditor's contention that *Till's* interest rate formula, applicable only in cram down cases, did not apply because its claim was fully secured. The court there pointed out that the creditor was confusing the term "cram down" with the term "strip down." "Although *Till* interpreted Section 1325(a)(5)(B)(ii) in a case involving the strip down of a secured claim, the statute itself is broader and applies to all cram down cases. Hence, the decision in *Till* is not confined merely to those cases where the value of the collateral is less than the creditor's claim. Rather, *Till* applies in all chapter 13 cases which are being confirmed over the objection of a secured creditor irrespective of the value of its collateral in relation to the amount of its claim." *In re Pryor* (Bankr. C.D. Ill. 2006) (Perkins, J.).

G. Adequate Protection

1. Claim of 910 creditor, not being entitled to treatment as secured claim in context of cramdown of Chapter 13 plan, was not entitled to assurance of adequate protection provided to secured creditors by cram down provision. *In re Carver*, 338 B.R. 521 (Bankr. M.D. Ga. 2006) (Walker, J.).

2. Adequate protection payments Chapter 13 trustee authorized to make preconfirmation not required to be an amount less than regular monthly payments and tied to monthly depreciation of collateral. Debtors' regular monthly payments were "adequate protection" on "indubitable equivalence" theory under sections 361(3) and 1326(a)(2). *In re Perez*, 339 B.R. 385 (Bankr. S.D. Tex. 2006) (Bohm, J.).

3. Adequate protection payments made to enable debtors to continue to use motor vehicles that secure creditors' claims may qualify as administrative expenses, and creditors' claims for such payments may be entitled to priority as "actual, necessary costs and expenses of preserving the estate." Court's inquiry must center upon whether estate has received actual benefit, rather than upon loss that creditor may have sustained as result of debtor's possession of its property. These

administrative expense claims were payable ahead of administrative expense claims held by debtors' attorneys for payment of their fees under Code sections 507(a)(2), (b), and 1326(b)(1) mandating superpriority treatment for creditors' claims to extent that their was any failure of adequate protection and by virtue of language in plans requiring full adequate protection for creditors. Even though plans had to provide for payment of full amount of creditors' claims, adequate protection payments that Chapter 13 debtors were required to make to creditors whose claims were secured by 910 motor vehicles had to be calculated based on value of motor vehicles. *In re DeSardi*, 340 B.R. 790 (Bankr. S.D. Tex. 2006) (Isgur, J.).

H. Foreclosures

1. Because the debtor's petition was not filed until after the foreclosure sale was held, no automatic stay was in place to stay the sale. Once the gavel fell at the foreclosure sale, only the purchaser's rights arising from the sale remained to be enforced. *In re Murphy*, 2006 WL 1071153 (Bankr. D.D.C. 2006) (Teel, J.).

I. Tax Sales

1. Tax buyer under Illinois law holds “claim” against debtor-taxpayer that are treated in bankruptcy if petition filed before redemption period expires. *In re* McKinney (Bankr. C.D. Ill. 2006) (Perkins, J.).

J. Redemption

1. Redemption value under Section 722 is the wholesale value of a vehicle. The date of the hearing is appropriate for determining the value of the collateral as it most closely approximates the time a secured creditor could repossess and sell the collateral after a debtor's bankruptcy filing. *In re Lloyd*, 2006 WL 1174470 (Bankr. E.D. Mo. 2006) (Surratt-States, J.).

K. Proofs of Claim

1. "A split of authority exists among bankruptcy courts as to whether proof of a secured claim is necessary. The courts in the 7th Circuit that have published opinions are all on the same side of the split, holding that a secured creditor in a Chapter 13 case must have a proof of claim on file before payments may be made through a plan…. To say it another way, a Chapter 13 trustee may properly refrain from making a distribution to a secured creditor, even though the plan provides for payment of the secured claim by the trustee and even if the plan is confirmed, until and unless a proof of claim is on file for the secured claim…. Rule 3002(a) refers only to unsecured creditors and equity security holders; no reference is made to secured creditors. The Bankruptcy Code and Rules contain no express deadline for the filing of a secured claim. This Court agrees with those courts that hold that a secured claim may be filed after expiration of the Rule 3002(c) deadline and still be 'timely', *i.e.*, payable. This conclusion has been characterized as the majority view." *In re Mehl*, 2005 WL 2806676 (Bankr. C.D. Ill. 2005) (Gorman, J.).

L. Administrative Freeze

1. Creditor's failure by releasing restraint on debtor's bank account, where the creditor had knowledge of the bankruptcy filing was violation of the automatic stay. Though creditor faxed a general release letter to bank instructing it to release debtor's account, which happened that same day,

creditor sent the letter more than one month after it received notice of the filing. It is the creditor's responsibility, not the debtor's, to ensure that the lien has been removed. *In re Henry*, 328 B.R. 664 (Bankr. E.D.N.Y. 2005) (Craig, J.).

2. Although the Code stays right of setoff, a creditor may temporarily withhold payment from a debtor's account to protect setoff rights. Award of actual damages in the amount of $1,000.00 was appropriate for creditor's willful violation of the automatic stay in placing an indefinite hold on two savings accounts held in joint tenancy by Chapter 7 debtor and his nondebtor father. Creditor is a sophisticated player in the industry, had knowledge of the filing, and deliberately placed an indefinite hold on the accounts because debtor was jointly named on the accounts. Creditor intended to apply funds in these accounts against debtors' loans without seeking leave of the bankruptcy court. Award of punitive damages of $5,000 also warranted because creditor's actions in this case were a pervasive practice; creditor's amelioratory actions in reviewing and modifying its procedures to avoid future violations of the Bankruptcy Code, though belated and of no comfort to debtors, were laudatory and were considered by the court in making its award. *In re Cullen*, 329 B.R. 52 (Bankr. N.D. Iowa 2005) (Kilburg, J.).

XII. Discharge

A. IRS

1. Code prohibits discharge of income tax debt for which a return was required to be filed, but was not filed. Document filed by debtor six years late and IRS assessed tax liability was not an "honest and reasonable" endeavor to comply with the law and was not a "return" within the meaning of the Bankruptcy Code's exception to discharge under Section 523(a)(1)(B). Debtor offered no excuse for belated filing and document was not a reasonable attempt to satisfy tax obligations. *In re Payne*, 431 F.3d 1055 (7th Cir. 2005) (Posner, J.).

2. Even if taxes were attributed to income of self-employed spouse, and debtor was unemployed and had no source of income independent of spouse, debtor was jointly and severally liable for taxes by executing and filing a joint tax return. Debtor's filing of a "required" tax return is not an element that must be satisfied for tax debt to be excepted from discharge under "240-day rule" of Section 507(a)(8)(A)(ii). Plain language of statute has no "required" return element, even though such requirement was found in other provisions of the Code. *Carlin v. US (In re Carlin)*, 328 B.R. 221 (Bankr. 10th Cir. 2005) (Cornish, J.).

3. Debtors must exhaust administrative remedies before seeking bankruptcy court to impose sanctions for IRS's willful violation of the discharge injunction. *In re Lowthorp*, 332 B.R. 656 (Bankr. M.D. Fla 2005) (Paskay, J.).

4. Valid prepetition tax liens would survive debtor's chapter 7 bankruptcy even if tax obligations were discharged. However, liens don't attach to property and rights to property acquired by the debtors postpetition. *Dahmer v. United States (In re Dahmer)*, 336 B.R. 784 (Bankr. W.D. Mo. 2006) (Dow, J.).

5. IRS can allocate an income tax refund to payment of a dischargeable claim and debtors cannot. "Generally, if a taxpayer voluntarily pays a tax obligation, that taxpayer may direct how the

payment is applied. However, if the payment is deemed to be an involuntary payment, the IRS if free to allocate the payment in the way that will maximize recovery of the taxes due. *In re Lybrand,* 338 B.R. 402 (Bankr. W.D. Ark. 2006) (Mixon, J.).

6. 8th Circuit disagrees with holding of 7th Circuit in *Payne*, instead following the dissent of Easterbrook in *Payne.* Court holds that in deciding if document is an "honest and genuine attempt" to satisfy tax law to qualify as "return" within meaning of dischargeability exception, court need only look face of the document itself. In deciding whether tax forms belatedly filed after IRS assessed taxes qualified as "returns," Court would not apply definition of "return" that was added to the Code by BAPCPA where debtor filed petition prior to effective date of BAPCPA. Exceptions from discharge should be strictly construed to provide maximum "fresh start." Court compares Posner and Easterbrook divergent opinions, stating: "Judge Posner asserted that the main purpose of the filing requirement is to spare the government the burden of calculating what tax is owed. He concluded that since the debtor filed a purported return only after the IRS made an assessment, the document was not a reasonable attempt to comply with the tax law "requirements of filing a timely return and paying the amount of tax calculated on the return" and thus was not a return under § 523(a)(1)(B)(i), whether or not it yielded useful information. Judge Easterbrook, however, dissented from this view: He pointed out that "timely filing and satisfaction of one's financial obligations are requirements distinct from the definition of a 'return' " and argued that the relevant legal provisions were the ones that require taxpayers to yield all financial information necessary for calculation of their tax liabilities. The court, he contended, had conflated the objectives of obtaining accurate financial data and maximizing tax revenues, and had insinuated a motive requirement into the definition of "return" that the cases used to formulate that definition do not support. "Motive may affect the *consequences* of a return," Judge Easterbrook said, "but not the definition." *Payne*, 431 F.3d at 1061-62 (Easterbrook, J., dissenting). With due regard to the opinions of the other circuits, we find Judge Easterbrook's arguments persuasive. *In re Colsen*, 446 F.3d 836 (8th Cir. 2006) (Arnold, J.).

7. IRS in contempt for attempts to collect interest on discharged debt. IRS notifies discharged debtors under Chapter 13 of intent to levy to collect interest on discharged income tax debt. Court finds that income tax claim was satisfied and discharged, and attempt to collect interest violated § 1328(a). *In re Bryant*, 340 B.R. 569 (Bankr. N.D. Tex. 2006) (Lynn, J.).

8. "Undersecured" portion of chapter 11 debtor-taxpayer's income tax liability was not discharged in debtor's bankruptcy case. Thus, post-confirmation effort by IRS to collect unpaid tax by issuing notice of levy did not violate the discharge injunction. *In re Gill*, -- B.R. -- (Bankr. M.D. Fla. 2006) (Glenn, J.).

B. § 523(a)(2)

1. Discharge denied where workers' compensation settlement proceeds are disbursed without paying secured claim with lien on recoveries. *Loranger Family Chiropractic Center v. Tansey (In re Tansey)* (Bankr. E.D. Mich. 2005) (Rhodes, J.).

2. Whether creditor "justifiably relied" on debtor's misrepresentation(s) requires consideration of creditor's particular circumstances, knowledge, and characteristics, as opposed to objective standard requiring lack of contributory negligence on creditor's part. To "justifiably rely" on debtor's misrepresentation(s), creditor must conduct only a cursory examination or investigation

for patent misrepresentations and not the sort of further investigation that reasonable man would conduct. *Central Credit Union of Ill. v. Logan (In re Logan)*, 327 B.R. 907 (Bankr. N.D. Ill. 2005) (Cox, J.).

3. Even assuming that default judgments could be given collateral estoppel effect under Illinois law, default judgment that was entered against Chapter 7 debtors in state court fraud action brought by purchaser of their business could not be given collateral estoppel effect on question of nondischargeability of judgment debt as one for money obtained by debtors' false statement in writing regarding value and profitability of business, where default judgment stated only that debtors had made fraudulent misrepresentations, without any findings or discussion as to reasonableness of purchaser's reliance. *Jacobus v. Binns (In re Binns)*, 328 B.R. 116 (Bankr. 8th Cir. 2005) (Venters, J.).

4. § 523(a)(2)(B) only applies where the false statements concern the debtor's financial condition, taken as a whole. False statements regarding specific aspects of the debtor's financial condition are actionable under § 523(a)(2)(A). *Cadwell v. Joelson (In re Joelson)*, 427 F.3d 700 (10th Cir. 2005).

