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CHAPTER 13 RECENT DEVELOPMENTS

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In re Hubbard, 333 B.R. 377, 385, 387 (Bankr. S.D. Tex. 2005) [BAPCPA] (Chapter 13 debtors that sought an extension of time in order to obtain a prepetition credit briefing did not satisfy the requirements of § 109(h)(3) where they failed to file a certification, failed to establish that they requested credit counseling services and failed to get such services within five days of the request, and failed to provide satisfactory explanation of an exigent circumstance. Debtors sought extensions of time to obtain the prepetition briefings required under § 109(h). The court found that prepetition repossession of an automobile did constitute an exigent circumstance as did an impending foreclosure. "When a perspective debtor faces a loss of the family home unless immediate relief is granted under the Bankruptcy Code, exigent circumstances exist." In addition to establishing exigent circumstances, the debtor must request credit counseling services from an approved agency and not be able to obtain such services within five days. Court rejected the argument of the United States Trustee that it is the debtor that must seek the credit counseling and cannot do so through an attorney. "The court finds that an attorney may act as a debtor's agent and request credit counseling services on behalf of a debtor. Such a request may satisfy the requirement in 11 U.S.C. § 109(h)(3)(A)(ii) if the attorney requested the services on behalf of a particular debtor. However, general inquiries by an attorney concerning

the availability of creditor counseling . . . are insufficient to satisfy the requirement of § 109(h)(3)(A)(ii) as to each individual debtor that the attorney may represent." Further, the statute only requires that "the debtor requested creditor counseling services from *an* approved nonprofit budget and credit counseling agency." "Congress apparently chose not to impose the inefficiency of requiring each individual to investigate the availability of credit counseling services. Instead, § 109(h)(2) places the burden of determining availability of counseling services on the United States Trustee. Prospective debtors must contact a provider that has already been approved by the United States Trustee. If that provider cannot provide the services during 'the five day period beginning on the date on which the debtor made that request' (§ 109(h)(3)(A)(ii)) then the prospective debtor has two choices: (1) contact additional providers and obtain the services pre-petition; or (2) if the debtor faces exigent circumstances, elect to file an appropriate certification. . . . [T]he Court finds that § 109(h)(3)(A)(ii) only requires a prospective debtor to contact a single agency before filing a certification under § 109(h)(3)." Because the Chapter 13 debtors failed to comply with the requirements of § 109(h) they were not debtors and the five "cases" were stricken by the court.).

In re Hubbard, 333 B.R. 373, 375, 376 (Bankr. S.D. Tex. 2005) [BAPCPA] (Debtors that failed to submit certifications that satisfy the requirements of § 109(h)(3) were not entitled to file bankruptcy petitions; the United States Trustee would be compelled to demonstrate that prepetition briefing services were available in the District under § 109(h)(2). In a number of cases, debtors requested extensions of the time to obtain the briefing required by § 109(h). "The Court sees no ambiguity in the statute. Subparagraph (1) requires the debtor to receive credit counseling, subject to the exceptions in subparagraphs (2) and (3). Subparagraph (4) makes subparagraph (1) inapplicable to certain debtors. . . . [T]he Court can only consider granting relief under subparagraph (3) if a certification is filed that: 1. Describes exigent circumstances that merit a waiver of the credit counseling requirement; 2. States that the debtor requested credit counseling services from an approved agency, but was unable to obtain the services during the five day period beginning on the date on which the debtor made the request; and 3. Is satisfactory to the Court." The motions failed to meet the requirement that the applications be submitted under penalty of perjury, failed to detail that credit counseling services were requested but unavailable, and did not provide sufficient facts to establish to the court that the exigent circumstances were satisfactory. The court, however, construed the application as a request under § 109(h)(2) and noting the possibility that the "United States Trustee's initial process of determining whether credit counseling is available may have produced inaccurate results." The court compelled the United States Trustee to describe the procedures undertaken under its statutory certification obligations.).

In re Cleaver, 333 B.R. 430, 434, 435, 436 (Bankr. S.D. Ohio 2005) [BAPCPA] (Where a Chapter 13 putative debtor does not certify or mention anything concerning prepetition efforts to obtain a credit briefing, the debtor's motion for determination of exigent circumstances must be denied and the petition stricken. The debtor, facing an imminent foreclosure sale, filed a motion for extension of time to obtain the prepetition credit briefing. The court initially held that the motion, because it was signed by the debtor personally, marginally satisfied the requirement of a "certification" but held that the certification failed to meet statutory requirements. "The certification must: 1. Describe exigent circumstances that merit a wavier of the prepetition briefing requirement; 2. State that the debtor requested 'credit counseling services' from an approved agency, but was unable to obtain the briefing within five days; and 3. Be acceptable to the court. . . . It can be argued that the exigency in this case is self-created. After all, foreclosures in Ohio follow a lengthy judicial process, typically lasting several months before the gavel finally falls at a sheriff's sale. Mr. Cleaver might have filed his bankruptcy a week, two weeks, or even a month earlier thus allowing sufficient time to obtain the briefing. However, the common reality is that many debtors file at the last minute just before a foreclosure sale or the loss of their money or possessions to creditors. . . . [T]he immediacy of the foreclosure sale in this case appears to be exactly the sort of exigent circumstance contemplated by the statute. . . . [I]n this case Mr. Cleaver did not certify or mention anything regarding his prepetition attempts to obtain a credit briefing, but only that he would promptly obtain the briefing postpetition. While Mr. Cleaver's attempt at compliance may have been pragmatic and well intentioned given the exigent circumstances, it does not comply with the statutory certification requirements. . . . In the absence of the certificate of an approved nonprofit budget and credit

counseling agency verifying Mr. Cleaver's receipt of the credit briefing prior to the filing as per § 521(b) or Mr. Cleaver's certification in compliance with § 109(h)(3), he is not eligible to be a debtor under the Bankruptcy Code.").

In re Wallert, 332 B.R. 884, 890 (Bankr. D. Minn. 2005) [BAPCPA] (Chapter 13 debtor's petition would be dismissed when the debtor failed to submit a certification of prepetition credit counseling and failed to meet of the requirements to establish an exigent circumstance. Chapter 13 debtor sought relief from the requirement of prepetition counseling and indicated an impending sheriff's sale and foreclosure against her homestead. She did not, however, establish that she was unable to obtain a prepetition briefing and counseling during the five day period beginning on the date she made her request. A waiver cannot be granted if the debtor faces an exigent circumstance within five days but is incapable of getting a credit counseling appointment prior to the threatened event but sooner than five days. "The application admittedly falls heavy on the debtor who acts less proactively, but what does that say? Only that a sand-struck posture, stargazing for fear of confronting the basilisk, or any other sort of avoidance behavior—the failure to think proactively and to consult attorney and credit counselor with at least a six-day horizon—will likely deprive such debtors of eligibility to muster bankruptcy remedies against the very creditor action that so threatens them. The statute does nothing more than mandate debtors to recognize and start dealing with their straits of insolvency squarely, at least a week before they will bloom out to an actual, permanent economic loss.").

In re Laporta, 332 B.R. 879, 883 (Bankr. D. Minn. 2005) [BAPCPA] (Chapter 7 pro se debtor's petition, accompanied by a letter stating that she had attempted to use the web site for the US Trustee to obtain credit counseling agency, was not adequate to satisfy the requirements of 11 U.S.C. § 109(h)(3) and the debtor was not exempted from the requirement of receiving a prepetition credit briefing; failure to comply with § 109(h) rendered the debtor ineligible to be a debtor under Chapter 7 and the case would be dismissed. In order to seek an exception from the requirement of a prepetition briefing, the debtor must file a certification which must describe exigent circumstances, state that the debtor requested counseling services from an agency but was unable to obtain the services, and which circumstances are satisfactory to the court. Here, the debtor submitted a document but it was not certified. "Under federal law, a 'certification' must be 'subscribed,' i.e., signed by the declarant. It also must contain the declarant's statement that the content of the document is true and correct, with an acknowledgment that the declarant is under the penalty of perjury in making the statement. . . . The debtor never states that she actually made a request to an approved agency for credit counseling services, let alone that she was unable to timely obtain such services after such a request. . . . The statute is utterly clear. The performance of credit counseling pre-petition is a first-level requirement for any individual who seeks bankruptcy relief. That pre-requisite may be overridden, and the court may permit the credit counseling to be obtained post-petition. However, this is possible only if the debtor certifies that she meets the requirements of 11 U.S.C. § 109(h)(3)(A), in their exacting detail. If such a debtor does not submit this certification with her petition for bankruptcy, in proper form, and with content 'satisfactory to the court,' the first-level requirement is not overridden.").

In re Watson, 332 B.R. 740, 745-46 (Bankr. E.D. Va. 2005) [BAPCPA] (That the prepetition counseling obligation is imposed only on individual Chapter 11 debtors and not on a corporate or partnership Chapter does not render the statute unconstitutional; a debtor's failure to allege that he sought prepetition bankruptcy counseling and was unable to obtain the same within five days of the request renders fatal the application for recognition of exigent circumstances. The Chapter 11 debtor filed a certificate of exigent circumstances indicating that due to the short time frame between his decision to file and the hearing on a detainer action, he was unable to obtain credit counseling. This, however, was insufficient to satisfy the requirements of § 109(h)(3)(A) which imposes on a debtor three obligations. These must be read in the conjunctive and, accordingly, the debtor must satisfy all three. Here, the "debtor has failed to make a showing, either through his Original Certification, his Amended Certificate, or during the hearing, that he made any request for credit counseling services. Thus, his failure to do so services as a fatal flaw under Section 109(h)(3)(A)(ii) and the Debtor cannot satisfy the eligibility requirements set forth under § 109(h)." The court

has no discretion to permit the debtor any extension of time to obtain the creditor counseling and the case must be dismissed.).

In re Gee, 332 B.R. 602, 604 (Bankr. W.D. Mo. 2005) [BAPCPA] (Debtor is not eligible to be a debtor under § 109 if the debtor has failed to obtain the required credit counseling services and the debtor has failed to comply with the three requirements for establishing exigent circumstances. The debtor filed a Chapter 13 petition and a motion to waive the counseling requirement indicating she had difficulty in obtaining the funds to pay counsel, difficulty in communicating with counsel or physically reaching counsel's office. She also asserted that CCCS of Springfield, Missouri did not do counseling on the day she requested it. A debtor is eligible for a waiver only if the debtor satisfies each of three requirements: (1) the certification of exigent circumstances that merit a waiver; (2) that the debtor requested counseling services but was unable to obtain them in the five day period beginning on the date when the debtor made the request; and (3) the certification is satisfactory to the court. Where the debtor fails to request credit counseling services prior to the filing of the petition and fails to assert that she was unable to obtain them during the five day period after making the request, the application cannot be granted. "Accordingly, the Debtor is ineligible for a waiver for the exigent circumstances exception. As a result the Debtor is ineligible to be a debtor under § 109(h) having neither obtained the requisite credit counseling nor demonstrated eligibility for a temporary or permanent waiver.").

In re Hubbard, 332 B.R. 285, 289 (Bankr. S.D. Tex. 2005) [BAPCPA] (A Chapter 13 debtor's request for an extension of time to obtain credit counseling would be denied where the debtor failed to file a certification and failed to comply with each element of § 109(h)(3). When the debtor filed the Chapter 13 petition, she requested an extension of time to obtain the credit counseling because she was "unable to get signed up with a counselor" alleging the counseling agencies were swamped. The request, however, was defective because the debtor failed to file a certification and failed to state that the debtor requested credit counseling services but was unable to obtain the services within five days. "The debtor has not filed any certification with the Court. The debtor has filed an unverified motion. It contains no affidavit, declaration or other certification as to its accuracy. The plain language of § 109(h)(3) requires a certification. Without a certification, the motion is fatally defective. . . . 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. . . . 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.").

§ 7.9 Eligibility of an Incompetent and Petitions on Behalf of Others

McNairy v. Estate of Garrett Baxter (In re Baxter), 320 B.R. 30 (Bankr. D.D.C. 2004) (Complaint filed by conservatory for Chapter 13 debtor alleging that lender, closing attorney and others allowed the debtor's son to mortgage the debtor's real property based on a power of attorney that was invalid is dismissed for the most part because the lenders and others were not aware and had no reason to be suspicious that the power of attorney was not valid.).

In re McDonald, Nos. 8:04-BK8585-MGW, 8:04-BK-1742-MGW, 2004 WL 2931370, at *3 n.5 (Bankr. M.D. Fla. Dec. 17, 2004) (unpublished) (Bankruptcy court annuls automatic stay to validate state court guardianship proceeding against 83-year old debtor in a nursing home and to permit temporary guardian to complete state court guardianship process. After the Chapter 13 filing, petition was filed in state court to appoint a guardian for the debtor. A temporary guardian was appointed and the temporary guardian froze the debtor's bank accounts. The debtor's son, who had been using those bank accounts and who was himself a debtor in a separate Chapter 13 case attacked the guardianship proceeding and account freezing as a violation of the automatic stay. In a footnote, "[i]t appears that a guardian may administer a Chapter 13 case for the ward.").

C. REGULAR INCOME REQUIREMENT
- § 8.1 What Is Regular Income?
- § 8.2 When Must Debtor Have Regular Income?

1. SOURCES OF REGULAR INCOME
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- § 10.1 Debtor Must Be Able to Make Payments under a Plan

D. DEBT LIMITATIONS

1. IN GENERAL
- § 11.1 Dollar Amounts

Dillon v. Texas Comm'n on Environmental Quality (In re Dillon), No. 04-41307, 2005 WL 1220761 (5th Cir. May 23, 2005) (Debtor not eligible because claim of Texas Commission on Environmental Quality exceeds $290,925.).

§ 12.1 Time for Determining Debt

Hounsom v. United States, 325 B.R. 319, 326 (M.D. Fla. 2005) (Upon objection to the debtor's eligibility, bankruptcy court can consider matters such as proofs of claim filed after the petition to determine eligibility under § 109(e). "[P]roofs of claim filed in the bankruptcy case—necessarily after the petition itself was filed—have been used in determining eligibility under Section 109(e). Courts have found it permissible to look beyond the debt amounts listed in debtor's schedules where the issue of Section 109(e) eligibility if raised.").

In re Smith, 325 B.R. 498, 502 (Bankr. D.N.H. 2005) ("[C]hapter 13 eligibility is determined on the petition date . . . . Eligibility for chapter 13 is not based upon postpetition events such as allowed claims, filed claims, or treatment of claims in a confirmed chapter 13 plan. . . . [D]ebtor cannot affect or alter their eligibility for chapter 13 by how they treat a claim in a confirmed chapter 13 plan, let alone in a proposed chapter 13 plan." Because the debtor omitted tax claims from the schedules after failing to file tax returns for several years, schedules were not filed in good faith and the court would consider the amount claimed by taxing authorities in a timely filed proof of claim as evidence of the amount of the tax debt for eligibility purposes.).

In re Arcella-Coffman, 318 B.R. 463 (Bankr. N.D. Ind. 2004) (At conversion from Chapter 7 to Chapter 13, eligibility is determined at date of Chapter 7 petition but facts and circumstances that developed in the bankruptcy case—including amendments to the statement and schedules—can be considered.).

§ 13.1 Use of Statements and Schedules in Eligibility Calculations

In re Smith, 325 B.R. 498, 502 (Bankr. D.N.H. 2005) ("As long as a debtor's schedules are completed after the exercise of a reasonable level of diligence and are filed in good faith, the schedules will determine a debtor's eligibility for chapter 13." Because the debtor omitted tax claims after not filing tax returns for several years, the schedules were not prepared in good faith and it was appropriate for the court to consider proofs of claim filed after the petition by the taxing authority in the eligibility calculation.).

In re Arcella-Coffman, 318 B.R. 463, 474 (Bankr. N.D. Ind. 2004) (Rejecting *Comprehensive Accounting Corp. v. Pearson (In re Pearson),* 773 F.2d 751 (6th Cir. 1985), statement and schedules are the "jumping off" point for determining whether a debtor is eligible at conversion from Chapter 7 to Chapter 13. "[T]he § 109(e) determination may be made by review of pertinent facts apart from those stated in the debtor's schedules.").

§ 14.1 Are Claims Split under 11 U.S.C. § 506(a)?

In re Smith, 325 B.R. 498, 502–03 (Bankr. D.N.H. 2005) ("This Court adopts the reasoning of the courts which utilize a section 506(a) analysis in determining the amount of secured and unsecured debt for purposes of eligibility under section 109(e). . . . On Schedule D the unsecured portion of secured debts total $49,899.29. There is no allegation the Debtors' schedule D is inaccurate or was filed in bad faith. Accordingly, the $49,899.29 in unsecured deficiency claims shown in schedule D shall be included . . . . [T]he leased automobile is owned by the creditor and not the bankruptcy estate, the claim cannot be a secured claim . . . . Therefore, the obligation of $6,029.21 to the automobile lessor shall be included.").

In re Arcella-Coffman, 318 B.R. 463, 474 (Bankr. N.D. Ind. 2004) (Applying *In re Day,* 747 F.2d 405 (7th Cir. 1984), "the eligibility criteria of § 109(e) require the bifurcation of secured/unsecured claims under 11 U.S.C. § 506(a), a process which the facts of the case make clear involved consideration of evidence apart from the debtor's schedules.").

2. NONCONTINGENT DEBTS ARE COUNTED

§ 15.1 What Is a Noncontingent Debt?

Hounsom v. United States, 325 B.R. 319, 326 (M.D. Fla. 2005) (Prepetition tax debt is noncontingent because all the events that gave rise to the debtor's liability occurred prior to the filing of the bankruptcy petition. Tax debts for tax years 1996 through 2000 were noncontingent in a Chapter 13 case filed in March of 2002.).

§ 15.2 Is Partnership Debt Contingent?

§ 15.3 Guaranties
§ 15.4 Other Contract Debts
§ 15.5 Tort Liability

In re Pike, 320 B.R. 222, 224 (Bankr. D. Me. 2005) (A Chapter 13 plan would be confirmed over the objection of an unsecured creditor holding an unliquidated, disputed claim based on a wrongful death. Although 28 U.S.C. § 156(b)(2)(B) does not permit the bankruptcy court to conduct "the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under Title 11", confirmation of a debtor's Chapter 13 plan is not dependent on such. The debtor proposed to pay all available income to the Chapter 13 trustee. The wrongful death creditor was the only creditor and would receive payments under the plan after the payment of the trustee's commission. There was no need to estimate the claim. Even if the wrongful death creditor's claim must be estimated, estimation could be conducted by the court for purposes of confirmation, not necessarily distribution.).

§ 15.6 Claims through and against Debtor's Corporation
§ 15.7 Prebankruptcy Judgments

3. LIQUIDATED DEBTS ARE COUNTED

§ 16.1 What Is a Liquidated Debt?

Hounsom v. United States, 325 B.R. 319, 324, 326 (M.D. Fla. 2005) (Tax claims for prepetition tax years are liquidated notwithstanding that the debtor disputes the debts and even when IRS has not filed a prepetition notice of deficiency, notwithstanding that IRS filed several amended proofs of claim after the Chapter 13 petition successively enlarging the amount of the tax debt. Citing *United States v. Verdunn,* 89 F.3d 799 (11th Cir. 1996), tax claims are liquidated because "established Internal Revenue Code criteria" are used to determine the amount of the debt. Whether a statutory notice of deficiency is issued is a factor bearing on whether the debt was liquidated but "'[t]his factor is not indispensable to the concept of a liquidated debt . . . there are other ways of demonstrating that a tax debt is liquidated." That the IRS filed several amendments to its proof of claim "'does not necessarily create a dispute over such a claim, or result in a change of status from a liquidated debt to an unliquidated debt.'").

In re Smith, 325 B.R. 498, 504, 505, 506 (Bankr. D.N.H. 2005) ("A claim is 'liquidated' if it is subject to ready determination and precision in computation of the amount due. . . . The issue of whether a debtor is liable for a particular debt is separate from whether that debt is liquidated as of the filing date for the purposes of section 109(e)." Claim of Plymouth Village Water & Sewage District that the debtor's business violated state law by disposing of hazardous dry cleaning waste without a permit was liquidated because the amount was easily determined from actual prepetition clean-up costs incurred by the District. "The Debtors' obligations to the District arise primarily under the provisions of [state law], which imposes strict liability for costs directly or indirectly resulting from a violation of specified hazardous waste laws. The Debtors' liability to the District is based upon actual costs, therefore the obligation will, of necessity, be a liquidated claim because it can be readily determined with precision through simple arithmetic computation." The debtors' obligation to the state of New Hampshire is not liquidated because it is based entirely on civil penalties that have not yet been determined and with respect to which some discretion must be exercised by the state. "[T]he determination of the penalty in the context of the penalty matrix is an exercise in discretion and is not subject to ready determination and precision in computation of the amount due. . . . [T]he actual amount of the penalty is dependent upon the exercise of discretion. Although the amount of the penalty is limited by the New Hampshire statute, there is a range of possible outcomes dependent on a discretionary determination of the seriousness of the violations then applied to the penalty matrix.").

In re Fredricksen, 325 B.R. 302, 307, 309 (Bankr. D. Or. 2005) (Debtor was ineligible for Chapter 13 relief where the IRS issued notices of deficiency in the amount of $5,300,000 notwithstanding the debtor's assertion

that she could raise an innocent spouse defense. "The fact that debtor may be relieved of liability at some future time pursuant to 26 U.S.C. § 6015 does not render the tax debt unliquidated for purposes of § 109(e). . . . First, the determination of whether a debtor has debt in excess of the limits established in § 109(e) is made as of the petition date. Post-petition events are irrelevant. . . . Debtor had not even asserted the innocent spouse defense on the petition date. Second, the fact that debtor has a potential defense to liability does not render the tax debt unliquidated." Court followed *In re Slack,* 187 F.3d 1070 (9th Cir., 1999), and distinguished limitations on *Slack* found in *In re Ho,* 274 B.R. 873 (B.A.P. 9th Cir. 2002), because the debtor had filed the tax return and the debtor's liability for the tax debt was not as "far fetched" as it was in *Ho*. "The general rule that disputes as to a debtor's liability for a debt do not render that debt unliquidated applies in this case." Further, the issuance of the notice of deficiency by the IRS demonstrated that the liability was readily determinable so as to render the debt liquidated. Although the issuance of a pre-petition notice of deficiency does not *per se* liquidate a tax debt, "it does play a role in determining whether the amount of a tax debt is subject to ready determination and thus liquidated.").

In re Arcella-Coffman, 318 B.R. 463, 467–73 (Bankr. N.D. Ind. 2004) (Determining whether a debt is liquidated for § 109(e) purposes includes consideration of both liability and amount. "[A] 'claim' is a 'right to payment', whether or not the debtor has been determined to be 'liable' with respect to the asserted 'right to payment'. . . . As stated in § 101(12), it is *liability* of the debtor with respect to a claim that causes a 'claim' to become a 'debt'. There must therefore be some threshold determination of the debtor's probable liability on a 'claim' before a claim can become a 'debt' for the purposes of § 109(e). . . . [F]ocus on damages totally ignores the definition of 'debt' in 11 U.S.C. § 101(12), which requires not only the assertion of a 'claim' by the creditor, but also 'liability' of the debtor with respect to the asserted right to payment. . . . The eligibility of a Chapter 13 debtor is not determined by the amount of 'claims'; it is determined by the amount of 'debts'. In a legal proceeding to actually 'liquidate' a claim, one does not get to the damage determination until the threshold issue of liability has been determined adversely to the defendant. . . . [I]t simply cannot have been Congress' intent that § 109(e) debt ceiling determinations are to be made by assuming that a debtor is liable on any, and every, claim asserted by a creditor, or on every 'claim' stated in a debtor's schedules which the debtor denotes as being merely 'disputed'. . . . '[T]he question whether a debt is liquidated turns on whether it is subject to "ready determination *and* precision in computation of the amount due."' (citations omitted) [emphasis supplied]. Properly understood, this test has two components: ready determination, which focuses on the debtor's liability on a claim, and *precision in computation of the amount due,* which focuses on the monetary award . . . . A debt is subject to 'ready determination and precision in computation' if the debtor's liability and the amount due can 'be readily ascertained either by reference to an agreement or through simple mathematics'. If a factfinder must rely upon its judgment to establish liability, or to compute an appropriate amount to compensate for past or future injury, then the debt will be 'unliquidated'. Because the determination of both liability and damages ordinarily requires the exercise of judgment by the factfinder, claims based on tort and on quantum meruit are generally unliquidated . . . . To be 'liquidated', both liability on a claim, and the amount of the debt once liability is established, must be capable of being determined in a relatively simple hearing, and must not require an extended evidentiary hearing for their determination.").

§ 16.2 Effect of Defenses and Counterclaims

In re Smith, 325 B.R. 498, 504–05 (Bankr. D.N.H. 2005) ("The relevant determination is the amount of the creditor's claim rather than the debtor's ultimate liability after taking into account any defenses or counterclaims." Claim of Plymouth Village Water & Sewage District for costs resulting from a violation of hazardous waste laws was not unliquidated even though debtors claimed that costs incurred were unreasonable and that the District failed to mitigate damages. "Even if the Debtor has defenses that may decrease the amount of the District's claim based on reasonableness of expenditures or a failure to mitigate damages, it does not affect the character of the claim.").

4. SPECIAL DEBT-COUNTING PROBLEMS

§ 17.1 Disputed Debts

In re Smith, 325 B.R. 498, 504 (Bankr. D.N.H. 2005) ("A dispute over the underlying debt does not preclude inclusion in a section 109(e) analysis as long as the debt is otherwise non-contingent and liquidated. . . . The Court will include readily ascertainable amounts in the eligibility determination even if the liability is disputed.").

In re Arcella-Coffman, 318 B.R. 463, 471–73 (Bankr. N.D. Ind. 2004) ("[A] a dispute as to a debt does not *ipso facto* cause the debt to be unliquidated . . . . [T]he debtor's mere refusal to admit liability for, and the amount of, a claim will not negate a finding that a debt exists in an amount capable of easy mathematical computation. It is the good faith of the dispute, particularly with respect to the underlying issues of the debtor's liability—and not the statement that there is a dispute—that is relevant for the purpose of § 109(e). . . . A dispute as to liability, or as to the amount, does not, in and of itself, cause a debt to be unliquidated. The principal focus is on the ability of a factfinder to determine liability readily without extensive evidence or the exercise of judgment, and to determine the amount of the indebtedness by the application of relatively simple mathematical principles.").

§ 17.2 Taxes and Other Priority Claims

In re Smith, 325 B.R. 498 (Bankr. D.N.H. 2005) (Unscheduled taxes for years in which the debtor failed to file tax returns are unsecured debts counted toward the unsecured debt limitation; because the omission of the tax claims was not in good faith, the amount shown on the IRS's proof of claim is the amount used as an unsecured debt for eligibility purposes.).

§ 18.1 Joint Obligations of Spouses and Codebtors: Collateral That Is Not Property of the Estate

E. ELIGIBILITY OF REPEAT FILERS

§ 19.1 Eligibility of a Simultaneous Filer

Baltrotsky v. KH Funding, Inc. (Baltrotsky), No. DKC2004-2643, 2004 WL 2937537, at *4 (D. Md. Dec. 20, 2004) (unpublished) (Applying "single estate rule," filing of Chapter 13 case while prior Chapter 7 case was pending did not interrupt a foreclosure sale with respect to real property that remained in Chapter 7 estate and with respect to which relief from the stay had been granted in the Chapter 7 case. "As the bankruptcy court below held, '[t]he only assets which would be affected by the [Appellant's] Chapter 13 filing would be assets he owned at that time.' . . . In other words, the automatic stay created by the filing of the Chapter 13 petition would only be applicable to actions involving property included within the Chapter 13 estate. . . . This view comports with what has become known as the 'single estate rule' which holds that a debtor cannot maintain simultaneous bankruptcy cases because '[a] debtor possesses only one estate for purposes of trusteeship.' . . . Under this rule, '"property cannot be an asset of both [2] estates simultaneously."' . . . Appellant's Chapter 7 estate undoubtedly still existed at the time the Chapter 13 petition was filed. . . . [T]he Properties remained in the Chapter 7 estate throughout . . . . Therefore, the bankruptcy court did not err when it found that because the Properties were part of the Chapter 7 estate at the time Appellant filed his Chapter 13 petition, 'there was no automatic stay with respect to the foreclosure on The Properties created by his Chapter 13 filing.'").

In re Wayne, No. 03-01891, 2005 WL 612926, at *1–*2 (Bankr. D.D.C. Mar. 12, 2005) (unpublished) (Although it was an abuse of the bankruptcy system to file a Chapter 13 case to impose the automatic stay when a prior Chapter 7 case was still pending in which relief from the stay had been granted to a mortgage holder, sanctions were not imposed on debtor's counsel because counsel thought that the Chapter 7 case was ready to be closed. Citing *Freshman v. Atkins*, 269 U.S. 121, 46 S. Ct. 41, 70 L. Ed. 193 (1925), "With the case remaining ongoing a new filing is barred because ordinarily, a new bankruptcy case ought not be filed

during the pendency of another bankruptcy case. . . . The filing of this second case was for the purpose of obtaining a new automatic stay when the automatic stay had already been terminated in the prior case. By reasons of § 109(g)(2), the debtor could not have achieved that result by voluntarily dismissing the first case and then filing this second case. . . . So long as the prior case had not been dismissed . . . the filing of this case to achieve an automatic stay, and to circumvent § 109(g)(2), constituted an abuse of the bankruptcy system.").

In re Scruggs, 320 B.R. 94, 96–97 (Bankr. D.S.C. 2004) (Debtor is not eligible in a Chapter 13 case filed after discharge but while Chapter 7 case is still pending. Debtor filed a Chapter 13 petition approximately four months after discharge in a still pending asset Chapter 7 case. One hundred and four creditors were listed in both cases but the debts were listed as contingent in the Chapter 13 case. Debtor's counsel stated that the Chapter 13 filing before completion of the administration of the prior Chapter 7 case was necessary because the debtor desired to retain certain property and had fallen behind in payments during the Chapter 7 case. "The United States Supreme Court's decision in [***Freshman v. Atkins,*** 269 U.S. 121, 46 S. Ct. 41, 70 L. Ed. 193 (1925),] has been cited for the proposition that two cases which seek to discharge the same debt cannot be pending simultaneously. . . . [T]he Court in [***Johnson v. Home State Bank,*** 501 U.S. 78, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991),] did not recognize 'simultaneous chapter 20 filings' which seeks to discharge the same debt. . . . The filing of a chapter 13 petition during the administration of assets by a Chapter 7 Trustee (in an asset case) may require the return of such assets to the debtor, thus allowing the debtor the benefit of the chapter 7 discharge without the corresponding burden of liquidation of non-exempt assets . . . . [T]he Court finds this simultaneously filed Chapter 13 case should be dismissed.").

§ 19.2 Eligibility of a Serial Filer: "Chapter 20" and Beyond

In re Yunker, 328 B.R. 591, 594 (Bankr. M.D. Fla. 2005) (It was not per se bad faith for a debtor to file a Chapter 13 petition in 2005 after a claim was held nondischargeable in a Chapter 7 case in 2003; ample opportunity to challenge the good faith of the plan would be raised at confirmation. The debtor filed a Chapter 13 petition in 2002 but a claim held by Chase Lumber was declared nondischargeable. The debtor filed a Chapter 13 petition in January of 2005 and the creditor sought dismissal arguing that the plan, a "Chapter 20" was not filed in good faith. "The Debtor's fraudulent conduct which was the basis of this Court's . . . Judgment entered in the Chapter 7, is not sufficient, by itself, to support the finding of bad faith. . . . [L]iberal application of the relief available under Chapter 20 would be a perversion of the Code. A Debtor should not obtain judicial approval which it seeks to avoid paying a nondischargeable obligation by offering the creditor virtually nothing in a subsequent Chapter 13 case. Clearly changed circumstances in the financial affairs of a Debtor are a factor to be considered, together with the proposed Plan . . . evaluating the lack of good faith charged against the Debtor who seeks relief under the liberal discharge provisions of Chapter 13." Here, the debtor's proposed plan would pay 90% to the unsecured creditors, including the objecting creditor, debtor had married and was now supporting a family, and the debtor now had a regular income. The court accordingly held that the motion to dismiss would be denied and was premature as to the issue of confirmation.).

§ 20.1 Court Imposed Restrictions on Eligibility to Refile

Tennant v. Rojas (In re Tennant), 318 B.R. 860, 867 (B.A.P. 9th Cir. 2004) (Appeal of court-imposed restriction on refiling—that debtor must pay filing fee in full and file complete schedules, statement of affairs and plan—was moot but BAP observed: "These restrictions on Debtor's right to file a new bankruptcy petition abridged Debtor's rights to pay the filing fee in installments according to Rule 1006(b)(1) and to file the other documents within 15 days after the commencement of his case pursuant to Rule 1007(c). However, this part of Debtor's appeal is also moot, now that 180 days have passed.").

In re Oliver, 323 B.R. 769, 773–75 (Bankr. M.D. Ala. 2005) (Filing of a seventh Chapter 13 petition in violation of an injunction entered at dismissal of sixth case subjects counsel to sanctions under Bankruptcy

Rule 9011 and debtor is bared from refiling for two years. Debtor's seventh case was filed three weeks after dismissal of sixth case. Debtor's counsel conceded that it was not her policy to check PACER or other court records with respect to prior cases but rather she relied upon the representations of the debtor that there were three prior cases. Debtor did not mention the dismissal of the sixth case three weeks earlier with an injunction to refiling for 180 days. "[S]erial filing of bankruptcy petitions, in bad faith, may subject an attorney to the imposition of sanctions, even if the filing did not violate an injunction. . . . A lawyer may not take his client's word concerning previous bankruptcy filings when it is so easy to check the Court's records. . . . [A] lawyer who files a petition in bankruptcy, in violation of an injunction against refiling, violates Rule 9011 if she does not make a PACER search of the Court's records, notwithstanding the fact that the Debtor has misrepresented facts concerning prior bankruptcy filings. As PACER searches are simple, inexpensive and take only a minimal amount of time, the failure to conduct such a search is not reasonable under almost any circumstances.").

In re Bailey, 321 B.R. 169, 181–84 (Bankr. E.D. Pa. 2005) (In a chronicle of 10 bankruptcy filings by the debtor and the debtor's husband, including the tenth filing for the husband when the wife was barred from refiling, debtors last counsel violated Bankruptcy Rule 9011 by failing to run a PACER check that would have revealed the prior filing history and violated Rule 9011 by filing the tenth case for the husband to circumvent an order baring refiling by the wife. "The problem of serial filing of Chapter 13 cases is epidemic in no small part because of lawyers who will take any case at the request of a debtor . . . . Given the requirement that the petition identify all cases filed within the last six years by location, case number and date filed, I believe a PACER search should be done by every lawyer prior to filing a petition with this court. Where the client identifies a prior case, and in particular where a review of the docket in that case discloses a bar order, failure to further investigate the client's bankruptcy history, is inexcusable. . . . Had Iseman continued his electronic search . . . he would have easily discovered eight prior cases and the Second Bar Order. That was the reasonable inquiry required by Rule 9011 before he filed the petition for Mrs. Bailey. When Iseman joined Mrs. Bailey in signing her Chapter 13 petition, he certified that she was eligible to file, had disclosed her prior cases and was entitled to the benefits of the federal bankruptcy laws. . . . His failure to identify the prior cases on the petition he filed and his filing of the prohibited petition itself, which would have been apparent had he undertaken a reasonable inquiry, violated Rule 9011. . . . [I]t is the well established view of this and other courts that the actions of one family member in filing a bankruptcy petition for the purpose of staying foreclosure of the same property may be imputed to another family member due to a unity of interest and concert of action. . . . [A]n attorney is not an insurer of the accuracy of his client's financial information. However, when the petition to be filed represents a tenth automatic injunction on the exercise of a creditor's state law rights, an attorney has a heightened duty of inquiry. . . . [T]he filing of this case to circumvent the bar imposed on Mrs. Bailey in order to stay the imminent sheriff's sale was an improper purpose, ***i.e.,*** to obstruct the Bank's exercise of its valid state law remedies, and as such constituted a violation by Mr. Bailey and Iseman of the second ground of Rule 9011. . . . [S]anctions are mandatory. . . . I will order Iseman to conduct a PACER search of every potential debtor's bankruptcy history prior to filing any new bankruptcy petition. His filing of a petition is a certification that he has done so. Failure to discover and disclose in the bankruptcy petition prior filings will be a contempt of this Court's Order. . . . I find the award of $1,650 allocable $1,000 to Iseman and $650 jointly and severally to Mr. and Mrs. Baily reasonable.").

In re Scruggs, 320 B.R. 94, 97 (Bankr. D.S.C. 2004) (Because debtor is not eligible in a Chapter 13 case filed after discharge but while Chapter 7 case is still pending, Chapter 13 case is "dismissed with prejudice to bar a further filing under Chapter 13 for a period of forty-five (45) days from the entry of this Order.").

In re Merayo, 319 B.R. 883 (Bankr. E.D. Ark. 2005) (In the absence of evidence of "egregious conduct," order dismissing a prior case "with prejudice" means the bar to refiling for 180 days in § 109(g); debtor was eligible to refile more than 180 days after dismissal "with prejudice" of prior Chapter 13 case.).

§ 21.1 180-Day Bar to Eligibility in 11 U.S.C. § 109(g)—In General

§ 22.1 11 U.S.C. § 109(g)(1)—Willful Failure to Abide by Court Order or to Appear in Proper Prosecution

In re Jones, No. 04-47861DRD, 2005 WL 486758, at *3 (Bankr. W.D. Mo. Feb. 4, 2005) (unpublished) (Debtor is ineligible to be a debtor in a Chapter 7 case under § 109(g)(1) because debtor's fourth Chapter 13 case was dismissed for failure to comply with a court order to show cause why the debtor had failed to file a plan. "Debtor willfully failed to obey the Court's order to file a plan in her fourth bankruptcy case and the case was dismissed as a direct result of this failure. Thus, Debtor was ineligible to be a debtor in a case under the Bankruptcy Code, pursuant to § 109(g)(1), at the time she filed this Chapter 7 proceeding." That the debtor filed the fourth Chapter 13 case pro se was not an excuse because the debtor had previously confirmed at least two Chapter 13 plans and could have done so in the fourth case on her own but chose not to because her mortgage holder had been granted relief from the stay.).

§ 23.1 11 U.S.C. § 109(g)(2)—Voluntary Dismissal after Request for Relief from Stay

Hogan v. Marshall (In re Hogan), Nos. 04 C 5960, 04 B 16385, 2004 WL 2806206, at *4 (N.D. Ill. Dec. 3, 2004) (unpublished) (180-day bar in § 109(g)(2) applies even when there is no causal connection between dismissal and prior motion for relief from the stay. Debtor settled a motion for relief from the stay and three years later, voluntarily dismissed the Chapter 13 case. When debtor re-filed within 180 days, trustee moved to dismiss. "[Section] 109(g)(2) does not temporally limit the word 'following.' Thus, the fact that the motion to modify the stay and to dismiss were filed 3 years apart is irrelevant. . . . The inclusion of the 180-day rule in the definition of debtor suggests that Congress intended to create a bright line definition saying who may and may not be a debtor. . . . [T]here is no contextual reading of the statute which supports the conclusion that Congress meant the 180-day rule to be discretionary."), *vacated and remanded,* 138 Fed. Appx. 838 (7th Cir. 2005) (Dismissal under § 109(g)(2) is moot on appeal when the 180-day period runs and the debtor chooses not to refile.).

In re Steele, 319 B.R. 518 (E.D. Mich. 2005) (Debtors were ineligible to file Chapter 13 when they filed a petition within 180 days of the voluntary dismissal of their previous Chapter 13 following a motion for relief from stay. The Debtors' initial Chapter 13 case was filed in September of 2002 and GMAC had filed a motion for relief from stay in March of 2003. The Debtors and GMAC negotiated a stipulation requiring the Debtors to stay current and if they failed to do so, the stay would be lifted upon submission of an affidavit. In July of 2004, GMAC filed such an affidavit. In August of 2004 the Debtors dismissed their Chapter 13 case and filed a second case on October 28, 2004. Court strictly construed the provisions of § 109(g)(2) and held that the Debtors were ineligible to file the second Chapter 13 case and it must be dismissed.).

V. REPRESENTING DEBTORS AND CREDITORS BEFORE FILING

A. GENERAL CONSIDERATIONS

§ 24.1 Special Problems for Lawyers in Chapter 13 Cases
§ 24.2 Use of Paralegals and Representatives
§ 24.3 Bankruptcy Petition Preparers

Scott v. United States Trustee (In re Doser), 412 F.3d 1056 (9th Cir. 2005) (Franchisee of We The People was a bankruptcy petition preparer who engaged in deceptive and unfair practices that included the failure to mention the option of filing a petition under Chapter 13.).

In re Webers, 322 B.R. 216 (Bankr. M.D. Fla. 2005) ("Dependable Trustee Services" which helped consumers avoid foreclosure sales by transferring title to their homes to a trust and then filing a bankruptcy petition without the consumer knowing with a false address so that notices would not be sent to the debtor was found to be an illegally operating bankruptcy petition preparer that was also engaged in the unauthorized practice

of law. The company was permanently enjoined from performing bankruptcy petition preparer's services, was fined and attorney fees and costs were awarded.).

§ 24.4 Prefiling Role of Chapter 13 Trustee

B. DEBTORS' COUNSEL

§ 25.1 Explaining Chapter 13 to a Debtor
§ 25.2 Explaining Chapter 13 to an Employer
§ 25.3 Exemption Planning
§ 25.4 Getting Paid: Attorneys' Fees for Representing Debtors

C. CREDITORS' COUNSEL

§ 26.1 Prefiling Considerations for Creditors' Counsel

In re Attorneys at Law and Debt Relief Agencies, 332 B.R. 66, 69, 70 (Bankr. S.D. Ga. 2005) [BAPCPA] (Attorneys who are members of the bar of the Southern District of Georgia as well as those admitted ***pro hac vice*** are not debt relief agencies as defined by BAPCPA. Sections 526, 527, and 528 create new layers of regulation on entities defined as debt relief agencies. Although the definition of a debt relief agency is broad, it does not include the word "attorney" or "lawyer" but does specifically include "bankruptcy petition preparer." A BPP, defined in § 110, expressly excludes attorneys and their staffs. "Because the definition of 'debt relief agency' omits express reference to attorneys and includes a term which excludes attorneys, it is difficult to imagine that Congress meant otherwise. . . . I conclude that the inclusion of the term 'legal representation' in the definition of 'bankruptcy assistance' was Congress's effort to empower the Bankruptcy Courts presiding over a case with authority to protect consumers who are before the Court, who may have been harmed by a debt relief agency that may have engaged in the unauthorized practice of law." Further, the statute requires a DRA to tell an assisted person that he or she has the right to hire an attorney. It is difficult to imagine that the language, which conspicuously omits the word "attorney," requires an attorney to tell a person that they have the right to hire an attorney. Rather, BAPCPA is silent as to whether its intent is to preempt or curtail state interests in regulating attorney's conduct. "In the absence of explicit provisions, we are not convinced that Congress intended to limit the states' traditional control over the practice of law. Nothing in the statutory language demonstrates a Congressional desire to supercede the states' authority to regulate the legal profession. . . . It would be a breathtakingly expansive interpretation of federal law to usurp state regulation of the practice of law via the ambiguous provisions of this Act, which in no clear fashion lay claim to the right to do any such thing.").