5. Under Illinois law, debtor's obligation, as a disloyal employee, to forfeit compensation was premised on breach of fiduciary duty to employer, not on fraud. That law provides that employees who breach their fiduciary duties to their employers must forfeit all compensation received during the period of the breach. Expanded reading of "actual fraud" is applied in the Seventh Circuit, for nondischargeability purposes, and includes any deceit, artifice, trick, or design involving direct or active operation of the mind, used to circumvent and cheat another. Where debtor embezzled funds from his employer, debtor's obligation under Illinois law to forfeit his compensation was premised not on fraud, but on his breach of his fiduciary duty to his employer, and so resulting debt was not excepted from discharge as one obtained by false pretenses, false representation, or actual fraud. *Shelby Shore Drugs, Inc. v. Sielschott (In re Sielschott)*, 332 B.R. 570 (Bankr. C.D. Ill. 2005) (Lessen, J.).

6. Debtor-attorney's obligation to drawee bank for depositing into his account, and drawing against, check that he received from alleged Nigerian nationals which, he didn't know, was altered to name attorney as payee could not be excepted from discharge as one for money obtained by any false representation that debtor made in presenting check for deposit. Test is subjective based on creditor's own capacity and knowledge (or that may fairly be charged against him based his capacity). *Avis Rent-A-Car Systems, Inc. v. Maxwell (In re Maxwell)*, 334 B.R. 736 (Bankr. M.D. Fla. 2005) (Briskman, J.).

7. State court default judgment did not establish that plaintiff's claim was excepted from discharge under § 523(a)(2) because judgment related to fraud and non-fraud claims without indicating that a finding of fraud was necessary to the judgment. *H.J. Bushka Lumber and Millwork v. Boucher (In re Boucher)*, 336 B.R. 27 (Bankr. D. Conn. 2005) (Weil, J.).

8. Even if creditor-cable television provider had statutory claim against Chapter 7 debtor-subscriber for violating California law regarding theft of cable television signals, creditor made no *prima facie* case of actual fraud as no evidence existing showing oral or written representations made by debtor relevant to the litigation, and there was no evidence of who occupied the residence, the existence of any pattern of theft, or knowledge on debtor's part that his decoders allowed him to

receive programming he knew was stolen. *Comcast of Los Angeles, Inc. v. Sandoval (In re Sandoval),* 341 B.R. 282 (Bankr. C.D. Cal. 2006) (Bufford, J.).

9. Lender "reasonably relied" on false financial statements submitted in connection with chapter 7 debtor's applications for home purchase loans that overstated debtor's income and falsely indicated nature of her employment. No "red flags" existed to alert lender to problems with statements. Debtor certified accuracy of statements and lender attempted to verify debtor's employment. *Home Loan Corp. v. Hall (In re Hall),* -- B.R. -- (Bankr. M.D. Fla. 2006) (May, J.).

10. Debtor general contractor's failure pay materialmen with payments received from customer for material to be used in home remodeling project, coupled with failure to account for funds, was "defalcation" while acting in fiduciary capacity that would be excepted from discharge in contractor's chapter 7 case. Debt, however, was not excepted from discharge under Sections 523(a)(2)(A) or 523(a)(6). *In re Donlevy,* -- B.R. -- (Bankr. N.D. Ill. 2006) (Schmetterer, J.).

11. Nigerian business scam, discussed at Section XVII.L, involves question of whether loan to support debtor's venture is nondischargeable under Section 523(a)(2)(A). Court states: "Because the Court has found that the Plaintiffs failed to prove that the Debtor made an affirmative misrepresentation, the next critical question becomes: In Debtor's conversations with the Plaintiffs pre-dating the lending of money to the Debtor, did Debtor's willful omissions of details relating to the problems with the transaction, i.e. the indications regarding scamming and/or swindling, the law enforcement contacts, etc., constitute a willful misrepresentation, by way of behavior conveying a false impression, for purposes of § 523(a)(2)(A)? The question must be answered in the affirmative. Granted, the Debtor did not refuse to answer any questions, nor did he indicate that there was any topic that was "off limits" in his conversations with the Plaintiffs. However, a synopsis of the circumstances under which the Debtor parted with hundreds of thousands of dollars of his own money, the purported movement of the commission from one foreign bank to another, and the details relating to the scamming by some individuals who were involved in the transaction cried out for disclosure. Even in the absence of a question, the information should have been revealed, and Debtor's failure to disclose it was not inadvertent. Debtor's calculated concealment of such information constitutes a willful misrepresentation under 11 U.S.C. § 523(a)(2)(A)." *Johnson v. Curtis (In re Curtis),* 2006 WL 1506209 (Bankr. C.D. Ill. 5/24/06) (Gorman, J.).

C. § 523(a)(5)

1. State court and bankruptcy court have concurrent jurisdiction to consider whether child support and alimony orders are dischargeable. *Eden v. Chapski,* 405 F.3d 582 (7th Cir. 2005).

2. Debtor's obligation to law firm that represented former wife in state court dissolution proceedings was nondischargeable debt "owed to a former spouse." *In re Bearden,* 330 B.R. 214 (Bankr. N.D. Ill. 2005) (Schmetterer, J.).

3. Attorneys fees of $15,000 to Chapter 7 debtor's former husband for litigating custody issue and seeking to enforce family court's custody awards after debtor fled state was considered traditional support and would be excepted from discharge as debt for children's benefit and support. *Burnett v. Shain (In re Shain),* 2006 WL 1441619 (Bankr. W.D. Ky. 2006) (Fulton, J.).

4. Attorney's fees that are in the nature of maintenance or support can be nondischargeable under § 523(a)(5) even if payable directly to the attorney. Summary judgment denied because of genuine issues of material fact as to whether the attorney's fees at issue were in the nature of alimony, maintenance, or support. *Gallagher Langlas & Gallagher, P.C.),* 2006 WL 213704 (Bankr. N.D. Iowa 2006) (Kilburg, J.).

5. Debtor-spouse's obligation to pay a joint debt on a motorcycle awarded to him in his divorce decree is not a 'support" obligation where only section of marital settlement agreement referencing motorcycle was entitled "Division of Marital Property" and where the debt was not included among the joint debts that debtor was to required pay as maintenance. *In re Wilson,* -- B.R. -- (Bankr. W.D. Ky. 2006) (Fulton, J.).

D. § 523(a)(6)

1. Credit sales in ordinary course of seller's business does not create "fiduciary" relationship between seller and debtors. Also, any conversion chapter 7 debtors committed in using assets of wholly owned corporation for personal purposes was conversion of property of corporation, not of the corporation's creditor who sold the property to the corporation. Thus, the obligation of debtors to the creditor was not "willful and malicious injury" to seller's property. *IBA v. Hoyt (In re Hoyt),* 326 B.R. 13 (Bankr. W.D.N.Y. 2005) (Ninfo, J.).

2. Chapter 7 debtor's obligation for statutory damages awarded upon finding he had infringed creditor's copyright was nondischargeable, even absent showing by creditor in copyright infringement action that he was damaged. Copyright infringement, by its very nature, was harmful to copyright holder, and award of statutory damages was indication that debtor's infringement was significant. *Star's Edge v. Braun (In re Braun),* 327 B.R. 447 (Bankr. N.D. Cal. 2005) (Montali, J.).

3. Chapter 7 debtor's intentional misappropriation of satellite signal was "willful and malicious injury." All damages awarded to provider under the Federal Communications Act, including statutory damages and attorney fees, were nondischargeable. *DirecTV v. Karpinsky (In re Karpinsky),* 328 B.R. 516 (Bankr. E.D. Mich. 2005) (McIvor, J.).

4. Debtor-contractor's debt for additional sums above price he agreed to for completion of home construction project which homeowners had to pay to have work completed by another contractor was "willful and malicious injury" because contractor falsely represented to homeowners that he was licensed and insured and had ability to complete project when, in fact, he was neither. *Sinha v. Clark (In re Clark),* 330 B.R.702 (Bankr. C.D. Ill. 2005) (Gorman, J.).

5. Maliciousness not proven for Code section 523(a)(6). While debtor's depositing check attempting to communicate with drawer and despite his own concerns about supposed Nigerian nationals, especially having long delayed in paying him for his services, exhibited gullibility and naiveté but not willfulness and maliciousness. *Avis Rent-A-Car Systems, Inc. v. Maxwell (In re Maxwell),* 334 B.R. 736 (Bankr. M.D. Fla. 2005) (Briskman, J.).

6. Intent to cause harm must exist for injury to be malicious. Wife acted "willfully" by running her vehicle into creditor's vehicle several times, including after getting out of the car and ramming her

husband's car again. *Jeffries v. Sullivan (In re Sullivan),* 337 B.R. 210 (Bankr. W.D. Mo. 2005) (Dow, J.).

7. Punitive damages award in state court proceeding entered by default judgment excepted from discharge under Section 523(a)(6) because allegations of the complaint made willfulness and maliciousness essential to the judgment. *Rogers v. Bryant (In re Bryant)* (Bankr. E.D. Ark. 2005) (Taylor, J.).

8. When awards of compensatory damages and punitive damages are based on same conduct, punitive damages award is nondischargeable as "willful and malicious injury" if compensatory damages award is found to be nondischargeable. *Muegler v. Bening,* 413 F.3d 980 (9th Cir. 2005) (Lay, J.).

9. Causation must be shown in an action objecting to a § 523(a)(6) discharge. *Jamrose v. D'Amato (In re D'Amato),* 341 B.R. 1 (Bankr. 8th Cir. 2006).

10. Findings of state court criminal proceeding established that the debtor's liability for wrongful death was excepted from discharge under Section 523(a)(6). Debtor "knew that the consequences of serious illness or death were substantially certain to result from his actions of supplying the GHB and then instructing the other defendants to clean up rather than seek medical attention." *Estate of Reid v. Limmer (In re Limmer)* (Bankr. E.D. Mich. 2006) (Shefferly, J.).

11. Under Missouri law, judgment creditors, as the assignees of a bank's claim against the chapter 7 debtor, could assert action for fraud or deceit that may have existed between original bank creditor and debtor. Note was originally executed and involved neither personal skill, knowledge, nor a relation of personal confidence. The allegations raised by judgment creditors were not tort, but arose from the contract between the assignor bank and debtor, and the judgment creditors tendered full consideration to the bank for its assignment of the promissory note to them. *Delsing v. Hackett (In re Hackett),* 2006 WL 1174475 (Bankr. E.D. Mo. 2006) (Surratt-States, J.).

12. State court wrongful death judgment against Chapter 7 debtor for drowning of debtor's minor child in bathtub did not collaterally estop litigation on issue of whether debtor caused the death by willful and malicious injury for dischargeability purposes since issue of debtor's intent was not litigated in or necessary to the wrongful death lawsuit. Judgment required determination only that debtor's conduct was in conscious disregard of child. While conduct was reckless, and though judgment included punitive damages, such award could have resulted from either willful or reckless conduct, and judgment did not indicate the type of conduct found by the jury. *Duncan v. Duncan (In re Duncan),* 2006 WL 1411755 (4th Cir. 2006) (Duncan, J).

13. No summary judgment on whether debtor-wife's damages to ex-husband's property was "willful and malicious" because of existence of genuine issue of material fact. Debtor-wife and son from another marriage accessed marital home with sledgehammer during husband's absence to remove property belonging to debtor. Issue of fact remained as to whether damage was inflicted by debtor-wife or son, and whether such damage was accidental or intentional. Issues of fact remained despite evidence of butter and other food having been melted and thrown on walls and ceiling, mattresses having been left in front yard, and cassette tapes having been wrapped around trees. *Palik v. Sexton (In re Sexton),* -- B.R. -- (Bankr. N.D. Ohio 2006) (Woods, J.).

E. § 523(a)(7)

1. In this matter of first impression for the courts of appeals, 3rd Circuit holds that debtor's obligation for criminal restitution payments ordered by state court was nondischargeable as fine, penalty or forfeiture "payable to and for the benefit of a governmental unit," even though state collected money only to distribute to victims of debtor's crimes in compensation for their injuries. The court "distills" the case "into a judgment between the literal language of this Bankruptcy Code provision and federalism doctrine as expounded by the Supreme Court in *Kelly v. Robinson*, 479 U.S. 36 (1986). The Supreme Court meant what it said in *Kelly* when it held that "§ 523(a)(7) preserves from discharge *any* condition a state criminal court imposes as part of a criminal sentence." "In this case, at least, federalism concerns embodied in a long tradition of courts' unwillingness to discharge monetary obligations that form part of a state criminal judgment when applying federal bankruptcy statutes, and Congress's deference to that tradition, trump a literal reading of the statutory text." *In re Thompson*, 418 F.3d 362 (3d Cir. 2005) (Smith, J.).