§ 26.2 Getting Paid: Attorneys' Fees for Representing Creditors

D. COLLECTING INFORMATION FROM THE DEBTOR

§ 27.1 Use of Preinterview Forms

1. PERSONAL INFORMATION

§ 28.1 Names and Social Security Numbers
§ 28.2 Addresses, Friends and Relatives
§ 28.3 Health and Health Insurance
§ 28.4 Marital Status and Stability
§ 28.5 Income and Expenses

2. DEBT INFORMATION

§ 29.1 Use of Credit Reporting Agencies

In re Bailey, 321 B.R. 169, 179, 180, 182 (Bankr. E.D. Pa. 2005) (A Chapter 13 Debtor's attorney was liable for sanctions under Rule 9011 for failing to conduct an inquiry under PACER and thus failing to disclose prior bankruptcy cases in filing a ninth bankruptcy case for a debtor to stop a foreclosure sale. The statement that the attorney filed on behalf of the debtor in her latest petition, that she had only one prior bankruptcy case, was not accurate. The attorney insisted he had fulfilled his obligation under Rule 9011 by his questioning of the debtor relying upon the information the given without further investigation. "The court held

that a PACER search should be done by every lawyer prior to filing a petition with this court. Where the client identifies a prior case, and in particular where a review of the docket in that case discloses a bar order, failure to further investigate the client's bankruptcy history is inexcusable. . . . When [the attorney] joined Mrs. Bailey in signing her Chapter 13 petition, he certified that she was eligible to file, had disclosed her prior cases and was entitled to the benefits of the federal bankruptcy laws. . . . His failure to identify the prior cases on the petition he filed and his filing of the prohibited petition itself, which would have been apparent had he undertaken a reasonable inquiry, violated Rule 9011. . . . Since the filing of a petition after such a succession of unsuccessful cases is an extraordinary privilege, it is incumbent on counsel to satisfy himself that it is proposed in good faith, ***i.e.***, for a valid bankruptcy purpose and not merely to stay a sale. All benefit of doubt normally accorded the debtor should be replaced by a healthy skepticism, and the client should be required to prove his ability to perform before the case is filed." As sanctions debtor's counsel was ordered to conduct a PACER search of every potential debtor's bankruptcy history prior to filing any petition and assessed $1,000 awarded to the mortgage creditor.).

II. DOCUMENT CHECKLIST AND EXPLANATION OF FORMS

§ 34.1 Commercial Forms

§ 34.2 Petition, Signed by the Debtor

In re Brown, 328 B.R. 556, 559 (Bankr. N.D. Cal. 2005) (An attorney that submitted a Chapter 13 plan by electronic case filing which contained the debtor's electronic signature, without having in her possession the "wet" signature of the debtor, would be sanctioned $250. The debtor's attorney proposed a Chapter 13 plan and retained the document containing the actual signature of the debtor. When she negotiated an amended plan with the trustee, she submitted the amended plan as a revised plan but did not have a "wet" signature of the debtor on the revised plan. Pursuant to local rule, debtor's attorneys must retain documents bearing original signatures until five years after the case in which the document is filed is closed. Here, the debtor's attorney made changes to the original of the electronically filed plan and resubmitted it to the court without having the debtor's actual "wet" signature on the amended plan. "Under Bankruptcy Rule 9011(b)(3), by filing the documents with the court, the attorney is certifying that to the best of the person's knowledge, information and belief that 'the allegations and other factual contentions have evidentiary support.' Here, by electronically filing a document, the debtor's attorney certified that she had the document in question, bearing the debtor's original signature in her physical possession as required by the court's Interim Operating Order. Such is not the case.").

§ 34.3 List of Creditors and Addresses

§ 34.4 Statement of Social Security Number

§ 35.1 Schedules—In General

§ 35.2 Schedule A—Real Property

§ 35.3 Schedule B—Personal Property

§ 35.4 Schedule C—Exemptions

§ 35.5 Schedule D—Secured Claims

§ 35.6 Schedule E—Priority Claims

§ 35.7 Schedule F—Unsecured Claims

§ 35.8 Schedule G—Executory Contracts and Leases

§ 35.9 Schedule H—Codebtors

§ 35.10 Schedules I and J—Income and Expenditures

§ 36.1 Statement of Financial Affairs

§ 36.2 Plan

§ 36.3 Attorney's Disclosure of Compensation

In re Chapman, 323 B.R. 470 (Bankr. W.D. Wis. 2005) (Attorney disclosure required by Bankruptcy Rule 2016(b) must be amended within 15 days of payment or an agreement with respect to payment of attorney fees in a Chapter 13 case; debtors' attorney failed to timely update her disclosure to include $2,000 paid when a postpetition personal injury lawsuit was settled. Debtors' counsel ordered to disgorge half of the $2,000 as a sanction for failing to disclose and for misrepresentations to the court with respect to whether the funds were deposited to the attorney's trust account before a fee application was filed.).

In re Waldorf, No. 02-14899, 2005 WL 419714 (Bankr. M.D. Fla. Feb. 4, 2005) (unpublished) (Substitute counsel's failure to file 2016 disclosure of $1,000 retainer and $2,000 received from the debtors during the Chapter 13 case justifies order reducing allowable attorney's fees and requiring counsel to disgorge $1,500 of the funds received from the debtors.).

§ 36.4 Matrix of Creditors

§ 36.5 Cover Sheet

§ 36.6 Application to Pay Filing Fee in Installments

§ 36.7 Order to Pay Trustee

§ 36.8 Statement of Financial Affairs for Debtor Engaged in Business
§ 36.9 Local Documents

III. TIME AND PLACE FOR FILING

§ 37.1 Jurisdiction, Venue and Change of Venue

In re Donald, 328 B.R. 192 (B.A.P. 9th Cir. 2005) (Debtor that obtained a residence in Georgia, received social security checks in Georgia, and sought to cure the mortgage default on the house in Georgia should have her Chapter 13 case transferred to Georgia in that venue is appropriate in Georgia and not in California where she elected to file her Chapter 13 petition.).

In re Miles, 330 B.R. 861, 864 (Bankr. M.D. Ga. 2005) (Chapter 13 debtors residing in Alabama but filing in Georgia lacked standing to challenge the constitutionality of the United States Trustee Program. The debtors filed their Chapter 13 petition in Columbus, Georgia but listed their address in Phoenix City, Alabama. The United States Trustee sought a motion to change venue and the debtors responded by asserting the U. S. Trustee Program was unconstitutional because it did not apply in all 50 states and violated the uniformity clause. "The Debtors have not alleged or established that the Bankruptcy Administrator Program and the United States Trustee Program administered cases any differently. The Debtors have not shown any harm they will suffer by having their case transferred to a Bankruptcy Court in a state that does not participate in the United States Trustee Program. In fact, they seem to indicate that the program is a bureaucratic morass that should be dismantled.").

In re Brazzle, 321 B.R. 893, 900–01 (Bankr. W.D. Tenn. 2005) (Citing with *In re Jordan,* 313 B.R. 242 (Bankr. W.D. Tenn. 2004) and declining to follow *In re McDonald,* 219 B.R. 804 (Bankr. W.D. Tenn. 1998) and *In re Ross,* 312 B.R. 879 (Bankr. W.D. Tenn. 2004), "[T]his Court concludes that it may retain an improperly venued case if the totality of the facts and circumstances of the case demonstrate that retention is in the interest of justice or for the convenience of the parties. . . . Looking to the factors enumerated by Judge Kennedy in the *Jordan* case, the Court finds that it is appropriate to transfer this case to the Middle District of Tennessee. . . . [T]he proximity of Brazzle's creditors to the Middle District is greater than the Western District. . . . [T]he Debtor's proximity to the Middle District of Tennessee weights in favor of transferring the case.").

§ 38.1 When to File Petition

In re Sands, 328 B.R. 614, 617, 619 (Bankr. N.D.N.Y. 2005) (A bankruptcy petition is not filed with the court by ECF until the court's CM/ECF system records the information and generates a notice of electronic filing. The Chapter 13 debtor, facing a foreclosure at 11:00 a.m., commenced filing a petition with the bankruptcy court's CM/ECF system at 10:49 a.m. Because the court's CM/ECF system was "excruciatingly slow", the debtor did not complete the filing until 12:05 p.m. which was the time listed on the CM/ECF system receipt. By this time, however, the foreclosure had been complete on the debtor's home. "When the filers click on the 'next' tab, they submit their document to the Court. The bankruptcy clerk's office neither has possession of the electronically filed document nor does the office record any of the filers' information until the filers press the 'next' tab. Once the document is submitted, the CM/ECF system records the information and automatically generates a 'Notice of Electronic Filing,' which verifies the system's receipt of the filed document(s). . . . This court concludes that the Notice of Electronic Filing creates a rebuttable presumption that a debtor files a petition at the time the Notice states it was entered. . . . Problems occurring in counsel's office, such as a poor Internet connection or a hardware problem, will not excuse a debtor's untimely filing. . . . What debtor's counsel cannot do is simply log on to the CM/ECF system and expect the Court to deem such a log on the equivalent of filing. Commencing an electronic filing is not equivalent to the act of physically handing the document to a representative of the clerk's office. The clerk's office does not have possession of the petition until the debtor's counsel clicks 'next' tab and the Court's CM/ECF server receives the transmission.").

In re Howard, 333 B.R. 826 (Bankr. W.D. Wis. 2005) (Failure of a Chapter 13 debtor to have paid filing fees in earlier cases did not justify the dismissal of the current Chapter 13 case. The debtor filed two previous Chapter 7 bankruptcies in 1995 and 1996 and failed to pay the required fees. When the debtor filed a Chapter 13 petition in 2005, the clerk sought dismissal for failure to pay the old filing fees. The court found that the filing fees remaining unpaid were unsecured claims and that the requirement to pay fees and charges under Chapter 123 of Title 28 included in § 1307(c) were limited to the case before the court. The statute was not intended to reach nonpayment of fees for cases filed at any time in any other federal court.).

C. DEBTOR MUST COMMENCE MAKING PAYMENTS

§ 43.1 First Test of Debtor's Good Intentions
§ 43.2 Timing and Form of Payment
§ 43.3 Employer Problems
§ 43.4 Consequences of Failure to Commence Payments
§ 43.5 Return of Payments to Debtor

In re Bailey, 330 B.R. 775, 776, 777 (Bankr. D. Or. 2005) (Funds held by the Chapter 13 trustee following dismissal of the case prior to confirmation must be returned to the debtor and are not subject to levy or other forced collection under state law. The debtor's case was dismissed prior to confirmation and the trustee had collected $4,800 in plan payments. After dismissal, a creditor served the trustee with a state garnishment. The trustee sought instructions from the bankruptcy court. The funds must be returned to the debtor based upon the clear language of § 1326(a)(2) which mandates return of the funds to the debtor. "Section 1326(a)(2) is clear and unambiguous, therefore, its dictates must be followed. . . . In addition, sound policy reasons support returning the funds to the debtor. . . .' returning the money to the debtor ensures the orderly and efficient disposition of Chapter 13 cases. . . . By requiring the trustee to return the money to the debtor, Congress ensured that any attempts to reach the money would ensue outside the jurisdiction of the bankruptcy court. Therefore, unconfirmed cases may be closed as quickly as statutorily possible following dismissal."). [*In re Davis,* No. 04-30002-DHW, 2004 WL 3310531 (Bankr. M.D. Ala. June 16, 2004)].

In re Davis, No. 04-30002-DHW, 2004 WL 3310531, at *2 (Bankr. M.D. Ala. June 16, 2004) (At dismissal before confirmation, bankruptcy court retains jurisdiction to determine disposition of money held by the Chapter 13 trustee and § 1326 trumps a state court levy on the trustee by a creditor with a prepetition debt. "This court agrees with the [*In re Oliver,* 222 B.R. 272 (Bankr. E.D. Va. 1998),] line of cases holding that § 1326(a) is clear an unambiguous with regard to the disposition of the funds. The trustee has a statutory obligation to return the funds to the debtor. 11 U.S.C. § 1326 preempts the state court garnishments statute. This disposition of the money . . . fosters the policy of encouraging debtors who are financially able to repay their debts to file chapter 13. It ensures that debtors who attempt chapter 13 will not be penalized for an unconfirmed attempt.").

In re Brown, 319 B.R. 898, 902–03 (Bankr. M.D. Ga. 2004) (In dicta, "[i]n the Southern District of Georgia, in the event a case is dismissed prior to confirmation, accumulated payments are disbursed to secured creditors rather than returned to the debtor based on this rationale." The rationale is: "This Court routinely denies stay relief to automobile creditors prior to confirmation of Chapter 13 plans because considering such motions early in the case and requiring appropriate payments would hopelessly disrupt the administration of Chapter 13 cases. This delay in payment usually ends at confirmation, when the accumulated payments made by the debtor preconfirmation are disbursed to secured creditors. Courts like this one typically reason that the debtor's payments into the plan beginning one month after filing . . . serve as informal adequate protection." Because the debtor's plan would delay payments to a car lender until 10 months after the petition, while attorney fees were paid in full, bankruptcy court denied confirmation, dismissed the case and "[a]ny money paid into the case will, after payment of trustee's fees, be distributed to secured creditors in proportion to the size of their secured claims.").

D. DEBTOR MAY USE, SELL AND LEASE ESTATE PROPERTY

§ 44.1 Debtor Has Exclusive Control of Estate Property

1. PROPERTY OF THE ESTATE

§ 45.1 What Is Property of the Chapter 13 Estate?

In re Lawson, 333 B.R. 503, 505 (Bankr. D.D.C. 2005) (Automatic stay did not halt a foreclosure on the debtor's residence where the debtor had no equitable or legal interest in the property but was the spouse of the owner of the property. The debtor's spouse had filed a Chapter 13 petition and relief from stay had been

granted in her case. Immediately before the sale of the property, the debtor filed a Chapter 13 petition seeking to halt the foreclosure sale. "The debtor had no rights in the Property rising to the level of a legal or equitable interest accorded protection by the law; he fairs no better than would a luncheon guest who happened to be on the premises at the time of the foreclosure sale.").

§ 46.1 Postpetition Earnings

Lyle v. Santa Clara County Dep't of Child Support Servs. (In re Lyle), 324 B.R. 128, 132 (Bankr. N.D. Cal. 2005) (Tax refund for prepetition tax year did not become property of the Chapter 13 estate because refund was intercepted by the Treasury Department and remitted to the Santa Clara County Department of Child Support Services for delinquent child support and never became property of the Chapter 13 estate. Debtor filed 2003 tax return on February 12, 2004. The return reported an overpayment of $3,172 and requested a tax refund. On February 18, 2004, the Treasury Department matched the debtor's overpayment against delinquent child support. On February 25, the debtor filed a Chapter 13 petition and a few days later received a letter from the Treasury Department advising that the refund had been intercepted and applied to his delinquent child support. "[E]ven though a taxpayer holds a property interest in a federal income tax refund as of the end of a tax year, the value of that interest is subject to a later statutory determination of the amount of any refund. . . . [T]he debtor filed his 2003 income tax return reporting an overpayment of $3,127, but under [26 U.S.C. § 6402], he was never entitled to a refund of any portion of that overpayment. The funds attributable to the overpayment did not become property of his estate and, as a result, SCCDCSS is under no duty to turn over the funds to the trustee.").

§ 46.2 Prepetition Repossession, Levy, Sale or Conveyance

Unified People's Fed. Credit Union v. Yates (In re Yates), 332 B.R. 1, 5 (B.A.P. 10th Cir. 2005) (Creditor violates the automatic stay by refusing to return to the debtor collateral validly repossessed prior to the filing of a Chapter 13 petition. The credit union repossessed a GMC pickup on January 9, 2004. The debtor filed a Chapter 13 petition on January 16, 2004, sent the credit union notice of the automatic stay and requested return of the GMC. The credit union refused. The failure of the credit union to return the property was a violation of the automatic stay and an award of attorney's fees was appropriate because § 362(a)(3) imposes a stay on the exercise of control over property of the estate. "[I]f the exercise of control means anything, it means the ability to keep others from access to or use of an object. . . . As a practical matter, there is little difference between a creditor who obtains property of the estate before bankruptcy is filed, or after bankruptcy is filed. The ultimate result is the same-the estate will be deprived of possession of that property. This is precisely the result that § 362 seeks to avoid. . . . Section 362(d) works in tandem with § 542(a) to provide creditors with what amounts to an affirmative defense to the automatic stay. . . . The onus is on the creditor to seek relief from the stay. In addition, § 342(a) *requires* that a creditor turnover possession of 'property that the trustee may use, sell, or lease under § 363.' . . . A Chapter 13 debtor's need to retain estate property is indistinct from that of a Chapter 11 debtor." Accordingly, credit union exercised control over the pickup when it refused to turn it over to the estate and in so doing violated the automatic stay.).

In re Johnson, 328 B.R. 234, 236 (Bankr. M.D. Fla. 2005) (Automobile that was property of the debtor's Chapter 13 estate when the petition was filed but was repossessed after the Chapter 13 petition was dismissed, was not property of the debtor's Chapter 13 estate when the dismissal was set aside. Extending the holding of *Bell-Tel Federal Credit Union v. Kalter (In re Kalter),* 292 F.3d 1350 (11th Cir. 2002), the court held that "pursuant to Florida law, the debtors ownership interest in both vehicles passed to GTE upon repossession. The debtors' remaining right to redeem the vehicles is insufficient to render the vehicles property of the estate pursuant to 11 U.S.C. § 541.").

In re Pickett, 325 B.R. 579, 581 (Bankr. E.D. Mich. 2005) (Upon the expiration of a redemption period, the debtor lost all interest in property and the Chapter 13 plan could not compel reconveyance of the property.

Property tax authority obtained a judgment of foreclosure on March 1, 2002 and, pursuant to state law, the redemption period expired March 22, 2002. The debtor filed a Chapter 13 petition on September 17, 2002 and the state agency recorded its notice of judgment on November 7, 2002, auctioning the property on November 21, 2002. State law provided that "with the passage of the 21-day redemption period after a judgment of foreclosure . . . (i) all redemption rights expire; (ii) all existing recorded and unrecorded interests in the property are extinguished; (iii) fee simple absolute title vests in the foreclosing governmental unit; and (iv) that title is not to be stayed or held invalid." Thus, when the debtor filed the petition, he had no interest in the property that could be made a part of the Chapter 13 plan.).

In re Powers, 324 B.R. 225 (Bankr. W.D.N.Y. 2005) (Auto lender that had conducted a valid repossession of the debtor's automobile prior to the filing of the Chapter 13 petition held an unavoidable possessory garageman's lien on the vehicle under state law and would not be compelled to release the vehicle unless the debtor paid reasonable repossession costs in full or provided for payment of those costs on terms acceptable to the creditor through the debtor's Chapter 13 plan.).

In re Lyle, 324 B.R. 128, 131 (Bankr. N.D. Cal. 2005) (The state child support services office was not in violation of the automatic stay when it intercepted the debtor's tax refund from the Internal Revenue Service; the funds received from such overpayment were not property of the estate. The debtor had a substantial child support obligation owing to the State of California and had overpaid his federal taxes by approximately $3,100. He requested a refund from the Internal Revenue Service. The Internal Revenue Service, however, honoring the notice from the State of California, forwarded the entire overpayment of taxes to the state child support services agency and the debtor brought an action for a violation of the stay. Although the debtor had overpaid taxes, such does not equate to the right to a refund. "[T]he debtor's interest in a ***refund*** does not necessarily extend to the full value of any ***overpayment*** of taxes in a given tax year. . . . Rather, the express provisions of the Internal Revenue Code make it clear that the debtor's interest in a refund is contingent on the subsequent statutory determination of what portion of the overpayment, if any, the debtor is entitled to receive as a refund. . . . In light of the mandatory scheme described in §§ 6402(a) and (c), it is apparent that Lyle never became entitled to receive any tax refund.").

In re Rocco, 319 B.R. 411 (Bankr. W.D. Pa. 2005) (Because foreclosure sale was completed before the petition and sheriff's deed was delivered and recorded, debtors had no legal or equitable interest in real property at the Chapter 13 petition. Without legal or equitable interest, debtors lack standing to object to purchaser's motion for relief from the stay.).

§ 47.1 Proceeds, Rents or Profits from Property of the Estate
§ 47.2 Gifts, Loans and Windfalls
§ 47.3 Pension Benefits

In re Clifford, 332 B.R. 876 (Bankr. D. Minn. 2005) (Debtor's interest in his Evangelical Lutheran Church of America Pension is not excluded from the bankruptcy estate by § 541(c)(2) because the anti-alienation provision is not a spendthrift trust under state or federal law.).

§ 47.4 Entitlements Programs
§ 47.5 Leases and Other Contract Rights

In re Brettschneider, 322 B.R. 606 (Bankr. D.S.C. 2005) (Lease agreement with option to purchase was a land sale contract that was executory under South Carolina law but because the debtor was in default at the petition and Prime Financial filed an eviction proceeding in state court, the agreement was terminated before the petition and the property was not property of the estate.).

§ 47.6 Insurance Policies and Proceeds

In re Schlottman, 319 B.R. 23, 25 (Bankr. M.D. Fla. 2004) (Life insurance proceeds on death of joint debtor more than 180 days after the petition are not property of the Chapter 13 estate, but surviving joint debtor is not entitled to a hardship discharge because modification of the plan is not shown to be impracticable. Although a "literal reading" of § 1306(a)(1) would lead to the conclusion that life insurance proceeds payable at any time during the Chapter 13 case become property of the estate, § 1306(a)(1) incorporates § 541(a)(5): "It is fair to conclude that if the provisions of Section 541 apply to define property of the estate, the exclusions also apply as set forth in Section 541(a)(5)." Because only life insurance that the debtor becomes entitled to "within 180 days" of the petition becomes property of the estate under § 541(a)(5), the same limitation applies in a Chapter 13 case.).

§ 47.7 Causes of Action

Muse v. Accord Human Resources, Inc., 129 Fed. Appx. 487, 488–89 (11th Cir. 2005) (FLSA action that arose after confirmation is not property of the Chapter 13 estate; failure to amend schedules to reveal the cause of action does not judicially estop the debtor. "[T]he [*Telfair v. First Union Mortgage Corp.*, 216 F.3d 1333 (11th Cir. 2000),] court held that assets acquired post-confirmation are not property of the bankruptcy estate unless they are necessary to maintain the bankruptcy plan. . . . [C]onfirmation of the bankruptcy plan occurred on April 7, 1998. Applying *Telfair,* any property interests acquired by Muse after April 7, 1998, which was not necessary to fulfill the plan, became the property of the debtor (Muse). The unpaid wage claim arose in January 2000, nearly two years after confirmation and there is no assertion that those assets were necessary to meet the terms of the bankruptcy plan. Therefore, the unpaid wage claim was not part of the bankruptcy estate. Because it was not part of the bankruptcy estate, Muse had no duty to disclose it.").

Autos, Inc. v. Gowin, 330 B.R. 788, 792 (D. Kan. 2005) (A Chapter 13 debtor was under an obligation to amend the plan and schedules to disclose a cause of action that accrued after filing but prior to confirmation; judicial estoppel would not preclude pursuing the action because of failure to disclose the cause of action but any recovery would accrue to the benefit of the estate. The debtor brought an action against Autos that arose from the debtor's purchase and Autos' subsequent repossession of an automobile. The debtor did not disclose these claims in her schedules, although she advised the Chapter 13 trustee of the existence of the action. When the debtor initiated a federal court action, Autos argued judicial estoppel precluded recovery. Under Chapter 13, however, "after-acquired property constitutes property of the bankruptcy estate." The debtor has a duty to disclose the existence of these assets and has a duty take some other formal action so that creditors have notice of the claims and the opportunity to pursue them. An informal disclosure to the trustee is not adequate. The omission of a cause of action from the mandatory bankruptcy filings is tantamount to a representation that the claim does not exist. However, dismissing the debtor's claims against Autos would provide a windfall to the wrongdoer and would deprive creditors of a bankruptcy asset, however small it may be. The better remedy is to require the debtor to distribute any and all damages recovered to the creditors in her estate, denying her a personal recovery.).

In re Farmer, 324 B.R. 918 (Bankr. M.D. Ga. 2005) (Personal injury action that arose years after confirmation and at about the same time as completion of payments under the confirmed plan did not become property of the Chapter 13 estate and the debtors' action was not precluded by judicial estoppel because the debtors took no inconsistent position. Plan was confirmed in 1998. In August 2003, the trustee indicated to the debtors that payments were completed. In September 2003, the debtors were involved in an accident and a lawsuit was filed in April 2004. "The [*Wolfork v. Tackett,* 273 Ga. 328, 540 S.E.2d 611 (2001),] decision was limited in *Chicon v. Carter,* 258 Ga. App. 164, 573 S.E.2d 413 (2003). The Georgia Court of Appeals distinguished *Wolfork* from *Chicon* because in *Chicon* 'the injury itself and the action occurred after confirmation of a plan . . .' . . . The present case is analogous to *Chicon* rather than *Wolfork* because the injury occurred after confirmation and the Debtors were discharged after completing their plan. . . . [T]he Debtors have not taken

inconsistent positions and therefore judicial estoppel does not apply. . . . Under [*Telfair v. First Union Mortgage Corp.*, 216 F.3d 1333 (11th Cir. 2000)], the cause of action in the present case is not an asset of the bankruptcy estate. At confirmation there was no asset, because the cause of action did not arise until almost five years later. The asset was clearly not necessary to fulfill the Farmer's plan, as the case was completed a month before the accident.").

§ 47.8 Miscellaneous Real and Personal Property

2. ADEQUATE PROTECTION PRIOR TO CONFIRMATION

§ 48.1 Adequate Protection of Lienholders prior to Confirmation

E. EXEMPTIONS

1. IN GENERAL

§ 49.1 Available and Important in Chapter 13 Cases

Pequeno v. Schmidt (In re Pequeno), No. 04-40573, 2005 WL 513466 (5th Cir. Mar. 4, 2005) (unpublished) (Debtor does not have exemption in employment discrimination judgment because exemption extends only to compensation for loss of future earnings and debtor made motion in employment discrimination lawsuit to increase jury's award because jury failed to consider lost wages.).

In re Wayrynen, 332 B.R. 479, 484 (Bankr. S.D. Fla. 2005) [BAPCPA] (Limitation in § 522(p) which limits homestead exemption to $125,000 if acquired within 1,215 days, applies in all states, irrespective of whether the state has "opted out" of the federal exemptions. "Since Congress clearly intended for exemption limitations provided under § 522(p)(1) to apply to *all* debtors, the only plausible reconciliation of the . . . provisions contained in § 522 is that a Florida resident who files for bankruptcy protection, by virtue of (1) having chosen to reside in the State of Florida; (2) having chosen to purchase a residence in the State of Florida; (3) having chosen to make the residence his/her permanent residence; and (4) having availed himself/herself of the relief available under Title 11, United States Code; thereby elects to invoke the exemptions provisions available under Florida law.").

In re Virissimo, 332 B.R. 201, 205, 206 (Bankr. D. Nev. 2005) [BAPCPA] (Limitation of $125,000 on a homestead exemption for debtors that acquire the homestead within 1,215 days of filing is applicable to all states, not merely those states which have not opted out of the federal exemption. Chapter 7 debtors were seeking to claim the Nevada homestead exemption of $200,000 (now $350,000) even though they had moved to Nevada within 1,215 days. Court disagreed with *In re McNabb,* 326 B.R. 785 (Bankr. D. Ariz. 2005) and agreed with *In re Kaplan,* 331 B.R. 483 (Bankr. S.D. Fla. 2005). A debtor makes an election by selecting property to exempt. "Technically, under the terms of the statute, *there is an election*. That election may become ineffective if the debtor chooses a federal exemption in an opt out state, but the debtor nonetheless makes an 'election' within the meaning of the statute. . . . If the debtor wishes to exempt property he must engage in an act to do so. . . . [U]nder the 'plain meaning' rule the statute applies to debtors in all states, whether or not they reside in an opt-out state.").

In re Kaplan, 331 B.R. 483, 486, 487 (Bankr. S.D. Fla. 2005) [BAPCPA] (The $125,000 cap on homestead exemptions imposed by § 522(p) applies even in a state that has opted out of the federal exemptions. The Chapter 7 trustee objected to the debtor's claim of exemptions, arguing that new § 522(p) imposed a $125,000 cap on the debtor's homestead. The debtor had moved to Florida within the 1,215 period preceding the date of the filing of the petition. The court disagreed with *In re McNabb,* 326 B.R. 785 (Bankr. D. Ariz. 2005) and held that although *McNabb* was supportable based on the language as drafted, the canons of statutory construction permit the court to consider the legislative intent of Congress. "The shaky platform supporting the *McNabb* decision collapses unless the phrase 'as a result of electing under subsection (b)(3)(A) to exempt property under state law' unambiguously means the statute only applies to debtors who can chose between federal and state exemptions. . . . [T]here is another plausible meaning to the phrase 'as a result of electing' . . . [T]his court suggests that Congress was simply (albeit inartfully) intending the phrase to describe

those debtors who are utilizing state law exemptions under § 522(b)(3), whether they have a choice or not." Examining Congressional floor statements, the court concluded that "the Reform Act is replete with references demonstrating that the new homestead limitations in § 522(p) and (q) were intended to apply to all states in which debtors could previously exempt amounts in excess of $125,000.").

In re McNabb, 326 B.R. 785, 789, 790 (Bankr. D. Ariz. 2005) (The cap on a debtor's homestead exemption imposed by § 522(p), added by BAPCPA, applies only as a result of "electing" to exempt property under state or local law and, where a state does not permit such election, the cap does not apply. The debtor filed a Chapter 7 bankruptcy petition subsequent to the effective date of BAPCPA. The debtor's home had a value of $330,000 subject to a $205,500 first lien. The debtor sought to compel abandonment of the property to which creditors objected. Section 522(p), which became effective upon signing of the law on April 20, 2005, imposes a $125,000 cap on a homestead exemption if the homestead was acquired by the debtor within 1,215 days pre-petition. "[T]he $125,000 cap applies only 'as a result of electing under subsection (b)(3)(A) to exempt property under State or local law.' Code § 522(b)(1) allows debtors to elect to exempt property listed in either paragraph 2 or, in the alternative, paragraph 3." Originally, the Code contemplated the debtors would be able to elect either local or bankruptcy code exemptions. Congress gave to states the power to "opt out" of the bankruptcy code exemptions. Arizona, being an opt out state, does not give the debtor the right to "elect" state exemptions. Arizona's exemptions are the only ones available to a debtor. "It really is not for this Court to speculate on Congress's purposes when the language is clear and unambiguous. . . . Here there is no ambiguity or absurdity in result. The language is unambiguous in stating that the cap is imposed only 'as a result' of an election, so if there is no election there can be no cap. And the result can hardly be deemed absurd, when it is consistent with 163 years of bankruptcy law." Congress had the ability to draft language which limited all state exemptions referring to the language of § 522(o), but it created a blanket reduction in a homestead, irrespective of the method by which the homestead was derived. "If Congress had similarly intended the $125,000 cap found in § 522(p) to apply across the board, it would presumably have used the identical language.").

In re Gagnon, No. 03-10934, 2005 WL 1331142 (Bankr. D.N.H. June 1, 2005) (Chapter 13 debtor can use New Hampshire wild card exemption to protect multiple items of real and personal property.).

§ 49.2 Timing and Procedure

In re Fonke, 321 B.R. 199, 204, 206 (Bankr. S.D. Tex. 2005) (The period of time to object to a debtor's exemptions expires 30 days after the meeting of creditors and conversion to Chapter 7 does not extend or renew this period. Under § 522, the debtor may exempt property by filing the appropriate list. "At [such] time, the property is still considered property of the estate. The property may then only become exempt" if no party objects to the elected exemptions. Pursuant to § 522(c), once property is exempted, the property shall not be liable during or after the case for any debt of the debtor unless the case is dismissed. "Based on the plain reading of § 522(c), the property that was previously exempted in the case cannot be subject to liability for prepetition debts unless the case is dismissed." Accordingly, the Chapter 7 trustee is not afforded a new period of time in which to object to the debtor's exemptions when the Chapter 13 trustee, and other parties in interest, failed to object to the debtor's elected exemptions within 30 days of the conclusion of the debtor's original meeting of creditors.).

2. LIEN AVOIDANCE UNDER 11 U.S.C. § 522(f)

§ 50.1 Available in Chapter 13 Cases

In re Hansen, 332 B.R. 8 (B.A.P. 10th Cir. 2005) (A Chapter 13 debtor does not have standing to exercise the strong arm powers of a trustee under § 544.).

§ 50.2 Procedure for Lien Avoidance

In re Olsen, 322 B.R. 400 (Bankr. E.D. Wis. 2005) (Lienholder can challenge exemption in objection to lien avoidance because objection was filed and heard within the time frame for objecting to exemptions under Bankruptcy Rule 4003(b). Debtors apparently filed motion to avoid judicial liens on real property before filing statements and schedules. When a lienholder objected to a lien avoidance, the debtor then filed their schedule of exempt property. At the hearing on the motion to avoid lien—which was held within the period for objecting to exemptions under Bankruptcy Rule 4003(b)—the lienholder argued that the property subject to its lien was not available as a homestead exemption. Bankruptcy court found that the objection to the exemption in the form of an objection to the motion to avoid lien was timely.).

§ 51.1 Limitations on Lien Avoidance

In re Olsen, 322 B.R. 400 (Bankr. E.D. Wis. 2005) (Because at the Chapter 13 petition date, the debtors had accepted an offer to sell their home without two acres that were subject to a judgment lien, the two acres were no longer homestead property, were not available for homestead exemption and the debtors could not use § 522(f) to avoid a judgment lien on the two acres.).

In re Gagnon, No. 03-10934, 2005 WL 1331142 (Bankr. D.N.H. June 1, 2005) (When the sum of all mortgages, liens and exemptions is $248,267.94 and the value of the real property is $240,750, a $6,000 third lien impairs the debtor's exemptions and is avoidable in its entirety in § 522(f).).

In re Cersey, 321 B.R. 352 (Bankr. M.D. Ga. 2004) (Where a secured creditor's contract specifically provided for an allocation of payments, the creditor would retain its purchase money security interest rights and the Debtors' Chapter 13 plan must provide for the full value of the property to which the PMSI attached.).

§ 51.2 Protecting Lienholder after Lien Avoidance

F. AVOIDANCE AND RECOVERY POWERS

§ 52.1 Turnover of Property

§ 52.2 Relief from Garnishments

§ 53.1 Strong-Arm Powers, Statutory Liens, Preferences and Fraudulent Conveyances

Knapper v. Bankers Trust Co. (In re Knapper), 407 F.3d 573, 583 (3d Cir. 2005) (Chapter 13 debtor's § 544(b)(1) adversary proceeding fails because sheriff's foreclosure sale under Pennsylvania law could not be voided as a fraudulent conveyance when a debtor is attempting to use § 544(b)(1) to return real property to the Chapter 13 estate for her own benefit, not for the benefit of creditors. Debtor claimed that defaults judgments and sheriff's foreclosure sales were voidable under § 544(b)(1). The Chapter 13 trustee was listed as a plaintiff but "did not participate in her adversary proceeding in any way." Debtor alleged standing under § 522(h) and (g). "Knapper is not attempting to use § 544(b)(1) to avoid the default judgments and sheriffs' sale in order to recapture the two parcels of real estate for the benefit of creditors. Rather, she is attempting to use § 544(b)(1) to void the foreclosures and sheriffs' sales and have the real estate returned to her to the prejudice of creditors. However, a sheriff's sale pursuant to an order of court on a mortgage debt can not [*sic*] constitute a fraudulent transfer in violation of § 544(b)(1). Accordingly, we reject Knapper's attempt to seek refuge within the provisions of § 544(b)(1)." Debtor's challenge to state court's default judgments were barred by *Rooker-Feldman* doctrine because debtor could not prevail on constitutional claim without obtaining an order that would negate the state court judgments.).

Carrasco v. Richardson (In re Richardson), 311 B.R. 302 (Bankr. S.D. Fla. 2004) (Chapter 13 debtor lacks standing to avoid fraudulent transfer when no exemption is claimed for purposes of § 522(h). "[B]ased upon (1) the clear language of § 544, granting authority only to the trustee; (2) the absence of any statute granting

that authority to debtors; (3) the majority of cases on point concluding that Chapter 13 debtors lack standing under § 544; and (4) the guidance of the Supreme Court in [*Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000),] this Court concludes that Chapter 13 debtors lack standing to utilize the avoidance and recovery powers of a trustee under section 544(b).”), *aff'd*, 319 B.R. 724 (S.D. Fla. 2005).

In re Stubbs, 330 B.R. 717, 727 (Bankr. N.D. Ind. 2005) (Chapter 13 debtors have standing to invoke the strong-arm powers of a trustee under § 544; failure of a notary clause on a mortgage instrument to comply with state law creates a voidable transaction which can be set aside by the debtors pursuant to § 544. The acknowledgment on the debtors' mortgage instrument did not identify the individuals signing the mortgage, the space being totally blank. The Chapter 13 debtors initiated an action under § 544 seeking to avoid the mortgage on their property. The court found that the debtors had standing to pursue this action and that the result was clear. “Generally, the certificate of acknowledgment must disclose, in some way, the fact of the personal appearance of the 'acknowledger' before the attesting official taking the acknowledgment.” By leaving the acknowledgment blank, the acknowledgment form was defective under state law and the mortgage was subject to being set aside by a third party. Here, the debtors were such parties and the mortgage was void.).

In re Anderson, 324 B.R. 609, 611 (Bankr. W.D. Ky. 2005) (Chapter 13 debtor can use § 544(a)(3) to avoid a mortgage that was inadvertently released by Union Planters before the petition even though a state court determined before the petition that the mortgage was still valid. “Chapter 13 debtors may avail themselves of the strong-arm powers granted by 11 U.S.C. § 544(a). . . . Under 11 U.S.C. § 544(a)(3), the Chapter 13 debtor may avoid any lien that would be voidable by a hypothetical bona fide purchaser of real property without actual knowledge of the lien. . . . Debtor cannot be deemed to have constructive notice of Union Planters' mortgage. The only documents of record with regard to Union Planters' loan to Debtor are the Mortgage, Loan Modification and Mortgage Release. A hypothetical purchaser of the property in question who searched and found only those records, would conclude that Union Planters' released its mortgage against Debtors' property.”).

Crawley v. Aurora Loan Serv. (In re Crawley), 318 B.R. 512 (Bankr. W.D. Wis. 2004) (Citing *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000), Chapter 13 debtor does not have the powers of a trustee under § 544(a)(3) to avoid an unperfected mortgage.).

§ 53.2 Postpetition Transfers

G. MISCELLANEOUS POWERS AND DUTIES

§ 54.1 Can Debtor Sue and Be Sued?

Crosby v. Monroe County, 394 F.3d 1328, 1331 (11th Cir. 2004) (Citing *Cable v. Ivy Tech State College*, 200 F.3d 467 (7th Cir. 1999) and *Olick v. Parker & Parsley Petroleum Co.*, 145 F.3d 513 (2d Cir. 1998), Chapter 13 debtor “retains standing to pursue legal claims on behave of the estate,” including appeal of dismissal of § 1983 claims for unlawful arrest, use of excessive force and denial of medical care while in custody.).

Snyder v. United States, 63 Fed. Cl. 762, 765 (2005) (The Court of Federal Claims is without jurisdiction over Chapter 13 debtors' suit to recover an income tax refund when entitlement to that refund was litigated in the bankruptcy court and is on appeal to the United States district court; Chapter 13 debtors are not the real party in interest with respect to the tax refund. “Federal law dictates that the bankruptcy trustee is the only party with standing to bring a claim on behalf of a bankruptcy estate and is therefore the real party in interest . . . . [B]ecause the bankruptcy trustee is the only representative with the capacity to sue or be sued

concerning claims arising from the bankruptcy estate, plaintiffs are not the real party in interest with respect to the claims contained in their complaint.").

§ 55.1 Debtor Must File a Plan
§ 56.1 Assume, Reject, or Assign Leases, Rental Agreements and Executory Contracts
§ 56.2 Review Claims, Object to Claims and File Proofs of Claim

H. SPECIAL POWERS AND DUTIES OF A DEBTOR ENGAGED IN BUSINESS

§ 57.1 Operating a Chapter 13 Debtor Engaged in Business
§ 57.2 Additional Filing and Reporting Requirements

III. POWERS AND DUTIES OF CHAPTER 13 TRUSTEE

A. POWERS AND DUTIES

§ 58.1 Know the Trustee's Operating Procedures
§ 58.2 Who Will Be the Trustee?
§ 58.3 Removal and Liability of Trustee
§ 58.4 Advise and Assist Debtor
§ 58.5 Appear and Be Heard with Respect to Confirmation of a Plan
§ 58.6 Appear and Be Heard with Respect to the Value of Collateral
§ 58.7 Appear and Be Heard with Respect to Modification of Plans after Confirmation
§ 58.8 Ensure Debtor Commences Making Timely Payments
§ 59.1 Make Payments to Creditors Unless Plan or Confirmation Order Provides Otherwise
§ 60.1 Avoidance and Recovery Powers

Fisher v. Advanta Fin. Corp. (In re Fisher), 320 B.R. 52 (E.D. Pa. 2005) (Chapter 13 trustee can avoid mortgage with acknowledgment that was invalid under Pennsylvania law.).

§ 61.1 Recovery of Overpayments

In re Estrada, 322 B.R. 149, 152 (Bankr. E.D. Cal. 2005) (When the trustee miscalculated and required an overpayment of $475 from the debtors which was then distributed to creditors, the trustee cannot file and serve a final report and account until the trustee recovers the $475 erroneously paid to creditors and then refunds it to the debtors. "The trustee collected too much money from the debtors and the overpayment must be recovered and returned to them.").

In re Jurado, 318 B.R. 251, 258 (Bankr. D.P.R. 2004) (Chapter 13 trustee is not required to recover payments to creditors made with monies that would have been paid to a secured creditor had a timely proof of claim been filed by the secured creditor or by the debtor on behalf of the secured creditor. Debtor filed a proof of claim on behalf of a lienholder in the 54th month of a 60-month plan. Debtor then argued that the Chapter 13 trustee had to recover payments made to other creditors with the money that would have been paid to the lienholder had an earlier proof of claim been filed. Bankruptcy court allowed the debtor's proof of claim on the theory that there is no deadline by which a proof of claim must be filed by a secured creditor but distributions were allowed only going forward for the remaining months of the plan. By local rule, debtors are required to file proofs of claim on behalf of creditors specifically dealt with in the plan in order to avoid just what happened in this case. "[W]e find that debtor's counsel's attempt to protect his client's interests barely a few months prior to the completion of the 60-month plan is inexcusable. Debtor requests that the funds already disbursed under the plan be recovered by the Chapter13 Trustee and in turn be disbursed to [the lienholder]. Debtor's request is unacceptable. The ultimate burden to file a timely proof of claim on behalf of a creditor specifically dealt with in the Chapter 13 plan lies on the debtor.").

In re Jackson, 321 B.R. 94, 97–99 (Bankr. S.D. Ga. 2005) (Executive Office of the United States Trustee policy that Chapter 13 trustee collects percentage fee based on payments received from the debtor does not violate 28 U.S.C. § 586(e). Debtor objected to Chapter 13 trustee's fees, arguing that 28 U.S.C. § 586(e) requires the percentage fee to be assessed to payments on creditors not payments received from the debtor. "The statute provides for a 'percentage fee.' It does not specify the percentage to be assessed by the standing Chapter 13 trustee. Rather, it delegates to the AG the authority to set the percentage. . . . Through the policy set forth in the trustee handbook, the EOUST instructed the Trustee that the pot is all payments she receives from Debtor. According to Debtor . . . the statute provides that the pot is the total of payments the Trustee disburses to creditors under the plan. . . . [T]he plain language of the statute supports neither party's position. . . . The statute directs the AG to set a percentage fee . . . . Neither the statute nor the legislative history state what pot the percentage should be drawn from. The EOUST . . . policy of drawing the percentage fee from the total of payments received has been in place for at least five years. It is a simple, easy to apply formula. . . . [T]he Court is persuaded that the Trustee has not violated § 586 by basing her percentage fee on the payments she receives from Debtor—in compliance with EOUST policy—rather than on distributions made under the plan.").