2. Commercial bail bondsman brought action against the clerk NJ state court for wrongfully removing his name from bail bondsman registry following discharge of bail bond debts in a Chapter 7 case in violation of the discharge injunction and the prohibition against discriminatory treatment of debtors under Section 525. Third Circuit holds, in a matter of first impression, that judgments against commercial bail bondsman arising from bond debts were "forfeitures" that were excepted from discharge in chapter 7. *Dobrek v. Phelan*, 419 F.3d 259 (3d Cir. 2005) (Fisher, J.).

F. § 523(a)(19)

1. Arbitration of claims within the exception of § 523(a)(19) is not inconsistent with any provision of the Bankruptcy Code and does not jeopardize its objectives because this section contemplates the determination of these issues by another forum. It is appropriate to modify the automatic stay of § 362(a) to permit the plaintiffs to proceed with arbitration and to stay the proceeding pending the conclusion of arbitration of the claims of the type described in § 523(a)(19). *Holland v. Zimmerman (In re Zimmerman)*, 341 B.R. 77 (Bankr. N.D. Ga. 2006) (Bonapfel, J.).

G. *Rooker-Feldman* / Concurrent Jurisdiction / *Res Judicata*

1. Debtor who filed for Chapter 7 relief and triggered protections of automatic stay prevented state appellate court from hearing creditor's appeal from state trial court's order dismissing creditor's claims against debtor. Hence, debtor was equitably estopped from asserting that dismissal order collaterally estopped creditor from pursuing its nondischargeability claims on theory that there was no debt owing from debtor to creditor which creditor could except from discharge. *Gibraltar Indus., Inc. v. Douds (In re Douds)*, 327 B.R. 122 (Bankr. W.D.N.Y. 2005) (Bucki, J.).

2. Default judgment entered against Chapter 7 debtors in state court for wrongful eviction and conversion could not be given collateral estoppel effect in subsequent proceeding to except state court judgment debt from discharge based on debtor's alleged larceny of this property. Court could not ascertain from allegations of complaint and default judgment whether each of elements of this dischargeability exception was actually litigated in state court. *Noblit v. Noblit*, 327 B.R. 307 (Bankr. E.D. Mich. 2005) (Shapero, J.).

3. Default judgment that was entered against Chapter 7 debtors in state court fraud action in which they failed to answer or appear could not be given collateral estoppel effect under Illinois law. *Rooker-Feldman* doctrine was limited in application only to cases in which state-court losers complaining of injuries caused by state-court judgments invited federal court to review and reject those judgments. Default judgment entered against Chapter 7 debtors in state court fraud action, in which they failed to answer or appear, could not be given collateral estoppel effect under Illinois law, so as to bar debtors from disputing nondischargeability of judgment debt as one for money obtained by debtors' false statement in writing regarding their or an insider's financial condition. *Jacobus v. Binns (In re Binns)*, 328 B.R. 116 (Bankr. 8th Cir. 2005) (Venters, J.).

4. Judgment of nondischargeability entered in one bankruptcy case remained enforceable in face of discharge of the same debtors in subsequent Chapter 7 case, without need for creditor to file another nondischargeability proceeding in second case. *Moncur v. Agricredit Acceptance Co. (In re Moncur)*, 328 B.R. 183 (Bankr. 9th Cir. 2005) (Klein, J.).

5. State court's factual findings cannot be challenged in bankruptcy. *Hill v. Putvin (In re Putvin)*, 332 B.R. 619 (Bankr. 10th Cir. 2005).

6. Prepetition arbitration award entitled to preclusive effect, as such award is entitled to such effect under state law. *Khaligh v. Hadaegh*, 338 B.R. 817 (Bankr. 9th Cir. 2006).

7. Jury imposition of punitive damage award showed intentional misconduct, not mere recklessness, caused by pastor's defalcation from obtaining power of attorney over congregants' homes and transferring them to the church. *Artis v. West (In re West)*, 339 B.R. 557 (Bankr. E.D.N.Y. 2006) (Feller, J.).

8. State court default judgment given preclusive effect in discharge proceeding because allegations in complaint were deemed admitted by the court. *Ware v. Thomas (In re Thomas)* (Bankr. E.D. Mich. 2006) (Rhodes, J.).

9. As to "dischargeability," state courts generally enjoy concurrent jurisdiction with federal courts. An exception to that general rule of concurrent jurisdiction over issues of dischargeability, however, exists under Section 523(c), whereby state courts lack jurisdiction to decide whether a pre-petition debt was procured by fraud, false pretenses, or willful injury under Sections 523(a)(2), (4), or (6). This requires a creditor owed a debt that may be excepted from discharge under paragraphs (a)(2), (4) or (6) to initiate proceedings in the bankruptcy court for an exception to discharge. Section 523(c), however, is subject to one common-sense exception: it does not bar future litigation over whether a debt was dischargeable under § 523(a)(2), (4), or (6) if that debt was not scheduled in time to permit the timely filing of a proof of claim and timely request for a determination of dischargeability (unless the creditor had notice or actual knowledge of the case in time for such timely filing and request). The bankruptcy court's grant of summary judgment also did not violate the *Rooker-Feldman* doctrine. Although courts are split, court here follows "the prevailing view that a bankruptcy court does not intrude upon the comity owed stated courts by declaring a state court judgment void when the state court has invaded a sphere of exclusive jurisdiction the Congress has carved out for the bankruptcy courts." *Rey v. Laureda (In re Rey)*, 2006 WL 142039 (Bankr. M.D.N.C. 5/22/06) (Gleeson, J.).

10. State court action resulted in a default judgment. Because Debtor filed an answer and various other pleadings in the case, this constituted a final determination on the merits. According to the Missouri Supreme Court, where a defendant files an answer, but then fails to appear for trial, a judgment entered is not for default, but rather, it is a judgment on the merits. The issue of fraud litigated in the state court action mirrors the issue presented by § 523(a)(2)(A) dischargeability complaint. Hence, *res judicata* applies and the judgment is nondischargeable. *McArdle v. Alvarez (In re Alvarez)*, 2006 WL 1522811 (Bankr. W.D. Mo. Dow, J.).

H. Revocation of Discharge

1. Appropriate response by a Court to learning about inappropriate conduct by Chapter 7 debtor who should not have received a discharge was vacating the discharge order under Rule 9024 instead of revoking it under Section 727 and 105. *Disch v. Rasmussen*, 417 F.3d 769 (7th Cir. 2005).

2. Plaintiff seeking denial or revocation of discharge based on debtor's "refusal" to obey a court order must show more than mere failure to obey order. Plaintiff must establish some degree of volition or willfulness on debtor's part. Trustee failed to establish willful or intentional refusal to turn over tax refunds, and thus debtor did not "refuse" to obey a lawful court order. By the time trustee issued demand for tax refunds and court issued its order, debtor had already spent the money. *Gillman v. Green (In re Green)*, 335 B.R. 181 (Bankr. D. Utah 2005) (Thurman, J.).

I. Extensions of Time to Object to Discharge

1. Cause must be shown under Rules 4004(b) and 4007(c) to extend time for objecting to discharge. The purpose of these rules is not to enable the objector to "fish around to see if something will pop up." *In re Garner*, 339 B.R. 610 (Bankr. W.D. Tex. 2006).

2. Debtor who placed motion to extend time for appealing bankruptcy court's adverse nondischargeability judgment in bankruptcy clerk's after-hours depository on morning it was removed from depository by employees of clerk's office could not have motion treated as if it were filed the preceding day, based on clerk's practice, as to documents removed from after-hours depository, to stamp them as if they were filed the preceding day. Twenty-day time limit on motion to extend time for appealing bankruptcy court's judgment on "excusable neglect" theory after ten-day appeals deadline has passed was jurisdictional. Party seeking such an extension must move no more than 30 days after judgment was entered. Because motion was filed 31 days after judgment in question, court had no authority to grant extension, even on showing of excusable neglect. *In re Davenport*, 2006 WL 1302242 (Bankr. S.D. Tex. 2006) (Bohm, J.).

J. Failure to Timely Object to Discharge / Equitable Defenses

1. Deadline for filing nondischargeability complaints is not jurisdictional, and is subject to equitable defenses, including waiver, estoppel and equitable tolling. Doctrine of equitable estoppel precludes party to lawsuit from raising certain defense, regardless of merits of that defense, based on some improper conduct on his part. Equitable tolling, unlike equitable estoppel, does not require allegation of impropriety on defendant's part. Absent dispute that creditor received notice of deadline for filing nondischargeability complaint, bankruptcy court in deciding equitable tolling question must focus creditor's diligence in pursuing rights and resulting prejudice, if any, to debtor. Discussions between creditor and Chapter 7 debtor regarding debtor's willingness to sign consent

decree excepting his debt to creditor from discharge did not serve to equitably estop debtor from objecting to timeliness of complaint since the creditor failed to file nondischargeability complaint prior to expiration of deadline. Creditor was properly notified of bar date and had ample opportunity to request extension, but failed to do so, and did not file complaint until three months after bar date and two months after proposed consent decree was returned to it with memorandum advising it that court would not enter agreed judgment in absence of nondischargeability proceeding commenced by creditor. *Chattanooga Agricultural Credit Assn. v. Davis (In re Davis)*, 330 B.R. 606 (Bankr. E.D. Tenn. 2005) (Stair, J.).

K. Section 111 Requirements

1. Can Section 111 course in personal financial management be waived due to "disability" or "incapacity" as set forth in 11 U.S.C. § 109(h)(4). The statute requires the determination be made "after notice and hearing," hence, the mere allegations of an attorney are insufficient. Neuropsychological re-evaluation didn't suggest inability to attend or comprehend. Thus, no incapacity under Section 109(h)(4). Motion alleges facts that would appear to warrant a waiver. However, since the Debtor has not introduced any evidence to establish those allegations, the Court must deny the Motion. *In re Stockwell*, 2006 WL 1149182 (Bankr. D. Vt., 4/27/06) (Brown, J.).

L. *Prima Facie* Case Must Be Stated

1. Dischargeability challenge must state a *prima facie* case even if no objection is filed. *Columbiana County School Employees Credit Union v. Cook (In re Cook)*, 336 B.R. 600 (Bankr. 6th Cir. 2006) (Whipple, J).

M. Attorneys' Fees

1. Generally, in bankruptcy litigation, prevailing litigant may collect attorneys' fees if authorized by federal statute or enforceable contract. Thus, prevailing party in nondischargeability proceeding can recover attorney fees and costs incurred in that proceeding if recovery of such fees and costs is authorized under an enforceable contractual right. *Cable Co. v. Martinez (In re Martinez)*, 416 F.3d 1286 (11th Cir. 2005).

2. Section 523(d) grant of attorney fee award against mortgage lender who lost in trying to except mortgage debt from discharge based on failure disclose property was subject to another mortgage is upheld where the lender's complaint was not “substantially justified” because the lender failed to attend meeting of creditors or conduct discovery prior to filing complaint. Also, lender's own records showed that loan officer who prepared mortgage documents had an ongoing relationship with debtors and either knew, or should have known, of the other mortgage. *Commercial Fed. Bank. v. Pappan (In re Pappan)*, 334 B.R. 678 (Bankr. 10th Cir. 2005) (Thurman, J.).

N. Student Loans

1. Debtor's lack of "good faith" in making only three voluntary and three semi-voluntary payments on her student loans over 18 years precluded discharge of student loan. *Thompson v. New Mexico Student Loan Guar. Corp. (In re Thompson)*, 329 B.R. 145 (Bankr. E.D. Va. 2005) (St. John, J.).

2. Neither *Brunner* nor *Pena* imposes a requirement that additional circumstances be "exceptional" in the sense that the debtor must prove a "serious illness, psychiatric problems, disability of a depend[e]nt, or *something* which makes the debtor's circumstances more compelling than that of an ordinary person in debt." Undue hardship requires only a showing that the debtor will not be able to maintain a minimal standard of living now and in the future if forced to repay her student loans. Court states that it presumes that the debtor's income will increase where she can make payments and maintain a minimal standard of living. The debtor, however, may rebut that presumption with "additional circumstances" indicating that her income cannot reasonably be expected to increase and that her inability to make payments will likely persist throughout a substantial portion of the loan's repayment period. *Educ. Credit Mgmt. Corp. v. Nys (In re Nys)*, 446 F.3d 938 (9th Cir. 2006) (Tallman, J.).

3. Courts must to consider the income of a nondebtor spouse when deciding whether to except student loan from discharge under "undue hardship" test. This includes domestic "life partner" where debtor and partner operated for years as a single financial entity, and couple's historical and ongoing use of assets of life partner to debtor's personal expenses, education, and well being. *In re Wilding*, 337 B.R. 423 (Bankr. 9th Cir. 2006) (Haines, J.).

4. Provision regarding nondischargeability of student loans is self-executing and creditor need not file complaint to determine nondischargeability, but debtor must affirmatively assert "undue hardship." *Whelton v. Educ. Credit Mgmt Corp. (In re Whelton)*, 432 F.3d 150 (2d Cir. 2006) (Murtha, J.).

5. Debtor failed to establish that current disability of level-two bipolar disorder was likely to continue for requisite time into the future, and thus debtor not entitled to "undue hardship" exception for discharge of student loan. Debtor failed to introduce prognoses from treating physicians or from other experts. Debtor also failed to provide evidence of effects of continued course of medical treatment on her condition, which not established as the most severe form of the disease. *Nash v. Conn. Student Loan Fdn. (In re Nash)*, 446 F.3d 188 (1st Cir. 2006) (Coffin, J.).

O. Violations of Discharge Injunction Questioned

1. Creditor that debtors had paid roughly one month prior to commencement of Chapter 13 case after receiving letter from prosecuting attorney demanding payment in order to avoid being prosecuted on "bad check" charge did not violate discharge injunction by later forwarding to prosecuting attorney a copy of motion to convert debtors' Chapter 13 case to one under Chapter 7, on theory that creditor, by apprising prosecuting attorney of developments in bankruptcy case, was seeking to involve prosecuting attorney in collection of any debt that might arise upon avoidance of debtors' earlier payment as preferential. Delivery to prosecutor of copy of public document did not constitute act to collect debt, especially where debtors' payment had not been avoided, such that no debt existed, when delivery occurred. *Swain v. Dredging, Inc. (In re Swain)*, 325 B.R. 264 (Bankr. 8th Cir. 2005) (Schermer, J.).

2. Holder of unscheduled claim against debtor in no-asset case violated discharge injunction by attempting to collect claim. Court holds that unscheduled debts are excepted from discharge only if "the creditor is disadvantaged by not being able to share in a distribution in the case or is unable to challenge the dischargeability of his claim." No intent found. *In re Boyd*, 336 B.R. 277 (Bankr. E.D. Va. 2005) (Mayer, J.).

3. No private right of action under Code Section 524 for violation of discharge injunction. Section 105 doesn't establish substantive rights not otherwise authorized by law. *Brown v. Anderson (In re Brown)* (Bankr. E.D. Tenn. 2005) (Stairs, J.).

4. Discharged chapter 13 debtor asserts class action against bank based on assessment of post-petition, pre-confirmation attorney fees. Court holds that no private cause of action existed for mortgagee's alleged violation of Bankruptcy Code provision but that sole remedy was contempt proceeding. "Typically, challenges to creditor collection efforts occur post-discharge, and thus arise under 11 U.S.C. § 524, which governs the effect of bankruptcy discharges…. Under § 524(a)(2), a discharge operates as an injunction against a broad array of creditor efforts to collect debts as personal liabilities of the discharged debtor. This Court has not addressed whether § 524 implies a private right of action, either alone or through § 105(a), but the weight of circuit authority is that it does not…. [D]ecisions holding that § 105(a) does not authorize separate lawsuits as a remedy for bankruptcy violations, though established in the § 524 context, are equally applicable when the underlying complaint is grounded in § 506(b)." *Joubert v. ABN AMRO Mortgage Group, Inc. (In re Joubert)*, 411 F.3d 452 (3d Cir. 2005) (Smith, J.).

5. State court order directing debtor to pay ex-wife amount representing sale of medical practice described in settlement order was void as a determination of debtor's personal liability for a discharged debt where all but $20,000 of debtor's obligations under settlement were discharged in his original bankruptcy, and that $20,000 had been explicitly converted into five monthly alimony payments of $4,000 each. However, state court's award to debtor's ex-wife for expenses incurred in traveling to defend property settlement agreement when debtor attempted to discharge it in bankruptcy was not void as determination of debtor's personal liability with respect to discharged debt, since ex-wife's claim arose post-petition. *Egleston v. Egleston (In re Egleston)*, 2006 WL 1223044 (5th Cir. 2006) (Garwood, J.).

P. Sovereign Immunity

1. Court addresses whether there is an explicit waiver of sovereign immunity in 11 U.S.C. § 106 to allow an award of emotional distress damages against the IRS/US. Court beings examining standards for determining whether Congress waived the sovereign immunity of the federal government, stating that the standard is quite stringent and the waiver must be "unequivocally expressed." Court questions whether the "money recovery" language of Section 106 constitutes a waiver of immunity for emotional distress damages. Court concludes that the waiver does not extend that far, and that the US is immune from damages for emotional distress for violating discharge injunction, noting that the law has always been wary of claims of emotional distress, because they are so easy to manufacture. *US v. Torres (In re Torres)*, 432 F.3d 20 (1st Cir. 2005) (Torruella, J.).

XIII. Property of the Estate

A. Trusts and Estates

1. Distributions that Chapter 7 debtor-beneficiary received postpetition from *inter vivos* spendthrift trust were not brought into property of the estate under Section 541(a)(5)(A) defining estate

property to include property that debtor acquires within 180 days of petition date by bequest, devise, or inheritance. *In re Eley,* 331 B.R. 353 (Bankr. S.D. Ohio 2005) (Walter, J.).

2. The Debtor asserted she had no pre-petition right to the proceeds of mother's wrongful death action because she could not have brought the suit herself. Furthermore, she asserted, when the suit was filed, she was not a party to the suit and did not even have knowledge of it until well after her bankruptcy filing. Court finds that proceeds are property of the estate, even though debtor, not being personal representative of mother's estate, could not have filed suit herself and had no knowledge of suit until after commencement of her bankruptcy case. *In re Lott*, 332 B.R. 922 (Bankr. E.D. Mich 2005) (Shapero, J.).

B. Tax Refunds

1. Non-wage-earning spouse who did not contribute to prepetition tax overpayments resulting in income tax refund had no property interest in refund under Illinois law, and did not, merely by executing joint return with her wage-earning spouse, acquire any such interest. *In re Lock*, 329 B.R. 856 (Bankr. S.D. Ill. 2005) (Meyers, J.).

2. One-half of tax refund was presumptively property of nondebtor-spouse, and excluded from property of the estate, absent proof of court order or prenuptial or other agreement providing for different allocation of ownership of refund. *In re Innis,* 331 B.R. 784 (Bankr. C.D. Ill. 2005) (Perkins, J.).

C. Asset Sales

1. Under Virginia law, competing bidder and real estate agents did not tortiously interfere with winning bidder's contract for the purchase of Chapter 13 debtors' house by submitting a higher and better offer than purchaser's initial offer. Purchaser had no protected expectancy since, both contractually and under bankruptcy law, the contract was contingent on court approval. Before hearing on approval, property was on market and subject to higher or better offers. Failure to obtain court approval of purchaser's initial offer was not a result of interference by competing bidder, real estate agents, or anyone else but from the normal exposure of property to the market. Court's action in postponing the sale was sufficient to purge the transaction of any taint from allegations raised by purchaser. *Siddiqui v. Gardner (In re Williamson),* 327 B.R. 578 (Bankr. E.D. Va. 2005) (Mayer, J.).

D. Abandonment

1. Decision to Abandon Irrevocable under Excusable Neglect Standard

   a. Rule 60(b)(1) standards, as applied to trustee's abandonment decision. do not warrant reversal of trustee's decision to abandon property. Where trustee permits property to be abandoned and closes case without confirming value of property via appraisal or order excepting unknown equity from abandonment, subsequent discovery of equity accrues to benefit of the debtor. *Russell v. Tadlock (In re Tadlock),* 338 B.R. 436 (Bankr. 10th Cir. 2006).

2. Relief from Technical Abandonment Upon Closing of Case

a. Chapter 7 trustee filed motions to revoke administrative closing of case and to compromise debtor's *pro se* federal discrimination lawsuit against former employer. Court construes motion as a motion to revoke the technical abandonment of the asset. Court holds that a technical abandonment is not irrevocable and that relief from technical abandonment may be granted pursuant to the Rule 60(b) governing relief from judgment or order. Court also finds that Trustee's filing of report of no distribution is insufficient proof of a conscious abandonment of an asset. Court balances equities, noting revocation under Rule 60(b) "extraordinary circumstances" test may not be warranted where it would unfairly prejudice the purported owner of the property. Circumstances extraordinary here where trustee believed employer's small settlement offer was final and thus of no value to the estate, but soon after trustee filed report, employer increased its offer, and trustee filed motion to reopen just 13 days after case was closed. Subsequent settlement was about 12 times the original "final" offer, and claimants would be paid in full. *In re Balonze*, 336 B.R. 160 (Bankr. D. Conn. 2006) (Weil, J.).

b. The Trustee abandoned the real property to the debtors when he failed to administer it prior to the closure of the case. Such abandonment is generally irrevocable, although some courts have found that a technical abandonment may be revoked under certain circumstances upon the reopening of a case. Here, the Trustee attempted to administer the real property but was unable to obtain an offer to purchase. The Trustee made an informed decision when consenting to the mortgagee's motion for relief from stay and filed a report of no distribution. The Trustee could have avoided the problem by including a provision in the lift stay order reserving the estate's interest in any excess proceeds and requiring that any such proceeds be remitted to the Trustee. Thus, request for revocation of abandonment denied. *In re Locklair*, 2006 WL 1491440 (Bankr. M.D.N.C. 5/18/06) (Carruthers, J.).

E. Judicial Estoppel / Unscheduled Assets

1. Chapter 7 trustee was not barred by judicial estoppel from prosecuting prepetition cause of action that debtors didn't disclose on schedules. Trustee learned of rights only after case had been closed. Trustee made no inconsistent statement, and judicial estoppel doctrine's equitable nature would make it wrong to apply it to benefit wrongdoers at expense of creditors previously victimized by debtors' nondisclosure. *Wood v. Household Finance Corp.*, 2006 WL 1148509 (W.D. Wash. 2006) (Martinez, J.).

F. Insurance

1. Insurance proceeds payable under policy that chapter 13 debtors purchased postpetition on asset purchased prepetition and part of chapter 13 estate were proceeds of postpetition insurance policy, not of destroyed prepetition asset. Hence, proceeds didn't have to be turned over to trustee, but to loss payee per the insurance contract. *In re West*, -- B.R. -- (Bankr. E.D. Va. 2006) (Adams, J.).

G. Employee Stock Options

1. Pre-BAPCPA case holding that employee stock options granted are property of the estate regardless of whether they are exercisable at that time and that if they become exercisable postpetition, part of the profits realized are “earnings” from the debtor's postpetition services, and

thus profits must be split debtor and the estate *pro rata*. *In re Michener*, -- B.R. -- (Bankr. D. Del. 2006) (Walrath, J.)..

XIV. Claims Objections and Proofs of Claim

A. Documentation Issues

1. Objection to claim based solely on lack of documentation or deviation from the official form is not sufficient substantive basis for disallowing claim, especially if debtor acknowledges the claim as a legitimate debt in schedules. Creditor with claim based on a "writing" must attach the original or duplicate of that writing to the proof of claim unless it has been lost or destroyed, in which case a statement of the circumstances of the loss must be filed with the claim. If the required documents are too voluminous, creditor filing a proof of claim may attach a summary. *In re Burkett*, 329 B.R. 820 (Bankr. S.D. Ohio 2005) (Walter, J.).