V. AUTOMATIC STAY AND PRECONFIRMATION RELIEF FROM STAY

A. EXTENT OF AUTOMATIC STAY

§ 68.1 Usual Protections

Brown v. Chesnut (In re Chesnut), 422 F.3d 298, 301, 304 (5th Cir. 2005) (Automatic stay precludes foreclosure on property which debtor only has an arguable claim of right. Brown held a mortgage on property owned by Mrs. Chesnut. Mr. Chesnut filed a Chapter 13 petition, arguing that the property was community property even though it was titled only in his wife's name. Brown elected to pursue foreclosure, believing that the property was not property of the estate. The Court of Appeals held that "Brown's belief that the property was not part of the estate was not sufficient to obviate compliance with the relief-of-stay procedures of 11 U.S.C. § 362(d)." Even though the district court subsequent found that the property was not community property and was solely the property of Mrs. Chesnut, bankruptcy law demands "some process prior to the seizure of arguable property.").

§ 68.2 Additional Protection for Postpetition Property and Income

§ 68.3 Postpetition Creditors

§ 69.1 Alimony and Support Exception

Eden v. Chapski, Ltd., 405 F.3d 583 (7th Cir. 2005) (Divorce proceeding pending in state court during the Chapter 13 case was excepted from the automatic stay by § 362(b)(2)(A)(ii); fee award to former spouse's attorney was not a violation of the automatic stay and after discharge in the Chapter 13 case, state court had concurrent jurisdiction to determine that the fee award was nondischargeable.).

§ 70.1 Criminal Action or Proceeding Exception

§ 71.1 Police and Regulatory Power Exception

In re Gandy, 327 B.R. 796, 802, 803 (Bankr. S.D. Tex. 2005) (The filing of a Chapter 13 petition did not stay state court actions for violation of environmental laws or for consumer fraud. In two separate cases, the debtors asserted that the automatic stay precluded the state court from pursuing actions against Chapter 13 debtors for violation of the environmental laws of the State of Texas or for the deceptive trade practices of the debtor who had referred to herself as "Notario," implying she was an attorney, when she was simply a Notary Public. The stay, however, did not apply in that the actions constituted police and regulatory matters and were not stayed. "Where a governmental unit is suing a debtor to prevent or stop a violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay. . . ." Even though the state was seeking monetary damages in both cases, ". . . a state court may liquidate the claim and enter a judgment but the governmental unit is stayed from enforcing the money judgment against a debtor without an order of the bankruptcy court." That the debtors were asserting defenses in both cases was not relevant to the determination whether the automatic stay applied.).

Patton v. Orford (In re Patton), 323 B.R. 311, 315 (Bankr. D.N.H. 2005) (Town did not violate the automatic stay by proceeding in state court to abate debtors' illegal junkyard; collection of town's attorney fees from proceeds of sale of junked cars was also within police and regulatory power under § 362(b)(4) and was not a violation of the stay. "[T]he ability to recover legal fees without violating the automatic stay pursuant to § 362(b)(4) is analogous to the many cases finding that fees arising out of actions to enforce alimony or support obligations under § 523 of the Bankruptcy Code are routinely found to be in the nature of alimony and support and thus excepted from discharge.").

§ 72.1 Setoffs and Recoupments
§ 73.1 Termination of Services to Debtor and Discrimination against Debtor
§ 74.1 Expiration of Stay

Lomagno v. Salomon Bros. Realty Corp. (In re Lomagno), 429 F.3d 16 (1st Cir. 2005) (Foreclosure, conducted after the dismissal of a Chapter 13 case but prior to the reversal of the dismissal by the appellate court, was a valid foreclosure sale. After the bankruptcy court dismissed the debtors' Chapter 13 case based on issues raised *sua sponte*, the debtors appealed to the appellate panel. While the appeal was pending, the creditor foreclosed on the debtors' property. The BAP ultimately reversed the court's decision. The debtors were present at the original dismissal hearing and alerted to both the dismissal and the pending foreclosure sale. Accordingly, the order dismissing the case was consistent with due process even though the dismissal was error. As such, the debtors' failure to diligently pursue a stay pending appeal does not warrant the avoidance of the stay termination.). *aff'g,* 320 B.R. 473 (B.A.P. 1st Cir. 2005).

Mollo v. IRS, No. 4:04-CV-2758, 2005 WL 791237 (M.D. Pa. Feb. 25, 2005) (unpublished) (Automatic stay expired when discharge was entered in debtors' Chapter 7 case after conversion from Chapter 13 and subsequent filing of IRS lien did not violate the automatic stay because there was no stay.).

In re Montoya, 333 B.R. 449, 460, 461 (Bankr. D. Utah 2005) [BAPCPA] (Failure of a debtor to rebut the presumed bad faith of a Chapter 13 filed within several days of the dismissal of her prior Chapter 13 case precludes the extension of the automatic stay as to the debtor. The debtor filed a Chapter 13 petition six days after her previous Chapter 13 case had been dismissed. She filed an application to extend the automatic stay beyond the thirty days established in § 362(c)(3). By filing a Chapter 13 petition within a year of the dismissal of her prior Chapter 13, the case was presumed to have been filed not in good faith and the good faith factors are found in *Gier v. Farmer State Bank (In re Gier),* 986 F.2d 1326 (10th Cir. 1993). Here, the debtor did not present any clear and convincing proof that her creditors had not suffered as a result of her repeat filings, (the fifth *Gier* factor) nor that her treatment of creditors both before and after the petition were filed was fair. "[N]o distribution was made to any non-administrative creditor during the fourteen months of [her prior] case. She used depreciating collateral without compensation to the creditor and, as shown in the [present filing], the collateral has declined in value. In light of the length of time creditors went unpaid, and the fact that no distribution at all was made to creditors, it is a heavy burden indeed for the Debtor to prevail. . . . But at the hearing no evidence was presented that the treatment of her creditors both before and after the petition was filed, was in good faith. . . . Section 362(c)(3)(B) requires this Court to view this issue from the creditors perspective. [T]he Debtor must demonstrate that the filing of the petition is in good faith as to the creditors to be stayed. . . . The debtor needed to come forward with clear and convincing evidence showing the Court that the negative impact on the creditors has now somehow been overcome. . . . [T]he subjective evidence of the Debtor's intent is insufficient to rebut the presumption because the objective evidence before the Court shows that creditors have received no payments at all for fifteen months, their prefiling collection rights have been stayed . . . some creditors collateral has depreciated significantly, creditors are not treated any better under this plan than the plan proposed in the [prior case], any payment to creditors will be over an extended period under the current plan rather than immediately from, for example, a pending sale, and, therefore, from the creditor's perspective, the Debtor has not filed in good faith." Although the debtor's motion was denied, the court noted that the stay did not lift "as to property of the estate as defined by § 1306, but only with respect to any action related to a debt or property securing a debt as to the debtor.").

In re Schlitzer, 332 B.R. 856, 858 (Bankr. W.D.N.Y. 2005) [BAPCPA] (The automatic termination of the stay that is triggered when a debtor fails to file documents required under § 521 is not applicable in a Chapter 13 case. The *pro se* debtor filed a Chapter 13 petition but failed to file the statement of intent required by § 521 and Rule 1007, and failed to file an income and expense form or a Chapter 13 plan. The trustee filed an application to extend the stay. "When the plain language of § 521(a)(2), which specifically states 'within 30 days after the date of filing of a petition under Chapter 7 of this Title,' is read together with § 362(h), which

refers specifically to the failure of a debtor to comply with the requirements of § 521(a)(2), is it clear that the requirement that a debtor file a statement of intention applies only in cases filed under Chapter 7.").

In re Charles, 332 B.R. 538, 541, 542 (Bankr. S.D. Tex. 2005) [BAPCPA] (In order for the automatic stay to be extended upon a repeat filing, notice to creditors must be adequate and the debtor must establish by clear and convincing evidence the second filing is in good faith. The debtor filed a Chapter 13 petition following the voluntary dismissal of an earlier case and sought an extension of the stay pursuant to § 362(c)(3). In order to obtain an extension, the debtor must file a motion, there must be notice and a hearing, the notice and hearing must be completed before the expiration of the original thirty day stay, and the debtor must prove that the filing is in good faith. Here, the motion "does not set forth a reasoned basis to extend the stay as to any creditor other than Citifinancial Mortgage Company. . . . The present motion gives inadequate notice as to why the automatic stay should be extended against ***all*** creditors." The debtor's burden is particularly onerous. In order to extend the stay, the debtor must prove with clear and convincing evidence, that the case was filed in good faith. "This Court is obliged to implement Congress' intent. Taken in context, Congress intended to direct the Court to conduct an early triage of refiled cases. Debtors whose cases are doomed to fail should not get the benefit of an extended automatic stay.").

B. VIOLATION OF STAY AND REMEDIES

§ 75.1 Examples of Stay Violations, and Not

L'Heureux v. Homecomings Fin. Network, Inc. (In re L'Heureux), 322 B.R. 407, 410–11 (B.A.P. 8th Cir. 2005) ("[W]e have found no case law that requires the creditor in a foreclosure proceeding to remove a notice of sale which has been cancelled. . . . The failure to remove the notice of sale is not similar to the actions or failure to act which the courts . . . have found to involve violations of the automatic stay.").

Mollo v. IRS, No. 4:04-CV-2758, 2005 WL 791237 (M.D. Pa. Feb. 25, 2005) (unpublished) (IRS did not violate the automatic stay by filing a notice of tax lien after discharge in a Chapter 7 case converted from Chapter 13 because the automatic stay terminated when the discharge was entered in the Chapter 7 case.).

Rowell v. Chase Manhattan Automotive Fin. Corp. (In re Rowell), 359 F. Supp.2d 645, 647–48 (W.D. Mich. 2004) (Repossession of the debtor's car more than a month after the petition was not a willful violation of the stay when the address used for Chase was a post office box and the car was returned immediately upon demand. "There can be no dispute that the term 'willful violation' requires, at a minimum, that the creditor had actual notice of the stay. . . . Although Rowell asserted that Chase had been sent notice and that he himself had called Chase to give notice of the stay, the address for Chase that was provided to the bankruptcy court was a post office box without an individual's name or title. Chase denied receiving the notice prior to the repossession. . . . [A] willful violation requires more than a mere showing that the creditor had knowledge of the bankruptcy petition. . . . '[M]ost courts have held that a willful violation requires proof that the creditor demonstrated "egregious intentional misconduct."' . . . [T]here is no evidence that Chase's conduct amounted to 'egregious, intentional misconduct.' . . . This undisputed fact that the vehicle was immediately returned also supports the bankruptcy court's determination that the violation was merely technical and that no damages were appropriate.").

Baltrotsky v. KH Funding, Inc. (Baltrotsky), No. DKC2004-2643, 2004 WL 2937537 (unpublished) (D. Md. Dec. 20, 2004) (Foreclosure sale two days after Chapter 13 petition did not violate stay because real property was property of a simultaneously pending Chapter 7 estate and relief from the stay had been granted in the Chapter 7 case.).

In re Rutherford, 329 B.R. 886, 896 (Bankr. N.D. Ga. 2005) (Creditor violated the automatic stay by failing to return to the debtor an automobile which was validly repossessed prior to the filing of the Chapter 13 bankruptcy. The debtor's first Chapter 13 case was dismissed and the creditor immediately repossessed the

vehicle. Shortly after repossession, debtor filed a second Chapter 13 petition and the creditor refused to turn the automobile over, arguing it was entitled to adequate protection. The automatic stay was intended to deter a creditor from unilaterally holding property of the estate. Section 542 "creates an affirmative obligation on the part of the party holding estate property to turn the property over, and that obligation is not dependent upon the holding of a hearing or the entry of an order by the bankruptcy court." Accordingly, "because § 542(a) imposes an affirmative duty to return estate property, the creditor's unilateral refusal to comply with that duty constitutes an 'act' within the meaning of § 362(a)(3)." Accordingly, retention of the validly repossessed automobile violated the stay and subjected the creditor to damages, including attorney's fees.).

In re Hernandez, No. 04-40178-H2-13, 2005 WL 1000059 (Bankr. S.D. Tex. Apr. 27, 2005) (unpublished) (State University of New York violated automatic stay by refusing a Chapter 13 debtor's request for transcript when debtor was in default of undergraduate student loans but SUNY had not moved for relief from the stay. New York state regulations prohibit SUNY from releasing a transcript to a student who is in default of student loans. "SUNY's refusal to provide a transcript unless the debtor pays the student loan is clearly an act to collect or to recover a prepetition claim against the debtor. . . . [*Andrews University v. Merchant (In re Merchant),* 958 F.2d 738 (6th Cir. 1992)] . . . is persuasive both as to the result and in its reasoning." Bankruptcy court orders SUNY to either provide the transcript or immediately move for relief from the stay for cause. Court indicates that if SUNY files the motion for relief from the stay, the debtor will have the burden of proof that cause is not present—including evidence that the debtor is not abusing the stay, that the debtor is making a good faith effort to repay SUNY and that the debtor's financial circumstances are likely to improve if SUNY is required to provide the transcript.).

Lyle v. Santa Clara County Dep't of Child Support Servs. (In re Lyle), 324 B.R. 128, 131–33 (Bankr. N.D. Cal. 2005) (Santa Clara County Department of Child Support Services did not violate the automatic stay by refusing to turnover a tax refund that was intercepted and applied to delinquent child support under 26 U.S.C. § 6402 because the Chapter 13 debtor's property interest in that tax refund was limited by the statutory determination that no amount was due as a refund because of the intercept. The Chapter 13 case was filed in February of 2004. The debtor was entitled to a refund for tax year 2003 but just before the Chapter 13 petition, the Treasury Department matched the 2003 refund against his delinquent child support liability. Just after the Chapter 13 petition, the Treasury Department notified the debtor that his tax refund had been intercepted and sent to the California Child Support Intercept Agency. "Under [26 U.S.C. § 6402(c)], . . . the Secretary must reduce the amount of a person's tax overpayment by the amount of past due support owed by that person once a state has satisfied the notice and procedural requirements for a tax intercept. . . . Lyle's past due support obligations far exceeded the $3,127 overpayment. As a result, the Secretary was statutorily required to reduce the overpayment to zero, leaving no balance to refund. Because the value of Lyle's interest in a tax refund was zero, there was nothing to become property of his estate. . . . [A]s a result, SCCDCSS is under no duty to turn over the funds to the trustee.").

In re Bivens, 324 B.R. 39 (Bankr. N.D. Ohio 2004) (Bank violated the automatic stay by canceling debtor's homeowner's insurance and force writing different insurance based on mistaken belief that the debtor had vacated the property.).

Curtis v. LaSalle Nat'l Bank (In re Curtis), 322 B.R. 470 (Bankr. D. Mass. 2005) (LaSalle National Bank and its servicing agent, EMC Mortgage, violated the automatic stay and then the discharge injunction by sending demand letters and initiating foreclosure with respect to a mortgage that the debtor first discharged in a Chapter 7 case and then stripped off because it was a wholly unsecured lien in a subsequent Chapter 13 case. EMC filed frivolous pleadings in the adversary proceeding, raised frivolous defenses and EMC's witnesses displayed arrogant defiance in the face of plainly intentional violations of the automatic stay.).

Baird v. United States (In re Baird), 319 B.R. 686, 689 (Bankr. M.D. Ala. 2004) (IRS willfully violated the automatic stay by sending notices of levy to the debtor and redirecting a portion of social security benefits based on mistaken belief that a conditional order of dismissal actually resulted in dismissal. "The standard for a willful violation of the automatic stay is met if the defendant has knowledge of the stay and intends the actions which constitute the violation. . . . It does not require a specific intent to violate the stay. . . . [T]he IRS had knowledge of the debtor's bankruptcy case. . . . The IRS was not justified in unilaterally treating the case as dismissed based on receipt of an order which clearly made dismissal conditional. If in doubt as to the status of the case, the IRS had a duty to make an inquiry.").

Hampton v. Yam's Choice Plus Autos, Inc. (In re Hampton), 319 B.R. 163, 165–72 (Bankr. E.D. Ark. 2005) (Car lender willfully violated automatic stay by exercising control over the use of debtor's car through a "PayTeck" device. "The PayTeck operates to shut down the vehicle if a payment is missed and may also serve as an anti-theft device . . . . It protects the lienholder by disabling the vehicle's starter if a certain code is not entered onto a keypad by a certain preprogrammed date. The lienholder retains the necessary monthly codes, and gives a new code to the debtor only after receipt of each monthly payment. . . . Debtor testified that she called to obtain a new code, explained that she was in bankruptcy, but was told that she was behind on her payments and would not be given a code. Debtor testified that she was ultimately given a bad code, and called back for a new one which then worked. . . . Debtor continued to have problems consistently starting her car and obtaining correct codes to start her car once it shut off. . . . [T]he PayTeck on Debtor's car resulted in an overt exercise of control over estate property in violation of the automatic stay. . . . [T]he Defendant's failure to take appropriate action to avoid violating the automatic stay leads the Court to find that Defendant willfully exercised control over estate property by requiring the Debtor to call Defendant every month for a code to start her car. . . . It is the fact that Defendant placed the burden on Debtor to obtain a code in the first place that violates the automatic stay. Once Debtor filed bankruptcy, Debtor should have been free to use her vehicle without interference by Defendant . . . . By placing that burden on the Debtor, rather than taking action itself, Defendant willfully violated the automatic stay.").

In re Alvarez, 319 B.R. 108 (Bankr. W.D. Pa. 2004) (Because landlord did not follow Pennsylvania law when he changed the locks on debtor's leased commercial restaurant property without notice, lease was not terminated before the petition and failure to return the property to the debtor violated the automatic stay.).

Ratliff v. Ford Motor Credit Co. (In re Ratliff), 318 B.R. 579, 582 (Bankr. E.D. Okla. 2004) (FMCC violated stay by refusing to return a car repossessed before petition based on condition that the debtor pay repossession charges. "[T]he Defendant exercised control over estate property, thereby willfully violating the automatic stay, when it refused to turnover the vehicle, or disclose the location of the vehicle, until the repossession fee was paid.").

In re Mollo, 318 B.R. 290 (Bankr. M.D. Pa. 2004) (IRS lien was not filed in violation of stay when IRS filed its notice of lien after entry of discharge but before closing of prior Chapter 7 case; IRS has a secured claim in subsequent Chapter 13 case.).

§ 76.1 What Court?
§ 77.1 Sanctions or Contempt?

Williams v. Levi (In re Williams), 323 B.R. 691, 702 (B.A.P. 9th Cir. 2005) (A request for monetary sanctions under § 362(h) is initiated by motion not by adversary proceeding; in contrast, "Rule 7001 requires an adversary proceeding when a debtor is seeking a finding of contempt.").

In re Omine, 329 B.R. 343, 348 (Bankr. M.D. Fla. 2005) (Limitations on a monetary recovery under § 106(a)(3) found in the Equal Access to Justice Act are not applicable to limit attorney's fees awarded as sanctions against the Florida Department of Revenue for its violation of the automatic stay because the DOR

consented to the court's jurisdiction by filing its proof of claim. The EAJA addresses limitations on judgments for costs and attorney's fees awarded to a prevailing party in any civil action brought by or against the United States. Section 106(a)(3) of the Bankruptcy Code extends this limitation to "any governmental unit." Such limit, however, is found only in a section of the statute which the Eleventh Circuit has declared to be unconstitutional. The Florida DOR, by filing a claim, consented to the jurisdiction of the court and, consequently, "the award of any fees, costs, or damages against them similarly are determined by the same rules that apply to other litigants. The limitations imposed by the EAJA simply do not apply. The provisions of the EAJA . . . apply only in circumstances of forced abrogation of sovereign immunity protection. They do not apply when the state agency consents to this Court's jurisdiction.").

In re Bivens, 324 B.R. 39, 42 (Bankr. N.D. Ohio 2004) (Section 362(h) "was added to the Bankruptcy Code in 1984, and was intended to supplement the only previously available remedy for a stay violation: Contempt. Based, therefore, upon § 362(h)'s supplementation for the remedy of contempt, this provision will be applied, unless the context clearly requires otherwise, to actions to which damages are sought for a stay violation.").

Hampton v. Yam's Choice Plus Autos, Inc. (In re Hampton), 319 B.R. 163, 165 n.1 (Bankr. E.D. Ark. 2005) (Although styled as a motion for contempt, debtor's adversary proceeding seeking compensatory and punitive damages for violation of the automatic stay "is actually for damages rather than contempt because a statute has been violated rather than a court order.").

§ 77.2 Motion Practice or Adversary Proceeding?

In re Heghmann v. Indorf (In re Heghmann), 324 B.R. 415, 419–20 (B.A.P. 1st Cir. 2005) (In an adversary proceeding alleging violations of the automatic stay, authority to proceed in forma pauperis in 28 U.S.C. § 1915(a) allows the BAP to determine whether debtor can appeal to the United States Court of Appeals for the First Circuit without paying fees; although debtors meet the requisite showing of poverty, stay litigation is frivolous attempt to relitigate issues debtors repeatedly lost in state court proceedings with respect to an eviction. "28 U.S.C. § 1930(b), allowing the Judicial Conference of the United States to prescribe other fees in bankruptcy cases, does not contain any language removing these fees from the operation of § 1915. Most bankruptcy courts that have addressed the § 1930 issue in published opinions hold that § 1930(a) applies only to the filing of a bankruptcy petition and does not apply to fees, as set from time to time by the Judicial Conference pursuant to § 1930(b), for other proceedings in bankruptcy. . . . Because appeal fees are not explicitly excepted from waiver by § 1930, we conclude that we may consider the Debtor's § 1915 request to proceed in forma pauperis on appeal to the United States Court of Appeals for the First Circuit.").

Williams v. Levi (In re Williams), 323 B.R. 691 (B.A.P. 9th Cir. 2005) (Request for sanctions under § 362(h) is initiated by motion; Bankruptcy Rule 7001 requires an adversary proceeding when debtor seeks a finding of contempt.).

§ 78.1 Remedies for Violation of Stay

Williams v. Levi (In re Williams), 323 B.R. 691, 702 (B.A.P. 9th Cir. 2005) (Bankruptcy appellate panel remands to determine whether damages for violation of the automatic stay under § 362(h) are appropriate notwithstanding that bankruptcy court annulled the stay retroactively to validate the actions taken in violation of the stay. "[C]ase law has not yet definitively addressed whether an action taken in violation of the stay, validated by annulment after the fact, may nonetheless serve as the basis for an award of money damages if the debtor has suffered an injury. . . . [I]t is far from clear that annulment of the stay should preclude damages for violation of the stay before the annulment; the principle that one may be held in contempt notwithstanding the reversal of the order violated . . . seems an appropriate analogy.").

L'Heureux v. Homecomings Fin. Network, Inc. (In re L'Heureux), 322 B.R. 407, 411 (B.A.P. 8th Cir. 2005) ("Emotional distress damages for automatic stay violations are available if the individual debtor puts on clear evidence establishing that significant harm occurred as a result of the violation. . . . The evidence of illness, emotional distress and medical expenses is voluminous. However, the bankruptcy judge, in evaluating such evidence, determined that it was not related to the six-day delay in failing to remove the foreclosure notice. Such a finding is not clearly erroneous.").

United States v. Harchar, 331 B.R. 720, 730, 732 (N.D. Ohio 2005) (Emotional distress does not qualify as an injury within the meaning of § 362(h) and, accordingly, damages may not be awarded to an individual debtor for emotional distress. The Internal Revenue Service repeatedly withheld the debtors' post-petition refunds as a result of an "administrative freeze." The debtors sought sanctions for violation of § 362 against the IRS and asserted the right to collect damages for emotional injury. Initially noting that § 362(h) was somewhat ambiguous because it provided for an award for actual damages without defining those terms, the court examined legislative history behind the enactment of § 362(h). " [T]here can be little doubt that when § 362(h) was enacted in 1984, Congress was concerned not with providing debtors compensation for emotional harms, but with providing explicit statutory authorization for the 'only previously available remedy for a stay violation: Contempt.' . . . There is little indication that awarding damages for emotional harm was commonplace under the bankruptcy court's traditional contempt procedures. . . . Section 362(h) is indisputably an ambiguous statute with a dearth of legislative history. Nonetheless, by considering the language of the statute in terms of its purpose and in light of the circumstances surrounding its enactment, it is clear that Congress did not intend to authorize the award of emotional damages under § 362(h).").

Curtis v. LaSalle Nat'l Bank (In re Curtis), 322 B.R. 470 (Bankr. D. Mass. 2005) (EMC's motion to reconsider was just as frivolous as the defenses it raised to debtor's adversary proceeding alleging stay violations and violations of the discharge injunction with respect to a wholly unsecured mortgage that was first discharged in a Chapter 7 case and then stripped off in a subsequent Chapter 13 case; because of EMC's intentional violations, frivolous litigation tactics and the arrogant defiance of its witnesses, punitive damages of $30,000 were awarded in addition to $15,000 compensatory damages for emotional distress and $8,220 in attorney fees and costs.).

In re Bivens, 324 B.R. 39, 42–45 (Bankr. N.D. Ohio 2004) (Bank willfully violated the automatic stay by cancelling debtor's homeowner's insurance and force writing a different policy based on mistaken belief that the debtor had vacated the property; actual damages of attorney fees and punitive damages of $1,000 were appropriate. "An award of damages is mandatory under § 362(h) when a violation of the automatic stay is found to be 'willful.' . . . ['W]illful,' . . . does not require any specific intent. . . . [A]ny intentional and deliberate act undertaken with knowledge . . . by communicating false information to the Debtor's insurance company, Fifth Third Bank can be said to have deliberately and intentionally, albeit not necessary [*sic*] with malice, caused a notice of insurance cancellation . . . . [P]unitive damages is not conditioned upon the existence of a finding of any actual damages. . . . [C]ases in which punitive damages have been awarded involve conduct that is egregious, vindictive or intentionally malicious. . . . Fifth Third Bank's conduct cannot be said to rise to such a high level of culpability . . . . Still, by § 362(h0's use of the words 'appropriate circumstances,' as opposed to any reference to the transgressor's state of mind, a high level of culpable intent is not necessarily a prerequisite to an award of punitive damages. . . . [A]n award of punitive damages may still be appropriate for a violation of the automatic stay when there is a strong showing that the creditor acted in bad faith or otherwise undertook their actions in reckless disregard of the law. . . . Fifth Third Bank is a sophisticated creditor who must have recognized the need to bring an appropriate action before the Court when seeking to change the terms of the Debtor's insurance. . . . [A]t no point was Fifth Third Bank's interest in the Debtor's property ever seriously placed in jeopardy. . . . Fifth Third Bank is a highly sophisticated creditor with significant financial resources who undertook actions highly vexatious in nature against what appears to be an average consumer debtor. . . . $1,000.00 in punitive damages is appropriate.").

Baird v. United States (In re Baird), 319 B.R. 686, 690–91 (Bankr. M.D. Ala. 2004) (Although IRS willfully violated the automatic stay by issuing notices of levy and intercepting a portion of the debtor's social security benefits punitive damages were not available for violation of the automatic stay by the IRS, emotional distress proof was lacking and attorney fees were not recoverable because the government's position in the stay litigation was not substantially unjustified. "Punitive damages . . . cannot be a component of the money judgment. 11 U.S.C. § 106(a)(3). . . . Actual damages for a willful violation of the automatic stay by the IRS are controlled by 26 U.S.C. § 7433(e). Under that section, administrative and litigation costs are allowed only as prescribed by 26 U.S.C. § 7430. . . . Without a basis in fact or proof of damages with reasonable certainty, the court cannot award the plaintiff damages for worry, embarrassment, humiliation, and mental anguish. Under 26 U.S.C. § 7430, attorneys' fees may be awarded in an action under § 362(h) . . . . In this circuit, attorneys' fees are recoverable only when the government's position taken during the court proceeding is substantially unjustified. 26 U.S.C. § 7430(c)(7)(A) . . . . In other words, attorneys' fees may be awarded only if the government's position was unjustified in the course of litigating this very adversary proceeding. Here, the wrongful conduct of the IRS occurred pre-litigation. . . . Hence, it is impermissible to award the plaintiff damages representing his attorney's fees.").

Hampton v. Yam's Choice Plus Autos, Inc. (In re Hampton), 319 B.R. 163 (Bankr. E.D. Ark. 2005) (For willfully violating the automatic stay by requiring the debtor to call each month to get a code that allowed use of the debtor's car notwithstanding a PayTeck security device, debtor awarded actual damages for lost pay, pay for rides from relatives and friends, towing charges, and cell phone charges totaling $2,752.86. Punitive damages were not allowed because circumstances were not "egregious.").

In re Alvarez, 319 B.R. 108 (Bankr. W.D. Pa. 2004) (Landlord's violation of the automatic stay by unilaterally changing the locks and refusing to return possession to the debtor justified an award of "restart-up costs" in the form of damages equal to the rent remaining for the current month, in addition to returning the property to the debtor.).

Ratliff v. Ford Motor Credit Co. (In re Ratliff), 318 B.R. 579 (Bankr. E.D. Okla. 2004) (FMCC's refusal to turn over a car repossessed before the petition until debtor paid repossession costs was a willful violation of the stay sanctioned under § 362(h) by payment of repossession charges plus auction expense fees plus actual costs of a rental vehicle and attorney fees.).

C. PRECONFIRMATION RELIEF FROM STAY

1. PROCEDURE

§ 79.1 Strategic Considerations

§ 80.1 Timing, Procedure and Form

In re Herrin, 325 B.R. 774, 777, 778, 779 (Bankr. N.D. Ind. 2005) (A mortgage creditor would not be entitled to relief from stay prior to confirmation of a debtor's Chapter 13 plan for failure of the debtor to maintain payments to the Chapter 13 trustee; the appropriate remedy is dismissal or conversion. Aames Capital Corporation sought relief from the automatic stay on the grounds that the debtor had failed to maintain payments to the trustee prior to the confirmation of the plan. The debtor's plan proposed that the trustee would make all payments to Aames, both arrearage and post-petition ongoing mortgage payments. The court held that granting relief from stay to Aames would give it an unfair advantage over other creditors. "Perhaps there is something to rewarding an alert creditor which pursues its rights as contrasted to sleeping creditors who don't. But if the basis for a pre-confirmation stay relief motion is the debtor's failure to pay the trustee, there is a lack of egalitarianism in rewarding the diligent at the expense of the non-diligent when the same ground would support a remedy that benefits all affected by the same conduct." Until confirmation of the plan, Aames had no right to receive any payments and, accordingly, "has no standing to complain that the debtor has not placed himself/herself/themselves in a position to make those payments. . . . Until the movant creditor has obtained the right to receive pre-confirmation disbursements from the Trustee, the focus must be the credo

of the King's Musketeers—'All for one, and one for All.'" Nor was Aames entitled to adequate protection. It is an "extraordinarily rare case in which a creditor secured by a residence will be able to demonstrate that the value of its collateral is declining as a result of imposition of the automatic stay.").

In re Brown, 319 B.R. 876 (Bankr. N.D. Ill. 2005) (False allegation by EMC that debtor was three months in arrears of postpetition mortgage payments made in support of motion for relief from the stay justified sanction of $10,000 payable to the debtor on the court's motion under Rule 9011(a)(1)(B); attorney fees cannot be awarded because the sanction was imposed on the court's own motion after debtor's counsel failed to provide the proper safe harbor required by Bankruptcy Rule 9011.).

In re Nair, 320 B.R. 119 (Bankr. S.D. Tex. 2004) (J. Ward Holliday, counsel for Triad Financial Corporation, violated Bankruptcy Rule 9011 by submitting agreed orders for relief from the stay that included allowance of $550 attorney fees for the filing of the motion when Triad's claims were undersecured. An undersecured creditor cannot recover attorney fees under § 506(b) and the postpetition fees for filing a motion for relief from the stay did not exist at the petition and thus are not allowable under § 502(b). "[T]his Court concludes that Triad's request for attorney's fees was not justified by 'existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.' Instead, the request was made in the anticipation that it would not be scrutinized by the Court because it was filed as an agreed order.").

2. GROUNDS FOR RELIEF FROM STAY

§ 81.1 Lack of Adequate Protection

In re Box, 324 B.R. 290 (Bankr. S.D. Tex. 2005) (Home equity lender is not entitled to relief from the stay based on lack of adequate protection because under the Texas constitution, its lien is unenforceable when the bankr required the debtors to apply the proceeds of the home equity loan to an unsecured prior obligation of the debtors to the bank. Under the Texas constitution, a lender may not demand that the proceeds of a home equity loan be used to pay off another debt to the same lending institution as a condition of making the loan. Because the bank would not have made the home equity loan unless the proceeds were applied to its preexisting debt, the constitutional prohibition was violated and the lien against the debtors' homestead was not valid for purposes of the bank's motion for relief from the stay.).

In re Miller, 320 B.R. 203 (Bankr. N.D. Ala. 2005) (Failure to make any payments to mortgage holder and failure to provide for any payments through the plan constitute lack of adequate protection and entitle mortgage holder to relief from the stay notwithstanding that there are defects in the mortgage documentation and the debtor gave timely notice of rescission of the mortgage several years before filing the Chapter 13 case. Separate adversary proceeding will determine whether mortgage was invalid and whether debtor can complete the rescission under Alabama law.).

§ 81.2 Other Cause for Relief

In re Frye, 323 B.R. 396, 402 (Bankr. D. Vt. 2005) (While a prepetition forbearance agreement containing a pre-petition waiver of the automatic stay is not *per se* enforceable, the court will examine the facts of each case to determine whether such a wavier would be enforced. The debtor's first Chapter 13 case was voluntarily dismissed upon working out of a forbearance agreement with Union Bank which contained a prospective waiver of the application of the automatic stay. When the debtor did not perform under the forbearance agreement, the debtor again filed a Chapter 13 petition and Union Bank sought relief from the stay to enforce the forbearance agreement. "[A]lthough pre-petition waivers of the automatic stay are not *per se* enforceable, sound public policy grounds exist, in certain circumstances, for their enforcement." Here, because of the debtor's repeated failures to perform her side of the bargain over the history of the lending relationship, the lack of clear proof that the disposition of the property and the application of its proceeds would be feasible,

the court found that the majority of factors supported enforcing the pre-petition waiver and stay relief would be granted.

In re Rocco, 319 B.R. 411 (Bankr. W.D. Pa. 2005) (That foreclosure sale was completed before the petition and sheriff's deed delivered and recorded left Chapter 13 debtors with no legal or equitable interest at the petition under Pennsylvania law; accordingly, debtors lacked standing to object to purchaser's motion for relief from the stay. Debtors' separate adversary proceeding claiming that the foreclosure sale was preferential or a fraudulent conveyance or violated various state and federal consumer protection laws was too speculative to provide a defense to the motion for relief from the stay.).

§ 82.1 Prospective, In Rem and Automatic Relief from Stay

In re Lord, 325 B.R. 121 (Bankr. S.D.N.Y. 2005) (The bankruptcy court would grant relief from stay "with prejudice" and grant *in rem* relief from the stay to one creditor when the Chapter 13 debtor had apparently abused the system, engaged in repeated filings, filed incomprehensible and unfounded accusations against the court and the creditor's counsel and the debtors had failed to appear at their scheduled hearings. Where, however, a debtor had engaged in repeated filings, but had not been involved in a collaborative effort with other individuals to frustrate a foreclosure effort, the court would grant relief from the stay "with prejudice" [relief from stay would be applicable in the instant case and any subsequent case filed by the same debtor] but would not grant *in rem* relief as to a second creditor.).

In re Frye, 323 B.R. 396 (Bankr. D. Vt. 2005) (Although prepetition waivers of the automatic stay "are not *per se* enforceable, sound public policy grounds exist, in certain circumstances, for their enforcement"; because the debtor's plan to refinance property and sell other property is not substantiated by loan commitments or written sale contracts prepetition waiver of the automatic stay in a forbearance agreement that was consideration for the debtor's voluntary dismissal of a previous Chapter 13 case is enforceable and relief from the stay is granted.).

In re Frye, 320 B.R. 786, 790–91 (Bankr. D. Vt. 2005) (Provision of forbearance agreement executed at dismissal of prior bankruptcy case that bank would be entitled to ex parte relief from the automatic stay with respect to real property if the debtor filed another bankruptcy petition was enforceable but not automatically so. Citing *In re Atrium High Point Ltd. Partnership,* 189 B.R. 599 (Bankr. M.D.N.C. 1995), with approval, and acknowledging a split of authority, "[a]lthough pre-petition agreements waiving the protection afforded by the automatic stay are enforceable, such waivers are neither *per se* enforceable, nor self-executing. . . . [T]his Court . . . will enforce pre-petition stay waivers even if the bankruptcy filing was not in bad faith and even if the debtor has some equity in the property which would typically negate the availability of relief under § 362(d), if other compelling factors are present. . . . [O]nce the pre-petition waiver has been established, the burden is upon the party opposing enforcement to demonstrate that it should not be enforced.").

In re Grischkan, 320 B.R. 654, 660 n.4 (Bankr. N.D. Ohio 2005) (On a motion to dismiss in the debtor's fourth bankruptcy case filed on the eve of foreclosure, lender asked for "in rem relief" which was denied in this footnote: "The lender also requested in rem relief. The court cannot decide that issue, however, because [the debtor's spouse] has in interest in the property and she was not served with the motion or given notice of the proceedings.").

§ 82.2 Annulment of the Stay

Williams v. Levi (In re Williams), 323 B.R. 691, 697–702 (B.A.P. 9th Cir. 2005) (Bankruptcy court had jurisdiction to retroactively annul the stay in third bankruptcy case to validate actions that would otherwise violate the stay in second bankruptcy case; retroactive annulment does not resolve whether debtor is entitled

to damages under § 362(h) for violations of the stay before annulment. Debtor lived in a condominium that was titled in his fiancé. After failing to pay homeowner's association dues, a foreclosure sale was scheduled. Debtor filed a Chapter 13 case two days before the sale. Sale went ahead and purchaser recorded deed after the petition. Chapter 13 case was dismissed and several months later, debtor refiled (his third Chapter 13 case). Purchaser moved for relief from the stay. Bankruptcy court annulled the stay retroactively to the second bankruptcy case. "In considering Levi's [the purchaser's] motion to annul the stay, the bankruptcy court was properly interpreting and effectuating the automatic stay, within its ancillary jurisdiction from the second case, which survived dismissal. . . . Nothing in the language of § 362(d) restricts the reach of a stay relief order to the particular bankruptcy case in which that relief is sought. The bankruptcy court may therefore property grant relief from a stay that arose under subsection (a) in a prior, different bankruptcy case before the same court. . . . Postpetition actions taken in violation of the automatic stay, even those undertaken by an actor with knowledge of the bankruptcy filing, may be validated by annulment of the stay. . . . [T]he Ninth Circuit adopted a balancing of equities approach for analyzing a request for retroactive stay relief . . . . It may be that, even though the equities favor retroactive relief from the automatic stay in favor of the action, a debtor's request for damages under § 362(h) for the actor's willful violation of the stay before that annulment should be granted. . . . [C]ase law has not yet definitively addressed whether an action taken in violation of the stay, validated by annulment after the fact, may nonetheless serve as the basis for an award of money damages if the debtor has suffered an injury. . . . [I]t is far from clear that annulment of the stay should preclude damages for violation of the stay before the annulment; the principle that one may be held in contempt notwithstanding the reversal of the order violated . . . seems an appropriate analogy.").

In re Thomas, 319 B.R. 910 (Bankr. M.D. Ga. 2004) (Retroactive annulment of the stay effective in 2002 is appropriate when mortgage holder foreclosed without notice of the bankruptcy case but was then told by debtor's counsel that it was okay to resell the property because the Chapter 13 case was filed to deal with other issues. Two years later, debtor was unable to show any necessity for use of the property and bank had already resold the property but could not deliver good title.).

In re McDonald, Nos. 8:04-BK8585-MGW, 8:04-BK-1742-MGW, 2004 WL 2931370 (Bankr. M.D. Fla. Dec. 17, 2004) (unpublished) (Bankruptcy court annuls automatic stay to validate and complete state court guardianship proceeding against 83-year old debtor in a nursing home.).

In re Wilkerson, Nos. 04-3148DWS, 03-36593DWS, 2004 WL 2977564 (Bankr. E.D. Pa. Dec. 8, 2004) (unpublished) (Annulment of stay appropriate in debtor's fifth bankruptcy case to validate foreclosure sale; bankruptcy court not persuaded that debtor's failure in series of Chapter 13 cases was attributable to poor representation by former counsel.).

In re Barr, 318 B.R.592 (Bankr. M.D. Fla. 2004) (Compelling circumstances justify annulling stay retroactively through three Chapter 13 cases to ratify district court judgment; debtor litigated actively in district court without revealing bankruptcy cases.).

§ 83.1 Application of § 362(d)(2) in Chapter 13 Cases

VI. CODEBTOR STAY

A. EXTENT OF CODEBTOR STAY

§ 84.1 Cosigners and Joint Obligors Are Protected

Williams v. Levi (In re Williams), 323 B.R. 691, 699 (B.A.P. 9th Cir. 2005) (Arguably in dicta, debtor does not have standing on appeal to argue that a foreclosure sale during the Chapter 13 case violated the codebtor stay when codebtor is not a party to the appeal. Debtor lived in a condominium that was titled in his fiancé. Homeowner's association foreclosed a few days after the Chapter 13 petition. Bankruptcy court annulled the stay retroactively to validate the foreclosure sale. On appeal, BAP observed that the fiancé's interest in the

condominium "presumably was protected by the co-debtor stay of § 1301 . . . she is not a party to this appeal, and [the debtor] has no apparent standing to appeal on her behalf.").

In re Jones, No. 04-47861DRD, 2005 WL 486758, at *2 (Bankr. W.D. Mo. Feb. 4, 2005) (unpublished) (That debtor filed fourth Chapter 13 case pro se does not excuse the debtor's failure to file a plan when ordered to do so; fifth bankruptcy case, a Chapter 7, was filed in violation of § 109(g)(1) and is dismissed. "Debtor's counsel reminded the Court that the prior filing was pro se. However, this does not show that Debtor's failure to file a plan was not willful as pro se debtors are held to the same standards as debtors represented by counsel. . . . Debtor had been a debtor in three prior Chapter 13 cases, including two in which her plans were confirmed; thus, she knew the basics of preparing and filing a plan and presumably could have done this on her own.").

In re Amoroso, 123 Fed. Appx. 43 (3d Cir. 2004) (Debtor's attorney would be sanctioned for failing to serve a copy of a motion on an attorney representing a creditor and then certifying there was no opposition to the court. Upon filing a motion for relief from stay, counsel for the creditor had entered an appearance even though that counsel had not filed a request to receive notices under Rule 2002(1). Pursuant to Rule 9010(b), an attorney appearing for a party must file a notice of appearance with the attorney's name, office address,

and phone number unless the appearance is otherwise noted in the record. The Local Rules required that an attorney filing a document is deemed to have entered an appearance for the party on whose behalf the paper is filed. Accordingly, debtor's counsel was under an obligation to forward a copy of a motion to confirm a Chapter 13 case on counsel for creditor.).

§ 96.7 Bankruptcy Rule 3012: Violation of Security
§ 96.8 Bankruptcy Rule 3013: Classification of Claims
§ 96.9 Bankruptcy Rule 3015: Filing of Plan and Objections to Confirmation

II. TIMING, STANDING AND FORM OF PLAN

§ 97.1 Overview: Designing Plans That Work
§ 97.2 Time for Filing Plan
§ 97.3 Who Can File Plan?
§ 97.4 Form of Plan

In re Wilson, 321 B.R. 222, 226–28 (Bankr. N.D. Ill. 2005) (Model Chapter 13 plan for the Northern District of Illinois (www.ilnb.uscourts.gov) mandatory since August 16, 2004, fixes procedures for determining the pre- and postpetition defaults with respect to home mortgages and does not impermissibly modify claims protected by § 1322(b)(2).).

III. PROVIDING FOR PRIORITY CLAIMS

§ 98.1 Plan Must Provide Full Payment

Carlisle v. United States Dep't of Justice (In re Carlisle), 320 B.R. 796 (M.D. Pa. 2004) (Bankruptcy court properly denied confirmation of a plan that failed to provide full payment under § 1322(a)(2) for taxes entitled to priority under § 507.).