2. Failure to properly document a claim is no basis for disallowance; it's just not *prima facie* evidence of its validity. Debtors shouldn't object to undocumented claims unless they really question the claim's validity. *Heath v. American Express Travel Related Services Co., Inc. (In re Heath)*, 331 B.R. 424 (Bankr. 9th Cir. 2005).

3. Proofs of claim filed by credit card lender assignee, while not prima facie valid based on creditor's failure to provide breakdown of interest and late fees as written attachment to these proofs of claim, were some evidence of creditor's claims. In absence of any evidence to contradict amounts of claims, they would not be disallowed based solely upon lack of such supporting documentation. *In re Irons*, 2006 WL 1379586 (Bankr. N.D.N.Y. 2006) (Gerling, J.).

4. Claim for credit card debt is "based on a writing," thus requiring the creditor to attach some supporting documentation for claim to be *prima facie* valid. Account summary attached to proof of claim was sufficient, even though account summary was not a business record. Attachment identified debtor by name and social security number, and stated total amount of debt. This was sufficient information to establish the claim asserted was against the debtor. *In re Joslin*, 2006 WL 1075469 (Bankr. D. Kan. 2006) (Nugent, J.).

B. *Rooker-Feldman* Doctrine

1. Under *Rooker-Feldman* doctrine, bankruptcy court lacked subject matter jurisdiction over complaint against mortgagee, which had obtained a prepetition state-court judgment against debtor. Debtor did not seek to strike or open the state-court judgment, but asserted she was not properly served and failed to receive appropriate notice in state court, and that she was denied due process rights. Court finds it would have to find the state-court judgment was erroneously entered, which *Rooker-Feldman* doctrine prevented the court from doing. Also, debtor's claim concerning ownership of her loan at time of foreclosure implicated mortgagee's standing in state court and so was "inextricably intertwined" with the state-court judgment. *Holler v. Fairbanks Capital Corp. Servicing Ctr. (In re Holler)*, 2006 WL 1318786 (Bankr. W.D. Pa. 2006) (Agresti, J.).

C. Late-Filed Claims

1. Creditor was entitled to payment on its allowed general unsecured claims even though claims were filed more than eight months after claims bar date. Chapter 7 case had surplus funds after payment of all claims in full. This was also a no asset case where creditors were advised of such. The Code does not automatically disallow late claims. A party may object to a late-filed proof of claim, but lateness does not invalidate a claim to the extent it is: (1) a priority claim filed in time to participate in a distribution; (2) an unsecured claim held by a creditor who did not have timely notice of the claims bar date and who files the claim in time to participate in a distribution; or (3) an unsecured claim to the extent excess funds remain after payment of timely filed claims. The net effect of the foregoing is to subordinate the payment of late unsecured nonpriority claims to the payment of nonpriority unsecured claims for which proofs were timely filed. 11 U.S.C. § 726(a)(3). *Hollingsworth v. Kaler (In re Hollingsworth)*, 331 B.R. 399 (Bankr. 8th Cir. 2005) (Schermer, J.).

2. Chapter 13 debtor listed creditor and its attorney on mailing matrix. Creditor did not file timely proof of claim. Court sustains objection to the late-filed claim. Creditor argued that equitable factors supported allowance of claim. Court disagrees, stating that Section 502(b)(9) does not have an equitable exception and cannot be overridden by Section 105. "In sum, Section 502(b)(9) requires the Court to disallow KeyBank's proof of claim in this case because it was not timely filed by the deadline set forth under Fed. R. Bankr. P. 3002(c). That section is clear and unequivocal," *In re Oslanci* (Bankr. E.D. Mich. 2006) (Shefferly, J.).

D. Informal Proofs of Claim

1. Nondischargeability complaint showed seller's intent to hold estate liable for balance due under prepetition purchase agreement, and thus qualified as "informal proof of claim" filed prior to expiration of claims bar date that could be amended with formal proof of claim filed after bar date expired. *In re Hayes*, 327 B.R. 453 (Bankr. C.D. Cal. 2005) (Carroll, J.).

XV. Reaffirmation Agreements

A. Reaffirmation Agreement Stricken

1. Because of mutual mistake made in execution of reaffirmation agreement (*i.e.*, mistaken assumption that big payment on petition date to lender would be permanent and not reversed), court will not deem balance due in the agreement as binding on mortgagee. Court looks to state law in interpreting reaffirmation contract. *National City Mortgage Co. n re Wiese (In re Wiese)*, 337 B.R. 206 (Bankr. N.D. Iowa 2005).

2. Prior to BAPCPA, the 4th Circuit permitted a debtor let the debt "ride-through" by continuing to make payments on the debt and retain the property serving as collateral for that debt. "BAPCPA, however, Congress included language in § 362(h)(1), § 521(a)(6), and § 521(d) designed to limit a debtor's right to ride-through. Section 362(h)(1) provides that the automatic stay terminates 'with respect to personal property' when the debtor does not state an intention to reaffirm or redeem, or does not perform such intention within a specified period of time. The language of § 362(h)(1) is specifically limited to personal property and does not apply to real property. Similarly, § 521(a)(6) refers to the debtor not retaining possession of *personal* property as to which a creditor has an allowed claim unless the debtor reaffirms or redeems. Again, this section does not apply to real

property. Finally, § 521(d), which is designed to allow creditors to enforce *ipso facto* clauses in certain leases and contracts, limits its application to when a debtor fails to take action as specified in either § 362(h)(1) and § 521(a)(6). Therefore, it too is limited to personal property. Here, the sections in BAPCPA designed to limit ride-though apply to personal property only, despite the fact that, pre-BAPCPA, ride-through was permitted for both real and personal property in the Fourth Circuit pursuant to *Belanger*. Congress could have easily made § 362(h)(1) and § 521(a)(6) applicable to both real and personal property, but it chose not to. Thus, the court finds that debtors in this circuit continue to have the right pursuant to *Belanger* to retain real property without being required to reaffirm or redeem, so long as payments to the creditor are current. Because the Debtors are entitled retain their real property while they continue to make payments on a debt that is current, this court finds that reaffirming the indebtedness to the Creditor would not be in their best interest." *In re Bennet*, 2006 WL 1540842 (Bankr. M.D.N.C. 5/26/06) (Carruthers, J.).

3. "BAPCPA amended the provisions of § 524 with respect to reaffirmation agreements for consumer debts. In order for the Reaffirmation Agreement to be enforceable it must have been entered into before the granting of a discharge to the Debtor under § 727 and the disclosures required under § 524(k) must have been made at or before the time the Debtor signed the agreement. 11 U.S.C. § 524(c). In addition, the Bankruptcy Code requires that the Reaffirmation Agreement be filed with the Court and, on the facts of this case, that the Court determine, after a hearing at which the Debtor appears, that the Reaffirmation Agreement does not impose an undue hardship on the Debtor. 11 U.S.C. § 524(c) and (d). As required by § 524(k)(3), the Reaffirmation Agreement advises the Debtor of his right to rescind the Reaffirmation Agreement at any time before the Court enters a discharge order or before the expiration of the 60-day period that begins on the date the Reaffirmation Agreement is filed with the Court, whichever occurs later. Any such rescission must be completed by the Debtor notifying the creditor. 11 U.S.C. § 524(k)(3). However, the Reaffirmation Agreement does not contain any indication of the identity of the creditor to whom notice of rescission should be given or any address to which such notice could be delivered. Therefore, the Reaffirmation Agreement does not comply with the requirements of § 524(k)(3). AO 4008-1 requires the use of the proscribed form in order to insure compliance with the requirements of § 524, as revised by BAPCPA. In addition to the use of the required form, AO 4008-1 requires that a reaffirmation agreement be 'accompanied by the best available evidence of the claim and, as appropriate, copies of the underlying contractual agreement.' Given the evidence before the Court in the form of the Reaffirmation Agreement, the Installment Contract, and the Title Certificate, there is simply no way for the Court, the Debtor or any other person to determine what agreement has been reaffirmed, the terms of such agreement or the identity of the creditor who has entered into the agreement. Although the Reaffirmation Agreement is on in the form required by AO 4008-1, it has not been completed properly. In addition, either the Reaffirmation Agreement has not been properly executed by the lien holder of the motor vehicle that is the collateral for the loan or the documentation necessary to establish that the person executing the Reaffirmation Agreement is the holder of the claim and the security interest in the motor vehicle has been omitted. Finally, the Debtor's right of rescission is meaningless unless the disclosures in the Reaffirmation Agreement identify the name and address of the person to whom the Debtor must direct a notice of rescission. Accordingly, the Reaffirmation Agreement does not comply with the requirements of § 524 and cannot be approved." *In re Reardon*, 2006 WL 1520214 (Bankr. D.N.H. 2006) (Deasy, J.).

XVI. Fees

A. Fee Requests - Chapter 13's

1. Bankruptcy court's use of precalculated lodestar amount for typical Chapter 13 cases (as provided in its General Order) in calculating reasonable fee award for Chapter 13 debtors' attorneys, was not abuse of discretion. Court did not mechanically award precalculated lodestar amount without analyzing whether case was typical. Also, court considered whether upward adjustment was warranted, but decided not to do so based on specific findings that attorneys spent unreasonable amount of time on case, duplicated each other's efforts, performed unnecessary work, were unprepared for confirmation hearing, and were handling case that presented no novel or complex issues. *In re Cahill*, 428 F.3d 536 (5th Cir. 2005).

2. Bankruptcy court's failure to make any findings of fact to permit the BAP to review its conclusion that the $2,027 in fees requested by Chapter 13 debtors' attorney for his services in a case was not reasonable compensation necessitated reversal of its decision to award fees only in presumptive $800 amount and remand for further proceedings. *McCoy v. Hardeman (In re Tahah)*, 330 B.R. 777 (Bankr. 10th Cir. 2005) (Clark, J.).

3. "Counsel has a duty to supervise clients' conduct for compliance with the Bankruptcy Code. As a professional, an attorney must instruct the debtor on appropriate conduct and must develop client control. To foster such client control, an attorney must be: ... knowledgeable about the parameters and limits of available alternatives and remedies, and unwilling to allow a client to direct or dictate the progress or activity in a case, if such activity is inconsistent with the requirements of the law. Debtors were adamant about not paying bank through their plan until a final determination was made in state court. Attorney drafted a plan providing for payment of the bank's estimated claim as required by the Bankruptcy Code. The Court has three main concerns regarding attorney's fee application. Although Debtors' attitude made attorney's job more difficult, attorney failed to sufficiently communicate with debtors about the requirements of the Code regarding treatment of secured claims. Attorney also failed to initially comply with debtors' request that he withdraw as counsel. Finally, attorney's hourly rate for fees exceeds the high end of hourly rates currently being charged by similarly situated bankruptcy attorneys in this court. Rather than make a line by line determination, the Court will approve a reduced amount of the overall fees [at] $5,000." *In re McAllister*, 2005 WL 2205830 (Bankr. N.D. Iowa 9/6/05) (Kilburg, J.).

4. Attoneys may receive full hourly rate for time spent traveling and waiting if it was reasonable, necessary, and beneficial. Usually time is spread over several cases, but when only one client benefits, then that client must pay for actual and necessary travel and waiting. While debtors should be expected to find local attorneys, they are free to choose out-of-town counsel if they so desire. *In re Holka,* 2005 WL 1806436 (Bankr. E.D. Mich. 7/20/05) (Shapero, J.).

5. Attorney assisting in filing an unfeasible Chapter 13 case dismissed based on failure to maintain plan payments. Attorney could have "readily determined the correct mortgage arrearage amount before filing the case." Attorney compensated $500 for work in preparing the petition. *In re Jones*, 339 B.R. 903 (Bankr. E.D. Mich. 2006) (Rhodes, J.).

B. Fee Requests - Chapter 7 Trustees

1. Term "parties in interest," as used in Section 326(a) capping trustee's compensation based on monies disbursed to parties in interest, includes professionals retained by trustee. Thus, fees and costs paid to trustee's counsel are properly included in base used to calculate maximum compensation payable to trustee. *In re Nardelli*, 327 B.R. 488 (Bankr. M.D. Fla. 2005) (Jennemann, J.).