In re Lowthorp, 325 B.R. 470 (Bankr. M.D. Fla. 2005) (Chapter 13 plan may "provide for" an IRS obligation even where the plan makes no specific reference to the claim and the plan provided specifically for another claim held by the IRS. After the completion of the debtor's Chapter 13 plan, the IRS commenced collection actions against the debtor. The debtor argued that the Chapter 13 discharge had eliminated the IRS obligation. Although the plan specifically dealt with the IRS claim of $1,100 for taxes, the plan did not specifically mention an obligation to the IRS for trust fund penalties and the IRS did not file a proof of claim based on that debt. The IRS was, however, served with all documents relating to the confirmation process and failed to file a proof of claim. Accordingly, the IRS unfiled claim was discharged even when the plan made no specific reference to the claim because the plan provided for full payment of priority claims and the IRS, although having knowledge of the bankruptcy, did not file a proof of claim in a timely fashion.).

§ 99.1 What Claims Are Priority Claims?

In re Grabow, 323 B.R. 236 (Bankr. W.D. Wis. 2005) (Real estate taxes are not a priority claim because the priority for real estate taxes in § 507(a)(8) is reserved for unsecured claims and the real estate taxes are secured by a statutory lien under Wisconsin law; Chapter 13 plan cannot provide for real estate taxes as a priority claim without postpetition interest over the objection of a mortgage holder whose interest will be eroded by the accumulation of postpetition interest.).

In re Mclaughlin, 320 B.R. 661 (Bankr. N.D. Ohio 2005) (Attorney fees awarded by state court in contempt action against debtor for nonpayment of child support are entitled to priority under § 507(a)(7) and must be paid in full in a Chapter 13 case.).

In re Harrell, 318 B.R. 692, 694 (Bankr. E.D. Ark. 2005) (Debts for state income taxes for tax years 1996, 1997 and 1998 are general unsecured claims not entitled to priority and dischargeable in a Chapter 13 case

when debtor filed the petition on June 10, 2003 and filed tax returns for the years in question after the petition, on August 4, 2003. "[S]ubsection 507(a)(8)(A)(iii) gives priority to income taxes not assessed before but still assessable after the commencement of the case. However, unassessed but assessable taxes of a kind specified in section 523(a)(1)(B) or (C) are not entitled to priority under section 507(a)(8)(A)(iii).").

§ 100.1 Deferred Payments Are Permitted
§ 100.2 Interest Not Required
§ 100.3 Secured Priority Claims?

In re Grabow, 323 B.R. 236 (Bankr. W.D. Wis. 2005) (Real estate taxes secured by a statutory lien are not a priority claim but are a secured claim that must be paid with postpetition interest under §§ 506(b) and 1325(a)(5); plan that treats real estate taxes as a priority claim for full payment without interest cannot be confirmed over the objection of a lienholder whose position will be eroded by accumulating postpetition interest on the tax lien.).

§ 100.4 Special Provisions for Attorneys' Fees
§ 100.5 Filing Fees

IV. PROVIDING FOR SECURED CLAIMS

§ 101.1 General Rules
§ 101.2 Acceptance of Plan

In re Grabow, 323 B.R. 236 (Bankr. W.D. Wis. 2005) (Tax lienholder's failure to object to confirmation of a plan that treated its claim as a priority claim for payment in full without interest when the claim was actually oversecured by a statutory lien and entitled to postpetition interest cannot be confirmed over the objection of a junior mortgage holder whose position would be eroded by the accumulation of postpetition interest; tax lienholder's failure to object to confirmation is not an acceptance of the plan when the plan did not accurately classify the tax lienholder's claim and an objection to confirmation was filed by the junior lienholder.).

§ 102.1 Surrender or Sale of Collateral

In re White, 320 B.R. 829, 830–31 (Bankr. E.D.N.C. 2004) (Debtors can partially surrender the personal property that secures the IRS's lien and the IRS's refusal to accept surrender based on its inability to accept the surrender of personal property renders the IRS unsecured. Bankruptcy court first determined that a "partial surrender is allowable." IRS was secured by personal property and debtors proposed to surrender a used car, some household goods, wearing apparel and jewelry partially securing the IRS's claim. The IRS responded that partial surrender is not permitted and in the alternative, that it did not have a mechanism for accepting the surrender of personal property nor was it permitted by federal law from levying on personal property. Bankruptcy court concluded that IRS must be unsecured because "its claim is secured by a lien on property that it cannot levy upon, cannot accept from the debtors as payment, and cannot otherwise use to satisfy its debt. . . . The effect of the IRS's inability to enforce its lien and collect payment is that its claim is not a secured claim, but is an unsecured claim.").

§ 103.1 Classification of Secured Claims

Bank One, N.A. v. Leuellen (In re Leuellen), 322 B.R. 648 (S.D. Ind. 2005) (For purposes of modification after confirmation, each secured creditor is in a separate class and can be treated individually by the debtor under § 1329(a).).

§ 103.2 Direct Payment of Secured Claims by Debtor
§ 103.3 Partially Secured Claims

A. SECURED CLAIMS OTHER THAN HOME MORTGAGES

§ 104.1 The Power to Modify

§ 104.2 Lien Retention

In re Brown, 319 B.R. 898, 901–03 (Bankr. M.D. Ga. 2004) (While not adopting the notion that lien retention in § 1325(a)(5) includes "adequate protection" of a creditor's lien at least to the extent of depreciation, court reaches approximately the same result by holding that the feasibility requirement in § 1325(a)(6) is failed when payment in full of attorney fees prior to payment of a car lender will delay the car lender in receiving payments until 10 months after the case is filed and the court would likely have to grant the car lender relief from the stay after confirmation, thereby putting the plan in jeopardy. "[A]dequate protection is not a stated requirement of confirmation. . . . Debtor will not be allowed to propose a plan that withholds payments to ALM for almost a year while Debtor continues to benefit form the use of ALM's depreciating collateral and when the accumulation of preconfirmation payments does not amount to enough to pay attorney fees proposed for payment in full at confirmation. When one or more additional months of debtor payments are required to fully fund the attorney fees claim, the creditor secured by a depreciating asset such as the automobile in this case is likely to be irreparably harmed. If stay relief is granted, the chances of Debtor being able to make all payments under the plan are slim. . . . [T]he Court will grant ALM's objection to confirmation and dismiss this case.").

1. VALUATION

§ 105.1 Valuation, Claim Splitting and *Dewsnup*

§ 106.1 Is Claim Secured, and By What?

In re Schick, 418 F.3d 321, 328 (3d Cir. 2005) (A certificate of debt filed with the Clerk of the Superior Court of New Jersey for unpaid motor vehicle surcharges creates a statutory lien, not a judgment lien, even though state law provides that the lien is treated as if it were the recording of a judicial lien. Because the New Jersey statute grants the Motor Vehicles Commission a lien upon the docketing of the certificate of the debt, which is then treated as having the effect of a civil judgment, the MVC obtains its lien, not by any judgment, but rather by the ministerial act of docketing, which is treated as having the consequences of a judgment. "In our view, this statutorily created short-cut, in the absence of any meaningful judicial process or proceeding, renders the MVC's lien a lien that 'arises solely by force of statute.'").

In re Anderson, 324 B.R. 609 (Bankr. W.D. Ky. 2005) (Chapter 13 plan can treat Union Planters as an unsecured creditor because the bank inadvertently released its mortgage before the petition and even though a state court declared that the mortgage was valid, the debtor can avoid the released mortgage under § 544(a)(3).).

In re Cersey, 321 B.R. 352 (Bankr. M.D. Ga. 2004) (When purchase money security interests are combined and cross collateralized, the contract must provide an allocation method if the seller's purchase money security interests are to remain enforceable as secured claims; otherwise, the effect of consolidation of an earlier PMSI with a later is to transform the PMSIs into ordinary security interests.).

In re White, 320 B.R. 829, 830–31 (Bankr. E.D.N.C. 2004) (IRS's secured claim is not a secured claim because its collateral is personal property and the IRS refused the debtors' surrender claiming that it could not liquidate personal property; bankruptcy court concluded that IRS had to accept the surrender which it had already refused or that its lien was not in fact secured because it had no ability to convert its collateral into payment. IRS filed a secured claim and debtor proposed to surrender part of the personal property in which the IRS claimed a lien, including a used car, some household goods, wearing apparel and jewelry. IRS refused the debtors' surrender arguing that a partial surrender is not allowable. Bankruptcy court concluded that a partial surrender is allowable. IRS then argued that no surrender is possible because the IRS does not have a mechanism for accepting surrender of personal property. "The IRS contends that its claim is secured by a

lien on property that it cannot levy upon, cannot accept from the debtors as payment, and cannot otherwise use to satisfy its debt. . . . If the IRS has no ability to convert its lien on personal property to payment, then the property does not 'secure payment' and it has no value to the IRS. The effect of the IRS's inability to enforce its lien and collect payment is that its claim is not a secured claim, but is an unsecured claim.").

In re Elkowni, 318 B.R. 605 (Bankr. M.D. Fla. 2004) (Seller of lot was not a secured claim holder because seller's option to repurchase did not mature into a lien on the property; debtor rejected option contract and seller could not prove any damages.).

In re Mollo, 318 B.R. 290 (Bankr. M.D. Pa. 2004) (IRS has a secured claim because lien was filed in state court after entry of discharge in prior Chapter 7 case when automatic stay was not in effect. Also, to the extent the IRS lien attached to exempt property, automatic stay did not apply to exempt property that passed out of the Chapter 7 estate before IRS filed notice of lien.).

§ 107.1 As of What Date Is Value Determined?

Chase Manhattan Bank USA N.A. v. Stembridge (In re Stembridge), 394 F.3d 383, 387–88 (5th Cir. 2004) (For purposes of valuation under § 1325(a)(5)(B), the court must use a replacement value standard to determine the extent of a secured claim. Further, "the Code entitles the secured creditor to the present value of its claim at the institution of the automatic stay. . . . We hold that in order to confirm a plan under § 1325(a), the value of the collateral should be determined as of the filing of the petition, and that the plan should provide the replacement value less any adequate protection payments already paid.").

In re Gagnon, No. 03-10934, 2005 WL 1331142 (Bankr. D.N.H. June 1, 2005) (For purposes of avoiding a lien that impairs an exemption under § 522(f), the fair market value of real property is determined on the petition date.).

In re Brown, 324 B.R. 769 (Bankr. E.D. Mo. 2005) (For cram down purposes in Chapter 13 cases, replacement value is retail value as of the date of confirmation further reduced as required by the court Vehicle Valuation Policy.).

In re Mitchell, 320 B.R. 687 (Bankr. E.D. Mo. 2005) (Ninety-five percent of NADA retail value for the month in which the plan is confirmed is the court's replacement value policy after *Associates Commercial Corp. v. Rash,* 520 U.S. 953, 117 S. Ct. 1879, 138 L. Ed. 2d 148 (1997).).

Dean v. LaPlaya Inv., Inc. (In re Dean), 319 B.R. 474, 479 (Bankr. E.D. Va. 2004) (Third mortgage that was wholly unsecured at the petition in 2001 but would be partially secured due to appreciation in an adversary proceeding in 2004 is wholly unsecured and subject to lien stripping because the petition date is the proper valuation date. "[T]he petition date is the appropriate date to value debtors' principal residence because debtors have used the property as their principal residence throughout the bankruptcy case from the date of their petition to the present. Real property generally appreciates . . . permitting a valuation date removed from the petition date would allow creditor's status to change from that of an unsecured creditor to a secured creditor through no affirmative action of debtors to put their property to more productive use, correct a defect, etc. It seems unlikely that the original note holder factored the passive appreciation of debtors' real property into its lending decision, and the court is reluctant to allow a windfall conversion from unsecured to secured status on this basis.").

§ 108.1 Valuation in Chapter 13 Cases before *Rash*
§ 109.1 *Rash* and Valuation

Cathcart v. Wachovia Mortgage, No. 1:04-CV-1236-JDT-TAB, 2005 WL 756208, at *3 (S.D. Ind. Feb. 22, 2005) (unpublished) (Valuation of real property for stripped down purposes in a Chapter 13 case should be fair market value, not net liquidation value. Applying *Associates Commercial Corp. v. Rash,* 520 U.S. 953, 117 S. Ct. 1879, 138 L. Ed. 2d 148 (1997), "[j]ust as in the cram-down context, the Debtor in this case wishes to retain use of the subject property. When property is retained by a debtor, the Supreme Court notes that the 'replacement-value standard . . . accurately gauges the debtor's "use" of the [retained] property.' . . . The court finds *Rash* to be persuasive (if not controlling) in the context of the instant case, and concludes that the Bankruptcy Court was correct to use a fair market value standard rather than net liquidation value.").

In re Gagnon, No. 03-10934, 2005 WL 1331142, at *2 (Bankr. D.N.H. June 1, 2005) ("This Court has previously resolved conflicting valuation testimony in the context of a motion to avoid a lien under section 522(f)(2)(A) by examining the testimony and resolving the differences in a weighted average analysis of all reliable and credible evidence presented by the parties." Because the debtor's valuation of the residence at $239,000 was closer in time to the petition date than the creditor's expert's valuation of the residence at $246,000, the court gave greater weight to the debtor's valuation and the weighted average value was determined to be $240,750.).

In re Brown, 324 B.R. 769 (Bankr. E.D. Mo. 2005) (Applying *Associates Commercial Corp. v. Rash,* 520 U.S. 953, 117 S. Ct. 1879, 138 L. Ed. 2d 148 (1997), and the bankruptcy court's Vehicle Valuation Policy, value of car is 95% of the N.A.D.A. retail value for the first three years of age with an additional 2% deduction for each year thereafter up to a maximum deduction of 15%. N.A.D.A. retail value was $2,350. $800 was deducted for high mileage under the N.A.D.A. guide, leaving $1,550. Because the car was eight years old at confirmation, the retail value was adjusted downward to 85% of N.A.D.A. retail or $1,317.50. Evidence that the car needed to be painted further reduced the car by $528.97 to a secured claim of $788.53.).

In re Maiden, 324 B.R. 607 (Bankr. W.D. Ky. 2005) (Based on affidavit of heavy equipment expert that a loader had a replacement value between $8,000 and $10,000, bankruptcy court values the loader at $8,000.).

Nowlin v. Tammac Fin. Corp. (In re Nowlin), 321 B.R. 678 (Bankr. E.D. Pa. 2005) (Accepting expert testimony that mobile homes generally depreciate rather than appreciate in value, court found that lender's appraisal was inflated and that debtor's estimate of fair market value of the mobile home was undervalued. Mobile home purchased for $46,100 in October of 1999 was valued by the court at $38,000.).

In re Mitchell, 320 B.R. 687, 689–90 (Bankr. E.D. Mo. 2005) (Applying *Associates Commercial Corp. v. Rash,* 520 U.S. 953, 117 S. Ct. 1879, 138 L. Ed. 2d 148 (1997), "this Court has held that the replacement value of an automobile lies in its retail value as of the date of confirmation. . . . Retail value in this district is determined by . . . the Court's Vehicle Valuation Policy . . . . The Policy requires that the value of a vehicle be equal to 95% of the National Automobile Dealers Association (NADA) (Central Edition) . . . retail value for the first three years of age if neither party presents any conflicting evidence to challenge such value." The debtor submitted an appraisal for $6,000; the creditor submitted an appraisal for $10,628.33. "[T]he Court finds Creditor's appraisal . . . persuasive but not conclusive and will therefore apply the Policy to the facts in this case.").

In re Harken, No. 04-02914, 2004 WL 3019467 (Bankr. N.D. Iowa Nov. 29, 2004) (unpublished) (Court accepts bank's N.A.D.A. Official Used Car Guide retail value of $18,739 and rejects the debtor's Kelley Blue Book website retail value of $15,590. Debtor purchased car six weeks before Chapter 13 petition and made no payments under the contract.).

2. PRESENT VALUE: INTEREST

§ 111.1 "Value, As of the Effective Date of the Plan" Means Interest
§ 112.1 Interest Rate Anarchy: Present Value before *Till*
§ 112.2 Present Value after *Till*

In re Willoughby, 324 B.R. 66, 75 (Bankr. S.D. Ind. 2005) (Cause exists under § 502(j) to reconsider the interest portion of the treatment of a secured claim under a confirmed Chapter 13 plan in light of *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (2004). Plan confirmed on February 9, 2004 provided 19.99% interest to Daimler Chrysler. *Till* was decided on May 17, 2004 and on June 17, 2004, debtor moved to amend the confirmed plan to reduce the interest rate to 5.5%. Daimler objected. "[I]nterest under § 1325(a)(5)(B)(ii) is designed to protect a creditor from future injury and, to the extent it is being paid pursuant to an uncompleted plan, it is prospective in nature. Because *Till* represents a significant change in the law that has prospective application, the Court must conclude that 'cause' exists to reconsider Daimler's allowed secured claim under Rule 60(b)(5). . . . [T]his holding applies only to ***future*** payments made on secured claims according to ***uncompleted*** plans. Neither Rule 60(b)(5) nor Section 502(j) provide a basis to revisit the interest rates applied to claims that have already been paid in full or to payments that have already been made. In other words, creditors and the trustee are not expected to account for or disgorge payments that have already been made or received.").

In re Cook, 322 B.R. 336, 343 (Bankr. N.D. Ohio 2005) (In the context of a Chapter 13 estate that would liquidate to produce a 100% dividend and thus the plan must provide present value interest to unsecured claims to satisfy the test in § 1325(a)(4), because the plurality reasoning in *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (2004), lacked a legal rationale shared by five justices, *Till* is not binding precedent with respect to the meaning of value as of the effective date of a Chapter 13 plan. "Due to the lack of a consensus on a legal rational, the *Till* decision results in no ***binding*** precedent.").

In re Cachu, 321 B.R. 716, 719–23 (Bankr. E.D. Cal. 2005) (Cram down rate of interest due a taxing authority after *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (2004), is prime rate at the petition with a nominal risk factor of .5%. "[T]he *Till* Court adopted a two-part 'prime-plus' formula for purposes of compliance with § 1325(a)(5)(B)(ii). . . . The debtor has the burden of proof as to the first element of the prime-plus formula, the prime rate. The second element, the risk adjustment, must be proved by the secured creditor . . . . The form chapter 13 plan used in this District makes the plan 'effective from the date of the petition.' . . . The court takes judicial notice that the 'Bank prime loan' rate as published by the Federal Reserve for [the petition date] was 4.25% . . . . Once the prime rate is determined, *Till*'s 'prime-plus' formula contemplates an upward adjustment to compensate for 'risk.' 'The appropriate size of the risk adjustment depends on such factors as the circumstances of the estate, the nature of the security, and the nature and feasibility of the reorganization plan.' . . . [S]ome courts have noted that bankruptcy may actually benefit a secured creditor, 'the risks inherent in a chapter 13 case are less than the risks associated with non-bankruptcy cases because the court's approval of a chapter 13 plan presumes the debtor's ability to complete the plan.' . . . [T]here is generally no other category of claims in any bankruptcy proceeding that has less risk of nonpayment than the real property taxes. Since the risk of nonpayment is very low, the cost of protecting and collecting the claim in a chapter 13 proceeding should not be substantial either. . . . The County does not, and cannot, argue that its collateral is at risk. . . . The Plan does appear to be feasible . . . . [A] lower interest rate on the Tax Claim will actually improve the Plan's feasibility by reducing the monthly burden to the Debtors. The feasibility requirement in Code § 1325(a)(6), together with the cramdown provision in § 1325(a)(5)(B), 'obligates the court to select a rate high enough to compensate the creditor for its risk but not so high as to doom the plan.' . . . [T]he County will actually benefit financially should the Debtors' Plan fail . . . . [T]he County will no longer be bound by the cramdown rate and it can enforce its tax lien for the full amount of the taxes due plus penalties and interest at the substantially higher statutory rate. . . . Real property taxes cannot be discharged in bankruptcy. . . . In summary, the court is not persuaded that the County bears any risk of nonpayment. . . . However, the Supreme Court did suggest in *Till*

that the bankruptcy court is ***required*** to make some upward adjustment to the prime rate to compensate for what it recognized generally as 'a greater risk of nonpayment than solvent commercial borrowers' . . . . In the absence of any evidence to illustrate what that 'greater risk' is for real property taxes, the court finds and concludes, . . . that a nominal adjustment in the amount of one-half of one percent (0.5%) will adequately compensate the County for any hypothetical 'risk' of nonpayment.").

Nowlin v. Tammac Fin. Corp. (In re Nowlin), 321 B.R. 678, 685 (Bankr. E.D. Pa. 2005) (Proper interest rate at cram down of mobile home under *Till v. SCS Credit Corp.,* 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (2004), is "the rate calculated under the 'formula approach' which begins with the national prime rate and then makes an upward adjustment to account for the risk being placed upon the creditor. . . . [T]he evidentiary burden is on the creditor to justify the upward adjustment. . . . [T]he parties stipulated that the national prime rate of interest as of the date Plaintiff filed her chapter 13 petition was 4% and as of the date of the trial was 4.5% . . . . Plaintiff's proposal to pay Defendant 8% interest on its 'crammed down' claim under her chapter 13 plan is adequate to compensate Defendant for any risk it may assume under the plan.").

In re Harken, No. 04-02914, 2004 WL 3019467 (Bankr. N.D. Iowa Nov. 29, 2004) (unpublished) (Prime rate from *The Wall Street Journal* plus three percentage points risk adjustment is proper cram down interest rate with respect to a car that the debtor purchased six weeks before Chapter 13 petition.).

3. OTHER SECURED CLAIMS ISSUES

§ 113.1 Full Payment of Allowed Secured Claim

In re Box, 324 B.R. 290 (Bankr. S.D. Tex. 2005) (Where a bank obtained a junior mortgage on the Chapter 13 debtor's residence and compelled the debtor to apply proceeds from the loan to a previously unpaid unsecured obligation, the mortgage on the debtor's residence was invalid under Texas law and need not be treated as a secured claim in the debtor's Chapter 13 plan.).

§ 114.1 Calculating Payments to Secured Claim Holders
§ 114.2 Accounting for Adequate Protection

In re Brown, 319 B.R. 898, 902, 903 (Bankr. M.D. Ga. 2004) (A Chapter 13 plan which proposes to delay payments to an automobile creditor while paying Debtor's attorney's fees from initial plan payments would not be confirmed. Although adequate protection has no place in the discussion of confirmation of a plan, the court held that such a plan would be unfeasible. "The Code recognizes the financially distressed Debtor's need to pay filing fees in installments . . . . [S]uch cases must propose to pay attorney's fees following filing, usually through the plan from payments made to the trustee. . . . However, the willingness of the Code to permit such cases to be filed does not amount to a corresponding mandate for confirmation if the other provisions of § 1325 are not satisfied." Feasibility was in doubt in that the auto creditor would be likely to receive relief from the stay if its payments were so deferred. "Debtor will not be allowed to propose a plan that withholds payments to ALM for almost a year while Debtor continues to benefit from the use of ALM's depreciating collateral and when the accumulation of preconfirmation payments does not amount to enough to pay attorney fees proposed for payment in full at confirmation . . . . If stay relief is granted, the chances of Debtor being able to make all payments under the plan are slim.").

§ 115.1 Curing Default, Waiving Default, Maintaining Payments and Combinations
§ 116.1 Oversecured Claim Holders

In re Grabow, 323 B.R. 236 (Bankr. W.D. Wis. 2005) (Oversecured real estate tax lien is entitled to postpetition interest and to treatment as a secured claim holder under § 1325(a)(5) and § 506(b) notwithstanding that the plan proposed to treat the real estate taxes as a priority claim for full payment

without interest when a junior lienholder objected to confirmation on the ground that accumulating postpetition interest on the statutory lien for real estate taxes would erode the junior lienholder's position.).

Stewart v. Capital City Mortgage Corp. (In re Stewart), Nos. 00-00046, 02-10020, 2004 WL 3130573 (Bankr. D.D.C. Nov. 10, 2004) (unpublished) (Oversecured mortgage holder is entitled to contractual late charges, reimbursement for taxes paid and contractual attorney fees actually incurred for work by in-house counsel; because mortgage holder's records were incomprehensible and mortgage holder failed to give notice of defaults required by modified deed of trust and evidence in support of attorney fees was insufficient or nonexistent, most charges to debtor's account were disallowed.).

§ 117.1 Pawn Transactions

B. HOME MORTGAGES

§ 118.1 Most Home Mortgages Cannot Be Modified: § 1322(b)(2) and *Nobelman*

In re Ellis, 324 B.R. 595, 598 (Bankr. M.D. La. 2005) (A Chapter 13 plan could not modify the mortgage secured by a lien on real property when the debtors lived in a manufactured home located on the real property to which the lien did not attach. The debtors had granted a mortgage to Household Finance Corporation with a lien on "immovable property" and, after obtaining the loan, placed a manufactured home on the property. The debtors' Chapter 13 plan proposed to modify the terms of Household's promissory note mortgage by reducing the balance and lowering the interest rate. "To qualify for protection under the anti-modification provision of § 1322 a creditor must satisfy a two-prong test: 1) the subject property must be real estate and (2) the subject property must be the debtor's principal residence. . . . There is no dispute that Household's mortgage encumbers the debtors' immovable property, which is real estate within the meaning of 11 U.S.C. § 1322(b)(2). . . . The subject property also satisfies the second branch of the test, as there is no dispute that the debtors occupy the property (actually a manufactured home on the property) as their principal place of residence. Therefore, Household's claim against the debtors is secured by property that is their principal residence and Bankruptcy Code § 1322 bars modification of the Household obligation." The court would not, however, equitably modify the mortgage agreement to confer upon Household a lien on the manufactured home located on their property. Household was unable to demonstrate that a mutual error or mistake had been committed in the original loan.).

1. HOME MORTGAGES THAT ARE NOT PROTECTED FROM MODIFICATION

§ 119.1 Claims That Are Not Secured Only by Security Interest in Real Property That Is the Debtor's Principal Residence

In re Nowlin, 321 B.R. 678, 683 (Bankr. E.D. Pa. 2005) (The Chapter 13 debtor's mobile home was treated as personal property for purposes of § 1322(b)(2) and the debtor's plan could bifurcate the secured creditor's claim. The debtor's Chapter 13 plan proposed a value of $31,000 on a mobile home. The lienholder argued that its claim was protected from modification by § 1322(b)(2). The debtor did not own the real property upon which the mobile home sat and the mobile home was attached only by cinder blocks. "[M]obile homes that are not permanently attached to the land by a concrete foundation do not become real property even though the wheels have been removed and the they are equipped with skirting and serviced with water, gas, sewer, electric, telephone, and cable television, where the land on which the mobile home sits is not owned by the owner of the mobile home." Because the mobile home was personal property and not real property, it was not subject to the protection of § 1322(b)(2) and the debtor could bifurcate the claim under § 506(a).).

§ 119.2 Statutory Liens and Judgment Liens, Including Foreclosure Judgments

In re Carr, 318 B.R. 517, 519 (Bankr. W.D. Wis. 2004) (Prepetition foreclosure judgment does not forfeit protection from modification in § 1322(b)(2), notwithstanding that under Wisconsin law, the contractual mortgage ceased to exist and was replaced by a judgment lien. "Although a judgment lien is not a 'lien created by an agreement' . . . a majority of courts has concluded that a mortgage reduced to a prepetition foreclosure judgment is a security interest, and remains protected from modification by § 1322(b)(2).").

§ 120.1 Non-Purchase Money, "Short-Term," and Real Estate-Secured Loans for Purposes Other Than Acquiring Residence

In re Carr, 318 B.R. 517, 519 (Bankr. W.D. Wis. 2004) (Nonpurchase money mortgage to fund a business venture is protected from modification by § 1322(b)(2) when only collateral is the debtor's principal residence. "[A] few earlier cases had limited the prohibition of § 1322(b)(2) to modifications of purchase money mortgages. . . . However, nothing in the language of § 1322(b)(2) or in its legislative history indicates that Congress intended that limited interpretation of § 1322(b)(2).").

§ 121.1 Timing Issues: Lien Waiver, Surrender or Avoidance

In re Dean, 319 B.R. 474, 479 (Bankr. E.D. Va. 2004) (The filing date is the appropriate date to value a debtor's principal residence for purposes of determining whether property supporting a junior mortgage has any value sufficient to protect the mortgage from modification. The Debtors' property had a value of $197,000 at the date of filing. By the time they commenced an adversary proceeding, the property had a value of $237,000. At the time of the petition, the junior mortgage was unsupported by any equity. "The court concludes . . . that the petition date is the appropriate date to value debtors' principal residence . . . . Real property generally appreciates during the course of a bankruptcy case, and permitting a valuation date removed from the petition date would allow creditor's status to change from that of an unsecured creditor to a secured creditor through no affirmative action of debtors to put their property to more productive use, correct a defect, etc.").

§ 121.2 Timing Issues: Prepetition Changes in Collateral or Use
§ 122.1 Rental Property, Farmland and Other Income-Producing Property
§ 123.1 Mobile Homes

Cluxton v. Fifth Third Bank (In re Cluxton), 327 B.R. 612 (B.A.P. 6th Cir. 2005) (Lien on mobile home cannot be modified under § 1322(b)(2) because mobile home became real property under Ohio law when prior owner surrendered the title and mobile home became taxed as part of the real property.).

Nowlin v. Tammac Fin. Corp. (In re Nowlin), 321 B.R. 678 (Bankr. E.D. Pa. 2005) (Applying Pennsylvania law, mobile home that sat on concrete blocks, had no wheels, was surrounded by skirting and sat on leased land was personal property because the mobile home was not permanently attached to the land and the debtor never intended to keep the mobile home in its present location. The contract between the debtor and the lender required the lender's permission to permanently attach the mobile home to the land.).

§ 124.1 Claims Secured by Bank Deposits, "Shares" or Escrow Account Balances

In re Hughes, 333 B.R. 360, 362–63 (Bankr. M.D.N.C. 2005) (A security interest in escrow funds pledged in a mortgage document precludes such mortgage from being subject to the protections of § 1322(b)(2) and the Chapter 13 plan could reduce the secured claim to the value of the debtor's residence. "If the examination of the loan documents reveals that such documents do provide for a security interest in addition to the security interest in the residence, then the claim is not secured solely by the debtor's residence and can be

modified. . . . The present case is one in which the loan documents purport to provide additional security for the indebtedness secured by the deed of trust . . . . The GMAC loan documents do not simply provide for escrow payments for taxes and insurance and the establishment of an escrow account for such payments. Instead, the loan documents in the present case require the borrower to pledge the escrow funds as 'additional security' for the principal and interest due under the promissory note . . . . It is difficult to see how an escrow account or escrow funds could be regarded as part of the bundle of rights inherent in real property. . . . [E]scrow funds or an escrow account are entirely separate from the debtor's real property and that a security interest in escrow funds or an escrow account is a separate and additional security interest.").

§ 125.1 Claims Secured by Insurance Policies, Proceeds or Premiums

1st 2nd Mortgage Co. of NJ, Inc. v. Ferandos (In re Ferandos), 402 F.3d 147, 156 (3d Cir. 2005) (Security interest in an escrow fund for insurance and taxes was not additional collateral under New Jersey law. "Under New Jersey law the mortgagor retains no interest in such funds once escrowed. . . . [W]e conclude that any grant of a security interest was meaningless and conveyed essentially no interest at all. . . . [F]unds for taxes and insurance, paid over and placed in escrow, exist precisely for the purpose of paying said taxes and insurance—a cost incurred by the debtor in connection with the ownership of the real property. The debtor simply pays these costs in advance and retains no interest in the funds once placed in escrow.").

§ 126.1 Claims Secured by an Assignment of Rents

1st 2nd Mortgage Co. of NJ, Inc. v. Ferandos (In re Ferandos), 402 F.3d 147, 155 (3d Cir. 2005) (Distinguishing *Wilson v. Commonwealth Mortgage Corp.*, 895 F.2d 123 (3d Cir. 1990), *Sapos v. Provident Institution of Savings,* 967 F.2d 918 (3d Cir. 1992), *Hammond v. Commonwealth Mortgage Corp. of America (In re Hammond),* 27 F.3d 52 (3d Cir. 1994), and *Johns v. Rousseau Mortgage Corp. (In re Johns),* 37 F.3d 1021 (3d Cir. 1994), "Under New Jersey law, real property is defined to include 'rents.' . . . Therefore, the protections of § 1322(b)(2) still apply to a mortgage in New Jersey where the debt is also secured by rents.").

§ 126.2 Claims Secured by Fixtures, Furniture, Equipment, Appliances, Machinery, Easements, Appurtenances, Mineral Rights, Water Rights and the Debtor's First Born

§ 127.1 Claims Secured by Miscellaneous Other Real or Personal Property

In re Bulson, 327 B.R. 830, 839, 845 (Bankr. W.D. Mich. 2005) (A claim secured by the debtors' residence and outlying rental property was subject to modification under § 1322(b)(2). The debtors' Chapter 13 plan proposed to bifurcate Countrywide's claim which was secured by property upon which the debtors had a residence and a structure which housed the debtor's mother. Creditor argued that because it had a lien on property which was the debtors' residence as a single parcel of property, its claim was not subject to modification. The court acknowledged that there was a "definitional gap" in § 1322(b)(2) by using the phrase "real property that is the debtor's principal residence." The court concluded that the lack of a statutory definition was an oversight on the part of Congress and concluded that the "home mortgage exception [would be limited] to those instances where the mortgage includes only a single family dwelling unit used by the debtor as his principal residence and structures that complement that dwelling unit (e.g., a detached garage or storage shed). . . . Put simply, the Bulsons were permitted under their plan to modify Countrywide's rights as a lender and mortgagee under § 1322(b)(2), because there was a second dwelling unit on the Holton property.").

In re McCambry, 327 B.R. 469 (Bankr. D. Kan. 2005) (A duplex in which a Chapter 13 debtor resided and rented out an apartment was eligible for the Kansas homestead exemption because the debtors exercised control and dominion over the entire property, the surrounding yard, driveway leading to the tenant occupied portion of the duplex, and limited the tenant's rights of ingress and egress.).

§ 128.1 Modification of Unsecured Home Mortgage

Cathcart v. Wachovia Mortgage, No. 1:04-CV-1236-JDT-TAB, 2005 WL 756208 (S.D. Ind. Feb. 22, 2005) (unpublished) (Proper valuation standard to determine whether second mortgage can be stripped off principal residence is fair market value under *Associates Commercial Corp. v. Rash,* 520 U.S. 953, 117 S. Ct. 1879, 138 L. Ed. 2d 148 (1997), net liquidation value; because landlocked portion of mortgaged property has some value in excess of first mortgage, second mortgage cannot be stripped off in a Chapter 13 case. Debtor's appraiser valued property at $111,000, subject to a first mortgage of $112,000. Appraiser assigned no value to a portion of the property that was landlocked and not accessible. Bankruptcy court concluded that some value—at least $1,000 should be assigned to the inaccessible portion of the property brining the value above $112,000, the amount of the first mortgage, and thus there was value to which Wachovia's second mortgage could attach.).

In re Rascon, 321 B.R. 48, 52 (N.D. Cal. 2005) (A debtor's Chapter 13 plan which specifically mentions a creditor by name and states that the value of the property securing one of the creditor's two claims is equal to the amount of the claim secured by a first lien, implies that the creditor's second lien is void under § 506 and the property vested in the debtor free of the junior lien. After completion of the debtor's Chapter 13 plan, the creditor asserted that its junior $100,000 lien on the property was still in place. The debtor reopened the bankruptcy case for a determination of the extent of the lien. Although unchallenged liens pass through bankruptcy unaffected, "a creditor's lien may be avoided through the Chapter 13 plan confirmation process where the basis for avoidance is lack of collateral value. . . . The lien stripping effect of § 506 is consistent with § 1322(b)(2) . . . [C]onfirmation of a plan can void an unsecured lien if the creditor is 'provided for by the plan.' . . . Therefore, to satisfy due process requirements, and thus 'provide for' the creditor, a plan must provide notice that is 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" The debtor's plan identified the creditor by name and accurately characterized the claims. Accordingly, the creditor's liens, one in the amount of $250,000 had been treated fully secured, and the second in the amount of $100,000, had been treated where unsecured in its entirety pursuant to § 506(a).).

Profitt v. Mendoza, No. 1:04-CV-742-LJM-WTL, 2004 WL 3223059 (S.D. Ind. Nov. 23, 2004) (unpublished) (Fair market value, not net liquidation value, is proper standard for determining whether a mortgage is wholly unsecured by value; when fair market value is $17,000 and first mortgage is $103,248.73, there is value to partially secure a second mortgage and the second mortgage cannot be stripped off the property because of § 1322(b)(2).).

Dean v. LaPlaya Inv., Inc. (In re Dean), 319 B.R. 474 (Bankr. E.D. Va. 2004) (For purposes of stripping off a third mortgage, the value of real property is determined at the petition in 2001 rather than at trial of an adversary proceeding in 2004. Because third mortgage was wholly unsecured at the petition, the third mortgage holder cannot improve its position based on appreciation and the passage of time.).

§ 128.2 Providing for and Accounting for an Unprotected Mortgage: Modifying, Curing Default, Maintaining Payments and Combinations

In re Rascon, 321 B.R. 48 (N.D. Cal. 2005) (Distinguishing *Enewally v. Washington Mutual Bank (In re Enewally),* 368 F.3d 1165 (9th Cir. 2004), plan that treated creditor's first mortgage as fully secured and treated creditor's second mortgage as a wholly unsecured claim did not bifurcate a single secured claim into separate claims and thus was not a modification for purposes of § 1322(b)(2).).

2. CURING DEFAULT AND MAINTAINING PAYMENTS ON HOME MORTGAGES

§ 129.1 Overview: General Rules for Saving Debtor's Home

a. WHAT DEFAULTS CAN BE CURED?

§ 130.1 Prepetition Defaults

In re Carpenter, 331 B.R. 529, 533, 534 (Bankr. D. Conn. 2005) (Amount necessary to cure a pre-petition mortgage default is determined under the strict terms of the agreements applicable to the debt as it exists prior to filing, not to what the obligation would be had the debtor not defaulted. The debtor's mortgage was held by the USDA and included an interest subsidy. The debtor defaulted and the interest subsidy was terminated. When the debtor filed a Chapter 13 petition seeking to cure the default, she argued that the arrearage should be calculated as if the subsidy had been in place. The court disagreed. "It is well established that curing a default through a Chapter 13 plan in accordance with § 1322(b)(5) 'de-accelerates' the underlying debt. . . . The arrearage must be determined under the terms of the agreements and regulations applicable to the debt as it exists prior to its 'de-acceleration,' rather than by looking what might have been had no default occurred. . . . Not until the default is cured are its consequences undone.").

In re Johnson, 329 B.R. 783, 787 (Bankr. M.D. Ga. 2005) (Creditor may not impose a late fee which, by contract, applies to any late "periodic payment" when the debtor failed to make a lump sum payment. The debtor filed a Chapter 13 petition seeking to cure defaults. The debtor objected to the claim asserted by the creditor, noting that the claim contained a late charge of $13,439. The note provided for a 5% late charge if "any periodic payment" was not made within 15 days of its due date. The note, however, required a single payment of $268,693.09 on August 12, 2001. The debtor did not make the payment. "The Court is persuaded that the usual and common understanding of 'periodic payment' does not include the making of a single payment for the full amount. . . . Periodic payment means one of a series of payments made over time instead of a single payment for the full amount. Since the promissory note did not provide for periodic payments, Movant could not have missed a periodic payment." Accordingly, including the late charge was inappropriate in the claim.).

In re Crichlow, 322 B.R. 229, 234–35 (Bankr. D. Mass. 2005) (Because memorandum of sale was executed before the Chapter 13 petition indicating that the prevailing bidder at a properly conducted foreclosure sale had paid the requisite deposit, no property interest remained in the debtor under Massachusetts law and the debtor could not cure default or maintain payments through the plan because of § 1322(c)(1). "The phrase in the statute that refers to 'conducted in accordance with applicable nonbankruptcy law' is a requirement that the foreclosure was held in compliance with applicable state laws. . . . The phrase 'sold at a foreclosure sale' refers to the sale that occurs at a foreclosure auction not pursuant to or after. . . . The statute makes two references to state law, how the sale was conducted and the point at which the property was sold at the auction. That i must turn to state law to determine whether those two requirements of the statute are met does not render the statute ambiguous or require an in-depth analysis of when a title transfer under Massachusetts foreclosure law. . . . The Debtor did not offer any credible evidence that the foreclosure sale was conducted other than in accordance with the Massachusetts foreclosure laws. . . . [B]ecause the Memorandum of Sale was signed at the sale, the Property was sold at the foreclosure sale. . . . [T]he Debtor is not entitled to cure her mortgage default. . . . [W]ere I to adopt the Debtor's argument that 11 U.S.C. § 1322(c)(1) must be analyzed based upon how Massachusetts defines the term 'sold at a foreclosure sale,' I would conclude that the Property was sold when the auctioneer and [the prevailing bidder] signed the Memorandum of Sale.").

§ 131.1 Postpetition Defaults

In re Wilson, 321 B.R. 222, 226–28 (Bankr. N.D. Ill. 2005) (Procedures in model Chapter 13 plan for determining the prepetition arrearage on a home mortgage and requiring mortgage holders to file and serve a statement of postpetition fees, charges and other obligations arising during the Chapter 13 case do not impermissibly modify the rights of the mortgage holder for purposes of § 1322(b)(2). The model Chapter 13 plan for the Northern District of Illinois provides that if the debtor pays the prepetition cure amount, the mortgage is reinstated according to its original terms and the mortgage holder's right to recover prepetition arrearages is extinguished. Also, 30 days from the final payment under the plan, the model plan requires the

standing trustee to serve on the mortgage holder a notice that the cure amount has been paid and all prepetition mortgage obligations of the debtor have been resolved. The mortgage holder then must file and serve a statement of any postpetition defaults and the debtor has an opportunity to dispute that statement and to modify the plan to provide for payment of additional amounts to pay the postpetition defaults. "The Model Plan provisions were adopted to reduce the number of foreclosures filed against debtors immediately following the conclusion of their Chapter 13 case. . . . By providing a procedure for the parties to use to definitely ascertain what a debtor owes his home lender, the Model Plan does not modify a mortgage holder's rights in violation of § 1322(b)(2). Instead, it merely provides a framework within which to enforce those rights according to the loan document terms. [The Model Plan] does *not* modify the mortgage holder's right to charge late fees, attorneys' fees, or assess other collection costs as provided in the contractual agreement between the creditor and the debtor. . . . The Model Plan simply discourages a home lender from surprising a debtor with a foreclosure action immediately following the Chapter 13 case based on the default that existed at or before the end of the bankruptcy. What appears to trouble GMAC is that the Model Plan affirms that the bankruptcy court—not GMAC—is the adjudicator of disputes under the loan documents during the Chapter 13 case. . . . The majority of courts agree that since § 1322(b)(5) allows the cure of ***any*** default, a debtor can modify his plan under § 1329 to cure postconfirmation defaults, so long as the curing is done within a reasonable period of time and while current payments are being maintained. . . . [P]lan provisions that supply a way to cure postpetition defaults under § 1322(b)(5) do not violate § 1322(b)(2).").