2. Bankruptcy court could not award any compensation to Chapter 7 trustee for services in discovering that debtors had undervalued property in what at first appeared a "no asset" case, even though as a result of discovery, debtors converted cases to Chapter 13 and unsecured creditors received significant distributions on claims. When cases were converted, trustee had not made any distributions to creditors. Plain meaning of statute capping trustee's compensation based upon distributions made in Chapter 7 case barred award of compensation to trustee on "composite trustee," "constructive disbursement," quantum meruit, or other theory. *In re Silvus*, 329 B.R. 193 (Bankr. E.D. Va. 2005) (St. John, J.).

3. Disagreeing with *Nardelli, infra*, court states: "What the *Nardelli* court seems to skip over is that professional persons are those who perform post-petition services and who may qualify for the allowance of their compensation as persons with unpaid administrative expenses, but who, nevertheless, are supposed to remain disinterested, that is, they cannot become persons or parties in interest with interests adverse to any class of creditors or equity security holders. In this respect, even though persons with allowed administrative expenses may be directly affected by the distribution of proceeds of the estate, and to that extent may loosely be referred to as 'parties in interest,' they are surely a paradoxical type of 'party in interest' on their face, namely, parties in interest who cannot hold an interest adverse to the estate. It is difficult to escape the strictly logical conclusion that it is inconsistent, or worse, rather incoherent, to say that those with administrative expenses cannot be parties in interest under section 327(a), and at the same time, to define them as parties in interest for purposes of section 326(a)." *In re Vona*, 333 B.R. 191 (Bankr. E.D.N.Y. 2005) (Bernstein, J.).

4. Trustee's compensation calculation under § 326 may include distributions to administrative claimants, but not to trustee's professionals. *In re McBrearty*, 335 B.R. 513 (Bankr. E.D.N.Y. 2005).

5. Trustee permitted fees associated with failed opposition to debtor's motion to convert to Chapter 13. *In re Kuhn*, 337 B.R. 668 (Bankr. N.D. Ind. 2006) (Klingeberger, J.).

C. Fee Requests - Trustee's Counsel

1. Trustee's attorneys' services limited to tasks not routinely provided by the trustee. *Ferrette & Slater v. U.S. Trustee (In re Garcia)*, 335 B.R. 717 (Bankr. 9th Cir. 2005).

2. Attorney fees that Chapter 7 trustee incurred in preserving and disposing of property that debtor jointly owned with mother were related to performance of trustee's duties and could not be deducted from sales proceeds prior to division of proceeds between estate and debtor's mother, even though mother benefited from attorney's work. *Stine v. Diamond (In re Flynn)*, 418 F.3d 1005 (9th Cir. 2005) (Leavy, J.).

D. Retainers

1. Prepetition retainer to Chapter 13 debtors' attorney to secure representation and pay for substantial prepetition services was "advance payment retainer" that became attorney's property upon receipt and was not included in "property of the estate." *Barron v. Countryman*, 432 F.2d 590 (5th Cir. 2005).

E. Flat Fees

1. Flat fee arrangements for routine Chapter 7 cases are to be encouraged: they are simple and save time, eliminating the need for attorneys to prepare fee applications, trustees to police the applications and courts to approve them, and by saving time and effort, the result should be lower fees for debtors. Although a "cushion" in the flat fee charged by a debtor's attorney is acceptable, a $1,300 excess fee over the services provided is not reasonable. Here, however, flat fee of $2,000 based on potential complications in the case, including possible challenge to the dischargeability of bank's claim, debtor's claimed exemption in specialized audio equipment, and debtor's claimed exemption in a triplex, was excessive and would be reduced to $1,000. Flat fee was more than twice district average fee, case was a no-asset, mostly garden-variety case, none of the potential complications materialized, attorney and paralegal spent a combined total of five hours working on the case, not including travel time, and reasonable value of services provided was only $700. *In re Murray*, 330 B.R. 732 (Bankr. E.D. Wis. 2005) (Kelley, J.).

F. Debtor's Counsel's Fees

1. "Court may order return of any funds paid to debtors' counsel. In these cases, it appears that any fees charged by debtors' counsel (including any filing fees that were paid by the putative debtors) exceeded the reasonable value of the services received. Counsel--by failing to comply with the plain wording of the statute [on credit counseling] and this Court's November 8, 2005 order--has failed to cause these individuals to commence cases under the Bankruptcy Code. Within two business days, counsel shall file a pleading in which counsel shows cause why all fees and expenses should not immediately be returned to the debtors." *In re Hubbard*, 333 B.R. 377 (Bankr. S.D. Tex. 2005) (Isgur, J.).

G. Retainers

1. 5th Circuit overrules lower court orders of disgorgement for fees collected pre- and postpetition in 167 Chapter 13 cases. Attorney's retainer agreements did not require escrowing of prepetition "deposits" earned. Also, neither Texas professional ethics standards nor applicable Code provisions or court rules require disgorgement Court, however, affirms order requiring disgorgement of postpetition fees for which no court approval was obtained. Prepetition funds obtained as an "advance payment" retainer are not property of the estate. Such retainer is distinguished from a "security retainer," as to which the client retains an interest until services are rendered, which becomes property of the estate. *Barron v. Countryman*, 432 F.3d 590 (5th Cir. 2005) (Jones, J.).

H. Lodestar

1. William A. Cohn sued Judges Brown, Kennedy, and Latta of the Western District of Tennessee, alleging that they violated the Code and his constitutional rights by not awarding fees based on a lodestar analysis. Cohn sought a declaratory judgment and mandamus relief. District Court dismisses, holding that Cohn lacked standing to assert his claims, that the claims were not ripe for adjudication, and that Cohn was not entitled to mandamus relief. 6th Circuit affirms solely on the ground that Cohn lacks standing to assert his claim. Cohn alleged that the judges were determining fees based on a "threshold" or "lump-sum" calculation, not on a case-by-case basis as under a lodestar analysis. This method was alleged to ignore the actual hours spent. Cohn complained also that the judges improperly treat fee awards in bankruptcy cases as inferior to those of secured creditors, thereby preventing attorneys from receiving full fee awards if the Chapter 13 plan is dismissed prior to completion of all payments. Court says appropriate way to handle matter is to bring appeal of each particular decision, instead of seeking blanket prohibition. *Cohn v. Brown*, 2005 WL 3439786 (6th Cir. 2005) (O'Malley, J.).

I. Debtor's Counsel Fees

1. "The Court may order the return of any funds paid to debtors' counsel. In these cases, it appears that any fees charged by debtors' counsel (including any filing fees that were paid by the putative debtors) exceeded the reasonable value of the services received. Counsel--by failing to comply with the plain wording of the statute and this Court's November 8, 2005 order--has failed to cause these individuals to commence cases under the Bankruptcy Code. Within two business days, counsel shall file a pleading in which counsel shows cause why all fees and expenses should not immediately be returned to the debtors." *In re Hubbard*, 333 B.R. 377 (Bankr. S.D. Tex. 2005) (Isgur, J.) (ruling in 5 separate debtor cases).

J. Assignment of Tax Refund for Postpetition Fees

1. Debtors permitted to unconditionally assign prepetition to attorney tax refunds to be issued postpetition. Such assignment as an advance payment of fees removed the refund from property of the estate. Court finds that estate's interest in refund only exists if money wasn't earned by the law firm under § 329. *(Redmond v. Lentz & Clark, P.A.) In re Wagers*, 340 B.R. 391 (Bankr. D. Kan. 2006).

XVII. Attorney Ethics

A. Fee Splitting

1. Six month suspension of law license for affiliating with credit counseling and debt consolidation agency. Violations of DR 3-101(A) (lawyer shall not aid a nonlawyer in the unauthorized practice of law); 3-102(A) (no fee sharing with non-lawyers); 3-103(A) (no law partnership with non-lawyers). Credit agency provided office space and support in exchange for percentage of legal fees. Procedure: receptionist would direct consumers to counselor or lawyer, depending on circumstances. Lawyer's fees deposited into client trust account, and 75% turned over to the credit agency. Aggravating factor in suspension: failure to appreciate wrongfulness of his misconduct. Finding: Attorney had "abandoned his professional responsibility to oversee and safeguard his

clients' individual interests by fronting for a business that profited from the sale of debt-management services to consumers." *Cleveland Bar Assn v. Nosan,* No. 05-1184 (Ohio, 2/1/06).

B. Rule 11 / Rule 9011

1. Bankruptcy attorney who, in response to objections by Chapter 13 trustee to debtor's plan, had obtained permission from debtor to alter plan to satisfy trustee's objections and electronically filed modified plan without obtaining fresh signature of debtor on modified plan Rule 9011 by falsely certifying through filing that she had revised plan bearing debtor's original signature in her physical possession. *In re Brown*, 328 B.R. 556 (Bankr. N.D. Cal. 2005) (Grube, J.).

2. Rule 9011 sanctions against both debtor and his counsel were warranted for intentionally filing the case in the wrong district, in bad faith, and to delay pending litigation. Debtor and counsel understood significance of filing the petition in the improper district and the delayed effect that such filing would have upon the pending litigation against debtor. These were flagrant violations justifying Rule 11. Counsel did not meet with debtor and had not received proper identification from debtor prior to filing the petition. The petition was filed in improper district to avoid paying the filing fee, debtor failed to sign and file the Declaration Under Penalty for Electronic Filing, as required by the court, and the filing was for the improper purpose of delaying or frustrating pending litigation against debtor. *In re Ktona*, 329 B.R. 105 (Bankr. M.D. Fla. 2005) (Briskman, J.).

3. Chapter 13 debtor's attorney, in responding to trustee's motion to dismiss case for debtor's failure to make payments under plan, denied that debtor had failed to make plan payments but did not conduct requisite reasonable inquiry into underlying facts. Attorney, unable to contact debtor to question him about payments, failed to engage in any further inquiry and simply denied trustee's allegations in alleged attempt to protect debtor's rights. *In re Thomson*, 329 B.R. 359 (Bankr. D. Mass. 2005) (Rosenthal, J.).

4. Style matters. "Before the court is a motion entitled 'Defendant's Motion to Discharge Response to Plaintiff's Response to Defendant's Response Opposing Objection to Discharge.' As background, this adversary was commenced on December 14, 2005 with the filing of the plaintiff's complaint objecting to the debtor's discharge. Defendant answered the complaint on January 12, 2006. Plaintiff responded to the Defendant's answer on January 26, 2006. On February 3, 2006, Defendant filed the above entitled motion. The court cannot determine the substance, if any, of the Defendant's legal argument, nor can the court even ascertain the relief that the Defendant is requesting. The Defendant's motion is accordingly denied for being incomprehensible." Court adds as a footnote: "Or, in the words of the competition judge to Adam Sandler's title character in the movie, '*Billy Madison,*' after Billy Madison had responded to a question with an answer that sounded superficially reasonable but lacked any substance, 'Mr. Madison, what you've just said is one of the most insanely idiotic things I've ever heard. At no point in your rambling, incoherent response was there anything that could even be considered a rational thought. Everyone in this room is now dumber for having listened to it. I award you no points, and may God have mercy on your soul.' Deciphering motions like the one presented here wastes valuable chamber staff time, and invites this sort of footnote." *Factac v. King (In re King),* 2006 WL 581256 (Bankr. W.D. Tex. 2/21/06) (Clark, J.).

5. Court abused discretion in finding Rule 9011 sanctions warranted against an attorney who tried to assist a dissatisfied client. Here, a new staff attorney files a second petition for the client (whose first case was dismissed because the plan and attorney disclosures weren't filed) without meeting the client to update the schedules or get the client's signature for the petition. The petition listed the wrong address, and the client didn't get notices, including the dismissal of the second case. Client discovers about second dismissal after new attorney files another petition and creditor seeks dismissal as bad faith serial filing. Trustee seeks sanction against Briggs, who offered to testify on behalf of client against bad faith dismissal. Court ordered Rule 11 sanctions of return of filing fee, $750 fine, $300 in trustee attorney fees. Court also refers the matter for possible criminal prosecution and disbarment proceedings. 8th Circuit BAP affirms on Rule 9011 findings, but rules penalties an abuse of discretion. 8th Circuit reverses, finding that the referral of the matter for criminal and disciplinary prosecution was "even more abusive." A saving factor for the attorney Briggs was that he took immediate action to try and rectify the situation. The 8th Circuit thus struck the sanctions award. *Briggs v. Labarge (In re Phillips)*, 433 F.3d 1068 (8th Cir. 2006).