§ 132.1 Nonmonetary Defaults
§ 133.1 Reasonable Time to Cure Defaults

In re Gillis, 333 B.R. 1, 11 (Bankr. D. Mass. 2005) (A Chapter 13 plan may provide for a balloon payment from a "cure and maintain" plan if the borrowing is feasible and in good faith. The debtors proposed a Chapter 13 plan to cure a $38,000 arrearage on their home mortgage. The entire cost of the plan of $93,400 would be funded by a $500 per month payment and a lump sum payment of $75,930 to be paid upon the refinancing or sale of their home in the last month of their 36 month plan. The proposal was feasible and the cure length was not unreasonable. The $780,00 fair market value of the property significantly exceeded the mortgage balance of approximately $600,000. It was not unreasonable to provide for the cure of this mortgage default in the last month of the plan. Based upon testimony of a mortgage broker who specialized in loans to Chapter 13 debtors, financing should be available. Section 1322(a) permits the debtor to fund a plan from future earnings or other future income, and the proceeds from the refinancing the home constituted such other income. Nor should the debtors be required to sell their home. The plan "effectuates a cure just as quickly as the Debtor and his wife can feasibly effectuate one. They have submitted all their disposable income to the plan. And they propose to refinance the property by the thirty-sixth month of their plan because the option of refinancing is not likely to be available to them much sooner than then. . . . I hold that where a debtor has a justifiable interest in keeping his or her home, a cure period is not rendered unreasonable solely because a cure could be effectuated sooner through an immediate sale.").

In re DePaolo, Nos. 04-18008-WCH, 03-20143-WCH, 2005 WL 524492, at *3–*4 (Bankr. D. Mass. Mar. 3, 2005) (unpublished) (Plans that would complete the curing of default on home mortgages by refinancing or sale in the 36th and 60th months fail to cure default within a reasonable time as required by § 1322(b)(5). Both debtors had equity in real property. DePaolo's plan would make 35 monthly payments of $321 and a balloon payment of $46,179.07 in the 36th month. Ceruti's plan would make 59 payments of $600 and a balloon payment of $111,060 in the 60th month. "What constitutes a 'reasonable time' to cure arrears under § 1322(b)(5) is a flexible concept to be determined upon the facts presented by each case. . . . ['A] reasonable time as used in § 1322(b)(5) is simply the most expeditious time, consistent with true rehabilitation, within which the debtor can cure defaults.' . . . There is no clear indication from the plans or from either DePaolo's or Ceruti's briefs why 36 and 60 months, respectively, are needed to cure the arrears. . . . [T]hat the cure of the MERS arrears in both cases are dependent upon a refinance or sale . . . in the final month of the plans, betrays that 36 and 60 months are indeed unreasonable times in which to cure arrears. Both DePaolo and

Ceruti's property have significant equity at the present and to refinance or sell in the nearer future while said equity is guaranteed would be the most consistent with true rehabilitation. For DePaolo and Ceruti to speculate as to increased equity in their homes over the terms of their plans whether through payments on their mortgages or increases in property value is effectively a gamble with MERS collateral and claims.").

b. INTEREST AND OTHER CHARGES TO CURE DEFAULTS

§ 134.1 In General: *Rake* and Contracts before October 22, 1994
§ 135.1 Section 1322(e): Contracts after October 22, 1994
§ 136.1 Rate of Interest to Cure Default: Contracts before October 22, 1994
§ 136.2 Rate of Interest to Cure Default: Contracts after October 22, 1994
§ 137.1 Undersecured Mortgage and Interest to Cure Defaults
§ 138.1 Late Charges, Attorneys' Fees, Costs and Other Charges

Henthorn v. GMAC Mortgage Corp. (In re Henthorn), No. 03-4156, 2005 WL 293646, at *2 (3d Cir. Feb. 9, 2005) (unpublished) (Debtors cannot challenge reasonableness of $845 of costs and attorney fees charged by GMAC Mortgage when confirmed plan provided that debtors would make payments to GMAC "outside of bankruptcy" and debtors sold the property a year after confirmation to satisfy the mortgage. "Section 506(b) does not apply here because the debtors excluded the GMAC mortgage obligation from their confirmed bankruptcy plan, and the challenged fees were paid to GMAC from the debtors' post-confirmation sale of the mortgaged property. . . . Having excluded their contractual relationship with GMAC from the plan . . . plaintiffs cannot later, post-confirmation, invoke § 506(b) and § 105(a) to superintend the 'reasonableness' of fees collected by GMAC from the proceeds of the sale of its collateral.").

In re Jacobs, 324 B.R. 402 (Bankr. N.D. Ga. 2005) (Condominium association is entitled to add attorney's fees, reasonable and necessary to the collection of its prepetition debt for condominium association fees; however, prepetition legal services costing $3,474.70 when the debtor was only $325 in default of Association fees is unreasonable and the Association's continued collection efforts without attempting non-judicial resolution with the debtor was not necessary when the debtor was continuing to pay monthly fees without litigation.).

In re Dunbar, No. 03-GK-03506-PMG, 2005 WL 852585 (Bankr. M.D. Fla. Mar. 30, 2005) (unpublished) (Foreclosure fees and costs claimed in the current bankruptcy case are appropriately recoverable in accordance with the note and mortgage and can be recovered by Wells Fargo/Norwest Mortgage, Inc. by reversals of amounts previously credited to the debtor's loan amount.).

In re Barron, 325 B.R. 17, 20 (Bankr. M.D. Ala. 2005) (When mortgage contract required that the debtor maintain insurance "against such risks and in such amounts as [Green Tree] may reasonably require" debtor appropriately purchased physical damage insurance for the $15,000 value of the mobile home listed in the schedules; Green Tree is not entitled to recover the cost of force-place insurance in the amount of the principal balance of its debt, $32,000. Confirmed plan provided for postpetition payments directly to Green Tree and payment of a prepetition arrearage through the Chapter 13 trustee. The debtor valued the mobile home collateral at $15,000 in the schedules and purchased a physical damage insurance policy for $15,000. When Green Tree learned that insurance coverage was limited the value, it purchased insurance coverage for the full amount of the principal balance of its debt, approximately $32,000. Bankruptcy court found that Alabama law would limit Green Tree's recovery from the hazard insurer to the value of the mobile home at the time of the loss, thus it was unreasonable for Green Tree to force-place hazard insurance in any amount greater than the $15,000 policy purchased by the debtor.).

Stewart v. Capital City Mortgage Corp. (In re Stewart), Nos. 00-00046, 02-10020, 2004 WL 3130573 (Bankr. D.D.C. Nov. 10, 2004) (unpublished) (Oversecured mortgage holder is entitled to one time contractual late charge on each late payment, actual documented costs and reasonable attorney fees for in-house counsel if

documented. Interest on late charges is not collectible because there was no provision of the note or deed of trust providing for such interest. Charges for courier service and other miscellaneous costs were mostly disallowed because of lack of documentation. Same for attorney fees—Capital City's records were incomprehensible or nonexistent and many attorney fee charges were not documented or related to matters that were decided against Capital City in the claims litigation. Interest on attorney fees was not allowed because there was no provision in the note or modified deed of trust for such interest. Capital City's failure to give notice of defaults under the deed of trust precluded it from recovering interest even on amounts it justifiably advanced for the debtor.).

c. CALCULATING PAYMENTS TO CURE DEFAULT

§ 139.1 In General

§ 140.1 Calculating Plan Payments to Cure Default on Mortgages before October 22, 1994

§ 141.1 Calculating Plan Payments to Cure Default on Mortgages after October 22, 1994

In re Wilson, 321 B.R. 222, 224, 225, 227 (Bankr. N.D. Ill. 2005) (It does not impermissibly modify the rights of a creditor secured in the debtor's residence to include in the district's model plan a provision requiring a mortgagee, upon notification by the trustee that the prepetition arrearage had been cured, to either treat the mortgage as reinstated and fully current or itemize all outstanding obligations due as of the date of the notice. In the Northern District of Illinois, the plan form required a mortgagee to either treat a mortgage as reinstated and fully current or itemize all outstanding payment obligations when notified by the trustee, thus giving the debtor the opportunity to object to any alleged discrepancy. If the mortgagee failed to respond, the mortgage would be treated as reinstated according to its original terms. GMAC Mortgage objected to this provision, arguing that it modified their rights in violation of § 1322(b)(2). The provisions of the model plan "provide a mechanism for resolving disputes over the accrual of postpetition charges assessed by a mortgage holder while the Chapter 13 case is pending. Without such a procedure, the lender may not inform the debtor of the charges, in order to avoid violating the automatic stay. . . . [The model plan] does ***not*** modify the mortgage holder's right to charge late fees, attorneys' fee, or assess other collection costs as provided in the contractual agreement between the creditor and the debtor. Instead, under the Model Plan, once the Chapter 13 trustee distributes the final payment of the arrearage cure amount, he must notify the mortgage holder that any fees and costs permitted under the loan documents, which accrued during the Chapter 13 case, must be itemized within 60 days or forfeited. . . . It is proper for the Chapter 13 Model Plan to provide this mechanism for fixing the amount of the mortgagee's postpetition attorneys' fees," The use of the model plan provisions gives the debtor certainty regarding the amount of any postpetition faults and it "does not reduce the size or timing of installment payments under the plan or under the mortgage; instead, it is a provision that provides a mechanism for the debtor to cure any defaults, as plans may do pursuant to § 1322(b)(5).").

3. OTHER HOME MORTGAGE ISSUES

§ 142.1 Demand, Matured and Balloon Loans; "Short-Term" Mortgages before October 22, 1994

§ 143.1 Demand, Matured and Balloon Loans; "Short-Term" Mortgages after October 22, 1994

§ 144.1 Prepetition Foreclosure Judgment: Curing Default, Payment in Full or Modification under § 1322(c)(2)?

Cain v. Wells Fargo Bank, N.A. (In re Cain), 423 F.3d 617, 620 (6th Cir. 2005) (A Chapter 13 debtor's ability to cure a default on a mortgage terminates at the foreclosure sale even though the redemption period had not passed at the time of the filing. The debtor filed the petition twelve days after the foreclosure sale and argued the default could be cured under § 1322(c)(1). "In our view, 'a foreclosure sale' is a single, discrete event - typically an auction at which the highest bidder purchases the property. . . . Our interpretation is consistent

with [*Federal Land Bank of Louisville v. Glenn (In re Glenn),*] 760 F.2d 1428 (6th Cir.), *cert. denied,* 474 U.S. 849 (106 S. Ct. 144, 88 L. Ed. 2d 119 (1985)). . . . We held in *Glenn* that a Chapter 13 debtor's right to cure a default on a home mortgage terminates on the foreclosure sale of the mortgaged property. . . . In so holding we expressly rejected 'the day the redemption period expires following sale' as 'the cut-off date of the statutory right to cure defaults.'").

Agee v. Fenton Poured Walls, Inc. (In re Agee), 330 B.R. 561, 567 (E.D. Mich. 2005) (Following Sixth Circuit decision of *Federal Land Bank of Louisville v. Glenn (In re Glenn),* 760 F.2d 1428 (6th Cir. 1985), the right of a Chapter 13 debtor to cure a default in a mortgage terminates at the foreclosure sale notwithstanding the fact that Michigan law required state court confirmation of the foreclosure sale. "The Sixth Circuit understood that a foreclosure sale may not be final until some further action required under state law." Even though the debtor could contest the foreclosure procedure in state court, the foreclosure sale produces a new element, the change in ownership and, accordingly, a change in expectations. This results in a bright light determination as to when a Chapter 13 debtor may cure a mortgage default.).

In re Brooks, 324 B.R. 56 (Bankr. N.D. Ill. 2005) (A "consent foreclosure" agreement between the debtors, who had entered into a contract for deed with the sellers, who had waived all rights to a deficiency judgment and which occurred prior to the date of the foreclosure sale, cutoff the debtors' rights to cure the default under Chapter 13.).

§ 145.1 Accelerating Payment of a Home Mortgage
§ 146.1 Debts Discharged in Prior Bankruptcy and Nonrecourse Debts
§ 147.1 Direct Payment of Mortgage or Payment by Trustee

Henthorn v. GMAC Mortgage Corp. (In re Henthorn), No. 03-4156, 2005 WL 293646, at *2 (3d Cir. Feb. 9, 2005) (unpublished) (Debtors cannot challenge oversecured mortgage holder's charge of $845 for costs and expenses when plan provided that debtors would make payments "outside of bankruptcy" and a year after confirmation the debtors sold the property to satisfy the mortgage. Citing *Telfair v. First Union Mortgage Corp.,* 216 F.3d 1333 (11th Cir. 200), *cert. denied,* 531 U.S. 1073, 121 S. Ct. 765, 148 L. Ed. 2d 666 (2001), "Section 506(b) does not apply here because the debtors excluded the GMAC mortgage obligation from their confirmed bankruptcy plan, and the challenged fees were paid to GMAC from the debtors' post-confirmation sale of the mortgaged property. . . . Having excluded their contractual relationship with GMAC from the plan . . . plaintiffs cannot later, post-confirmation, invoke § 506(b) and § 105(a) to superintend the 'reasonableness' of fees collected by GMAC from the proceeds of the sale of its collateral.").

V. PROVIDING FOR UNSECURED CLAIMS

§ 148.1 In General
§ 148.2 What Claims Are Unsecured Claims?

In re Haque, 331 B.R. 524, 527, 528 (Bankr. D. Mass. 2005) (A lien supporting a claim which had been discharged in the debtors' previous Chapter 7 case, could be subject to lien avoidance in the Chapter 13 and the resulting claim would be unsecured. The debtors originally filed a Chapter 7 petition and failed to avoid a creditor's judicial lien. Several years later, the debtors filed a Chapter 13 petition and then sought to void the lien. The lien of the secured creditor survived the Chapter 7 discharge even though the debtors' *in personam* liability did not. The creditor thus held a secured claim against the debtors' property at the filing of the Chapter 13 case and, upon avoiding the lien in the Chapter 13 case, pursuant to § 506(a), the claim was converted into a recourse claim against the estate. "The debtor cannot object to the unsecured claim of a nonrecourse creditor because that is the 'price of separating the claim from its security' pursuant to § 506(a). . . . As the creditor cannot foreclose upon its lien because the Debtors' Chapter 13 petition, it is essentially left with a nonrecourse debt. Because the Code provides that such a debt is entitled to an unsecured

claim against the bankruptcy estate, so too is the creditor in this action entitled to an unsecured claim against the Debtors' estate.").

A. CLASSIFICATION OF UNSECURED CLAIMS
- § 149.1 Power to Classify Unsecured Claims: Tests for Unfair Discrimination
- § 150.1 Co-signed Debts
- § 151.1 Priority Claims

1. NONDISCHARGEABLE CLAIMS
- § 152.1 In General
- § 152.2 Alimony, Maintenance and Support
- § 153.1 Student Loans
- § 154.1 Restitution, Fines and Other Criminal Problems
- § 155.1 Driving While Intoxicated
- § 155.2 Long-Term Debts
- § 156.1 Claims That Are or Might Be Nondischargeable Only in a Chapter 7 (Chapter 12, or Individual Chapter 11) Case

2. OTHER CLASSIFICATIONS
- § 157.1 Direct Payments by Debtor
- § 158.1 Medical Providers
- § 158.2 Landlords and Lessors
- § 158.3 Suppliers or Other Business-Related Creditors
- § 158.4 To Satisfy an Objecting Unsecured Claim Holder
- § 158.5 Contingent and Unliquidated Claims
- § 158.6 Based on the Size of the Claim
- § 158.7 Postpetition Claims
- § 158.8 Miscellaneous Classes of Unsecured Claims
- § 159.1 A Proposal: Simpler Rules for Classification of Unsecured Claims

B. BEST-INTERESTS-OF-CREDITORS TEST
- § 160.1 In General: Plan Payments vs. Hypothetical Liquidation

In re Cook, 322 B.R. 336, 339 (Bankr. N.D. Ohio 2005) (When liquidation value of estate exceeds amount of unsecured debt, debtor must pay interest to confirm a 36-month plan that pays 100% of unsecured claims. "[Section] 1325(a)(4) requires that unsecured creditors receive interest in plans in which a debtor's assets exceed his or her liabilities. . . . The phrase 'the value, as of the effective date of the plan' indicates that the Chapter 7 value is measured at a single moment—when the plan becomes effective. A stream of payments extending over a period of thirty-six months or longer does not equal this value because the time value of money is not realized.").

- § 161.1 Exemption Issues

In re Maronde, 332 B.R. 593, 599, 600 (Bankr. D. Minn. 2005) [BAPCPA] (A Chapter 13 debtor's asserted exemption would be reduced by the amount of funds paid to satisfy a second mortgage on his home from cash advances on credit cards and liquidation of non-exempt assets; the prepetition conversion of non-exempt assets to create a homestead exemption demonstrates a lack of good faith. Prior to filing, the debtor obtained cash advances from his credit card and sold two vehicles, applying the proceeds to reduce an outstanding balance on a second mortgage that encumbered his home. Chapter 13 trustee objected to confirmation and the debtor's exemption. Section 522(o) limits the ability of a debtor to elect a homestead exemption if the debtor, with the intent to hinder, delay, or defraud a creditor, utilizes non-exempt proceeds to increase the equity in this homestead. By utilizing language similar § 548 and § 727, Congress intended to construe the limitation on exemptions similar to the fraudulent conveyance and discharge provisions. "Here an inference of intent to hinder, delay, and defraud creditors is inescapable. Many of the badges of fraud are present:

Debtor essentially transferred assets to himself; this was done at a time when he was insolvent; and the transfers constituted substantially all of his non-exempt assets. Debtor did not merely transmute non-exempt assets into exempt assets for the purpose of bankruptcy estate planning. . . . In this case, Debtor engaged in a scheme to defraud his creditors by using his (at the time) good credit to obtain a number of credit cards, use the cash advances, . . . to pay off his equity credit line." By reducing the exemption the plan failed to satisfy the "best interest of creditors test" and failed to satisfy the good faith requirements, mandating a denial of confirmation.).

§ 162.1 Nondischargeable Claims, Guaranteed Claims and Tardy Claims
§ 162.2 Discount Rates and Interest If Liquidation Would Produce Dividend

In re Cook, 322 B.R. 336, 345 (Bankr. N.D. Ohio 2005) (Chapter 13 estate that would liquidate to pay unsecured creditors in full requires debtor to pay present value interest to satisfy the best-interests-of-creditors test in § 1325(a)(4); because *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (2004), failed to produce a legal rationale shared by five justices, *Till* is not binding precedent for the present value interest rate required by § 1325(a)(4). Looking to Sixth Circuit authority, court concludes that the current market rate of interest is the best indicator present value and the substantial equity in debtor's estate suggests that "the average available rate on a home equity loan, prime minus one-half of one percent, is more than sufficient to satisfy the requirements of 11 U.S.C. § 1325(a)(4)." Court notes that on different facts a different current market rate might be generated.).

C. DISPOSABLE INCOME TEST

§ 163.1 In General

In re Carpenter, 318 B.R. 645, 647–48 (Bankr. E.D. Va. 2003) (For § 1325(b) purposes, debtor is part of a "family unit" and it is appropriate to consider total family income and expenses, including the income and expenses of a nonfiling spouse. "While reasonable family expenses may appropriately include payment of debt of the non-filing spouse . . . the court must examine the payment in the context of the debtor's entire family budget. . . . [D]ebtor is essentially paying most if not all of the $650.00 payments on his wife's credit card debt." In the context of 30% plan, debtor failed to demonstrate good faith.).

§ 164.1 Projected (Disposable) Income

In re Caraballo Rivera, 328 B.R. 12, 17 (Bankr. D.P.R. 2005) (Compulsory retirement contributions to the Puerto Rico Teachers' Retirement Fund are not disposable income but pension loan repayments are disposable income. The debtors' Chapter 13 plan was proposed to continue contributions to the Puerto Rico Teachers' Retirement Fund and to repay a pension loan obtained from the fund. The trustee objected. The court found that the debtors' monthly "retirement contributions of $274.42 were not disposable income. . . . [T]he 6% monthly deduction is mandatory under Puerto Rico law. . . . However, the Court finds that the loan repayments of $586.06 are not reasonablely necessary expenses. . . . [T]he Teachers' Retirement Board will not setoff its loan against the repayment amount. If the loan repayments are stayed during the life of the Chapter 13 plan, the Debtors' retirement will be postponed until they pay off the loan with the required interest. . . . No adverse tax consequences resulting from the Debtors' failure to repay the loan were alleged, either. On the other hand, had the Debtors' contributed the loan payments to their plan, the dividend to the general unsecured creditors would have substantially increased from 4% to 27%.").

In re Cox, No. 04-04596S, 2005 WL 681464 (Bankr. N.D. Iowa Mar. 21, 2005) (unpublished) (To determine the available projected disposable income, nonfiling spouse's income must be considered and one way to do that is to allocate expenses to the nonfiling spouse's income in the proportion that each spouse contributes to the family income. Because debtor's income is 85% of the family income, 15% of the family expenses will be allocated to the nonfiling spouse.).

In re Watson, 299 B.R. 56, 58–59 (Bankr. D.R.I. 2003) (Parochial school tuition is not a charitable contribution for purposes of § 1325(b)(2)(A). "Regarding the ***reasonably necessary*** issue, it has been held that 'in the absence of some compelling circumstance . . . a private school education is not reasonably necessary.' . . . These Debtors have given no reason why their children need to attend parochial school, i.e., they have not shown that the public schools in their area . . . are not adequate, and neither have they suggested any other special need to do so. The only reason advanced by them is preferential . . . . Allowing these Debtors to pay parochial school tuition which over the life of the Plan will exceed the amount distributed to creditors, is to require general creditors to fund the private education of the Debtors' kids. . . . If Congress intended parochial school tuition to be included within the scope of [§ 1325(b)(2)(A)], it could, should, and would have said so . . . . Debtors propose to purchase, under the guise of a so-called religious donation, a substantial asset—the private education of their children. . . . [P]arochial school tuition payments are not 'charitable donations' within the meaning of [§ 1325(b)(2)(A)]."), *aff'd,* 309 B.R. 652, 660–63 (B.A.P. 1st Cir. 2004) ("Generally, private school tuition is not a reasonably necessary expense. . . . Appellants have failed to demonstrate, or even argue, that either of their children require private schooling due to particular educational needs, or that the public school alternative cannot adequately meet their children's educational needs. . . . [A] preference, while apparently sincere, is not sufficient to render the expense of private school tuition reasonably necessary. . . . Appellants are not making a gift for which they receive nothing in return. . . . [T]he 'charitable contribution' exception does not protect a Chapter 13 debtor's right to use disposable income for payment of private religious school tuition. . . . A government action substantially burdens a person's right to exercise his or her religion when it 'has placed a substantial burden on the observation of a central belief or practice.' . . . '[E]ducation at a parochial school is not such a [central] belief, for the Roman Catholic Church does not mandate it.'"), *aff'd,* 403 F.3d 1, 8 (1st Cir. 2005) ("We can appreciate the importance attached by the Watsons to the religious values of a parochial school education. Still, it is not impossible to inculcate those values outside of a school, and the court could reasonably conclude, in the circumstances presented here, that it would be improper to impose the added expense on the Wastons' unpaid creditors where the children's educational needs could otherwise be met in the public schools.").

In re Oimoen, 325 B.R. 809, 812 (Bankr. N.D. Iowa 2005) (The debtors' Chapter 13 plan would not be confirmed when their projected expenses included funds to pay for and maintain their college age children's automobiles. The debtors proposed a 26% dividend to unsecured creditors and the trustee objected on the grounds that the plan violated § 1325(b). The debtors owned four automobiles, two of which were driven by the debtors and two of which were driven by the college age children. "Oimoen and Elaine has no legal obligation under their dissolution decrees to supply the autos. . . . The autos are not necessary expenses of post-secondary education. The expense projection would be reduced by $510.00 per month by eliminating the expense of providing the cars.").

In re Cox, No. 04-04596S, 2005 WL 681464 (Bankr. N.D. Iowa Mar. 21, 2005) (unpublished) (Payment of $250 per month by nonfiling spouse to nonfiling spouse's daughter from a previous marriage on account of a debt that the daughter cosigned which the daughter says must be paid by her mother if her mother ever wants to see her grandchildren again is not a reasonably necessary expense for purposes of determining the projected disposable income of the family.).

In re Baird, No. 04-03738S, 2005 WL 612863, at *5 (Bankr. N.D. Iowa Mar. 10, 2005) (unpublished) (Plan fails disposable income test for many reasons, including that debtors purchased a $200,000 home and a $20,000 new car on the eve of bankruptcy and the mortgage payment and car payment are not reasonable or necessary. "I believe that Bairds should not have purchased a home for $200,000.00 at a time when they were in financial trouble . . . . [T]heir monthly mortgage payment [$1,692.06] is not reasonable. . . . Nor is the $85.00 per month amount set aside to purchase a roof repair after the completion of the proposed plan. . . . Bairds do not need to save during the plan to finance the future repair. . . . 'Personal care' in the

amount of $74.00 was not supported or justified. The projection of $3430.00 for clothing purchases was also not supported or justified. . . . Bairds' have three growing children, but that alone does not justify a $4,000.00 annual clothing allowance. Bairds' monthly payment on their car loan is $388.00. The Impala was purchased immediately before bankruptcy for $20,000.00. . . . [T]hey failed to show that less expensive cars were not available. Several expenses are projected for discretionary recreation. These include monthly projections of $42.00 for cable television, $25.00 for their internet service provider, $22.00 for Mr. Baird's YMCA dues, and $100 for general recreation. These total $189.00, and I find them excessive in light of Bairds' proposal to pay only $289.00 per month to the trustee. . . . Bairds have failed to justify the home school expense of $130.00 per month.").

§ 165.2 Debtor or Dependent
§ 166.1 Counting the Three-Year Period
§ 167.1 Debtor Engaged in Business
§ 168.1 Payment-in-Full Option

In re Cox, No. 04-04596S, 2005 WL 681464 (Bankr. N.D. Iowa Mar. 21, 2005) (unpublished) (Plan satisfies the disposable income test notwithstanding that a portion of the nonfiling spouse's income will be used to pay a debt to the nonfiling spouse's daughter from a previous marriage on account of a debt that was cosigned by the daughter which the daughter says must be paid by her mother if her mother ever wants to see her grandchildren again. Disposable income test is satisfied notwithstanding the payment to the daughter that is not reasonable or necessary because it appears that all allowed claims will be paid in full through the Chapter 13 plan, thus the inappropriate payment to the daughter is not a bar to confirmation.).

D. OTHER UNSECURED CLAIMS ISSUES

§ 169.1 Good Faith Toward Unsecured Claim Holders?
§ 170.1 Methods of Paying Unsecured Claims
§ 171.1 Curing Default and Maintaining Payments on Unsecured Debt

VI. LEASES, RENTAL AGREEMENTS AND OTHER EXECUTORY CONTRACTS

§ 172.1 Debtor Can Assume, Assign or Reject Executory Contracts

In re Tyler, No. 04-50505-BKC-RBR, 2004 WL 3199340 (Bankr. S.D. Fla. Oct. 26, 2004) (unpublished) (Debtor's month-to-month lease of a § 8 subsidized apartment did not terminate before the petition because the landlord had filed an eviction action but no judgment of eviction had been entered and under Florida law, the debtor still had a right to possession of the leasehold; debtor can assume the defaulted subsidized housing lease under § 365 because the lease termination process was not completed before the Chapter 13 filing.).

§ 173.1 Debtor Must Cure Defaults and Assure Future Performance
§ 174.1 Nonresidential Lease of Real Property

In re Alvarez, 319 B.R. 108 (Bankr. W.D. Pa. 2004) (Because commercial landlord failed to follow Pennsylvania law when he changed the locks on debtor's restaurant without proper notice, the lease did not terminated before the petition and the landlord's refusal to return the property to the debtor was a violation of the automatic stay. Landlord was ordered to return the property to the debtor and to pay "restart-up costs" equivalent to part of a month's rent. Because the debtor had not made postpetition rent payments, the debtor was ordered to make payments toward the postpetition arrearage pending confirmation of a plan.).

§ 174.2 Rejection Generates Unsecured Claim

In re Meyer, 331 B.R. 794, 797 (Bankr. E.D. Wis. 2005) (Where the damages provisions of a terminated lease were ambiguous, the court would interpret the provisions in the manner proposed by the debtor. "[W]hen a document is ambiguous, it must be strictly construed against its drafter. This is a fundamental rule of

construction. . . . The motor vehicle lease in this case is silent on who, as between the lessor and the lessee, has the right to choose the early termination damages option in computing damages. . . . Because the lease is unclear with respect to this matter, it is the lessee who has the right to select that option.").

In re Mandel, 319 B.R. 743, 745–46 (Bankr. S.D. Fla. 2005) (Landlord is entitled to administrative expense for unpaid rent between petition and rejection of residential lease because debtor claimed to be self-employed and listed apartment as his place of business. Debtor's response to landlord's motion for an administrative expense was to reject the lease. "[T]he Debtor's post-petition occupation of the Apartment has conferred an actual, concrete benefit upon the estate because the Debtor was self employed, using the Apartment in his business to generate income to pay the creditors of the estate. . . . If the landlord can prove, as has been shown in the instant case, a concrete benefit to the estate, then the landlord of a residential lease may be granted an administrative claim.").

In re Elkowni, 318 B.R. 605 (Bankr. M.D. Fla. 2004) (Upon rejection of executory contract that included an option to repurchase a lot sold to the debtor, lot was resold for more than the original sale price and seller failed to prove any damages due to the debtor's breach.).

§ 174.3 Lessor Can Demand Adequate Protection
§ 174.4 Lessor Can Accelerate Assumption or Rejection
§ 175.1 Fake Leases and Rental Agreements

In re Shores, 332 B.R. 31 (M.D. Fla. 2005) (Chapter 13 debtors' rental agreement of a portable storage building was a "true lease" when the lessee could terminate the lease at any time by providing written notice, had no obligation to the lessor subsequent to termination where the useful life of the warehouse exceeded the term of the lease, where the lessee acquired no ownership rights or equity in the warehouse during the term of the lease, and where the lessee agreed to maintain the warehouse at its current location, unattached to any real estate. Chapter 13 debtors asserted that the rental agreement was a disguised security agreement, subject to cram-down in a Chapter 13. The court disagreed holding that, unless the entire pre-petition default were cured promptly under the plan, the debtor could not assume the contract.).

§ 176.1 Land Sales Contracts and Contracts to Make a Deed

In re Brettschneider, 322 B.R. 606 (Bankr. D.S.C. 2005) (Lease agreement with option to purchase was an executory contract that terminated before the Chapter 13 petition when the debtor defaulted and Prime Financial filed an eviction proceeding in state court; because the agreement was terminated before the petition, the property was not property of the Chapter 13 estate and the eviction proceeding was not subject to the automatic stay.).

In re Elkowni, 318 B.R. 605 (Bankr. M.D. Fla. 2004) (Option to repurchase a lot sold to the debtor was an executory contract that could be rejected notwithstanding that the debtor failed to commence construction on the lot within 12 months thus triggering the seller's option to repurchase. Seller failed to properly exercise repurchase option and debtor's rejection left seller with only a rejection damages claim. Because seller could not prove any actual damages, claim for contract rejection damages was disallowed.).

In re Morris, 318 B.R. 434 (Bankr. S.D. Ill. 2004) (Debtor's rights as purchaser under contract for sale of real property became property of the Chapter 13 estate; debtor can cure defaults under the contract and maintain regular payments through a Chapter 13 plan.).

§ 176.2 When Purpose of Plan Is to Deal with an Unfavorable Contract or Lease

VII. OTHER CONFIRMATION REQUIREMENTS AND PLAN DRAFTING CONSIDERATIONS

A. GOOD FAITH

§ 177.1 In General

1. FACTORS APPROACH

§ 178.1 In General

§ 179.1 Frequency of Filing Bankruptcy—Chapter 20 and Beyond

In re Bridges, 326 B.R. 345 (Bankr. D.S.C. 2005) (Debtors' "Chapter 20" attempt was not bad faith when an initial Chapter 13 filing was dismissed because the debtors' guarantees of their SubChapter S corporation's debts exceeded the debt limits in Chapter 13 and they had no non-exempt assets in their subsequent Chapter 7. The debtors originally filed a Chapter 13 petition which case was dismissed when the debtors' obligations exceeded the debt limits of § 109. The debtors' debts were principally guarantees from their closely held corporation. The debtors then filed a Chapter 7 petition and received a discharge with no distribution to unsecured creditors. When the debtors filed a subsequent Chapter 13 case, the trustee sought dismissal arguing the filing was not in good faith. The filing of a Chapter 13 petition following a Chapter 7 discharge is not *per se* bad faith under *Johnson v. Home State Bank*, 501 U.S. 78, 111 S.Ct. 2150, 115 L.Ed 2d 66 (1991) but the filing must be filed in good faith. Here, the debtors attempted to file a repayment under Chapter 13 but were precluded by the debt limits. They were honest and made all non-exempt assets available to the Chapter 7 trustee. The debtors were proposing to dedicate a substantial portion of their disposable income to their Chapter 13 plan and no creditor objected to the debtors' treatment of their claims under the proposed plan. Considering the totality of the circumstances, there was no evidence of manipulation or planned sequence of filings that signal abuse or prejudice creditors.).

§ 179.2 Accuracy of Petition, Schedules, Statement and Testimony

In re Armstrong, 320 B.R. 97, 107, 108 (Bankr. N.D. Tex. 2005) (In the same sense that a debtor must "forthrightly disclose" assets and liabilities in the statement and schedules, a creditor must forthrightly disclose the underlying support for a proof of claim when an objection is filed by the debtor; it is not bad faith for a Chapter 13 debtor to file blanket objections to unsecured proofs of claim when the attachments required by Bankruptcy Rule 3001 are not present so long as the debtor responds appropriately when the missing documentation is supplied. "[A] debtor acts in good faith by objecting to a proof of claim that lacks the requisite documentation. The court cannot, therefore, in the abstract, establish per se rules for when a debtor acts in bad faith contrary to the requirement of § 1325(a)(3) by objecting to a proof of claim.").

§ 179.3 Burden of Administration

a. MOTIVATION IN FILING

§ 180.1 Prepetition Conduct and Misconduct—In General

In re Smith, 329 B.R. 797 (Bankr. W.D. Mo. 2005) (Confirmation of a debtor's Chapter 13 plan, proposing to pay less than 1% to the only creditor of the debtor, the victim of an arson and theft, would be denied in that the plan was not proposed in good faith. A Chapter 13 plan may be confirmed despite egregious, criminal conduct by the debtor when other factors indicate that the plan was proposed in good faith Here, the debtor's minimal payments ($50 a month), single creditor whose claim would be excepted from discharge in a Chapter 7, and minimal length of the plan (36 months) purports a finding of a lack of good faith.).

In re Goodwin, 328 B.R. 868, 871, 872 (Bankr. M.D. Fla. 2005) (Confirmation of the debtor's Chapter 13 plan, proposing to pay 20% dividend to unsecured creditors, the bulk of which was a $202,110 judgment against the debtor which had been declared nondischargeable in a Chapter 7, would be denied and the case dismissed. The Prescotts' debt was declared nondischargeable when the Debtor converted his Chapter 11 case to Chapter 7. The debtor then sought refuge in Chapter 13 and the court dismissed the Chapter 13 case. Five

years later, the debtor again filed Chapter 13 and sought to discharge the Prescotts' obligation. "Although there is nothing, per se, illegal or unlawful for a Debtor to seek refuge in a Chapter 13 and try to enjoy the liberal discharge provisions of the Chapter, this may be a red flag and indicate an intent to abuse the provisions, purpose and spirit of the Code. . . . In the present instance, the Prescotts' claim constitutes nearly 100% of the Debtor's scheduled unsecured debts. . . . This is the third attempt by the Debtor to escape the consequences and evade the payment of the Prescott judgment." The court accordingly denied confirmation of the plan in that it failed to satisfy the good faith requirement of § 1325(a)(3).).

§ 181.1 Prepetition Transfers and Transactions

In re Baird, No. 04-03738S, 2005 WL 612863, at *4 (Bankr. N.D. Iowa Mar. 10, 2005) (unpublished) (In anticipation of bankruptcy, debtors purchased a $200,000 home and a $20,000 new car. "[T]his plan is not proposed in good faith . . . . Bairds moved to Sioux City when they were well aware of their financial problems. They contemplated bankruptcy but decided that before filing, they would stabilize their living situation. They purchased a home for approximately $200,000.00 and a new car for $20,000.00. Monthly house payments, including an escrow payment for real estate taxes, are $1,692.06. Bairds have failed to justify their purchase of a $200,000.00 home when they were in financial trouble. . . . [I]t was an inappropriate decision. . . . [T]hey appeared to have made little, if any, effort to reduce the costs of housing in order to make a more substantial effort to satisfy their creditors. . . . [T]here are dependable cars, both new and used, that are less expensive than $20,000.00. The purchase of the house and the car immediately before filing this plan are evidence that the plan was not filed in good faith.").

§ 182.1 Filing on the Eve of Whatever

1) NONDISCHARGEABLE DEBTS

§ 183.1 In General
§ 184.1 Criminal Misconduct
§ 185.1 Alimony, Maintenance and Support
§ 186.1 Student Loans
§ 187.1 Separate Classification of Nondischargeable Claims and Good Faith

In re Moroney, 330 B.R. 527, 532 (Bankr. E.D. Va. 2005) (The debtors' Chapter 13 plan proposed to pay a limited amount to the Internal Revenue Service which debt had been excepted from discharge in the debtors' prior Chapter 7 case would be dismissed as filed in bad faith. The debtors' effort to discharge the tax debt "leads to the question of whether the debtor inappropriately filed for Chapter 13 relief after obtaining a discharge in Chapter 7. This procedure, often referred to as 'Chapter 20,' may be permitted under certain circumstances, but it 'ought not be permitted when the debtor improperly seeks to accomplish indirectly through sequentially filings . . . that which he cannot achieve directly under each Chapter.' *In re Taylor*, 261 B.R. 877, 884 (Bankr. E.D. Va. 2001).").

2) NATURE OF FINANCIAL PROBLEMS

§ 188.1 Greed Not Need

In re Jordan, 330 B.R. 857, 860–61 (Bankr. M.D. Ga. 2005) (Debtor's mobile home which no longer served as the debtor's residence at the time of the filing of the Chapter 13 petition, was subject to "cram-down" in the Chapter 13 plan; the Chapter 13 plan was not proposed in good faith where the sole purpose of filing was to cram-down the mobile home for the benefit the debtor's non-dependent. The debtor's plan proposed to cram-down the value of a mobile home which the debtor no longer used as a residence and "rented" to his son for the exact amount of the monthly trustee payments. There was no other collateral under the plan. Because the property was not the debtor's principal residence at the time of the bankruptcy filing, the creditor's rights were not protected from modification under § 1322(b)(2). "It appears the sole purpose of this plan is to save the property, which is not the Debtor's residence and cram-down the debt on the property for the benefit of

the non-debtor son. . . . In the present case, the Debtor has failed to establish that this expenditure is necessary for his maintenance or support or that of his dependents. The property is not being used by the Debtor for his residence, nor does it generate any income. Rather, the Debtor's non-dependent son lives there. Further, it appears the son, who is not a dependent nor a debtor, would be the only person to reap the benefits of this plan by enjoying the use the property at a crammed down value." When the purpose of the Chapter 13 plan is just to restructure the claims of secured creditors in general, it does not serve a legitimate end and confirmation should be denied.).

In re Henry, 328 B.R. 529, 540, 541 (Bankr. S.D. Ohio 2004) (A Chapter 13 plan, filed 34 days after the debtor acquired a new automobile, proposing to cram-down the automobile loan and reduce the interest rate, was a plan not proposed in good faith. The debtor purchased a Cavalier with a "sticker price" of $13,044 and borrowed money from AmeriCredit which also paid off a $6,600 balance on a trade-in car, leaving the debtor with a total obligation of $20,300. Shortly after buying the car, the debtor filed a Chapter 13 petition proposing to "cram-down" the vehicle's secured claim to $13,300 and reduce the interest rate from 21.95% to 5%. "The close proximity in time between Henry's purchase of the Grand Am and the Petition Date convince the Court that he sought bankruptcy relief in order to gain an unfair advantage over AmeriCredit and thus has not proceeded in good faith. . . . Under these circumstances, to allow the Debtor to gain an economic advantage at AmeriCredit's expense would violate the spirit of the Bankruptcy Code." The intervening circumstances, threatened criminal prosecution for a bad check, was of the debtor's own making. Debtor's minimal commitment (37 months) and minimal payback to unsecured creditors (5%) and the debtor's repeated access to the Bankruptcy Code (Chapter 7 discharge within three years before filing) support a finding of a lack of bad faith. Even though the plan may properly "value" the secured claim of AmeriCredit, the plan cannot be confirmed as proposed without the requisite good faith.).

§ 189.1 Executory Contracts
§ 190.1 Tax Problems
§ 191.1 Payment of Attorney Fees
§ 192.1 Special Circumstances: The Unusually Worthy or Needy Debtor

b. DEGREE OF EFFORT

§ 193.1 Economic Components of Good Faith—In General

In re Paasch, 331 B.R. 919, 923 (Bankr. C.D. Cal. 2005) (A Chapter 13 plan to be funded by postpetition borrowing cannot be confirmed because the plan is not proposed in good faith. The debtor proposed to amend his Chapter 13 plan to pay administrative and priority claims in full and 4.93% to unsecured creditors. This plan would require payments of $2,399 per month but the debtor acknowledged he could only afford payments of $508 per month. The debtor proposed to borrow from one of his customers in order to fund the amended plan, proposing to repay this loan after the completion of the Chapter 13. The trustee objected. "Paasch's proposal in this case would barely make a start toward the fresh start contemplated by Chapter 13. Upon completion of the plan, Paasch would still owe nearly $50,000 in new debt undertaken to pay off his old debt. Furthermore, it is not apparent how Paasch could pay this new debt. Given his present monthly disposable income of $508, it would take ten additional years to pay off the new loan. This total of thirteen years far exceeds the statutory limit of five years for a Chapter 13 plan and comes close to the situation of indentured servitude that debtors frequently suffered under Chapter XIII. . . . There is no provision in Chapter 13 that explicitly prohibits a debtor from borrowing money for Chapter 13 plan payments. However, the court finds that a Chapter 13 plan that proposes to fund more than 70% of the payments by borrowing money fails the 'good faith' test, and cannot be confirmed.").

In re Vick, 327 B.R. 477, 487 (Bankr. M.D. Fla. 2005) (The amount a debtor is proposing to repay creditors in a Chapter 13 plan is a factor to consider in determining good faith. The debtor, an executive/stockholder of a glass company, converted his Chapter 7 case to a Chapter 13 case when his ex-spouse contested the dischargeability of her claim. The debtor's Chapter 13 plan proposed to pay less than 10 cents on the dollar

over 36 months and the debtor deliberately understated his capacity to earn income. The court denied confirmation of the plan and dismissed the case, noting that "[t]he substantiality of the repayment to the unsecured creditors, however, is certainly an important factor to consider in determining good faith. . . . The key to good faith is whether the debtor is exercising his best efforts or, instead, is merely abusing the system to delay or avoid payment of legitimate claims." The debtor, seeking to avoid any obligation to his former spouse, understated his income, spent a tax refund without a court approval, made every attempt to complicate the litigation with his ex-spouse, and had a long history of refusing to pay obligations. His efforts to pay little or nothing in exchange for a discharge are a manifestation of a lack of good faith.).

§ 194.1 Duration of Plan

In re Baird, No. 04-03738S, 2005 WL 612863, at *5 (Bankr. N.D. Iowa Mar. 10, 2005) (unpublished) (Bankruptcy court refuses to confirm a three year plan that includes keeping a $200,000 house and a $20,000 new car both purchased on the eve of filing the Chapter 13 case. "I will not confirm a three-year plan which is based on Bairds' staying in their present home. I cannot say whether I would confirm a five-year plan under the same condition.").

§ 195.1 Percentage of Payment
§ 196.1 Income, Expenses, Lifestyle and Luxuries

In re Carpenter, 318 B.R. 645, 647–48 (Bankr. E.D. Va. 2003) (Confirmation of 30% plan is denied on good faith grounds when budget included a $650 monthly payment for credit card debt of nonfiling spouse. "[D]ebtor has not satisfied his burden to demonstrate the plan was filed in good faith. He effectively proposes to prefer other debt to the claims of his unsecured creditors." The $650 payment was more than the $493 per month necessary to make minimum payments on the nonfiling spouse's credit card debt of $32,031. "While reasonable family expenses may appropriately include payment of debt of the non-filing spouse . . . the court must examine the payment in the context of the debtor's entire family budget. . . . [D]ebtor is essentially paying most if not all of the $650.00 payments on his wife's credit card debt.").

2. THE GENERIC APPROACHES TO GOOD FAITH

§ 197.1 Smell Tests

B. FEASIBILITY

§ 198.1 Able to Make Payments and Comply with Plan

In re Cox, No. 04-04596S, 2005 WL 681464, *4 (Bankr. N.D. Iowa Mar. 21, 2005) (unpublished) (Confirmation is denied because of the absence of evidence with respect to the amount of arrears on a home mortgage debt and the source of payment. Debtor asserted that he and his non-filing spouse were delinquent in their payments on a home mortgage debt and that they would cure the debt from a tax refund and other sources through payments directly to the mortgage holder. "Absent evidence on the arrears and sources of payment, the court is unable to determine that the amended plan is feasible or whether it will require payments from monthly disposable income which would adversely affect the 'full payment' distribution to creditors holding unsecured claims.").

In re Brown, 319 B.R. 898, 902–03 (Bankr. M.D. Ga. 2004) (Plan fails the feasibility requirement in § 1326(a)(6) because full payment of attorney fees in advance of payments to secured creditors will delay distributions to a car lender for 10 months after the petition and bankruptcy court would likely have to grant the car lender relief from the stay after confirmation which would tube the plan. "[Section] 1325(a)(6) requires the Court to be realistic about how this case is likely to unfold. If ALM were to seek stay relief post-confirmation in this case, the Court would likely be required to grant such relief. . . . Debtor will not be allowed to propose a plan that withholds payments to ALM for almost a year while Debtor continues to benefit form the use of ALM's depreciating collateral and when the accumulation of preconfirmation payments does

not amount to enough to pay attorney fees proposed for payment in full at confirmation. When one or more additional months of debtor payments are required to fully fund the attorney fees claim, the creditor secured by a depreciating asset such as the automobile in this case is likely to be irreparably harmed. If stay relief is granted, the chances of Debtor being able to make all payments under the plan are slim.").

C. LENGTH OF PLAN

§ 199.1 General Rule: Three Years, More or Less
§ 200.1 How to Calculate the Length of the Plan
§ 201.1 Cause for Extension beyond Three Years
§ 202.1 Payment of Claims beyond Length of Plan

D. MISCELLANEOUS PLAN PROVISIONS AND CONFIRMATION CONSIDERATIONS

§ 203.1 Plan Complies with Bankruptcy Code
§ 203.2 Filing Fee Payment Requirement
§ 203.3 Submission of Future Income
§ 204.1 Providing for Postpetition Claims
§ 204.2 Order of Payments to Creditors

In re Brown, 319 B.R. 898, 902–03 (Bankr. M.D. Ga. 2004) (Feasibility requirement in § 1325(a)(6) prohibits confirmation of plan that would pay attorney's fee in full in advance of payments to secured creditors with the result that car lender would wait 10 months after the petition before receiving payments. "A debtor with limited means may be unable to propose payment in an amount sufficient to pay attorney fees in full under the plan (as routinely proposed in this District), make separate installment payments for filing fees and, at the same time, to provide adequate protection to a creditor secured by depreciating collateral. The attorney fee priority may conflict with the necessity for adequate protection. The Court is mindful of the friction between these requirements and regularly approves plans that compromise both requirements by paying a portion of attorney fees at confirmation with the balance paid from future plan payments. Rather than create a rigid formula, the Court prefers to consider the question on a case-by-case basis . . . . Debtor will not be allowed to propose a plan that withholds payments to ALM for almost a year while Debtor continues to benefit form the use of ALM's depreciating collateral and when the accumulation of preconfirmation payments does not amount to enough to pay attorney fees proposed for payment in full at confirmation. When one or more additional months of debtor payments are required to fully fund the attorney fees claim, the creditor secured by a depreciating asset such as the automobile in this case is likely to be irreparably harmed.").

§ 205.1 Special Drafting Considerations for Debtor Engaged in Business
§ 206.1 Special Drafting Considerations for Debtor with Seasonal or Irregular Income
§ 207.1 Retention of Property of the Estate: Overcoming 11 U.S.C. § 1327(b)

Henthorn v. GMAC Mortgage Corp. (In re Henthorn), No. 03-4156, 2005 WL 293646, at *2 (3d Cir. Feb. 9, 2005) (unpublished) (When confirmed plan did not overcome the vesting effect in § 1327(b) and plan provided that debtor would make payments to GMAC Mortgage "outside of bankruptcy," debtor could not challenge reasonableness of $845 in costs and attorney fees collected by GMAC when the debtor sold the real property one year after confirmation. "The plan proposed by the Henthorns provided that they would continue making payments on the GMAC mortgage (which was not in arrears) outside of bankruptcy, and that upon plan confirmation the mortgaged property would re-vest in the Henthorns. In other words, the mortgaged property was excluded from the bankruptcy estate, and from the oversight of the bankruptcy trustee and the Bankruptcy Court. . . . Section 506(b) does not apply here because the debtors excluded the GMAC mortgage obligation from their confirmed bankruptcy plan, and the challenged fees were paid to GMAC from the debtors' post-confirmation sale of the mortgaged property. *See Telfair v. First Union Mortgage Corp.*, 216 F.3d 1333, 1339 (11th Cir. 200), *cert. denied,* 531 U.S. 1073, 121 S. Ct. 765, 148 L. Ed. 2d 666 (2001).").

§ 208.1 Miscellaneous Objections to Confirmation

In re Pike, 320 B.R. 222, 225 & n.8 (Bankr. D. Me. 2005) (28 U.S.C. § 157(b)(2)(B) is not a barrier to confirmation of a Chapter 13 plan in which the only creditor holds a disputed, unliquidated wrongful death claim of an unknown amount. "[T]he ***amount*** of the Estate's claim is simply irrelevant. . . . Estimation of claims, if necessary, for purposes of confirmation is a core matter. . . . Confirming Pike's plan requires neither estimating or liquidating the Estate's claim. . . . And even if it did, . . . it is clear that the claim could be estimated for purposes of ***confirmation***, just not ***distribution***. . . . Pike's eligibility for Chapter 13 relief, his good faith, the lawful level of his plan contributions, and all other elements of confirmation are conceded." In a footnote, "since the Estate's claim is the ***only*** claim that will be receiving plan dividends, it is impossible to conceive how its liquidation will be necessary for distribution purposes, either. The Estate will receive all plan distributions, less the trustee's commission.").

VIII. PRECONFIRMATION MODIFICATION OF PLAN

§ 209.1 Timing, Procedure and Form
§ 210.1 To Correct Errors in Original Plan
§ 211.1 To Reflect Changed Circumstances
§ 212.1 To Deal with Objections to Original Plan
§ 213.1 To Provide for Postpetition Creditors
§ 214.1 Effect of Preconfirmation Modification on Prior Acceptance or Rejection of the Plan
§ 215.1 Opposing a Preconfirmation Modification of the Plan

IX. CONFIRMATION PRACTICE AND PROCEDURE

A. HEARING ON CONFIRMATION

§ 216.1 Timing of Hearing on Confirmation
§ 217.1 Burden of Proof
§ 218.1 Discovery and Preparation for Confirmation Hearing

In re Moore, 319 B.R. 504, 517 (Bankr. S.D. Tex. 2005) (Court warns the debtor bar that debtor's counsel must be prepared to prosecute confirmation of a Chapter 13 plan on the first date set for the confirmation hearing else the case may be dismissed for delay that is prejudicial to creditors. Court explains that the common practice in the Southern District of Texas is to continue confirmation hearings when the trustee does not recommend confirmation or there is an objection to confirmation. Often Chapter 13 confirmation hearings are continued several times over several months. Because the court schedules over 200 cases per month for Chapter 13 hearings, the continuing of Chapter 13 confirmation hearings has reduced the effectiveness and economy of practice in the district. The court warns that "debtor and counsel must be prepared to carry the burden of proof for plan confirmation on the assigned date of the confirmation hearing. . . . Failure to review the claims docket, failure to file timely objections to claims and motions to value collateral, and any other failure to comply with the Initial Order are very substantial factors that the Court will consider in determining whether there is unreasonable delay prejudicial to creditors." Preparation for the confirmation hearing includes that motions to value collateral and objections to claim are filed at least 20 days before the hearing on confirmation.).

B. OBJECTING TO CONFIRMATION

§ 219.1 Standing to Object
§ 220.1 Time for Filing Objections
§ 221.1 Form of Objection

C. CHALLENGING THE GRANT OR DENIAL OF CONFIRMATION

§ 222.1 Too Many Choices

Ruehle v. Educational Credit Mgmt. Corp. (In re Ruehle), 307 B.R. 28, 31, 36–37 (B.A.P. 6th Cir. 2004) (Four years after confirmation and 21 months after discharge, confirmation order is vacated because it contained a provision that "excepting the aforementioned educational loans from discharge will impose an undue hardship on the debtor and the debtor's dependents. Confirmation of debtor's plan shall constitute a finding to that effect and that said debt is dischargeable." "[T]he bankruptcy court did not revoke the Debtor's plan . . . . [T]he order confirming the plan is being vacated pursuant to an entirely different procedure. There are no time limits on vacating an order that is void. The Debtor took her chances in trying to discharge a non-dischargeable debt by a process that is inconsistent with the Bankruptcy Code and Bankruptcy Rules. She will not now be permitted to argue that she relied on the confirmation order that she knew contained provisions that were inconsistent with the Bankruptcy Code and Bankruptcy Rules. She must now suffer the consequences of her ill advised actions. . . . [W]e choose to follow [*Banks v. Sallie Mae Servicing Corp. (In re Banks),* 299 F.3d 296 (4th Cir. 2002),] rather than [*Andersen v. UNIPAC-NEBHELP (In re Andersen),* 179 F.3d 1253 (10th Cir. 1999),] and [*Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee),* 193 F.3d 1083 (9th Cir. 1999),] and AFFIRM the decision of the bankruptcy court to vacate its order confirming the Debtor's chapter 13 plan on the basis that ECMC was denied due process by the Debtor's attempted discharge of her student loan through her plan."), *aff'd,* No. 04-3525, 2005 WL 1473934, at *3–*4 (6th Cir. June 23, 2005) ("This case, unlike [*Andersen v. UNIPAC-NEBHELP (In re Andersen),* 179 F.3d 1253 (10th Cir. 1999)] and [*Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee),* 193 F.3d 1083 (9th Cir. 1999)], fails to reflect that the original creditor or its successor, Educational Credit, had reasonable notice of the proposed plan or an opportunity to be heard prior to the confirmation. . . . [U]nder these circumstances, the challenge to the validity of the confirmation order was properly brought under Rule 60(b)(4), which permits relief from judgment when that judgment is void . . . . We conclude that the decisions in [*Banks v. Sallie Mae Servicing Corp. (In re Banks),* 299 F.3d 296 (4th Cir. 2002),] and [*Hanson v. Educational Credit Management Corp. (In re Hanson),* 397 F.3d 482 (7th Cir. 2005),] represent an evolving majority view that a purported 'discharge by declaration' of student loan debt is not only invalid but void and, therefore, subject to being set aside upon a Rule 60(b)(4) motion.").

In re Barber, 318 B.R. 921 (Bankr. M.D. Ga. 2004) (Trustee's Rule 59 motion to "reconsider" confirmation of a Chapter 13 plan is denied because trustee did not demonstrate a change in controlling law, did not demonstrate any new evidence that was not previously available and there was no clear error or manifest in justice in the ruling that the transfer of property from the debtors to their son was in good faith and not fraudulent.).

In re Carr, 318 B.R. 517, 520–21 (Bankr. W.D. Wis. 2004) (Citing Rule 60 and *In re Escobedo,* 28 F.3d 34 (7th Cir. 1994), Wells Fargo is entitled to relief from confirmation order that bifurcated its mortgage on the debtor's principal residence in violation of § 1322(b)(2). Plan confirmed without objection treated Wells Fargo's nonpurchase money mortgage as partially secured. Many months after confirmation, Wells Fargo moved to vacate the confirmation order. "The situation in this case is different factually, but not different in principal from the one presented in *Escobedo,* where '[the courts] refusal to apply res judicata principles in that case resulted from the fact that the debtor's original plan failed to comply with the mandatory provisions of 11 U.S.C. § 1322(a)(2).' . . . It is the policy of this Court to confirm plans quickly so that creditors get paid quickly. . . . Our policy can work only if the confirmation can be reviewed and the order vacated when the claims actually filed alter the assumptions on which the confirmation was granted. To that extent, the confirmation order is effectively provisional. A plan whose terms violate the Code cannot be allowed to trump a presumptively valid secured claim. Section 1322(b)(2) is mandatory in restricting the right to modify the claim of a secured creditor whose sole security is the debtor's principal residence. As in *Escobedo,* the provisions of the plan in this case do not comply with the mandatory provisions of the Code. Therefore, the result in this case must be the same as the result in *Escobedo*—the debtor's plan confirmation must be deemed nugatory. In *Escobedo,* the Seventh Circuit appears to have rejected the 'you snooze, you lose' doctrine. There

would be no justice in applying that doctrine here. Wells Fargo's motion to vacate the confirmation order must be granted.").

§ 224.1 Revocation of Confirmation

Barcus v. Schneider (In re Schneider), No. 03-35735, 2005 WL 1394997, at *1 (9th Cir. June 14, 2004) (unpublished) (Creditor cannot use a motion to dismiss filed more than a year after confirmation as an end-run of the 180-day time limit for requesting revocation of an order of confirmation procured by fraud under § 1330(a). Chapter 13 plan was confirmed on April 11, 2001. In November 2001, a handwriting expert declared that the debtor had forged a signature that the debtor had testified was genuine. A year later, in November 2002, a party to the forgery transaction filed a motion to dismiss the Chapter 13 case. "The Bankruptcy Code establishes the usual relationship between revocation and dismissal. If the court revokes an order of confirmation that was procured by fraud, the court may then dismiss the case. . . . Barcus seeks to bypass revocation, which is time-barred, and jump to dismissal. We decline to circumvent the Bankruptcy Code's procedures for addressing fraudulent procurement of a Chapter 13 confirmation, especially when doing so would fly in the face of an express time limitation. The 180-day limit for filing a request for revocation of a Chapter 13 plan, 11 U.S.C. § 1330(a), bars Barcus's motion to dismiss, which was filed approximately a year after the 180 days had run.").

Vicenty v. Sandoval (In re Sandoval), 327 B.R. 493, 511–12 (B.A.P. 1st Cir. 2005) (Creditors cannot use revocation of confirmation under § 1330 to challenge the debtor's eligibility for Chapter 13 relief when the creditor's motion was filed more than 180 days after confirmation. "[A]lthough an order of confirmation may in some cases be revoked for bad faith or fraud, requests for revocation on these grounds must be made within 180 days after the date of the entry of the order. . . . In this case, the order of confirmation was entered on October 13, 2000, and the Creditors did not seek revocation of the order until January 17, 2003 . . . . There is no provision in the Code or Rules allowing an extension of time for raising objections based on fraud or bad faith.").

§ 225.1 Appeal of Grant or Denial of Confirmation

Watson v. Boyajian (In re Watson), 309 B.R. 652 (B.A.P. 1st Cir. 2004) (Order denying confirmation that did not dismiss Chapter 13 case is not appealable as of right; applying criteria for review of interlocutory orders in 28 U.S.C. § 158(a)(3), question whether private church school tuition was reasonably necessary for purposes of § 1325(b)(2) is a controlling question of law with respect to which there are substantial grounds for difference of opinion and disposition would materially advance termination of the litigation. Debtors granted leave to appeal the denial of confirmation notwithstanding that bankruptcy court granted time for debtors to amend plan.), *aff'd,* 403 F.3d 1 (1st Cir. 2005) (Although bankruptcy court's order denying confirmation of the plan was not final because the debtors could propose an alternate plan, subsequently, the bankruptcy court entered an order dismissing the case and the later order rendered the denial of confirmation final for appellate purposes.).

PART 5: POSTCONFIRMATION PRACTICE

§ 226.1 Summary of Part 5

I. STATUTES AND RULES

§ 227.1 11 U.S.C. § 1325(c): Income Deduction Orders

§ 227.2 11 U.S.C. § 1327: Effects of Confirmation

In re Bryant, 323 B.R. 635, 639, 642, 643, 645 (Bankr. E.D. Pa. 2005) (A Chapter 13 plan which provided to pay Ocwen Bank its claim "in full" with a fixed amount of $41,471.59 would be binding upon the creditor and the creditor's lien would be released notwithstanding the fact that its actual claim securing the debtor's home was $67,736.17 "with arrearages stated at $41,471.59." The debtor's proposed Chapter 13 plan

provided that HUD Loan Management would have its "Bal Paid in Full $41,471.59." The plan also provided that HUD would retain its lien securing the claim, and the plan was confirmed without objection. A mortgage claim was later filed for $67,736.17 and the debtor received a discharge under the plan. When the mortgage creditor commenced foreclosure action, the debtor filed a second Chapter 13 case and objected to the claim, arguing that it had been discharged in the prior case. It was not disputed that the creditor received adequate notice of its proposed treatment. "A secured creditor which fails to object to confirmation will be deemed to have accepted the plan. *Szostek* [*Szostek,* 886 F.2d 1405 (3d Cir. 1989)] makes clear that plans that would not be confirmable due to provisions that do not conform to applicable law will nonetheless be given effect if an objection is not raised prior to entry of the confirmation order." Funds were forwarded to the creditor were not adequate to pay its claim in full. However, the mortgage creditor did not object to the plan which is a contract which can be enforced according to its terms. The notice of the debtor's plan was adequate to put the creditor on notice that the debtor was seeking to pay, in full, the amount of its secured claim in the amount specified. "[A] creditor with timely and unambiguous notice that its claim will be compromised and discharged may not ignore the confirmation process and fail to object notwithstanding that there either is no bar date for filing a claim or the time for filing a claim has yet to expire." The debtor's plan clearly made specific provision for the creditor's claim and its lien. The plan dictated that the lien which secured the debt would be subject to discharge upon full satisfaction. "Had claimant been vigilant and objected to the Plan as not providing for full payment, a contested matter would have resolved the amount of the secured claim. However, Claimant was silent, and the Plan was confirmed. Upon confirmation all lien rights were defined by the Plan and upon completion of the payments under the Plan in 1999, the identified debt, i.e., $41,471.59, was paid in full. Thus, the lien that secured that debt and which was retained for the life of the Plan did not survive the Debtor's discharge.").

Vicenty v. Sandoval (In re Sandoval), 327 B.R. 493 (B.A.P. 1st Cir. 2005) (Confirmation of Chapter 13 plan is res judicata with respect to the debtor's eligibility under § 109(e); creditors cannot challenge eligibility after confirmation by motion to dismiss.).

Countrywide Home Loans v. Davis (In re Davis), Nos. BAP WO-04-057, 2005 WL 1278096, at *1 (B.A.P. 10th Cir. May 26, 2005) (unpublished) (Order in adversary proceeding that confirmation did not invalidate Countrywide Home Loan's lien was precluded by prior bankruptcy court orders denying motion for relief from the stay when prior orders found that adversary proceeding was not required to invalidate liens. Confirmed plan provided "Countrywide Home Loans is secured by an unperfected mortgage that will be avoided upon plan completion." Countrywide did not object to confirmation. Nine months after confirmation, Countrywide filed a motion for relief from the stay alleging that its lien survived confirmation because an adversary proceeding was required to avoid its lien. Bankruptcy court denied motion for relief from the stay in two orders finding that Rule 7001 was not applicable and an adversary proceeding was not required. Several months later, Countrywide filed an adversary proceeding seeking a declaration of the validity of its lien. Bankruptcy court (different judge) held that confirmation of the plan ***did not*** invalidate Countrywide's lien. On further appeal, BAP concluded that the adversary proceeding was an attempted collateral attack on the prior rulings that an adversary proceeding was not required to invalidate Countrywide's lien.).

Salt Creek Valley Bank v. Wellman (In re Wellman), 322 B.R. 298, 301–02 (B.A.P. 6th Cir. 2004) (Confirmation precludes relief from the stay that is inconsistent with the plan notwithstanding that motion

for stay relief was filed before confirmation and decided after confirmation. "[T]he provisions of the Debtors' confirmed plan bound the Bank and pretermitted its motion from relief from stay, absent a post-confirmation default in carrying out the plan. . . . Once a plan is confirmed, it is treated as the exclusive and transcendent relationship between the debtor and the creditor. . . . When a debtor and creditor have been bound to a confirmed plan, an action by the creditor seeking relief that is incompatible with the plan is properly overruled.").

Broadnax v. Department of Veteran Affairs Washington Mutual Bank, No. Vic.A. 2:04CV693, 2005 WL 1185809 (E.D. Va. May 19, 2005) (Plan confirmed in 2000 precludes subsequent district court litigation in which debtor assets that mortgage holder imposed improper charges and improperly accounted for payments prior to confirmation; unconfirmed plan in subsequent Chapter 13 case has no res judicata or collateral estoppel effect in litigation between debtor and mortgage holder.).

In re Searcy, 333 B.R. 617, 623 (Bankr. D. Mass. 2005) (Adequately noticed Chapter 13 plan may modify the rights of a secured creditor and fix the amount to be paid, a separate objection to a claim is not necessary. The debtor's Chapter 13 plan, although confusing, proposed to discharge a deficiency on a cross-collateralized mortgage by paying less than the value of the equity remaining on the surviving property. Approximately fourteen years after the filing of the Chapter 13 plan, its confirmation, and completion, debtor sought to enforce these provisions. "[P]rovisions in an *adequately noticed* Chapter 13 plan which modify the rights of a secured creditors are the functional equivalent of a claim's objection under § 502(a). It does not matter, substantively, which route the debtor takes so long as the creditor is informed of the itinerary and has an adequate opportunity to respond either by defending its proof of claim or by pressing an objection to the plan." Here, however, the plan provisions were conflicting so notice would not be adequate. The delay in enforcing its rights, however, resulted in the application of laches, compelling the court to prohibit the collection of any further payment on the obligation.).

In re Payne, 329 B.R. 815, 818, 819 (Bankr. N.D. Ohio 2005) (Where a mortgage creditor could not demonstrate its connection with the original mortgagee, and could not explain how and why it applied payments in a Chapter 13 case, the claim was not entitled to presumption of validity and would be disallowed. The Chapter 13 debtors contested Aurora's mortgage claim when it asserted a $15,813 arrearage. The documents attached to the claim did not show that Aurora either owned or serviced the contract, the mortgage having originally been granted to Ameriquest. "There is nothing in the documents to show that the loan documents were ever transferred to Aurora. As a result, the claim is not entitled to a presumption of validity. . . . When a claim is not presumed to be valid, the creditor must prove the existence and validity of the debt." The parties had stipulated that Aurora was the loan servicer, but Aurora failed to demonstrate how it derived the arrearage. "A review of Aurora's spreadsheet for this account shows that Aurora repeatedly failed to comply with the contract and also failed to apply payments received from the Chapter 13 trustee to the debtor's pre-petition arrearage. Starting in June 2000, there are more than 60 occasions where Aurora charged the debtor's account for what are described as inspection fees, foreclosure attorney fees, foreclosure attorney costs, foreclosure title search, bankruptcy fees, statutory expenses, and foreclosure costs. . . . Also, on seven occasions, Aurora took funds sent to it by the Chapter 13 trustee which should have been applied to pre-petition arrearages and instead applied the funds to its own attorney fees, foreclosure costs, and inspection fees. . . . Aurora just kept piling on extra charges which left the debtor baffled as to how her account got into its current state." In the absence of any accounting, and without a presumption of validity, the court sustained the objection. Aurora was permitted to file an amended claim that cured the defects found by the court.).

In re Stiller, 323 B.R. 199, 205–15 & n.23 (Bankr. W.D. Mich. 2005) (Distinguishing *Fireman's Fund Mortgage Corp. v. Hobdy (In re Hobdy)*, 130 B.R. 318 (B.A.P. 9th Cir. 1991), *Fleet Real Estate Funding Corp. v. Fewell (In re Fewell)*, 164 B.R. 153 (Bankr. D. Colo. 1993) and *Universal American Mortgage Co. v. Bateman (In re Bateman)*, 331 F.3d 821 (11th Cir. 2003), $4,000 arrearage amount stated specifically by

the debtors with respect to a mortgage holder in the confirmed plan was binding on the mortgage holder with respect to the amount necessary to be paid to cure the default under the mortgage notwithstanding that the mortgage holder filed a proof of claim eight days after confirmation asserting an arrearage of $10,510.23. "A confirmed plan is res judicata with respect to the provisions of that plan. . . . U.S. Bank is bound by the terms of the Debtors' confirmed plan concerning the Section 1322(b)(5) cure of U.S. Bank's arrearage. . . . [W]hile it may be customary for parties, practitioners, and even the courts to speak of a home mortgage arrearage as a 'claim' that must be paid by the debtor as part of his Chapter 13 plan, it is not a claim as that term is used in the context of claims allowance under Section 502. A lender's claim for purposes of Section 502 is the amount owed to that creditor under the terms of the lending agreement as of the date of the debtor's bankruptcy petition. . . . [T]he cure of a home mortgage lender's arrearage under Section 1322(b)(5) is a confirmation issue, not a claims allowance issue. The amount of the arrearage and the time within which it is to be cured has everything to do with whether the debtor's plan can meet the confirmation standard of Section 1325(a)(1) with respect to the debtor's proposed treatment of the home mortgage lender and nothing to do with the amount of the home mortgage lender's Section 502 claim (*i.e.*, (1) unpaid principal balance, plus (2) secured but unpaid interest, plus (3) other unpaid charges). . . . [T]he July 14 plan unequivocally states that the amount of the arrearage to U.S. Bank for purposes of Section 1322(b)(5) is $4,000.00. U.S. Bank had an opportunity to object . . . . I have no choice but to enforce the confirmed plan as written. . . . U.S. Bank is at fault for the predicament in which it now finds itself. . . . U.S. Bank is barred under the plan from enforcing its rights under its loan contract and mortgage so long as Debtors comply with the Section 1322(b)(5) cure provisions included in that plan. However, the amount of U.S. Bank's claim against Debtors remains unaffected. While U.S. Bank's failure to object to Debtors' plan may delay recovery of the amount it is owed by Debtors under their contract, the fact remains that Debtors still owe U.S. Bank the full amount due under their loan agreement with U.S. Bank." In a footnote, "The practical effect of Debtors' apparent understatement of U.S. Bank's arrearage in their plan is to create a 'balloon' that must be accounted for at the conclusion of the promissory note's term. While such a balloon might be inconsistent with the original terms of the promissory note, it is nonetheless a permissible modification because of the Section 1322(b)(5) exception.").

In re Sullivan, 321 B.R. 306, 308 (Bankr. M.D. Fla. 2005) (Mortgage holder is bound by confirmed plan notwithstanding consensual relief from the stay before confirmation. "'[t]he pre-confirmation lift stay order terminated the automatic stay under 11 U.S.C. § 362(a), but does not change the binding effect of an order of confirmation . . . . The Court agrees with the holding in [*Green Tree Financial Corp. v. Garrett (In re Garrett)*, 185 B.R. 620 (Bankr. N.D. Ala. 1995)]. A confirmation order which provides for payments to a creditor is binding upon that creditor notwithstanding the fact that the creditor obtained relief form the automatic stay prior to confirmation of the plan.").

§ 230.1 11 U.S.C. § 1327(b): Vesting Effect on Property of Estate

Henthorn v. GMAC Mortgage Corp. (In re Henthorn), No. 03-4156, 2005 WL 293646, at *2 (3d Cir. Feb. 9, 2005) (unpublished) (Because plan provided that debtor would continue making home mortgage payments directly to GMAC Mortgage, debtor cannot challenge $845 charge for costs and attorney fees collected by GMAC when the debtor sold the real property and satisfied the mortgage one year after confirmation. "The plan itself excluded the mortgaged property and the corresponding lien agreement with GMAC from bankruptcy, and the property re-vested in plaintiffs upon confirmation. 11 U.S.C. § 1327(b). Plaintiffs then sold the property, and satisfied their obligations to GMAC, 'outside' of bankruptcy. . . . Having excluded their contractual relationship with GMAC from the plan—a decision that, among other things, allowed plaintiffs to sell the mortgage property without oversight from the Bankruptcy Court, payment of bankruptcy trustee's fees, or remittance of any profits on the sale to creditors with stripped liens—plaintiffs cannot later, post-confirmation, invoke § 506(b) and § 105(a) to superintend the 'reasonableness' of fees collected by GMAC from the proceeds of the sale of its collateral.").

In re Santangelo, 325 B.R. 874, 879, 882 (Bankr. M.D. Fla. 2005) (Even though the debtors' Chapter 13 plan provided that pre and post-petition property of the debtors would be deemed property of the estate after confirmation, a claim which the debtors had in a class action against Fairbanks Capital was not part of the payments used to be made creditors and vested back in the debtors at confirmation; the barring of the debtors from participating in the class action for failure to file a claim did not violate the automatic stay. Debtors were victims and members of a class in a lawsuit brought against Fairbanks Capital. The debtors' Chapter 13 plan provided a 100% dividend to unsecured creditors but provided "all pre and post-petition property of the debtor(s) herein, including but not limited to wages or other earnings, shall be deemed property of this estate in bankruptcy and as such shall be protected post-confirmation and pre-confirmation." Under Eleventh Circuit law, however, only assets needed to make payments under the plan are protected. *See Telfair v. First Union Mortgage Corp.*, 216 F.3d 1333 (11th Cir. 2000). Thus, the debtors' claims against Fairbanks were no longer property of the estate because the debtors were not relying upon any recovery from Fairbanks to pay any portion of their Chapter 13 plan. "Pursuant to the decision in *Telfair*, when property is not necessary to the fulfillment of the plan, the property is revested in the debtor and no longer constitutes property of the estate." Accordingly, any conduct or activity taken in the class action did not violate the automatic stay.).

In re Grice, 319 B.R. 141, 146 (Bankr. E.D. Mich. 2004) (Because plan provided that all property of the estate vested in the debtor at confirmation, at hardship discharge, bankruptcy court rejects trustee's argument that actual income in excess of projected disposable income should have been paid into the plan. "The Court rejects the contention that the Debtor has somehow misappropriated property of the estate. The Debtor's plan . . . provides that, under § 1327(b) of the Bankruptcy Code, all property of the estate vested in the Debtor upon confirmation. . . . The Debtor's income only became property of the estate to the extent that the income was projected disposable income. . . . The additional income, which was not projected as of confirmation, never became projected disposable income and remained vested in the Debtor. Neither the Code nor the confirmed plan obligated the Debtor in this case to pay the additional income to the Trustee. Therefore, her failure to do so does not evidence a lack of good faith or improper conduct that prevents a hardship discharge.").

§ 231.1 11 U.S.C. § 1327(c): Free and Clear Effect on Liens

In re Rascon, 321 B.R. 48, 51–53 (N.D. Cal. 2005) (Plan that treated creditor's first lien as fully secured and treated creditor's second lien as a wholly unsecured claim "provided for" both claims and confirmation vested the real property in the debtor free and clear of the second lien. "As a general rule, unchallenged liens pass through bankruptcy unaffected. . . . However, a creditor's lien may be avoided through the Chapter 13 plan confirmation process where the basis for avoidance is lack of collateral value. . . . Confirmation of a plan can void an unsecured lien if the creditor is 'provided for by the plan.' 11 U.S.C. § 1327(c). What is required to adequately 'provide for' the creditor is a function of due process. . . . The phrase 'provided for' is commonly understood to mean that the plan 'makes a provision for, deals with, or even refers to a claim.' *Rake v. Wade*, 508 U.S. 464, 113 S. Ct. 2187, 124 L. Ed. 2d 424 (1993). To adequately 'provide for' a creditor in a Chapter 13 plan, the plan must, at a minimum, identify the creditor by name and clearly and accurately characterize a claim. . . . A plan that seeks to eliminate a lien for lack of collateral value should 'reveal' that intent, at least by implication. . . . [H]ere, Debtor's Original Plan identifies Salah by name twice and accurately characterizes his secured claim. The Original Plan first lists Salah as a secured creditor in the amount of $250,000 . . . . Salah is then referenced a second time as a secured creditor to be paid directly by Debtor at 10% interest until the $250,000 balance is paid in full. . . . Salah was put on notice that the total value of the collateral securing his liens was $250,000. . . . As a result of the property's valuation however, the $100,000 lien was left unsecured . . . . Although the Original Plan did not expressly list the $100,000 lien as an unsecured claim on which Salah would be paid nothing, this was the necessary implication to be drawn from the other provisions of the plan. . . . Because the Original Plan . . . identifies Salah as a creditor and 'provides for' both the secured and unsecured liens, the Original Plan provided sufficient notice in accordance with due process requirements.").

In re Bryant, 323 B.R. 635, 639–45 (Bankr. E.D. Pa. 2005) (Confirmed plan which provided for home mortgage that "Bal Paid in Full$41,471.59" limited the mortgage holder's lien to that amount and when the $41,471.59 was paid in full through the plan, the lien was discharged; in subsequent Chapter 13 case, mortgage holder's proof of claim was disallowed except to the extent it sought repayment of postconfirmation fees, costs and escrow advances. "The language of the plan is clear: 'bal in full$41,471.59. . . . Under the holding in [*In re Szostek*, 886 F.2d 1405 (3d Cir. 1989)], Claimant is bound by the Plan, and the fact that the amount is incorrect to pay the claim in full as stated in the proof of claim filed post-confirmation would not compel a different result. . . . The confirmed Plan . . . dictates whether the lien that secures the debt will be discharged. Section 1327(b) provides that confirmation vests all of the property of the estate in the debtor except as otherwise provided in the plan or confirmation order. Section 1327(c) provides that such vesting shall be free and clear of any claim or interest of any creditor provided for by the plan. . . . Since a 'lien' is a 'claim' in a Chapter 13 case, *Johnson v. Home State Bank*, 501 U.S. 78, 111 S. Ct. 2150, 115 L. Ed.2d 66 (1991), whether a secured creditor's lien rights survive confirmation depends upon whether the plan 'provides for' the lienholder. . . . Upon confirmation all lien rights were defined by the Plan and upon completion of the payments under the Plan . . . the identified debt . . . was paid in full. Thus, the lien that secured that debt and which was retained for the life of the Plan did not survive the Debtor's discharge.").

A. LIMITATIONS ON EFFECTS OF CONFIRMATION

§ 232.1 Overview

§ 233.1 Notice and Due Process Considerations, Including Claims Allowance and Valuation

Ruehle v. Educational Credit Mgmt. Corp. (In re Ruehle), 307 B.R. 28, 32–34 (B.A.P. 6th Cir. 2004) (Following *Banks v. Sallie Mae Servicing Corp. (In re Banks)*, 299 F.3d 296 (4th Cir. 2002) and rejecting *Andersen v. UNIPAC-NEBHELP (In re Andersen)*, 179 F.3d 1253 (10th Cir. 1999) and *Great Lakes Higher Education Corp. v. Pardee (In re Pardee)*, 193 F.3d 1083 (9th Cir. 1999), confirmed plan that contained a finding of undue hardship for § 523(a)(8) purposes denied student loan creditor due process; creditor granted Rule 60 relief from the discharge order and from the order of confirmation. "Pursuant to Bankruptcy Rule 4007 and 7001(6) an action to determine dischargeability of a debt must be brought as an adversary proceeding. . . . There is no authority in the Bankruptcy Code or Bankruptcy Rules for including a discharge by declaration provision in the Debtor's plan. . . . [W]e choose to follow the growing trend finding that the student loan lender has been denied due process where a debtor attempts to discharge a student loan through a discharge by declaration provision."), *aff'd*, 412 F.3d 679, 683–84 (6th Cir. 2005) ("This case, unlike [*Andersen v. UNIPAC-NEBHELP (In re Andersen)*, 179 F.3d 1253 (10th Cir. 1999)] and [*Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee)*, 193 F.3d 1083 (9th Cir. 1999)], fails to reflect that the original creditor or its successor, Educational Credit, had reasonable notice of the proposed plan or an opportunity to be heard prior to the confirmation. . . . [E]ven the Ninth and Tenth Circuits appear to be backing away from, at least narrowly cabining, their holdings in *Pardee* and *Andersen*. . . . [*Educational Credit Mgmt. Corp. v. Repp (In re Repp)*, 307 B.R. 14 (B.A.P. 9th Cir. 2004)] explicitly agreed with the Fourth Circuit's Banks analysis and joined 'an emerging consensus' that an illegal 'discharge by declaration' provision violates the creditor's due process. . . . . Likewise in *Poland v. Education Credit Management Corporation (In re Poland)*, 382 F.3d 1185, 1189 n.2 (10th Cir. 2004), the Tenth Circuit directly criticized its previous holding in *Andersen* . . . . We conclude that the decisions in [*Banks v. Sallie Mae Servicing Corp. (In re Banks)*, 299 F.3d 296 (4th Cir. 2002),] and [*Hanson v. Educational Credit Management Corp. (In re Hanson)*, 397 F.3d 482 (7th Cir. 2005),] represent an evolving majority view that a purported 'discharge by declaration' of student loan debt is not only invalid but void and, therefore, subject to being set aside upon a Rule 60(b)(4) motion.").

Ventura Tax Collector v. Brawders (In re Brawders), 325 B.R. 405, 412–16 (B.A.P. 9th Cir. 2005) (Confirmed plan that ambiguously provided for a tax lien to which no objection was filed did not limit the extent of the tax lien and taxing authority did not violate the automatic stay by asserting its full lien rights

after discharge. Confirmed plan in prior Chapter 13 case placed County's tax lien in a class that was provided for as follows: "The value as of the effective date of the Plan, of the series of payments to be distributed under the Plan on account of each secured claim provided for by the Plan, *is equal to the allowed amount of such claim. . . . Each creditor shall retain its lien.*" Ventura County was listed with in this class with an "amount in default" of $9,350. Although not all together clear from the BAP opinion, Ventura failed to file a timely proof of claim and withdrew its claim as untimely. The debtors completed payments under the plan. After the first case was completed, Ventura proceeded to enforce its in rem rights against the debtors' house and the debtors filed a second case. The bankruptcy court found in the second case that Ventura violated the automatic stay because confirmation of the first case limited its lien rights. BAP concluded that language of first plan was too unclear to have any limiting effect on Ventura's lien rights but the language of the BAP opinion goes much further. "Debtors have not met their burden to establish that the Plan purported to have any effect on the amount of Ventura's tax assessment or its lien rights. . . . Debtors did not combine confirmation of a their Plan with an adversary proceeding seeking a declaratory judgment or partial lien avoidance limiting Ventura's in rem rights, nor did the Plan give notice that Debtors had any such intent. . . . Ventura did not file a timely proof of claim in the First Case and it withdrew its untimely claim, so the only Chapter 13 payments to which Ventura was entitled were those that Debtors provided in the plan—$9,35.00 over time, with interest. In addition, though, Ventura retained its in rem rights against Debtors' House, and those rights and the amount of the underlying debt owed to Ventura have not been affected by confirmation of Debtors' Plan in the First Case. . . . As [*Work v. County of Douglas,* 58 B.R. 868 (Bankr. D. Or. 1986)] observed, claims and interests are not the same thing. . . . [A] plan that provides for a claim but does not provide for an interest in property securing that claim does not affect the interest of the creditor in the property. The property vests free of the claim, but not free of the interest, which in this case is the lien of Ventura.").

In re Tessier, 333 B.R. 174, 177 (Bankr. D. Conn. 2005) (Where Chapter 13 debtors filed an amended Chapter 13 plan on the day of the confirmation hearing, a creditor would not be bound by its provision because the creditor had inadequate notice of its terms. The debtors' original Chapter 13 plan proposed that collateral securing the debt of Arcadia would be surrendered in full satisfaction of its obligations and unsecured creditors would receive nothing. On the day of the confirmation hearing, the debtors filed an amended plan, again providing that Arcadia would receive its collateral in full satisfaction of its claim, but now provided a 100% dividend to unsecured creditors. After confirmation, Arcadia asserted a deficiency claim to which the debtors objected. Even though Arcadia had filed no objection to the plan, it was not on notice that it made any difference to object. "Under such circumstances, the court concludes that notice to Arcadia of the First Amended Plan was insufficient to apprise it of the modification of its rights under the terms of the Second Amended Plan. Arcadia is not bound by the *res judicata* effect of the confirmed plan and the debtors' objection on that basis to Arcadia's deficiency claim is overruled.").

In re Burner, 321 B.R. 432, 434–36 (Bankr. N.D. Ohio 2004) (Citing *Ruehle v. Education Credit Management Corp. (In re Ruehle),* 307 B.R. 28 (B.A.P. 6th Cir. 2004), Chapter 13 debtor cannot invalidate a lien on a car through the confirmed plan or by motion but must instead file an adversary proceeding; res judicata effect of confirmation does not include that liens are avoided, citing *Cen-Pen Corp. v. Hanson,* 58 F.3d 89 (4th Cir. 1995). "Although this case does not involve a student-loan debt, the exact same principles apply. Pursuant to Bankruptcy Rule 7001, a debtor wishing to avoid a creditor's lien must bring an adversary proceeding; a debtor bears the burden to establish the necessary grounds to invalidate a lien . . . and paragraphs (1) through (9) of § 1322(b) do not provide any independent basis for avoiding a lien. Therefore, just as it was improper for the debtor in *In re Ruehle* to seek a determination of dischargeability through her plan, it is also improper in this case for the Debtor, as opposed to initiating an adversary proceeding, to seek to avoid the Creditor's lien through a provision placed in his Chapter 13 plan of reorganization." That the lienholder did not file a proof of claim and thus the debtor cannot put the lien at issue through the claims allowance process is a "dilemma" that is "simply the nature of a secured interest in bankruptcy . . . . [N]othing in the Bankruptcy Code or Bankruptcy Rules requires that a secured creditor file a proof of claim . . . . [I]t has

been fundamental to bankruptcy jurisprudence that liens and other secured interests in property pass through bankruptcy.").

In re Moore, 319 B.R. 504, 514 (Bankr. S.D. Tex. 2005) (Citing ***Sun Finance Co. v. Howard (In re Howard),*** 972 F.2d 639 (5th Cir. 1992) and ***Simmons v. Savell,*** 765 F.2d 547 (5th Cir. 1985), in the Fifth Circuit confirmation of a Chapter 13 plan cannot resolve the tension between the plan and an inconsistent proof of claim; to realize binding effect of a confirmed plan with respect to the value of collateral and the extent of liens, debtors must timely and properly object to inconsistent proofs of claim and secured claims must be determined prior to plan confirmation or at the hearing on confirmation and after adequate notice to affect claim holders. A plan that values a car at less than the amount claimed in a timely filed proof of claim is not effective as an objection to the claim and the separate objection filed by the debtor 14 days before the confirmation hearing is not adequate notice of the claim objection. Notice of the confirmation hearing from the trustee that collateral will be valued and the extent of liens determined at the confirmation hearing not sufficient—a separate claim objection is required that includes "a specific statement of which claim is to be adjudicated and when the hearing will be held." An objection to claim or motion to value to collateral must be filed at least 20 days before the confirmation hearing.).

In re Carr, 318 B.R. 517, 521 (Bankr. W.D. Wis. 2004) (Citing Rule 60 and *In re Escobedo,* 28 F.3d 34 (7th Cir. 1994), Wells Fargo is granted relief from confirmation order that bifurcated its claim secured by the debtor's principal residence. Plan confirmed without objection treated Wells Fargo as a partially secured creditor with respect to its nonpurchase money mortgage on the debtor's principal residence. Wells Fargo filed a proof of claim to which no objection was filed. Many months later, Wells Fargo moved to vacate the confirmation order. "Set against the putative finality of a confirmation is the statutory presumption of validity of a properly-filed claim. . . . It is the policy of this Court to confirm plans quickly so that creditors get paid quickly. . . . Our policy can work only if the confirmation can be reviewed and the order vacated when the claims actually filed alter the assumptions on which the confirmation was granted.").