6. After debtor challenged fees of creditor's law firm in connection with stay relief, Court issues order to show cause as to why firm should not be sanctioned when its attorneys submitted fee statements created solely for the purpose of litigation while falsely representing to the court that such statements were contemporaneous business records maintained by the firm. Court finds that firm's trial attorney's conduct should be sanctioned for falsely testifying that she was the records custodian for a particular fee statement and for presenting fee statement as a contemporaneous business record. Further, firm's conduct in creating the fee statements and presenting them to the court as contemporaneous business records over significant period of time violated Rule 9011. Firm sanctioned $65,000 and trial attorney sanctioned $1,000. *In re Porcheddu*, 338 B.R. 729 (Bankr. S.D. Tex. 2006) (Isgur, J.).

7. Sanctions warranted for unsecured creditor's filing of frivolous appeals from orders confirming amended Chapter 13 plans. Appeal merely sought to extend term of plan originally confirmed by bankruptcy court so that creditors would receive dividend which they had been promised. Creditor's attorney failed to offer any response to contention that appeals were barred by *res judicata* effect of original plan confirmation order, from which no appeal was taken. Also, attorney's response to contention that creditor lacked standing to pursue appeals because bankruptcy court had previously determined that creditor had standing was contradicted by record. *Tina Livestock Sales, Inc. v. Schachtele (In re Schachtele)*, 2006 WL 1277126 (Bankr. 8th Cir. 2006) (Surratt-States, J.).

8. Law firm's preparation of certifications in support of motions for relief from stay by mortgage lenders and having them pre-signed so that they could be appended to subsequently prepared summaries of mortgage defaults that were never reviewed by those signing the certifications violated Rule 9011. It was not true that the signatory had reviewed the documents. Further, the certifications were submitted for the improper purpose of attempting to mislead the court into believing that the certifications were proper. Court states: "The court is constrained to refer the conduct of [the attorneys and the firm] to the Chief Judge of this district for further review and ethics disciplinary proceedings. The Rules of Professional Conduct ('RPC') adopted by the New Jersey Supreme Court 'govern the conduct of the members of the bar' practicing in the bankruptcy courts of this district. Use of presigned certification forms … implicates RPC 3.3 (“Candor Toward the Tribunal”), which bars the knowing submission to a court of a false material fact or an offer of evidence known to be false. Whether lawyers at [the firm] have sacrificed their

professional independence is also of serious concern. RPC 5.4(d)(3); *see also* RPC 1.4(d) and 2.1. And, the [firm's] Certification Practice raises serious questions about the supervision of nonlawyer assistants. Of course, in the ethics process, [the firm and attorneys] are free to stress factors in mitigation of discipline (including, to the extent reflected in their actual practice, efforts to report only accurate data and their role in facilitating home-saving results). The court depends on the ethical and professional conduct of attorneys. As volume increases, judicial processes and participants are subjected to certain pressures. Electronic filing and retrieval are necessary court aids, but dependable, ethical performance by lawyers remains indispensable. Lawyers must maintain their independence-and resist, at the risk of losing a client or their employment, pressures which would undercut their professionalism. *In re Rivera*, -- B.R. -- (Bankr. D.N.J. 2006) (Stern, J.).

C. Conflicts

1. Law firm that simultaneously represented both chapter 7 debtor-passenger and driver of vehicle, and by continuing to represent debtor-passenger when, after recognizing its conflict of interest, it obtained substitute counsel for driver, violated obligations under New York disciplinary rule and would be denied fee for services rendered. It didn't matter whether firm obtained information during its representation of driver that could have been used during its representation of debtor. *In re Bruno*, 327 B.R. 104 (Bankr. E.D.N.Y. 2005) (Craig, J.).

2. Bankruptcy court did not abuse discretion in sanctioning Chapter 13 debtor's attorney for arranging for another attorney from a different firm to appear at meeting of creditors on debtor's behalf without disclosing this arrangement to debtor, for not informing debtor of plan confirmation hearing or to appear at hearing, and for repeatedly seeking to represent debtor, both as her attorney in Chapter 13 case and as broker in connection with sale of her home, without disclosing possible conflicts of interest; bankruptcy court's apparent failure to weigh appropriate aggravating and mitigating factors warranted vacation of its suspension order and remand for consideration of such factors. *In re Lehtinen*, 332 B.R. 104 (Bankr. 9th Cir. 2005) (Brandt, J.).

3. Debtor's attorney doubles as Wells Fargo "home mortgage consultant" and helps debtor refinance at lower interest rate, which enabled debtor to satisfy all unsecured claims. Attorney obtains consent to representation of debtor and lender. Actual conflict of interest results in disgorgement of $1,700 fee. Dual representation is impermissible conflict that can't be waived, and when an actual conflict exists, denial of compensation is the appropriate remedy. *Briggs v. LaBarge (In re McGregory)*, 340 B.R. 915 (Bankr. 8th Cir. 2006).

D. Failure to Advise State Court of Filing of Petition

1. Debtor's attorney's failure to advise state court of filing of case that stayed foreclosure sale was required to pay the attorneys' fees and costs of high bidder at the sale. Court noted that state law required attorneys representing debtors to file suggestions of bankruptcy before foreclosure sale. *In re Johnson*, 336 B.R. 568 (Bankr. S.D. Fla. 2006) (Friedman, J.).

E. Self-Dealing

1. Attorneys acts in his own interest, rather than in the interest of the bankruptcy estate, by inserting provision in settlement agreement with Chapter 7 debtor requiring him to support attorney's

request for attorney fees on untimely filed claims. Only purpose was to attempt to minimize judicial scrutiny of that request, which is to no one's benefit. While similar provisions requiring the estate's assets to be used "to pay administrative [expenses] and unsecured claims" are permitted, in light of attorney's later filing of unallowable claims, under 11 U.S.C. § 726(a), any surplus that remains must be distributed to the debtor. Thus, a debtor will generally have an incentive to object to unallowable claims. The settlement agreement effectively eliminates that incentive, both by prohibiting objections to claims and by barring (or purporting to bar) any distribution to the debtor. *Schilling v. Smith (In re Smith)*, 2005 WL 2089848 (6th Cir. 2005).

F. Pre-BAPCPA Crush Fallout

1. Rush of bankruptcy clients before BAPCPA does not excuse inadequate representation in filing cases without authority, in filing cases in one debtor's name while attaching another's personal financial information, in taking money for sole purpose of filing petition but not paying the filing fee until case was dismissed, in not notifying clients of dismissal, in knowingly making false statements in legal pleadings, in disobeying court orders, and in failing to communicate with clients. Sanction appropriate given that attorney aggressively advertised to attract high volumes and continued accepting representation without requisite expertise or staff. Appropriate sanction was disgorgement of sums paid by clients, less filing fees paid. *In re Bost*, 2006 WL 1223126 (Bankr. E.D. Ark. 2006) (Evans, J.).

2. Attorney filed debtor's bankruptcy petition less than a week earlier, and filed second petition with name of a different debtor listed in the caption but with debtor's petition attached as the PDF attachment. The attorney's failure to match the bankruptcy petition to the data input for the intended filer in ECF filing of second case was not "excusable neglect." Even though attorney did not mean to file two cases for a single debtor, and his mistake was understandable given that he filed 30 cases in the two days before BAPCPA became effective. The mistake, however, was not caused by the court or by attorney's lack of proficiency with ECF and should been discovered during the ECF filing process by the attorney's verifying the contents of the PDF document before the filing or receiving notice of the electronic filing. *In re Bradley*, -- B.R. -- (Bankr. N.D. Ind. 2005) (Dees, J.).

G. Bankruptcy Court's Disciplinary Authority

1. Attorney disciplinary proceeding is within bankruptcy court's "core" jurisdiction. There is no uniform procedure for disciplinary proceedings in federal system; rather, individual judicial districts are free to define the rules to be followed and the grounds for punishment. While recommended procedure is for matters involving attorney discipline to be referred to standing committee, in order to relieve bankruptcy court from serving in dual roles of prosecutor and arbiter in investigation, prosecution and discipline of attorneys, such a referral is not required. *In re Lehtinen*, 332 B.R. 104 (Bankr. 9th Cir. 2005) (Brandt, J.).

H. Claims Objections

1. It is improper tactic for debtor to object to proof of claim to recover an undisputed, scheduled debt based solely on lack of supporting documentation. *In re Moreno*, 2006 WL 1071889 (Bankr. S.D. Fla. 2006) (Mark, J.).

I. Judges

1. Judge pled guilty to mail fraud for not disclosing loans and for using position to get loans, though not as *quid pro quo* (she said). Because list didn't differentiate between attorneys who did and did not appear before her, bankruptcy court agreed that putting list in public record would jeopardize reputations of those who did not act unethically. It was the local newspaper that sought the record to be unsealed. District Court overturns, and resolves the following three questions: (i) whether list of creditors containing names of local attorneys supplying loans to judge was "scandalous matter" that had to be protected from public disclosure under Code section107(b)(2); (ii) whether under Bankruptcy Rule 9018, sealing of list is "necessary to protect governmental matters that are made confidential by statute or regulation"; (iii) whether denying access "violates the public's right of access to judicial records guaranteed by common law and the First Amendment." Court opens list, saying: "The statute [Code section 107(b)(2)] says nothing about the bankruptcy court examining the 'context' in which the material appears in order to determine whether the material is defamatory or scandalous. Rather, the crucial determination is whether scandalous or defamatory material is contained in the papers filed with the bankruptcy court, not whether the material in the papers can be construed as defamatory or scandalous once additional facts outside of the record itself are considered, such as the fact that the debtor is a former judge and some of her creditors are attorneys who may or may not have appeared in front of her after loaning her money. In contrast, in the *Phar-Mor* case, the bankruptcy court afforded protection because the complaint itself made numerous allegations of wrongdoing." *In re Neal*, 2006 WL 522439 (W.D. Mo. 2006) (Wright, J.).

J. Bankruptcy Crimes by Attorney

1. Sentence imposed for impeding bankruptcy proceedings on attorney who participated in scheme to assist client in fraudulently obtaining a loan was enhanced for abuse of a position of public trust. As attorney, defendant gave client money drawn from his client trust account, directed him to obtain a loan to reimburse him, provided assurance letters to lending bank about client's collateral, filed a bankruptcy petition for client, and gave false testimony to the bankruptcy court regarding the money. *U.S. v. Goldman*, 2006 WL 1359655 (8th Cir. 2006) (Murphy, J.).

K. Stupid Tricks

1. Bankruptcy bucket shop in California prepared and filed a Chapter 7 petition for an Illinois client, who didn't want to disclose the existence of about $6,000 in a non-exempt bank account that a paralegal at the firm advised would be exempt. Debtor said he'd never have filed for bankruptcy if he knew the funds would not be exempt from his bankruptcy estate. Lawyers advise debtor to skip the first and second scheduled meeting of creditors and to lie about whereabouts, saying that "he was sick for the first meeting and that he forgot the second meeting." This, the lawyer advised, would (and did) result in dismissal of his case, after which he could "spend the money and ... re-file after the money was gone." Once the Chapter 7 trustee discovered the stupid trick, he brought the matter before the Court, which ordered the lawyers to appear and explain what happened. Court was "not impressed" with their testimony, noting that it "is always suspicious when attorneys do not have documents to support their testimony." *In re Sadorus***,** 2005 WL 3429467 (Bankr. C.D. Ill. 2005) (Lessen, J.).