§ 234.1 Failure to Provide For

In re Barnes, 326 B.R. 832, 842, 843 (Bankr. M.D. Ala. 2005) (Debtor's Chapter 13 plan "provided for" the claim of a creditor even though the address to which notice was sent was not that of the creditor but the creditor's attorney; where the plan provided for the creditor as an unsecured creditor, the judgment lien which attached to the debtor's property survived the bankruptcy. The debtor filed a Chapter 13 petition and listed a judgment creditor on the petition but listed the address as the creditor's attorney. The plan treated the claim as an unsecured claim even though the creditor held a judgment lien against the debtor's property. The creditor did not file a claim and took no action until the debtor received a discharge. When the creditor sought to enforce its lien against the debtor's property, the debtor initiated an adversary proceeding to determine the effect of the discharge. The failure to list the creditor with his address was defective notice but, the creditor had actual knowledge of the bankruptcy filing. Thus the debtor's Chapter 13 discharge effected a discharge of the *in personam* liability of the debtor. The plan, however, did not "provide for" the judgment lien held by the creditor. "The Debtor in this case might have 'provided for' Sawyer's secured claim in his Chapter 13 plan. As Sawyer's judgment lien was only partially secured, Barnes could have provided in his Chapter 13 Plan for payment of the secured portion of the judgment, in full, while treating the remaining unsecured portion as an unsecured claim. . . . Instead, the Plan in the case at bar treated Sawyer's claim as unsecured. . . . As no action was taken in Barnes' Chapter 13 case [against the lien], Sawyer's judgment lien survived intact. . . . For this reason, the rule of *Dewsnup* applies and therefore Sawyer is entitled to appreciation in the property subsequent to the filing of the Chapter 13 petition." The creditor was free to pursue *in rem* rights against the debtor's property.).

§ 235.1 Other Limitations

B. SPECIAL EFFECTS OF CONFIRMATION

§ 236.1 Tax Refunds

In re Shultz, 325 B.R. 197, 201 (Bankr. N.D. Ohio 2005) (The Internal Revenue Service would not be entitled to relief from the stay to effect a set off of a debtors' prepetition refund against a debtors' prepetition tax liability since the confirmed Chapter 13 plan did not provide for such. The debtors' confirmed Chapter 13 plan specifically provided for payment, in installments, of the IRS obligation. When the Internal Revenue Service filed an application for relief from stay seeking to set off a prepetition tax refund to satisfy this claim, the debtors objected. "The goal in a Chapter 13 bankruptcy is to formulate a plan of reorganization. Once a plan is formulated and been confirmed by the court, its provisions are final and binding. . . . [O]nce a plan is confirmed, 'cause' for relief from stay must be based upon post-confirmation circumstances such as a default by the debtor under the terms of the plan. . . . The position taken, however, by the IRS simply does not mesh with the *res judicata* effect of plan confirmation. The Debtors' Chapter 13 plan, which was confirmed by this Court, has no provision providing the IRS with an immediate right of set off. Instead, like those other creditors, the Debtors' plan proposed to pay the IRS in deferred payments. And presently, the Debtors are not in default on this post-confirmation obligation. Additionally, it cannot be overlooked that the IRS did not even object to the Debtors' treatment of its claim despite receiving adequate notice thereof." A right of set off, therefore, does not provide a valid basis for granting relief from the stay. [The court cited BAPCPA, noting that after October 17, 2005, § 362(b)(26) would authorize the set off notwithstanding the automatic stay.]).

§ 237.1 Windfalls, Inheritances, Lotteries and the Like

In re Jafary, 333 B.R. 680, 687 (Bankr. S.D.N.Y. 2005) (A Chapter 13 trustee must return to the debtor funds received after the completion of the case when the trustee paid a mortgage arrearage that also paid directly at the time the mortgage was refinanced. Debtor's Chapter 13 plan provided for the curing of a default on a mortgage obligation as well as a pool of funds to be paid to unsecured creditors. After confirmation of the plan, the debtor sought to refinance his mortgage and pay off the Chapter 13 case. Upon receipt of the funds, the trustee satisfied the pool to the unsecured creditors and cured the mortgage default. Subsequent to the filing of the trustee's final report, the trustee received funds from the mortgage creditor, indicating that it had received cure amount on the mortgage at the time of the refinance. The debtor sought to compel the trustee to return the funds. "The amount paid to the unsecured creditors under a pot plan is determined by the number and amount of claims filed, and not by any increase in the pot itself. In retaining the $4,945.40, the Trustee in this instance seeks unilaterally to increase the amount of the pot." The trustee cannot do this without a modification of the plan. Debtor is entitled to these excess funds.).

§ 238.1 Loss, Destruction or Surrender of Property after Confirmation

In re Huff, 322 B.R. 661, 665, 668 (Bankr. M.D. Ga. 2005) (Upon the destruction of the Chapter 13 debtor's automobile, the creditor loss payee would be entitled to the insurance proceeds to the extent of its secured claim and the debtor's request to substitute collateral would be denied. AmeriCredit had a lien on the debtor's Pontiac Grand Prix which was destroyed and insurance policy, owned by the debtor, listed AmeriCredit as the loss payee. The debtor sought to substitute the collateral so he could utilize the insurance proceeds to purchase another automobile. "It should be noted that mere ownership of the insurance policy by the bankruptcy estate does not ***necessarily*** mean that the bankruptcy estate has sole interest or ownership of the proceeds in that insurance policy. . . . [W]here both the debtor (via the bankruptcy estate) and the secured creditor (via the insurance policy) have an interest in the insurance proceeds, the secured creditor shall be paid the value of its interest in accordance with the confirmed Chapter 13 Plan and any remainder shall be paid to the debtor as the party in whom the automobile revested when the Chapter 13 plan was confirmed." Court noted that "the outcome may differ in cases where the collateral has not revested in the debtor by the time the

collateral is destroyed. Such would be the case where destruction occurs pre-confirmation or where a provision in the debtor's Chapter 13 Plan states the collateral does not revest in the debtor upon confirmation.").

§ 238.2 Effects of Confirmation on Postpetition Claims

Joubert v. ABN AMRO Mortgage Group, Inc. (In re Joubert), 411 F.3d 452, 455, 456 (3d Cir. 2005) (Sections 502(b) and 105(a) do not create a private right of action to redress a violation of § 506(b). The debtor's Chapter 13 plan proposed to maintain payments on a mortgage and cure the default. During the case, the debtor refinanced her mortgage and made her final payment to the trustee as part of the refinancing settlement. Following the discharge, the debtor initiated a class action asserting that the funds that were paid to the mortgagee as a result of the refinancing included funds advanced or excess attorney's fees added in violation of § 506(b). "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. Here, the allegedly excessive attorney's fees were asserted prior to the discharge, thus § 524 was not implicated. Further, even assuming the creditor had violated § 506(b) by imposing excessive attorney's fees, § 506(b) does not afford a private cause of action to address an alleged 506(b) violation. the debtor's "lone remedy is a contempt proceeding pursuant to § 105(a) in bankruptcy court. . . . [W]e conclude that the decisions 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).").

In re Manus, 324 B.R. 85, 87 (Bankr. W.D. Ark. 2005) (It was impermissible for a debtor to include in the Chapter 13 plan language that forbade holders of mortgage claims from imposing postpetition legal fees without notice to debtor's counsel and filing a postpetition claim. The proposed Chapter 13 plan imposed an affirmative duty on holders of all mortgage claims to "refrain from imposition of any legal fees incurred post-petition without notice to debtor's counsel and filing of a post-petition claim." Such provision was not consistent with the Code. "The Bankruptcy Code defines 'claim' as a 'right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.' 11 U.S.C. § 101(5). If a fee or expense claimed by a creditor is based on the creditor's right to collect the fees under the respective pre-petition mortgage or deed of trust, the right to payment would be part of a pre-petition claim, even though the fees and charges were not incurred until after the debtor filed his respective bankruptcy petition. . . . There is no requirement . . . that a creditor refrain from imposing such post-petition fees in a proof of claim without giving notice to a debtor and filing a post-petition claim." Accordingly, the objection to confirmation raised by the mortgage creditor was valid and confirmation was denied.).

III. REPRESENTING CREDITORS AFTER CONFIRMATION

A. PROBLEMS WITH THE PLAN

§ 239.1 What to Do If Creditor Is Not Receiving Payments

§ 239.2 What to Do If Debtor Defaults

§ 239.3 What to Do If Debtor's Financial Condition Improves

§ 240.1 Representing a Postpetition Claim Holder

B. POSTCONFIRMATION STAY RELIEF PRACTICE

§ 241.1 Procedure

In re Walker, 332 B.R. 820, 831, 832 (Bankr. D. Nev. 2005) (Failure of a creditor's counsel to appear at a hearing on a motion for relief from stay was not such neglect that would excused to permit relief from the order denying relief from the stay with prejudice. Creditor's counsel filed a motion for relief from stay in the debtors' Chapter 13 case, alleging the debtors' failure to make payments and non-compliance with the plan. The debtors contested the motion. When the court entered an order denying the motion for relief from stay because no one appeared on behalf of the movant, the creditor sought relief from the order. Only one possible ground under Rule 60(b)(1) could be argued, that of excusable neglect. "To prevail on grounds of excusable

neglect, the movant must provide reasonably sufficient facts to show that the reason for the failure to appear was excusable. . . . [T]he Reconsideration Motion presents no evidence of any system used to prevent such mistakes. . . . Mr. Lahners has offered explanations on behalf of appearance counsel and his secretary . . . Mr. Lahners has not, however, offered any excuse for his own neglect, such as any reason for his negligence in failing to discover and thus prevent the error. All that Mr. Lahners has done is show that he abdicated his responsibilities to 'appearance counsel' and then to his secretary. This does not constitute a sufficient showing to merit a finding of excusable neglect on his behalf in light of the debtors' timely filed opposition. . . . Citimortgage's counsel knows, or should know, the consequences of a failure to appear at a scheduled hearing, set on that counsel's own motion, and as to which a proper objection was filed.").

In re Brown, 318 B.R. 876, 880 (Bankr. N.D. Ill. 2005) (Sanctions would be imposed against a mortgagee when its counsel filed a motion for relief from automatic stay with no grounds to support the motion. The mortgagee filed a motion for relief from stay alleging that the Debtor was three months behind on mortgage payments due after confirmation of the debtor's Chapter 13 plan. Debtor moved for sanctions asserting that there was a false pleading in the stay motion. The Debtor's motion was denied because Debtor's counsel had failed to comply with the "safe harbor" notice required by Rule 9011(c)(1)(A). The Court imposed sanctions itself under 9011(c)(1)(B) because the information provided by EMC Mortgage Company to its counsel was patently false. "[T]here is an urgent need for an appropriate sanction to be entered in order to deter EMC and other secured creditors from careless record keeping and giving of false information to their counsel when seeking modification of stay so they can foreclose on homes or seize family autos or other property related to family life." The court imposed sanctions of $10,000 and ordered "that this Opinion be delivered by EMC counsel to its executive officers, and the prohibition against EMC charging litigation expenses related to these matters to Debtor's account absent court permission.").

§ 242.1 Confirmation as a Defense to Relief from the Stay

Salt Creek Valley Bank v. Wellman (In re Wellman), 322 B.R. 298, 301–02 (B.A.P. 6th Cir. 2004) (Confirmation precludes stay relief when motion for relief from the stay is filed before confirmation but decided after confirmation. Confirmed plan provided for payment of mortgage. "Even where, as here, the motion for relief from stay is filed before confirmation, bankruptcy courts hold that, unless it pertains to a post-confirmation failure to make payments, the motion is untimely in view of the transcendence of the confirmed plan. . . . [C]onfirmation of a plan is res judicata as to those issues which were or could have been decided at the confirmation hearing. When a debtor and creditor have been bound to a confirmed plan, an action by the creditor seeking relief that is incompatible with the plan is properly overruled. . . . [T]he Bank's motion for relief from stay had been pretermitted by the confirmation of the plan.").

§ 243.1 Does Confirmation Dissolve the Stay?
§ 244.1 Postconfirmation Default and Relief from the Stay

In re Barron, 325 B.R. 17, 20, 21 (Bankr. M.D. Ala. 2005) (Green Tree is not entitled to relief from the stay and cannot recover the premium cost for force-place insurance when the debtor maintained hazard insurance for the full value ($15,000) of the mobile home and Green Tree purchased insurance for the full amount of the principal balance of its debt ($32,000). Mortgage contract required debtor to insure the manufactured home against "such risks and in such amounts as [Green Tree] may reasonably require." "Alabama law limits an insurable interest in property to the extent to which the insured might be damaged . . . . An insured would not be damaged beyond the value of the property insured. . . . [S]hould the debtor's mobile home be totally lost, the creditor's recovery from the hazard insurer would be limited to the value of the mobile home at the time of the loss. . . . Green Tree did not introduce any evidence of the value of the mobile home. The debtor listed the value of the mobile home in the bankruptcy schedules at $15,000. . . . [H]ence the creditor's insurable interest in the property is deemed to be $15,000. . . . [I]t was unreasonable for Green Tree to force-

place hazard insurance on the mobile home in any amount because the debtor had insured home in accordance with the contract.").

In re Brown, 319 B.R. 898, 902–03 (Bankr. M.D. Ga. 2004) (Arguably in dicta, postconfirmation relief from the stay would likely be granted to a car lender when funding of the plan will delay distribution to the car lender until 10 months after the petition in favor of full payment of attorney fees. "If ALM were to seek relief post-confirmation in this case, the Court would likely be required to grant such relief. . . . Debtor will not be allowed to propose a plan that withholds payments to ALM for almost a year while Debtor continues to benefit form the use of ALM's depreciating collateral and when the accumulation of preconfirmation payments does not amount to enough to pay attorney fees proposed for payment in full at confirmation. When one or more additional months of debtor payments are required to fully fund the attorney fees claim, the creditor secured by a depreciating asset such as the automobile in this case is likely to be irreparably harmed.").

§ 245.1 Postpetition Claims and Relief from the Stay
§ 246.1 Alimony and Support Collection after Confirmation
§ 247.1 Effect of Failure to File Proof of Claim on Postconfirmation Relief from the Stay

IV. INCOME DEDUCTION ORDERS

§ 248.1 Order to Debtor's Employer
§ 249.1 Can Employer Charge a Fee?
§ 250.1 Direct-Pay Orders
§ 250.2 Changing Employers or Source of Income
§ 250.3 Modification and Suspension of Income Deduction Orders
§ 251.1 Failure to Deduct or Remit
§ 252.1 Special Deduction Order Problems: Entitlements, Pensions and Government Employers

V. MODIFICATION AFTER CONFIRMATION

A. PROCEDURE AND STANDARDS FOR MODIFIED PLAN

§ 253.1 Standing, Timing and Procedure

Weber v. Heitkamp (In re Hopson), 324 B.R. 284, 287–88 (S.D. Tex. 2005) (Former bankruptcy counsel has an administrative expense for unpaid fees that is an allowed unsecured claim for purposes of standing to modify a Chapter 13 plan after confirmation under § 1329(a). "Appellant's entitlement to attorney's fees as an administrative expense under § 503 of the Bankruptcy Code, makes Appellant the holder of a 'claim.' . . . [B]ecause Appellant's claim is not secured by a lien on property of the estate, it is an 'unsecured' claim. . . . [Section] 1329(a) is susceptible to one reasonable interpretation, that is, that any person whose claim has been allowed, and whose claim is not secured by a lien on property of the estate, has standing under § 1329(a) to seek modification of the chapter 13 plan.").

In re Nevins, No. 02-37055DWS, 2005 WL 984182, at *3–*4 (Bankr. E.D. Pa. Apr. 26, 2005) (unpublished) (Completion of payments under the confirmed plan had not occurred so as to bar trustee's argument for modification to capture proceeds from the sale of the debtor's real estate when proceeds were paid to the trustee to hold pending further litigation with respect to distribution but proceeds were not paid to trustee for distribution to creditors. "Courts have construed 'completion of payments under the plan' to occur when the debtor makes all the payments required by the plan to the trustee. . . . In the instant case, the Debtors did not deliver the Proceeds to the Trustee to pay off the Confirmed Plan . . . . Rather they delivered the Proceeds as a compromise to allow the Sale Motion to be approved without objection pending litigation or negotiation of the allocation of the Proceeds.").

§ 254.1 Application of Tests for Confirmation

In re Nevins, No. 02-37055DWS, 2005 WL 984182, at *4 (Bankr. E.D. Pa. Apr. 26, 2005) (unpublished) (Arguably in dicta, "§ 1329(b)(1) requires that any modification must comply with the 'best interests of creditors test' of § 1325(a)(4) that creditors receive no less under a Chapter 13 plan than they would receive under a Chapter 7 liquidation. The test conducts its inquiry as of 'the effective date of the plan.' . . . With respect to post-confirmation modifications, most courts have been inclined to interpret this as the effective date of the plan *as modified.*" Court does not resolve proper distribution of proceeds from postconfirmation sale of the debtors' real property pending the filing of appropriate motions to modify by the debtors and/or the Chapter 13 trustee.).

In re Murphy, 327 B.R. 760, 773 (Bankr. E.D. Va. 2005) (Applying *Arnold v. Weast (In re Arnold),* 869 F.2d 240 (4th Cir. 1989), it does not matter that debtor's condominium vested in the debtor at confirmation nor is it necessary to determine that proceeds from the sale of the condominium 11 months after confirmation were or were not disposable income, because the increase in value was substantial and unanticipated, the debtor can be required to pay unsecured creditors in full from the sale proceeds on the trustee's motion to modify. Bankruptcy court first determined that the debtor's motion to permit sale of the appreciated condominium was not itself a motion to modify. Debtor then argued that condominium was not property of the Chapter 13 estate and the sale proceeds were not disposable income. "[A]s the court noted in [*Barbosa v. Solomon,* 235 F.3d 31 (1st Cir. 2000)], regardless of whether property revested in the debtor is technically property of the estate, 'until all payments due under the plan are made, both the trustee and the unsecured creditors have an interest in the preservation of the debtor's financial situation, and in the extension of the ability-to-pay standard to future situations under the plan.' . . . Mr. Arnold's post-petition earnings were just as much his property following confirmation as the condominium was Mr. Murphy's. But that did not preclude modification of Mr. Arnold's plan to take account of the unexpected improvement in his financial condition. . . . Nor does the court's holding depend on whether the sales proceeds constituted 'disposable income' . . . . The Fourth Circuit's holding in *Arnold* is not phrased in terms of changes in the debtor's disposable income, but rather in terms of the debtor's 'financial condition,' which is a broader concept. The requirement in *Arnold* that the debtor share any substantial and unanticipated improvement with his or her creditors is not grounded in the disposable income test, but rather in the fundamental requirement of good faith under § 1325(a)(3). . . . [W]hether the proceeds from the sale of the condominium constitute 'disposable income' in a technical sense is not controlling on the good faith analysis." The bankruptcy court seems to apply "good faith" to the debtor notwithstanding that the motion to modify was filed by the trustee.).

In re Ocasio Torres, 319 B.R. 61, 64 (Bankr. D.P.R. 2004) (Good faith test § 1325(a)(3) bars modification of 60-month plan in 46th month to declare the plan completed. "the Debtor[s'] modification in the instant case is not proposed in good faith. The confirmed plan originally called for sixty monthly payments and a 6.5% distribution. After 46 months, the Debtors moved to modify their plan to make virtually no payments on their unsecured debt and declare the plan completed. . . . [T]hey have not shown any changes of circumstances which would affect their ability to pay creditors. . . . Debtors did not provide any reason for the modification request. If Debtors' true reason for proposing a modification is the result of circumstances for which the Debtors should not be justly held accountable, then the Debtors should have moved to request a hardship discharge under § 1328(b)."). *Accord In re Santiago,* 319 B.R. 65 (Bankr. D.P.R. 2004).

§ 255.1 Does Disposable Income Test Apply?

In re Sunahara, 326 B.R. 768, 781, 782 (B.A.P. 9th Cir. 2005) (Section 1329(b) does not incorporate the disposable income requirements to a modified plan after confirmation. Debtor's original Chapter 13 plan was confirmed under which the debtor proposed to make payments over 60 months with an estimated dividend of 50% to unsecured creditors and total payments into the plan totaling $41,400. The model plan in the District contained a provision that unless all claims were paid in full, the plan could not be completed sooner

than 36 months. Shortly after confirmation, the debtor proposed a modification under which he sought to refinance his home and pay off the entire balance of the plan immediately from the proceeds of the refinance. The trustee objected arguing that the debtor was obligated to commit income for a minimum of 36 months. The debtor argued that 36 months requirement was not a measure of time of payments but the measurement of value creditors must receive. "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 § 1325(a)' apply to modifications under § 1329(a). . . . Simply put, the plain language of § 1329(b) does not mandate satisfaction of the disposable income test of 1325(b)(1)(B) with respect to modified plans. Had Congress intended to impose such a requirement, it could have easily done so by making the appropriate incorporating reference." The court must still consider carefully whether the modification has been proposed in good faith. "Such a determination necessarily requires an assessment of a debtor's overall financial condition including, without limitation, the debtor's current disposable income, the likelihood that the debtor's disposable income will significantly increase due to increased income or decreased expenses over the remaining term of the original plan, the proximity of time between confirmation of the original plan and the filing of the modification motion, and the risk of default over the remaining term of the plan versus the certainty of immediate payment to creditors." The debtor's modification was appropriate.).

In re Murphy, 327 B.R. 760, 773 & n.11 (Bankr. E.D. Va. 2005) (Applying *Arnold v. Weast (In re Arnold)*, 869 F.2d 240 (4th Cir. 1989), without regard to whether disposable income test applies, on trustee's motion to modify plan to require debtor to increase dividend to unsecured creditors based on proceeds of sale of condominium, because increase in value of condominium was substantial and unanticipated, good faith requires the debtor to increase the dividend to unsecured creditors. "Nor does the court's holding depend on whether the sales proceeds constituted 'disposable income' . . . . The Fourth Circuit's holding in *Arnold* is not phrased in terms of changes in the debtor's disposable income, but rather in terms of the debtor's 'financial condition' . . . . The requirement in *Arnold* that the debtor share any substantial and unanticipated improvement with his or her creditors is not grounded in the disposable income test, but rather in the fundamental requirement of good faith under § 1325(a)(3). . . . [W]hether the proceeds from the sale of the condominium constitute 'disposable income' in a technical sense is not controlling on the good faith analysis." In a footnote, "[t]hat said, it is difficult to see why the proceeds would *not* constitute 'income,' and 'disposable' income at that. The sale of an appreciated asset generates income for both accounting and income tax purposes. . . . [H]ere the sale resulted in actual cash. . . . However, the court's ruling in this case is not predicated on the status of the proceeds as income.").

§ 256.1 Duration of Modified Plan
§ 257.1 Changed-Circumstances Requirement?

In re Murphy, 327 B.R. 760, 771–72, 774 (Bankr. E.D. Va. 2005) (Applying *Arnold v. Weast (In re Arnold)*, 869 F.2d 240 (4th Cir. 1989), 51.6% increase in the value of a condominium in only 11 months is a substantial and unanticipated change in the debtor's financial condition that supports trustee's motion to increase dividend to unsecured creditors from sale proceeds; 33% increase in the value of a home over an 18-month period is substantial but not as "dramatic" and the court would have "difficulty" finding that such an increase was unanticipated for purposes of the trustee's motion to require the debtors to increase the dividend to unsecured claim holders from a refinancing. "Under *Arnold*, the test is whether the increased value of the real estate represents a 'substantial' change in the debtor's financial situation and whether the party seeking modification—here, the trustee—could have 'reasonably anticipated' the magnitude of the change at the time of confirmation. . . . [A] 51.6% percent [*sic*] increase in only 11 months . . . . represents a 'substantial' improvement in the debtor's financial condition. . . . [I]t is dramatic. . . . [T]here has been a substantial, unanticipated change in the debtor's financial condition. . . . [T]he improvement does not consist of either unrealized or phantom income—a mere improvement in the debtor's balance sheet—but of actual cash in the debtor's pocket that is reasonably available to pay creditors and that the debtor—who has not offered any

evidence suggesting otherwise—can apparently afford to pay without financial hardship. As the Fourth Circuit held in *Arnold,* Congress did not intend for chapter 13 debtors 'who experience substantially improved financial conditions after confirmation to avoid paying more to their creditors." In a companion case, the trustee moved to increase the dividend to unsecured creditors when the debtors refinanced their home in a transaction that indicated that the home had appreciated 33% over 18 months. "While clearly 'substantial,' it may not qualify as 'dramatic' in the quite the same way . . . . [T]he court might have some difficulty in finding that appreciation of this magnitude was something the trustee could not reasonably have anticipated at the time the plan was confirmed. . . . But even if the appreciation could be fairly characterized as both substantial and unanticipated, the court cannot find that the refinance effected an improvement in the debtors' *financial condition* sufficient to support involuntary modification . . . . The refinance simply exchanged the increase in the value of the house for a corresponding amount of debt. . . . A loan does not represent income nor does it improve a debtor's financial condition. . . . The trustee does not suggest that the debtors could have been compelled, 18 months into a five-year plan, to incur indebtedness and borrow against the equity in their residence so as to increase the dividend on unsecured claims . . . . The trustee's motion to modify the plan and to require the debtors to pay borrowed funds in order to increase the dividend on unsecured claims will therefore be denied.").

In re Willoughby, 324 B.R. 66, 75 (Bankr. S.D. Ind. 2005) (Cause exists under § 502(j) to reconsider the claim of an auto lender so as to reduce the "present value" portion of the claim following the Supreme Court decision in *Till*. The debtor's Chapter 13 plan was confirmed to pay DaimlerChrysler $1,329 with 19.99% interest for a claim secured by a 2000 Chrysler Concord. Following confirmation, the United States Supreme Court decided *Till v. SCS Credit Corp. (In re Till),* 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (2004) the debtor sought to amend the plan to reduce the interest rate from 19.99% to 5.5%. The court found that the Supreme Court's decision in *Till* had changed the law and this constituted "cause", justifying a reconsideration of the claim of DaimlerChrysler. Although cause did not exist to revise the value of the vehicle, the interest added to that amount is based on a different standard and could be reconsidered. "Because *Till* represents a significant change in the law that has prospective application, the Court must conclude that 'cause' exists to reconsider Daimler's allowed secured claim under Rule 60(b)(5)." Modification in the debtor's treatment of the Chrysler claim was, accordingly, approved.).

In re Nevins, No. 02-37055DWS, 2005 WL 984182, at *3 (Bankr. E.D. Pa. Apr. 26, 2005) (unpublished) ("Courts have generally recognized the appropriateness of granting the request of a trustee or creditor to increase distribution under a confirmed plan when a change in the debtor's financial situation is substantial and the magnitude of the change could not have reasonably been anticipated at the time of confirmation by the party seeking modification." With respect to trustee's argument that confirmed plan should be modified to capture proceeds from the sale of the debtors' real estate for the benefit of creditors: "The Trustee . . . has never exercised his right to file a request for a modification and as a result has never made a record to support this relief." Bankruptcy court grants trustee time to file a motion to modify to capture the proceeds of the sale of the debtors' real property by increasing the payments to unsecured creditors under the confirmed plan.).

In re Ocasio Torres, 319 B.R. 61 (Bankr. D.P.R. 2004) (Motion in 48th month of 60-month plan to declare the plan completed fails the good faith test in § 1325(a)(3) based on the debtors' failure to advance any evidence of a change in circumstance or other legitimate reason for requesting modification of the confirmed Chapter 13 plan.). *Accord In re Santiago,* 319 B.R. 65 (Bankr. D.P.R. 2004).

B. SPECIFIC MODIFICATIONS

§ 258.1 To Suspend Payments

§ 259.1 To Cure Postconfirmation Default

In re Wilson, 321 B.R. 222, 228 (Bankr. N.D. Ill. 2005) (Citing *Green Tree Acceptance, Inc. v. Hoggle),* 12 F.3d 1008 (11th Cir. 1994), and *Mendoza v. Temple-Inland Mortgage Corp.*, 111 F.3d 1264 (5th Cir. 1997),

"The majority of courts agree that since § 1322(b)(5) allows the cure of *any* default, a debtor can modify his plan under § 1329 to cure postconfirmation defaults, so long as the curing is done within a reasonable period of time and while current payments are being maintained." Accordingly, procedures in the model Chapter 13 plan for the Northern District of Illinois that give mortgage holders notice near the end of the plan and require mortgage holders to submit a statement of fees, charges and other amounts that have accrued during the Chapter 13 case then permit the Chapter 13 debtor to dispute those amounts or to modify the plan to cure the postpetition defaults. "[P]lan provisions that supply a way to cure postpetition defaults under § 1322(b)(5) do not violate § 1322(b)(2).").

§ 260.1 To "Add" Prepetition Creditors
§ 261.1 To Provide for Postpetition Claims
§ 262.1 To Incur New Debt
§ 263.1 To Sell or Refinance Property of the Estate

In re Nevins, No. 02-37055DWS, 2005 WL 984182 (Bankr. E.D. Pa. Apr. 26, 2005) (unpublished) (Debtors' motion to sell property after confirmation and to allocate proceeds is a motion to modify the plan; trustee's argument that sale proceeds in excess of value on schedules should be captured for the benefit of unsecured creditors must be presented as a motion to modify by the trustee and if timely filed, the competing motions can then be assessed under § 1329(b)(1). That the proceeds of the sale were paid to the Chapter 13 trustee for safekeeping pending further litigation did not constitute completion of payments under the plan and thus did not bar the trustee from filing a competing motion to modify the plan to increase payments to creditors based on the sale proceeds.).

In re French, No. 01-10603, 2005 WL 548081 (Bankr. D. Vt. Mar. 4, 2005) (unpublished) (Debtor's motion to refinance and pay off Chapter 13 plan early is treated as a motion to modify the plan and a creditor's responsive motion to modify to further increase payments to unsecured creditors triggers disposable income test analysis; evidence that debtor made $125,000 more than was projected for the year before the motions to modify renders further projection of the debtor's income and expenses speculative, but debtor's motion to refinance would be granted if the debtor will also increase payments to unsecured creditors by $20,000—the court's estimate of the amount of additional income that is likely to be available if the debtor's plan were extended from 48 months to 60 months.).

In re Murphy, 327 B.R. 760, 770, 771 (Bankr. E.D. Va. 2005) (Debtor's motion to sell or refinance real property to pay off plans early are not motions to modify under § 1329. "[E]arly payoff of the plan has absolutely no prejudicial effect on any party . . . . [N]either the motion to sell nor the motion to refinance seeks to reduce the *amount* to be paid the unsecured creditors. . . . [A]n early payoff actually *increases* the economic worth, or present value, of the distribution to the unsecured creditors. . . . [T]he court declines to treat a voluntary early pay-off by the debtors of the confirmed plans in the present cases as a post-confirmation 'modification' that triggers *de novo* review of previously resolved confirmation issues, such as the liquidation test." Accordingly, motions to sell and to refinance are instead measured against the test in *Arnold v. Weast (In re Arnold)*, 869 F.2d 240 (4th Cir. 1989). "Under *Arnold*, the test is whether the increased value of the real estate represents a 'substantial' change in the debtor's financial situation and whether the party seeking modification—here, the trustee—could have 'reasonably anticipated' the magnitude of the change at the time of confirmation." With respect to Murphy, the motion to sell represented a 51.6% increase in the value of Murphy's condominium in only 11 months. Bankruptcy court found this was a substantial and unanticipated change in the debtor's financial condition and granted the trustee's motion to require an increase in a dividend to unsecured creditors. With respect to the Goralski's refinance, a 33% increase in 18 months was substantial but not "dramatic." But even if that increase in value satisfied the substantial and unanticipated test, the Goralski's proposal to refinance did not effect an improvement in their financial condition because refinancing just converts the increase in value into a corresponding increase in debt. Thus, the financing debtors were not required to increase the dividend to unsecured claim holders.).

§ 264.1 To Surrender Collateral, Account for Repossession or Change the Treatment of a Secured Claim

Ruskin v. Daimler Chrysler Servs., N.A. L.L.C (In re Adkins), 425 F.3d 296, 304, 305 (6th Cir. 2005) (There is no provision in the Bankruptcy Code which allows a reclassification of a deficiency following a foreclosure after relief from the automatic stay from its original status as secured in the Chapter 13 plan. Following a default in the debtor's Chapter 13 plan, Chrysler obtained relief from the automatic stay and foreclosed on the debtor's Neon. The trustee objected to the request of Chrysler that the deficiency be treated in accordance with the original plan, i.e. secured, after deducting the amount recovered from the repossession. The court held that § 1327 was binding and extended its holding in *Chrysler Financial Corp. v. Nolan (In re Nolan),* 323 F.3d 528 (6th Cir. 2000), "[W]e find that where the Debtor's actions (i.e., default) provide cause for lifting the automatic stay under § 362(d), the Debtor or Trustee generally cannot move to reclassify the deficiency resulting from the sale of the underlying repossessed collateral as an unsecured claim." The court also rejected the use of § 502(j) to reclassify an already allowed claim. "[S]ection 502(j) addresses only the 'allowance' or 'disallowance' of claims, not the reclassification of an already allowed claim.").

Bank One, NA v. Leuellen (In re Leuellen), 322 B.R. 648, 652–61 (S.D. Ind. 2005) (Rejecting *Chrysler Financial Corp. v. Nolan (In re Nolan),* 232 F.3d 528 (6th Cir. 2000), Chapter 13 debtor can modify plan after confirmation to surrender a car and treat the deficiency, if any, as an unsecured claim when one of the debtors lost their job after confirmation and there is no claim of bad faith or abusive depreciation. "[T]he statute permits post-confirmation modification allowing surrender of collateral in satisfaction of a secured claim. Section 1322(b)(8) . . . contemplates surrender of collateral as a form of payment . . . . Under section 1325(a)(5)(C), also applied to section 1329(a) by subsection (b)(1), a debtor may choose to surrender property securing a claim prior to confirmation. . . . Congress's explicit incorporation of section 1322(b) and section 1325(a) into the standards for post-confirmation modification under section 1329(a) makes clear that Chapter 13 debtors retain the option to seek court permission to modify a confirmed plan by surrendering collateral to pay a secured claim. . . . When the debtor surrenders the collateral, it has the effect of transforming what had been a completely secured claim into a secured claim up to the value of the collateral, and any deficiency becomes an unsecured claim. . . . Section 1329(a)(1) . . . permits modification to 'increase or reduce the amount of payments on claims of a particular class provided for by the plan.' The modification proposed by the debtors fits easily within those terms . . . . This modification 'reduce[d] the amount of payments' on the creditor's secured claim from the amount stated in the original plan down to zero, after surrender of the collateral. . . . Section 1323(c) and its express application to section 1329(a) undercut the reasoning of *Nolan* . . . . A secured creditor's rights in general may be affected by a modification. . . . [E]ach secured creditor should be considered as a separate class, permitting the debtor to treat each secured creditor individually. . . . The risk of depreciation of collateral is a risk a secured creditor always bears. . . . The *Nolan* court's concern with preventing an unwarranted windfall to debtors upends this balance and grants a windfall to creditors by removing permanently the risk that collateral will depreciate more than expected. . . . The good faith requirement and the requirement of court approval in an adversarial judicial system provide important checks against debtors indulging their whims' or engaging in the 'subterfuges' feared by the *Nolan* court.").

§ 266.1 To Increase Payments to Creditors

In re Brown, 332 B.R. 562, 566, 567 (Bankr. N.D. Ill. 2005) (Trustee may seek to modify the debtor's Chapter 13 plan to increase payments when the debtor filed an application to refinance his home and disclosed an increased income but could not capture the funds available from the refinancing. The plan was confirmed to pay $425 per month for 36 months. After confirmation, the debtor sought to refinance his real property disclosing an increase in income. The trustee sought to modify the plan to increase the debtor's payments based upon the debtor's increased income and to capture the amount of funds generated by the refinancing. The trustee has an absolute right to seek modification of a bankruptcy plan after its confirmation before completion of the plan. The trustee's motion could be granted if the requirements for

modification—satisfaction of §§ 1322(a), 1322(b), 1325(c), and 1325(a) are met. There is no requirement that a plan be modified if the debtor's disposable income increases. "There is a split of authority on whether the disposable income test of § 1325(b)(1)(B) applies to plan modification . . . . Under the plain language of § 1325, subsection (b) is applicable only when an objection to confirmation is brought by the Trustee or the holder of an allowed unsecured claim. Here, the Trustee is the proponent of the plan modification and no such objection was asserted. Congress did not intend for debtors who experience substantially improved financial conditions after confirmation to avoid repaying their creditors. But even though the disposable income or 'best efforts' test may not be mandatory at the time of modification, the court finds that the good faith test requires consideration of whether there is excess income above the current plan payments that is available for the debtor to pay into the plan." Such is not the case, however, for the proceeds generated from the refinancing of the property. "The mere receipt of refinanced proceeds, alone, does not justify a plan modification requiring all those proceeds to be paid into the plan in addition to the originally monthly plan payments." The debtor's net worth for purposes of a liquidation test did not increase because the debtor incurred additional debt equivalent to the amount of the generated proceeds. Had the debtor's real estate been sold, as opposed to refinanced, the result could change. Accordingly, the debtor may use the proceeds from the refinance for an early payoff of the remaining months of his plan in the amount increased after the trustee's modification.

In re Murphy, 327 B.R. 760, 771, 773, 774 (Bankr. E.D. Va. 2005) (Where a Chapter 13 debtor, subsequent to confirmation, sought to sell his real estate for a substantial gain, unanticipated at the time of confirmation, the trustee's motion to modify the plan to capture the funds generated would be granted; where a Chapter 13 debtor sought to refinance his mortgage obligation to "capture the equity", the trustee's motion to modify to capture the gain would not be granted. In two separate cases, the Chapter 13 trustee sought to capture funds that had been generated by the escalating value of a debtor's home. In one case, the debtor had sought to sell his real estate for $235,000 eleven months after having listed his condominium at $155,000 at the time of filing. In the second case, the debtors valued their real estate at $223,000 subject to a $192,400 mortgage at the time of filing, and eighteen months later sought to refinance the mortgage in an amount sufficient to just payoff the balance of the plan. A debtor's early payoff of a plan does not constitute a modification under § 1329. Although the sale or refinance itself results in a lump sum payoff of any mortgage arrearage paid through the plan, such early payoff has absolutely no prejudicial effect on any party. "In the present case, neither the motion to sell nor the motion to refinance seeks to reduce the ***amount*** to be paid the unsecured creditors. Indeed, because there is a time value to money, an early payoff actually ***increases*** the economic worth, or present value, of the distribution to the unsecured creditors. . . . Accordingly, the court declines to treat a voluntary early pay-off by the debtors of the confirmed plans in the present cases as a post-confirmation 'modification' that triggers *de novo* review of previously resolved confirmation issues, such as the liquidation test." In each of these cases, however, the trustee sought to modify the plan. The test to determine whether a modification be granted, is whether "the increased value of the real estate represents a 'substantial' change in the debtor's financial situation and whether the parties seeking modification—here, the trustee—could have 'reasonably anticipated' the magnitude of the change at the time of confirmation." Where the debtor was selling real estate, actual cash in the debtor's pocket was generated. Where the debtor sought to refinance, however, there was no improvement in the debtor's net worth. Although the debtors "tapped" the equity in their house, the debtors received a loan. "A loan does not represent income, nor does it improve a debtor's financial condition. Rather, the case received from a loan is balance by a corresponding debt, with the result that the debtors' net worth remains unaltered." Thus, the trustee's motion to modify the plan was granted to capture the sale proceeds from the house, but was denied in the effort to capture the refinance proceeds from the debtor's refinance operation.).

In re Nevins, No. 02-37055DWS, 2005 WL 984182 (Bankr. E.D. Pa. Apr. 26, 2005) (unpublished) (Courts generally recognize that the Chapter 13 trustee can move to modify a confirmed plan to increase payments to unsecured creditors when circumstances change such as here where the debtor realized proceeds from the sale of real property in excess of the amount scheduled; however, trustee must make a motion to modify the plan and cannot simply argue in opposition to the debtors' motion to sell the real property that the proceeds

should be distributed in a manner different than that requested by the debtor. Bankruptcy court grants trustee a short time to file an appropriate motion to modify to increase payments to creditors.).

In re Drew, 325 B.R. 765, 773, 774 (Bankr. N.D. Ill. 2005) (Chapter 13 plan would be amended upon application of the trustee when the debtors sought to refinance their homes during the pendency of the plan. In these consolidated cases, each Chapter 13 debtor, during the term of the plan, obtained court approval to refinance real estate for an amount in excess of the value of the property at confirmation. The Chapter 13 trustee sought to amend each plan to increase the dividend to unsecured creditors by the cash amount of the refinancing proceeds received by the debtors that exceeds the payoff of the existing mortgages. "The statutory text of § 1329 allows for plan payments to be appropriately increased or decreased for the statutory grounds stated: the rise or fall of equity in property is not one of the limiting factors enumerated in the text. . . . If the debtors are unhappy with the result here, they can always voluntarily dismiss their Chapter 13 cases. . . . The effect of § 1329 is to allow confirmed Chapter 13 plans to be modified either to reduce the total price paid by debtors for the benefits received under Chapter 13, or as here, to increase that price. . . . What the Trustee seeks to do in these matters is to increase the effective dividends for unsecured creditors by the amount of 'equity' in the properties that the debtors seek to take out in cash from their approved refinancing. The Court finds that § 1329 permits this because the Debtors have not paid off their confirmed plans prior to the filing of the motions.").

§ 267.1 To Account for Payments Other Than under the Plan
§ 268.1 To Extend or Reduce the Time for Payments

In re Gallagher, 332 B.R. 277 (Bankr. E.D. Pa. 2005) (Where the debtor failed to satisfy a requirement in his plan to dispose of property and satisfy a claim by a date certain, the court would not permit a modification to forgive the default. The debtor's sixth Chapter 13 plan proposed to sell property by a date certain. When the debtor failed to accomplish that, he sought to modify the plan. The plan default should not be "cured" by an amendment to essentially forgive the default. The modification sought by the debtor failed to allege any substantial change in circumstances. Only when the self-executing dismissal provision of the plan was to be triggered, did the debtor seek to sell the property and, upon failure to do so, sought an amendment. Faced with such, the court would deny the application to modify.

In re Keller, 329 B.R. 697, 700, 703 (Bankr. E.D. Cal. 2005) (A Chapter 13 debtor may not terminate the plan earlier than the confirmed length simply by applying proceeds from the refinancing of property; for the debtor to shorten the duration of the plan, a modification is required. The debtors' Chapter 13 plan proposed 48 monthly payments resulting in a dividend to unsecured creditors of 31.5%. After 14 months, the debtors' filed a motion to refinance their home and use the loan proceeds to pay in full all liens and complete the Chapter 13 plan. "That is, after having made only 14 of the 48 monthly payments the plan requires them to make, the debtors wish to 'pay off' their plan and thereby preclude the trustee and unsecured creditors from ever modifying their plan." The debtors may not do so. The debtor is bound by the terms of the confirmed plan pursuant to § 1327(a). It proposed that the debtors would submit future income. "It makes little sense to require that a plan specify how it would be funded, and to require regular monthly payments that continue for at least 3 years, then verify that the debtor has the ability to make such payments only to permit the debtor to perform differently than required by the plan." Debtors may have a sudden ability to make a large payment such as increased income or receiving a windfall. When the debtor makes an accelerated lump sum payment rather than regular monthly payments, "the debtor is preempting the right of the trustee and the unsecured creditors to propose a modified plan should circumstances (such as an increase in the debtor's income) warrant a modification." The debtor may, however, seek a modification of the plan.).