2. Just because Chapter 13 debtor's attorney did not intentionally fail to appear either at pre-trial conference or at plan confirmation hearing, and that his absence may have been result of "stupidity," was no defense to liability for sanctions under Rule 11 for failing to obey scheduling or pretrial order or to appear at hearing. "Stupidity--acting without sufficient forethought--is a legitimate basis for imposing sanctions upon an attorney…. Acting without thinking is the very basis for sanctions under that rule. An empty head but a pure heart is no defense." *In re Hein*, 2006 WL 1305079 (Bankr. N.D. Ind. 2006) (Grant, J.).

L. Nigerian Business Scams

1. Debtor-attorney participates in classic "Nigerian business scam" and deposits stolen Avis check into his account as alleged payment from Nigerian nationals who said Avis owed them money. Here's what happened:

   a. The Debtor received a check (the "Check") payable to "F. David Maxwell" drawn on an Avis account with Bank of America in the amount of $234,954.84 on or about March 26, 2001. The Check, under the payee name, contained the Debtor's home address of "1583 E. Silver Star Road # 333, Ocoee, Florida 34761." The payee name and address were printed on the Check in the same font. The Check was sent in a United States Postal Express Mail package listing "John Maxwell" of 1996 Jefferson Boulevard, Los Angeles, California 90018 as the sender. The Debtor does not know a person named "John Maxwell" or anyone at the return address. He did not communicate with or attempt to communicate with the sender "John Maxwell." The Debtor has never used the name nor been known as "F. David Maxwell." The Debtor confirmed receipt of the Check with his Nigerian contacts and deposited it into his attorney trust account, titled "F. David Maxwell, Attorney at Law. Trust Account" Account No. 3391044359, at AmSouth Bank. The Debtor endorsed the Check "For Deposit 3391044359." The Check was paid by Bank of America from Avis' account. No attorney client relationship existed between the Debtor and any Nigerian national or Nigerian entity. The funds were to be deposited into a NoniMax account, according to the Debtor's arrangements with the Nigerian Nationals. The Debtor did not give any clear reason why he deposited the funds into his trust account instead of a NoniMax account.

   b. The Debtor disbursed the funds in accordance with the written instructions from a Nigerian contact named "Dr. Asiodu" dated April 4, 2001, after the check cleared, including a disbursement of approximately $100,000 to the Debtor for cost reimbursement ($60,000) and fees earned ($40,000). The Debtor transferred the balance of the funds, pursuant to the written instructions, to accounts in Lebanon and Nigeria. The Check was generated by Avis on and dated March 15, 2001. The original payee of the Check was "Ultramar, Inc.," a regular fuel-supplier vendor of Avis. The Check was altered to change the payee from "Ultramar, Inc." to "F. David Maxwell" after it was generated by Avis. It has not been determined who altered the Check, Avis did not learn that the Check had been altered and negotiated until Ultramar, Inc. made demand upon Avis for payment of overdue invoices in August 2001. The Check had been altered because there is a space between "FL" and the zip code 34761: a non-altered check generated by Avis accounting software would have no space separating the state and zip code. Avis requested Bank of America return the funds to Avis' account pursuant to the Deposit Agreement and Disclosures between Avis and Bank of America. Bank of America made a claim against AmSouth Bank for breach of warranty. AmSouth ultimately denied the claim stating the request was untimely pursuant to the controlling provisions of Georgia state

law. Avis delivered a $234,954.84 replacement check payable to Ultramar, Inc. on or about November 30, 2001 and made demand upon the Debtor for return of the funds.

c. The Debtor has not returned any of the funds to Avis. Avis holds a general unsecured claim against the Debtor in the amount of $234,954.84. The Debtor cooperated with the Secret Service after an investigation into the Nigerian Nationals was opened. The Debtor did not contact Avis to determine if Avis intended the funds be sent to him or if Avis owed a debt to the Nigerian Nationals. The Debtor did not perform services for or for the benefit of Avis. Despite the circumstances surrounding the Check, the Debtor cashed the check and disbursed the funds. The Debtor claims he believed the Nigerian National's investment proposition was a legitimate business venture. He believed he was entitled to negotiate the Check when he received it. His belief was based upon: (i) The payee's name on the Check matched his name almost exactly, (ii) The Check contained his home address, (iii) It was not apparent from the face of the Check that it had been altered, (iv) The details of the Check and its delivery were consistent with what the Nigerian Nationals communicated to him.

d. The Debtor should have been more skeptical of the Nigerian Nationals by the time he received the Check. The Debtor had been interacting with the Nigerian Nationals for over a year, with their business investment promises still unfulfilled, when the Check arrived. The notoriety of Nigerian business scams is widespread. Victims have been duped by sham Nigerian business deals since the early 1980s. The Google search engine identifies over 1.080,000 relevant web pages relating to "Nigerian business scams." Nigerian business scams are even the subject of comedy routines. In a recent appearance on The Daily Show, comedian Lewis Black chided a movie producer as being utterly gullible and told him. "I know a Nigerian banker who wants your email address." (Comedy Central television broadcast November 9, 2005). *Avis Rent-A-Car Systems, Inc. v. Maxwell (In re Maxwell)*, 334 B.R. 736 (Bankr. M.D. Fla. 2005) (Briskman, J.).

2. "Debtor was a fixed base operator at the Quincy Municipal Airport. Debtor also had numerous business dealings relating to aircraft and the aviation industry through his corporation, Curtis Aviation Services, Inc. Debtor was and continues to be involved in the buying and selling of airplanes. Debtor has belonged to professional organizations and has subscribed to numerous trade publications, giving him access to worldwide information about aircraft for sale. Mrs. Curtis is a respected citizen and teacher, and is a member of one of the most prominent families in Quincy.

a. In February, 2001, Debtor received a telephone call from Kay Khalil, President of Kay Aviation, London, England. Debtor knew of Mr. Khalil as someone who was involved in equestrian air transport from Europe into Louisville and Lexington, Kentucky. Debtor's friend and business acquaintance, Richard Sacks, had mentioned the name of Kay Khalil to the Debtor in relation to a possible business deal. In their first conversation, Mr. Khalil expressed to Debtor his interest in retaining Debtor for consulting, brokering aircraft, and providing related services. Mr. Khalil identified himself as representing a consortium that was interested in purchasing $400 million worth of aircraft for private and commercial use in the European market. In exchange for locating and brokering the purchase of these aircraft, the consortium was willing to pay a brokerage commission of $30 million upon completion of the deal.

b. Within days after the offer was made, Debtor communicated his willingness to consider the offer further, and Debtor traveled to London in June, 2001, where he met with Mr. Khalil,

Desmond Kampson, several alleged representatives of IBL Bank-Luxembourg, and others allegedly representing investors interested in purchasing aircraft. There were 12 to 14 people in the meeting, and the individuals involved in the meeting purportedly represented investors interested in purchasing approximately 17 aircraft ranging from large, commercial jets to smaller, private jets. Mr. Kampson identified himself as the owner of a business known as FSB International PLC. Mr. Kampson indicated that he was an attorney, suggested that he would be acting as an intermediary on behalf of the consortium, and also indicated that he would be serving as Debtor's attorney if Debtor decided to participate in the venture. After returning to Quincy, Debtor had numerous telephone conversations with Mr. Kampson, and Mr. Kampson requested payment of a $50,000 retainer. Debtor initially balked, but later agreed and, on July 5, 2001, Debtor wired $50,000 to Mr. Kampson.

c. In August, 2001, Debtor again flew to London and met again with other representatives working with the consortium. During this trip, Debtor saw aircraft which were purportedly being purchased by the consortium. The topic of transporting aircraft was discussed and Debtor was told that the consortium needed $90,000 for expenses relating to the transporting of aircraft. On September 10, 2001, Debtor wired the $90,000 from Quincy to London.

d. In September, 2001, Debtor traveled to Amsterdam, The Netherlands and, while there, Debtor was taken to a security vault and shown trunks containing a vast quantity of U.S. currency. Debtor was instructed to randomly extract five $100 bills from one of the trunks to prove that the bills were authentic. Debtor took the funds to an Amsterdam bank which verified that the bills were, indeed, authentic.

e. Because of his growing concern that he might be involved in a fraudulent scheme, on April 30, 2002, Debtor contacted the Federal Bureau of Investigation at the American Embassy in London. Debtor came to believe that some of the individuals to whom he had been wiring funds were not in any way connected with Mr. Khalil or the airplane transaction, and that they were perpetrating upon him advance fee and bad check swindles. Still, at this point, Debtor testified at trial that it did not occur to him that the entire airplane brokerage transaction might be a scam; Debtor believed merely that a few "bad apples" had permeated the transaction. In any case, Debtor continued to comply with requests that he send funds to Europe for alleged fees and expenses relating to the transaction and to bring about the release of his commission. Meanwhile, Debtor's $30 million commission was allegedly transferred, for some unknown reason, to St. Lucia.

f. On June 7, 2002, Debtor received a check from Mr. Kampson for $258,675.47. Debtor took the check to First Banker's Trust Company in Quincy to determine the check's validity. The Bank determined the check to be counterfeit. Debtor so advised FSB International PLC, but received no response. Meanwhile, Debtor continued to wire funds for alleged fees and expenses in his efforts to retrieve his commission.

g. Debtor continued to receive notices that the commission money was being transferred into various accounts in various places, and continued to advance fees and expenses associated with both the alleged transfers and the underlying consulting project. In September, 2002, Debtor's suspicions that he was somehow involved in a fee advancement scam grew and he again contacted the Federal Bureau of Investigation. Yet, Debtor was concurrently being told--and believed--that the $30 million deposit had been made in an account in Debtor's name, and that

he would be able to retrieve it. At about the same time, Debtor contacted Scotland Yard and also began working with Canadian authorities to unravel the scheme. Thanks in part to Debtor's cooperation with investigators, Mr. Kampson and others were ultimately arrested and incarcerated.

h. By the fall of 2002, Debtor had depleted his financial resources in attempting to obtain his $30 million commission, yet Debtor felt that accessing the commission was almost within his grasp. In fact, Debtor received fax confirmation on October 1, 2002, that his commission was in the InterEurope Bank. Debtor contacted Talmadge G. Brenner, a Quincy attorney, sometime prior to October 2, 2002, in order to locate potential lenders to loan him the money he thought he needed to collect the elusive commission. Debtor was prepared to make an offer that sounded too good to be true--he would double or triple an investment in two or three weeks. Mr. Brenner personally loaned Debtor $8,000; Mr. Brenner then telephoned Plaintiff Griffin and informed Mr. Griffin that Mr. Brenner had a client who had funds which were due to him in a European private depository and that, in order to obtain the funds, the client needed a short-term loan, in return for which he was willing to pay a very handsome return.

i. On October 2, 2002, Mr. Griffin met with Debtor. During the meeting, Debtor told Mr. Griffin that, as a result of an airplane transaction, Debtor had approximately $21 million in an offshore account, that he was broke, and that he needed to borrow money to pay an escrow fee to retrieve the money. Debtor offered the aforesaid generous return, and asked to borrow $30,000 from Mr. Griffin. Debtor stated that he intended to find another lender for an additional $20,000. Mr. Griffin expressed a willingness to lend the $30,000 plus the additional $20,000.

j. Debtor did not make known the history of his difficulties with alleged transfers of the commission from one foreign bank to another over the better part of a year. Debtor did not disclose any suspicions about a fee advancement scheme. He did not reveal his receipt of a counterfeit check, nor did he disclose the information he received regarding the "currency marginal fluctuation difference", nor his contacts with law enforcement. When asked why he failed to disclose these important facts, Debtor stated that he did disclose that he was broke, but that he did not think that the scams and swindles had anything to do with the existence of or the recovery of his commission. Debtor further stated that he would have truthfully disclosed any and all of the troubling information regarding any aspect of the transaction, the quest for his commission, and the scams and swindles, if Mr Griffin had inquired about any of it.

k. Mr. Griffin testified that Mr. Brenner had told him that Debtor would make good on the notes and would double his investment. Mr. Griffin also testified that the 'main thing' which induced him to make the loan was the return on the investment. Mr. Griffin admitted that he considered the perceived wealth of Mrs. Curtis in deciding to make the loan, and he also testified, 'the numbers had me in awe.'" *Johnson v. Curtis (In re Curtis)*, 2006 WL 1506209 (Bankr. C.D. Ill. 5/24/06) (Gorman, J.).