In re Miller, 325 B.R. 539, 542, 543 (Bankr. W.D. Pa. 2005) (It does not constitute a modification of the debtor's plan for the debtor to pay the entire plan base early, prior to the expiration of 36 months. The confirmed Chapter 13 plan was designed to cure an arrearage on a mortgage, payoff a modified balance on

an automobile loan, and pay the debtor's attorney's fees. No distribution was contemplated to unsecured creditors. Subsequent to confirmation, the debtor sought to obtain a new mortgage on her home and utilized the proceeds to pay off her mortgage and to tender the trustee an amount sufficient to pay the "plan base". The trustee argued that the debtor was required to remain in Chapter 13 for no less than 36 months or pay unsecured claims in full. The early payoff proposed by the debtor had no prejudicial effect on any party, since the payment would pay no less than the original plan proposed. "We . . . decline to treat a voluntary early pay-off of confirmed plans as a modification where Debtor seeks no change in the payment amount and actually increases the economic worth by paying the contractual obligations due under a confirmed plan earlier than promised." Confirmation of the debtor's plan necessarily incorporated a finding that all of the debtor's projected disposable income was dedicated to the plan. "There is nothing in the code that says the debtor must suffer through three years of paying projected disposable income if good fortune would allow him or her to make an earlier pay-off.").

In re French, No. 01-10603, 2005 WL 548081 (Bankr. D. Vt. Mar. 4, 2005) (unpublished) (Debtor's motion to refinance house and pay off Chapter 13 plan early is granted conditioned that the debtor increase payments to unsecured creditors by $20,000 to reflect the court's assessment of the likely additional disposable income that would be available were the debtor to continue making payments under the plan for 60 months. Debtor's motion to refinance is treated by the court as a motion to modify the confirmed plan. A creditor's responsive motion to further modify the plan to increase payments to unsecured creditors was based on evidence that the debtor made $125,000 more during the previous year than was projected at the time of the original confirmation. Based in part on the lack of clarity in the evidence with respect to the debtor's actual disposable income, court estimates that an additional $20,000 would satisfy the moving creditor's objection to the debtor's proposed refinancing.).

In re Green, 321 B.R. 725, 729 (Bankr. D. Nev. 2005) (Debtor's motion for issuance of a discharge based on the debtor having paid off the plan early is in essence a "de facto motion to modify the plan to provide for an early payoff" which can only be accomplished with notice to all creditors and opportunity to object, especially when the result will be completion of payments under the plan in less than the three years that would be required if a creditor objects under § 1325(b).).

In re Ocasio Torres, 319 B.R. 61, 63, 64 (Bankr. D.P.R. 2004) (Debtors would not be permitted to seek a modification of their confirmed Chapter 13 plan by simply stating that the plan was completed, without the Debtors satisfying the obligation to unsecured creditors proposed in the original confirmed plan when there was no change in the Debtors' circumstances. The Chapter 13 plan proposed 60 months of payments of $210 per month resulting in a distribution to unsecured creditors of 6.5%. After the trustee filed a motion to dismiss, the Debtors sought to modify their plan to reduce the total plan commitment to 46 months and reduce the total payments into the plan from $12,600 to $9,660. "The provisions of a confirmed plan bind the debtor and each creditor. . . . Plan confirmation is a final order, with *res judicata* effect, and is imbued with the strong policy favoring finality. . . . In the instant case, the fact that the liquidation value is zero and that the Debtors could have proposed a shorter plan does not defeat the finality of the Debtor's confirmed plan. Accordingly, the Court finds that the Debtors failed to advance a legitimate reason for requesting modifications of their confirmed Chapter 13 plan. . . . The Court [also] finds that the Debtor's modification in the instant case is not proposed in good faith. The confirmed plan originally called for sixty monthly payments and a 6.5% distribution. After 46 months, the Debtors moved to modify their plan to make virtually no payments on their unsecured debt and declare the plan completed.").

VI. MISCELLANEOUS POSTCONFIRMATION ISSUES

§ 269.1 Death or Incompetency of Debtor

PART 6: CLAIMS

In re Relford, 323 B.R. 669, 673, 675 (Bankr. S.D. Ind. 2004) (Chapter 13 debtor's schedules and statements provided sufficient evidence to support the unsecured proof of claim of eCast holding an assigned claim from J. C. Penney which had been listed as undisputed, non-contingent, and liquidated even though the proof of claim did not contain the writing upon which it is based. "Bankruptcy Rule 3001(c) provides that when a creditor's claim is based on a writing, the original or a duplicate of the writing must be filed with a proof of claim unless it has been lost or destroyed. . . . A claimant bears the ultimate burden of establishing the validity and amount of its claim by a preponderance of the evidence. A proof of claim executed and filed in accordance with Rule 3001 is '*prima facie* evidence of the validity and the amount of the claim.' . . . A party objecting to such claim has the initial burden of presenting evidence to refute the claim. However, when a proof of claim fails to comply with Rule 3001, the claimant cannot rest on its proof of claim but must come forward with sufficient evidence of the claim's validity and amount. . . . Here, eCast's Claim is deficient in that the Debtor's credit card agreement with J. C. Penney is not attached. It is also deficient in that the attached Account Summary does not provide a breakdown of the Debtor's account balance into pre-petition interest and principal. . . . eCast has not complied with Rule 3001's requirements and is, therefore, not entitled to the presumption that the Claim is valid." The question for the court, therefore, is whether by a preponderance of the evidence the claim is supported. Here the debtor's schedules were consistent with the amount sent forth in the deficient claim. It did not list the debt as disputed, unliquidated, or contingent. Based on that evidence, and in the absence of any contrary evidence or objection by the debtor, the court allows the claim as filed.).

In re Schraner, 321 B.R. 738 (Bankr. W.D. Wash. 2005) (Where a proof of claim includes the amount of the debts, identifies the account number of the debtor, in a form of a business record, and articulates the charges such as interest, late fees, and attorney's fees, the claim is allowable and satisfies the requirements of 3001(c).).

In re Vann, 321 B.R. 734 (Bankr. W.D. Wash. 2005) (Proofs of claim for credit card debt, being based upon a writing, should include the amount of the debt, the name and account number of the debtors, and, if the claim includes charges such as interest, late fees, and attorney's fees, a summary of these charges by category in the form of a business record. When the debtors objected to a number of claim which did not have the information required by the court in *In re Henry*, 311 B.R. 813 (Bankr. W.D. Wash. 2004), the creditors would be afforded an opportunity to supplement their proofs of claim before the claims would be disallowed.).

In re Guidry, 321 B.R. 712, 714–15 (Bankr. N.D. Ill. 2005) (A proof of claim is not subject to disallowance simply because the requirements of Rule 3001(c) have not been met; a creditor filing such claim loses its right to presumptive validity. The debtors' Chapter 13 petition disclosed obligations to Household Finance for $8,859 and Sears in the amount of $5,248. eCAST filed a proof of claim as successor in interest to Household Finance in the amount of $8,971.52 and a claim as successor to Sears in the amount of $5,248.16. The debtors objected to the claims on the grounds that they did not have the writing that formed the basis of the claims or a statement that the writings had been lost attached as required by Rule 3001(c). The debtors did not allege any statutory grounds to disallow the claim. "The basis for the debtors' claim objections is instead Fed. R. Bankr. P. Rule 3001(c). . . . Rule 3001(c), however, does not say that a failure to comply with its terms should

result in disallowance of the claim for which the noncompliant proof was filed. Nor could it. . . . [Bankruptcy] rules shall not 'abridge, enlarge, or modify any substantive right.' Thus, a bankruptcy rule cannot create a ground for disallowance of claims not set out in the Code. . . . Of course, if the debtors had raised a valid ground for disallowance in their claim objections—such as a denial that they actually owed the debts asserted—an evidentiary hearing would have been required. In that situation, eCAST's noncompliance with Rule 3001(c) would have resulted in eCAST having the burden of going forward with evidence at the trial." Because the debtors set forth no grounds that would require the disallowance of the claims and, in fact, largely admitting the validity of the claims on the basis of the debts listed in their schedules, their application to disallow the claims would be denied.).

In re Shaffner, 320 B.R. 870, 876–79 (Bankr. W.D. Mich. 2005) (Although a Chapter 13 trustee may elect not to administer a proof of claim which fails to contain sufficient documentation to support the claim, the mere failure to provide documentation, in and of itself, is not a basis to challenge the validity of the claim. The Chapter 13 trustee sought to disallow the claim of a creditor because the creditor did not include attachments with the proof of claim. The proof of claim indicated it was filed for "services performed." The trustee contended that the claim failed to comply with the official form because the creditor failed to make an affirmative statement that supporting documents did not exist. "[A] creditor's failure to include documents with its otherwise timely proof of claim is not fatal to the administration of that claim. . . . [A] claim may be disallowed only for the reasons set forth in 11 U.S.C. § 502(b). . . . Claims allowance should not be confused with the broader concept of claims administration. Claims allowance (or, perhaps, more appropriately, claims disallowance) is a process whereby the trustee or any other party in interest may invoke the bankruptcy court to establish the legal validity and/or the amount of a disputed claim. . . . However, the mere failure to provide documentation, in and of itself, is no more a basis for challenging the validity or amount of a claim in a bankruptcy proceeding than it is in a non-bankruptcy proceeding. . . . The trustee does have the discretion to simply ignore a filed claim if what is filed does not meet the formal requirements of Fed. R. Bankr. P. 3001. However, the trustee does not exercise this discretion in conjunction with her authority to invoke the judicial process of claims disallowance set forth in § 502(b). Rather, the trustee's discretion derived from her more general authority under § 704 to administer claims. . . . A cocktail napkin with only the creditor's name and the amount owed could conceivably constitute a proper claim against the estate. However, a bankruptcy proceeding that permitted such a broad universe of claims would be an administrative nightmare. . . . [A] proof of claim must include information concerning the basis for the claim, the date the debt was incurred, whether interest and other charges are included in the claim, and the secured or priority status of the claim. . . . Indeed, a creditor's failure to comply with the requirements of Fed. R. Bankr. P. 3001 would be sufficient justification for the trustee to ignore the creditor's claim in administering the bankruptcy proceeding. However, a trustee's decision to accept or ignore a particular claim for purposes of administration, unlike her decision to dispute the validity or amount of the claim, does not require the involvement of the judiciary. . . . If the documentation included with the creditor's proof of claim falls short of what is required by the Fed. R. Bankr. P. 3001, then it is within the trustee's prerogative to choose not to administer that claim. . . . Judicial involvement is required only if a creditor or some other party in interest asserts that the trustee has abused her discretion by, for example, refusing to administer a timely proof of claim that clearly conforms with the requirements of Fed. R. Bankr. P. 3001. . . . If the trustee wants a creditor to substantiate its claim, the trustee does not have to file a request for production or follow that request with a motion to compel or a motion for sanctions. Rather, the trustee can simply refuse to administer the proof of claim as filed. The creditor is then left with three alternatives: (1) provide the documents requested; (2) abandon its claim; or (3) file a lawsuit on the theory that the trustee has abused her discretion. . . . The Chapter 13 trustee could certainly have chosen not to administer Ms. Grotenhuis' claim. However, her decision to do so would have been suspect given that the Chapter 13 trustee has offered no justification for that course of action. . . . Ms. Grotenhuis is collateral damage in an escalating war between bankruptcy trustees and creditors. The war is over claims filed by assignees of obligations that may have originated years ago. Hostilities exist because the proofs of claims filed by these assignees are often devoid of documentation

evidencing the debt or establishing the amount owed." The trustee's application to disallow the claim was accordingly denied.).

In re Felipe, 319 B.R. 730, 735 (Bankr. S.D. Fla. 2005) (An adversary by a creditor seeking a declaration that proofs of claim with computer printouts attached would be sufficient to satisfy the requirements of Rule 3001 failed to state a claim upon which relief could be granted and would dismissed. The creditor sought declaratory relief approving its proof of claim procedures which would then shield the creditor in future cases in which the debtors are represented by the defendant attorney. The debtors had withdrawn their objections to the claims and, accordingly, there was no justiciable controversy which could be adjudicated. Abstract rights of unknown debtors would be affected by the declaratory action. "Without question, the rights of Future Debtors will be affected if this Court were to grant declaratory relief deeming computer generated account summaries to be sufficient documentation to render the future proofs of claim presumptively valid. Equally obvious is the inability to join these future unnamed debtors.").

§ 271.8 Bankruptcy Rule 3002: Filing of Proofs of Claim
§ 271.9 Bankruptcy Rule 3004: Filing of Claims by Debtor or Trustee
§ 271.10 Bankruptcy Rule 3007: Objections to Claims

In re Crowe, 321 B.R. 729, 733 (Bankr. W.D. Wash. 2005) (Chapter 13 debtors objections to proofs of claim for failure of the claims to comply with Rule 3001(c) and failure to comply with the court requirements articulated in *In re Henry*, 311 B.R. 813 (Bankr. W.D. Wash. 2004), would be denied on the grounds that the objections were not timely filed. At the time the debtors sought to refinance their home to pay 100% of their allowed unsecured claims, they raised objections to all but one of the proofs of claim filed on the grounds that insufficient documentation was supplied. The debtors withdrew their objections in the face of any opposition. The debtors' objections were submitted more than a year after the trustee served them with a notice of intent to pay claims. "The Court concludes that on the facts of this case, the debtors' objections are untimely. The Chapter 13 Trustee's Report of Filed Claims, showing each of these claims, was entered on May 2, 2003, and was served on the debtors. A statement in that report clearly advises the debtors that their objection to any of the claims had to be filed within 90 days after May 2, 2003 [pursuant to local rule]. . . . [T]he debtors have offered no reason why the claims objections at issue were filed nearly two years after plan confirmation and more than a year after the expiration of the deadline for claims objections." Claims would be allowed.).

§ 271.11 Bankruptcy Rule 3012: Valuation of Security
§ 271.12 Bankruptcy Rule 5005: Filing of Papers

II. PROCEDURE, TIMING, AND FORMS

A. FORM AND FILING OF PROOFS OF CLAIM

§ 272.1 Official Bankruptcy Form 10 and Variations

Carlisle v. United States Dep't of Justice (In re Carlisle), 320 B.R. 796 (M.D. Pa. 2004) (IRS proof of claim substantially complies with the Official Form when it contained the required signature but lacked a "printed name"; IRS is not required to attach documentation to support its proof of claim because a tax claim is based on a statute not on a writing.).

In re Isom, 321 B.R. 756, 757 (Bankr. N.D. Ga. 2005) (A proof of claim signed by an attorney is a claim signed by an agent authorized by the creditor. "The authority of an attorney to sign such a paper on behalf of a claim is universally recognized, and the Court finds no reason to doubt that the signer actually is an attorney who has authority to submit the proof of claim on behalf of the client. Although the attorney signing the proof of claim is not admitted to practice in this case or in this Court, there is no requirement that an attorney be admitted to this Court's bar in order to be authorized to sign and file a proof of claim on behalf of a client.").

In re Armstrong, 320 B.R. 97, 104–05 (Bankr. N.D. Tex. 2005) (Official Form 10 and Bankruptcy Rule 3001 required eCast to attach supporting documents or a summary including proof of the sale or assignment of its claim; the failure to do so forfeits the prima facie validity of the claim under Bankruptcy Rule 3001 but does not disallow the claim. Chapter 13 debtor did not violate good faith requirement in § 1325(a)(3) by filing blanket objections to unsecured claims that were not accompanied by the proper supporting documents. "[W]here the creditor has not met the standards of Bankruptcy Rule 3001 and Official Form 10, the claim is not automatically disallowed; rather, it is deprived of the *prima facie* validity which it could otherwise have obtained. . . . [L]ack of proper supporting documentation does not, in an of itself, result in a clam's disallowance; rather, it strips it of any *prima facie* validity, requiring the creditor to offer the supporting documentation to carry its burden of proof in the face of an objection. . . . Official Form 10 allows for a summary to be attached to the claim. . . . [A] summary attached to the claim must include: (1) the names and account number . . . (2) the amount of the debt; (3) be in the form of a business record . . . and (4) if the claim includes charges such as interest, late fees and attorney's fees, the summary must include a statement giving a breakdown of those elements.").

§ 273.1 Informal Proofs of Claim, Letters, Motions, Pleadings and Conversations
§ 274.1 Is a Plan Provision a Proof of Claim?

B. WHO SHOULD FILE PROOFS OF CLAIM AND WHEN?

§ 275.1 1994 Code Amendments Changed the Rules
§ 275.2 In General: Filing Is Required for Allowance
§ 276.1 Governmental Units
§ 277.1 Unsecured Claims
§ 278.1 Partially Secured Claims
§ 279.1 Priority Claims, Including Requests for Payment of Administrative Expenses
§ 280.1 Secured Claim Holders

In re Anderson, 330 B.R. 180, 185, 188 (Bankr. S.D. Tex. 2005) (Court order disallowing the secured claim of CitiFinancial Mortgage Company, allowing the claim as unsecured, would not be reconsidered when the creditor failed to attach a deed of trust to the proof of claim, failed to appear at the hearing on the application to disallow the secured claim, and failed to present any evidence at the hearing on the motion to reconsider. The debtor filed a Chapter 13 petition and disputed a claim of CitiFinancial. CitiFinancial filed a proof of claim asserting that it was a secured creditor but failed to attach any proof of perfection to the proof of claim. The debtors objected to the secured claim, asserting that the claim was, at best, an unsecured claim. When CitiFinancial failed to appear at the hearing on the motion to disallow the secured claim, the court sustained the debtors' objection. CitiFinancial then sought to reconsider this order. At the hearing, however, counsel for CitiFinancial failed to present any proof that it held a secured claim. Although a proof of claim is deemed to constitute a *prima facie* claim, CitiFinancial failed to attach any documents at all to its proof of claim. CitiFinancial failed to appear at hearing on the validity of the claim and, accordingly, the claim may not be allowed as a secured claim. An adversary is not necessary to object to its secured status. Although an adversary proceeding "would have been proper if the Debtors had attacked the lien as having been procured by fraud. Instead, . . . the Debtors' first and foremost argued that the absence of any documentation attached to the Movant's proof of claim requires a ruling that the claim is unsecured. . . . This Court finds that the Debtors' primary argument, and this one which the matter is concerned, is not the existence or legitimacy of Movant's lien; rather, it is the challenge to the claim's secured status due to lack of documentation which is a contested matter governed under Rules 3007 and 9013. . . . Movant's actions were sufficiently wanting in reasonable care so as to become the equivalent of a lack of good faith. . . . Movant's burden was not great and yet, if it does indeed have a lien on property of the Debtors, Movant utterly failed to establish that interest.").

In re Stiller, 323 B.R. 199, 216 (Bankr. W.D. Mich. 2005) ("[T]he Bankruptcy Rules impose no bar date upon the filing of secured claims in a Chapter 13 proceeding"; accordingly, if the claims allowance process is

allowed to trump the confirmation process with respect to the amount of a home mortgage arrearage, and unscrupulous mortgage holder could withhold filing a proof of claim until months or years after confirmation and effectively defeat confirmation of any plan that purported to pay an arrearage in full when the time remaining under the plan was too short to allow for full payment.).

In re Burner, 321 B.R. 432, 436 (Bankr. N.D. Ohio 2004) (Lien of a secured claim holder that does not file a proof of claim travels through the Chapter 13 case and is not subject to avoidance by motion or as a result of a confirmed plan but can only be challenged through the filing of an adversary proceeding. "[N]othing in the Bankruptcy Code or Bankruptcy Rules requires that a secured creditor file a proof of claim: *See* § 506(d)(2), a lien may not be avoided solely because a creditor does not file a proof of claim; and Bankruptcy Rule 3002(a), providing that an unsecured creditor, but not a secured creditor, must file a proof of claim for their claim to be allowed. . . . [I]t has been fundamental to bankruptcy jurisprudence that liens and other secured interests in property pass through bankruptcy.").

In re Mickens, No. 04-1324, 2005 WL 375661, at *1 (Bankr. D.D.C. Feb. 14, 2005) (unpublished) ("Despite F.R. Bankr. P. 3002(a) stating only that an ***unsecured*** creditor must file a proof of claim for the claim to be allowed, the deadline of Rule 3002(c) is not limited to unsecured creditors, and the Bankruptcy Code itself makes clear that filing of a timely proof of claim is necessary for a holder of a secured claim to have an allowed secured claim.").

In re Jurado, 318 B.R. 251, 255–57 (Bankr. D.P.R. 2004) (Although neither Code nor Rules requires a secured creditor to file a proof of claim by any particular time, local order requires debtor to file claim on behalf of creditors provided for by the plan prior to confirmation. Debtor's proof of claim on behalf of car lender in 54th month of 60-month plan was timely but car lender was limited to distributions during last six months of plan. Chapter 13 trustee was not required to recover monies that were distributed to other creditors that would have gone to the car lender had an earlier proof of claim been filed. "The Bankruptcy Code and Rules do not provide the time within which secured claims may be filed, or the consequences of a secured creditor's failure to file a proof of claim. . . . Although there is no statutory requirement for the filing of a proof of claim to confirm a chapter 13 plan, this court's Administrative Order 97-03 so requires. The basic reason for the requirement to file a proof of claim for a creditor specifically dealt with in the Chapter 13 Plan is to implement the intent of the plan for the benefit of both the debtor and the particular creditor.").

§ 281.1 Postpetition Claims

C. ENLARGEMENT OF AND EXCEPTIONS TO 90-DAY AND 180-DAY BARS

§ 282.1 General Rules: No Enlargement or Exceptions, Except . . .

Vicenty v. Sandoval (In re Sandoval), 327 B.R. 493, 512–14 (B.A.P. 1st Cir. 2005) (Ninety-day deadline for filing claims in Bankruptcy Rule 3002 is not subject to an excusable neglect exception if the creditor received adequate notice; incompetency can be a ground for exception under Bankruptcy Rule 3002(c)(2). "[T]he claim deadline in chapter 13 cases cannot be extended for excusable neglect so long as due process concerns are satisfied. . . . [T]he bankruptcy court found, but without taking evidence, that Davila Torres was not incompetent at 'relevant times' . . . . [T]he bankruptcy court should have taken evidence on the competency of Davila Torres during the relevant periods before reaching any conclusion under Rule 3002(c)(2). Rule 3002(c)(2) requires the bankruptcy court to consider three issues: (1) whether the creditor was incompetent, regardless of representation by an attorney; (2) whether an extension of time would be in the 'interests of justice'; and (3) whether an extension would 'unduly delay administration of the case.'").

In re Durham, 329 B.R. 899 (Bankr. M.D. Ga. 2005) (A creditor which failed to file a timely proof of claim and failed to file a claim within 30 days of an order voiding its preferential perfection did not establish cause to permit the court to reconsider its earlier disallowance of the claim. The creditor asserted a lien against an automobile held by the debtor and the Chapter 13 trustee filed a complaint to avoid the perfection of the lien

as preferential. Creditor did not file a claim prior to the entry of the order voiding the lien and did not file a claim within 30 days after the entry of the order. Although Rule 3002(c)(3) permits a creditor to assert a claim within 30 days after its lien is avoided, here the creditor failed to do so and also failed to file a claim prior to the bar date.).

In re Mickens, No. 04-1324, 2005 WL 375661, at *1 (Bankr. D.D.C. Feb. 14, 2005) (unpublished) (Arrearage claim for a mortgage is subject to the same filing and timeliness requirements as any other secured claim and an untimely filed arrearage claim is disallowed and will not receive distributions under the confirmed plan. "[T]he court has no discretion to enlarge the time under F.R. Bankr. P. 3002(c) for a creditor's filing a proof of claim other than in the case of a claim by a governmental unit, an infant, or an incompetent person.").

In re Barnes, No. 04-00426, 2004 WL 3135459, at *2 (Bankr. D.D.C. Dec. 10, 2004) (unpublished) (Bankruptcy court is without authority to extend bar date for filing proofs of claim after conversion from Chapter 7 to Chapter 13, notwithstanding that the clerk's notice to creditors regarding conversion of the case left blank the deadline for filing proofs of claim. "The structure of the Code and the Rules has led to the conclusion that the court generally cannot use its equitable powers to enlarge the bar date for filing claims in chapter 13. . . . Even when a creditor receives no notice of the bankruptcy case, bankruptcy courts have held that they are without power to enlarge the chapter 13 claims filing bar date. . . . This case is distinguishable from those rare cares in which the courts have found a power to enlarge the bar date . . . in the face of a rule prohibiting an enlargement of time, when the clerk's office or the debtor has misled creditors as to the bar date. . . . This case turns upon a notice that did not affirmatively mislead: it simply left the deadline blank. No creditor could reasonably have been misled to think that there was no bar date.").

§ 283.1 Unscheduled Creditors

Vicenty v. Sandoval (In re Sandoval), 327 B.R. 493, 507–10 (B.A.P. 1st Cir. 2005) (Notice of Chapter 13 petition and notice of bar date mailed to creditors' prepetition attorney satisfied notice and due process entitlements. "[A] debtor's objection to a late claim cannot constitutionally be sustained and the creditor's claim barred if the debtor's failure to list, or inaccurate listing of, the creditor causes the creditor to miss the proof of claim deadline. . . . Strict application of the Rule 3002 deadline for filing claims assumes that the creditor has received this prescribed notice; late filed claims may be permitted in cases where notice to the creditor was materially deficient or misleading. . . . [N]otice served on a creditor's counsel is presumed to satisfy both bankruptcy and due process notice requirements as to the creditor, so long as there is a nexus between the creditor's retention of the attorney and the creditor's claim against the debtor. . . . Because the state court judgment is an asset held by the conjugal partnership and not Davila Torres or Vicenty Cardona individually, notice must have been sufficient as to the conjugal partnership in order to satisfy due process. . . . Service of the Notice of Filing on attorney Davison Lampon constituted adequate notice to Davila Torres, and therefore the conjugal partnership.").

§ 284.1 Amended Claims

D. FILING OF PROOFS OF CLAIM BY DEBTOR OR TRUSTEE

§ 285.1 Timing, Form and Superseding Claims

In re Jurado, 318 B.R. 251, 256–57 (Bankr. D.P.R. 2004) (Proof of claim filed by debtor on behalf of car lender in 54th month of 60-month plan is timely because there is no bar date to the filing of a secured claim; however, disbursements will be limited to funds received by the Chapter 13 trustee after the filing of the claim and trustee need not recover monies paid to other creditors that would have gone to the car lender had an earlier proof of claim been filed. "Although there is no statutory requirement for the filing of a proof of claim to confirm a chapter 13 plan, this court's Administrative Order 97-03 so requires. The basic reason for the requirement to file a proof of claim for a creditor specifically dealt with in the Chapter 13 Plan is to implement the intent of the plan for the benefit of both the debtor and the particular creditor. . . . In this case,

the plan was confirmed even though a claim was not filed by or on behalf of [the car lender], a secured creditor specifically dealt with in the Chapter 13 plan. The creditor did not participate in the distribution of funds, and the debtor is now left with a lien and arrears on a secured claim, the treatment of which was the main reason for the filing of the bankruptcy petition.").

§ 286.1 Strategic Considerations: When to File Claims for Creditors

In re Jurado, 318 B.R. 251 (Bankr. D.P.R. 2004) (Local rule that requires debtors to file proofs of claim on behalf of creditors specifically provided for by the plan before confirmation is intended to encourage the use of Bankruptcy Rule 3004 by debtors who desire to pay lienholders through the Chapter 13 plan. When the debtor filed a proof of claim on behalf of a lienholder in the 54th month of a 60-month plan, the claim was allowable because there is no deadline for the filing of secured proofs of claim in Chapter 13 cases but the few months remaining in the plan were insufficient to pay the lienholder in full. The debtor is left with a lien because the creditor did not participate in the distribution of funds through the plan. The burden is on the debtor to file a claim on behalf of a lienholder when the debtor really wants or needs to pay the claim through the plan.).

E. ALLOWANCE AND OBJECTIONS TO CLAIMS

§ 287.1 Timing, Procedure and Evidence Presumption

Musgrove v. Davis (In re Musgrove), Nos. EO-05-002, 03-73331, 2005 WL 977076 (B.A.P. 10th Cir. Apr. 26, 2005) (unpublished) (Stipulated order which fixed the amount and priority of a domestic relations claim is not subject to review by a motion for rehearing 11 months later; bankruptcy court did not abuse its discretion by presuming that debtor's attorney had authority to settle the disputed claim against the debtor.).

Carlisle v. United States Dep't of Justice (In re Carlisle), 320 B.R. 796 (M.D. Pa. 2004) (IRS proof of claim for taxes need not have documentation attached because the tax claim is not based on a writing but on a statute. That the IRS's tax claim was signed by an authorized agent but lacked a "printed name" does not render the claim invalid.).

In re Parrish, 326 B.R. 708, 719, 720, 721 (Bankr. N.D. Ohio 2005) (Where a proof of claim fails to contain the writing upon which the obligation is based, the burden of proving the existence and the amount of the claim falls on the claimant when faced with an objection to the allowance of the claim. The debtor objected to a secured claim asserted by Beneficial. The debtor admitted that he had signed a note to TransAmerica Financial Services and had pledged his property as security. At the hearing, Beneficial could not establish how it obtained the note, how it had applied the debtor's payments, or how it calculated its proof of claim. "On objection, a proof of claim filed in accordance with the rules is *prima facie* evidence that the claim is valid and in the amount stated. . . . If a proof of claim is not filed in accordance with the rules, the creditor does not get the evidentiary benefit of having the claim deemed to be *prima facie* valid. . . . Consequently, the failure to include the required supporting documentation negates its *prima facie* validity. . . . Because Beneficial did not attach the relevant note, security agreement, and evidence that its lien is perfected, it does not get the benefit of the presumption that its claim is valid and in the amount stated. . . . A claimant who is a servicer must, in addition to establishing the rights of the holder, identify itself as an authorized agent for the holder." Beneficial argued that had the debtor made all payments on time, this confusion would not have resulted. "[T]his particular aspect of the debtor's behavior is irrelevant as a defense. A lender has an obligation to keep a full and accurate accounting of payments made and charges accrued, should be prepared to explain the contractual basis for all charges, and should be able to document the charges such as inspection fees, court costs, and the like were actually incurred and paid. An entity acquiring a note and mortgage from a lender stands in the same shoes on this point and has the same duty. This is so no matter how many times a note and mortgage are transferred. A borrower does not forfeit the right to have a lender maintain accurate records just because the borrower misses payments.").

In re Hawthorne, 326 B.R. 1, 3, 5, 6 (Bankr. D.D.C. 2005) (While an objection to a proof of claim need not comply with the service requirements imposed under Rule 9014(b), an objection to the claim must comply with Rule 3007. The debtor objected to a claim filed by Sherman Acquisition doing business as Resurgent Acquisition. In the box for "name and address where notices should be sent" on the proof of claim was the address of "Resurgent Capital Services, P. O. Box 10587, Greenville, SC 29603-0587." The debtor mailed her objection to the claim to "Sherman Acquisition, LP dba Resurgent Acquisition P. O. Box 10587, Greenville, SC 29603-0587." The court noted that service under Rule 7004 was not required in the claims allowance process. "When a creditor files a proof of claim, it is analogous to a complaint, subjecting the creditor to the jurisdiction of the court to adjudicate the validity of its claim. . . . The creditor . . . has an implicit obligation to keep the trustee and the court informed of any change in address. . . . When the court has already acquired jurisdiction over the creditor's person by way of its filing a proof of claim, due process is satisfied by mailing the objection and notice to the name and address specified on the proof of claim for the receipt of notices in the case." Accordingly, Rule 7004, mandated service on the creditor's "dwelling house or usual place of abode or . . . the place where the individual regularly conducts a business or profession" was not applicable. However, the debtor's objection to the claim did not even comply with Rule 3007. "The creditor indicated notices relating to its claim should be sent to Resurgent Capital Services. The debtor mailed the notice to the creditor itself, instead of Resurgent Capital Services. . . . To obtain the benefits of service by mail under Rule 3007, the party filing an objection ought to scrupulously comply with the creditor's specific instruction regarding how notice is to be sent.").

In re Relford, 323 B.R. 669, 674–79 (Bankr. S.D. Ind. 2004) (Schedules and account summary attached to proof of claim established validity and amount of eCast's claim on behalf of J.C. Penney; eCast given 30 additional days to provide evidence of its assignment from J.C. Penney. "[A] credit card or consumer credit claim is based on both the credit card agreement and proof of the credit card's actual use. Accordingly, a claim for such debt must include the parties' credit agreement (and any amendments thereto), as well as evidence regarding the debtor's use of the credit card . . . . [A] summary of the debtor's use of the credit card will generally suffice. At a minimum, it must set forth the amount of the debt, the name and account number of the debtor, account balance as of the petition date and a breakdown of interest, late fees and attorney fees if the debt includes such charges. . . . Here, eCast's claim is deficient in that the Debtor's credit card agreement with J.C. Penney is not attached. It is also deficient in that the attached Account Summary does not provide a breakdown of the Debtor's account balance into pre-petition interest and principal. Additionally, if the balance includes any other fees, those fees are not specified. . . . [T]he Bill of Sale does not establish a contractual relationship between any of the 'Sellers' indicated above and *J.C. Penney*. . . . [T]he Court cannot conclude that eCast is the holder of the Claim. ECast has not complied with Rule 3001's requirements and is, therefore, not entitled to the presumption that the Claim is valid. . . . [N]oncompliance with Rule 3001 does not necessarily mean that the claim *must* be amended to include the missing documentation in order to be allowed. . . . [T]he determinative question is whether the preponderance of the evidence supports allowance of the claim . . . . [T]he Court does not wish to encourage creditors to file proofs of claim with little to no documentation. . . . By the same token, the Court does not wish to encourage debtors to object to claims they admittedly owe. . . . [The] schedules list a debt to J.C. Penney in an amount slightly above the amount indicated in the eCast's Claim. The debt is not listed as 'disputed,' 'unliquidated' or 'contingent.' This is strong evidence of the validity and amount of the Debtor's indebtedness to J.C. Penney . . . . While there is sufficient evidence to support the validity and amount of the Claim, thereby relieving eCast of the duty to provide additional documentation in that regard, eCast must provide additional evidence of its purported assignment from J.C. Penney.), *on reconsideration*, No. 03-22614-JKC-13, 2005 WL 994573 (Bankr. S.D. Ind. Apr. 19, 2005) (On motion to reconsider of eCast, Bankruptcy Rule 3001(e) does not require the transferee of a claim to prove the consideration or other evidence for the transfer if the claim is transferred before the filing of a proof of claim. "[T]he Court must conclude that it erred in concluding that the Claim was deficient because it lacked sufficient evidence regarding the subject transfer.").

In re Stetar, 323 B.R. 646 (Bankr. W.D. Pa. 2005) (A state court finding that the debtor's brother did not have a valid claim against the debtor was preclusive and bankruptcy court would deny a claim based on the same theory asserted by the debtor's brother.).

In re Baker, 321 B.R. 864 (Bankr. N.D. Ohio 2004) (HomEq Servicing Corporation's failure to respond to debtor's objection to its arrearage claim and failure to respond to a motion for accounting eventually resulted in a judgment voiding its mortgage lien entirely; on HomEq's motion for relief from that judgment, bankruptcy court found HomEq largely culpable for failing to respond notwithstanding clear notice of various hearings and motions but reduce the sanction to disallowance of all arrearages—approximately $4,000—and payment of debtor's attorney fees.).

In re Crowe, 321 B.R. 729, 731–32 (Bankr. W.D. Wash. 2005) (Although eight out of ten creditors to which the debtor filed objections did not respond, only one of the debtors' claims objections was justified under *In re Henry*, 311 B.R. 813 (Bankr. W.D. Wash. 2004). "The hope was that by requiring creditors with small claims to comply with Bankruptcy Rule 3001(c) through a relatively minimal production of documents in support of their claims, the burden on debtors to verify the accuracy of those claims would be lessened and fewer costs would be incurred overall by both creditors and debtors in the allowance process. Subsequent to *Henry*, however, reported cases describe creditors who fight with even more zeal to avoid having to file even minimal support for their claims and debtors who have taken up *Henry* as a sword to disallow perfectly legitimate unsecured claims when there is no reasonable justification for disputing the claims. . . . This case is a good example of *Henry* run amok . . . . In *Henry*, this Court held that the failure to comply with Rule 3001(c) by attaching the writing upon which the claim is based negates the *prima facie* validity of the claim under Bankruptcy Code § 502(a). . . . This Court also held that a credit card debt is a claim based upon a writing and that to maintain *prima facie* validity, a creditor should attach to its proof of claim form or file in response to a claims objection (i) a sufficient number of monthly account statements to show how the total amount asserted as been calculated, and (ii) a copy of the agreement authorizing the charges and fees included in the claim. Finally, this Court held in *Henry* that in the absence of that minimum evidentiary presentation, the creditor's claim could be disallowed. . . . [N]othing in *Henry* eliminated a creditor's right to submit a summary of the debt when the documentation supporting the debt is voluminous." Most of the debtors' objections were untimely—filed more than 90 days after the trustee's report of filed claims which contained a statement that objections must be filed within 90 days. Most of the debtors' objections were "form objections that are untimely and which seek to impose on each creditor a burden not imposed by *Henry*."); *In re Schraner*, 321 B.R. 738, 739–40 (Bankr. W.D. Wash. 2005) (Although no creditor responded to the debtors' objections to five claims, court disallows two of the claims and denies the debtors' objections to three of the claims on the grounds that three of the claims were adequately documented. "In [*In re Henry*, 311 B.R. 813 (Bankr. W.D. Wash. 2004)], this Court held that the failure to comply with Rule 3001(c) by attaching the writing upon which the claim is based negates the *prima facie* validity of the claim under Bankruptcy Code § 502(a). . . . This Court also held that a credit card debt is a claim based upon a writing and that to maintain *prima facie* validity, a creditor should attach to its proof of claim form or file in response to a claims objection (i) a sufficient number of monthly account statements to show how the total amount asserted as been calculated, and (ii) a copy of the agreement authorizing the charges and fees included in the claim. Finally, this Court held in *Henry* that in the absence of that minimum evidentiary presentation, the creditor's claim could be disallowed. Recently, the Court clarified its decision in *Henry* in . . . [*In re Crowe*, 321 B.R. 729 (Bankr. W.D. Wash. 2005)]. In *Crowe*, this Court confirmed the ability of a creditor to file a summary of its claim when the documentation supporting the claims is voluminous." Three of the claims to objections were filed were supported by sufficient information under *Henry*. One of the claims was not itemized appropriately, but the creditor was allowed additional time to supplement the claim. One of the clams was a duplicate and was disallowed.). *Accord In re Vann*, 321 B.R. 734 (Bankr. W.D. Wash. 2005).

In re Guidry, 321 B.R. 712, 714 (Bankr. N.D. Ill. 2005) (That eCAST did not attach documentation to its proof of claim as required by Bankruptcy Rule 3001(c) is not a ground for disallowance of the claim. eCAST

filed proofs of claim on behalf of Household Finance and Sears that included an account summary but did not attach a writing that formed the basis for either claim. Debtors objected to allowance raising only the ground that the summary attached to the proofs of claim did not comply with Bankruptcy Rule 3001(c). "Rule 3001(c) . . . does not say that a failure to comply with its terms should result in disallowance of the claim . . . . [A] claim cannot be disallowed solely on the basis that its proof was not accompanied by a Rule 3001(c) attachment.").

In re Shaffner, 320 B.R. 870, 876 (Bankr. W.D. Mich. 2005) (Claim is not disallowed merely because it has no attached documentation when there is no evidence that documents exist. "[T]he mere failure to provide documentation, in and of itself, is no more a basis for challenging the validity or amount of a claim in a bankruptcy proceeding than it is in a non-bankruptcy proceeding. . . . [T]he mere failure to comply with rules concerning the form and content of a proof of claim is not justification under the Bankruptcy Code to judicially invalidate a creditor's otherwise lawful claim.").

In re Armstrong, 320 B.R. 97, 106 (Bankr. N.D. Tex. 2005) (eCast and other unsecured claim holders forfeit prima facie effect of proofs of claim that are not accompanied by the documents required by Official Form 10 and Bankruptcy Rule 3001; claims are not disallowed solely because supporting documents were missing; debtor did not violate good faith requirement in § 1325(a)(3) by filing blanket objections to unsecured claims that were not accompanied by proper documentation. "[I]n the case of a credit card or consumer account creditor, in order for the proof of claim to be given *prima facie* effect, the creditor must attach an account statement containing the debtor's name, account number, the prepetition account balance, interest rate, and a breakdown of the interest charges, finance charges and other fees that make up the balance of the debt, or attach enough monthly statements so that this information can be easily determined. The failure to attach a statement or statements with the required information will result in the loss of the proof of claim's *prima facie* validity; however, it will not result in disallowance of the claim. . . . The transferee has an obligation under Bankruptcy Rule 3001 to document its ownership of the claim. 'In the event the claimant is an assignee of a debtor's original creditor, a claimant must attach a signed copy of the assignment and sufficient information to identify the original credit card account. . . . The failure to attach the transfer documents and a statement or statements with the required information will result in the loss of the proof of claim's *prima facie* validity; however, it will not result in disallowance of the claim.").

Paul Mason & Assocs., Inc. v. Felipe (In re Felipe), 319 B.R. 730, 732–35 (Bankr. S.D. Fla. 2005) ("In the guise of lawsuits against an attorney who frequently represents debtors in Chapter 13 cases in this district, the Plaintiff, who frequently files proofs of claim as agent for various institutional unsecured creditors, seeks a declaratory judgment that the computer printouts it typically attaches to its proofs of claim are sufficient documentation to render the claims presumptively valid. . . . [T]he Complaints must be dismissed for failure to state a claim and failure to join indispensable parties. . . . Although Plaintiff alleges that [the attorney's] procedure for objecting to its claims is abusive, the relief sought is not actually against [the attorney], individually, but rather declaratory relief determining the adequacy of the supporting documentation generally attached to Plaintiff's proof of claims. As such, there is no justiciable controversy . . . . Defendant Cordero is not an adverse party since he acts as counsel and has no personal stake in the claims objection process. . . . The actual adverse parties are all of the future debtors . . . who will file bankruptcy cases in which Plaintiff files proofs of claim. . . . [T]he Future Debtors are indispensable parties pursuant to Rule 7019 and failure to join them is fatal to Plaintiff's Complaints.").

In re Sandifer, 318 B.R. 609 (Bankr. M.D. Fla. 2004) (eCast claims that lack documentation of fees, interest, payments and finance charges are disallowed; claims amended to include documentation of charges, payments, fees and interest are allowed.).

In re Mazzoni, 318 B.R. 576 (Bankr. D. Kan. 2004) (Objections to eCast claims are overruled because debtor stated no ground for disallowance other than that attachments were insufficient. Failing to attach writings

required by Rule 3001(c) deprives claim of prima facie validity under Rule 3001(f) but does not disallow claim.).

§ 288.1 Failure to File Proof of Claim

In re Burner, 321 B.R. 432 (Bankr. N.D. Ohio 2004) (Leinholder's failure to file a proof of claim does not affect the validity of its lien notwithstanding that it will not receive distributions through the confirmed plan; debtor cannot avoid the lien through the confirmed plan or by motion but must file an adversary proceeding.).

In re Jurado, 318 B.R. 251 (Bankr. D.P.R. 2004) (A consequence of the failure of a secured creditor to file a proof of claim is that the claim is not allowed and the creditor will not receive distributions under the plan. To avoid this outcome, local rule requires the debtor to file a proof of claim on behalf of any creditor that is specifically dealt with in the plan before confirmation of the plan. When debtor filed proof of claim in the 54th month of a 60-month plan on behalf of a secured creditor that was supposed to be paid in full through the plan, the debtor's proof of claim is allowed but the creditor will only receive distributions for the remaining months of the plan.).

§ 289.1 Untimely Filed Claims in Cases Filed before October 22, 1994: The *Hausladen* Phenomenon

§ 290.1 Untimely Filed Claims in Cases Filed after October 22, 1994

In re Mickens, No. 04-1324, 2005 WL 375661, at *1 (Bankr. D.D.C. Feb. 14, 2005) (unpublished) (Untimely filed claim for mortgage arrearages is disallowed on trustee's objection. "[T]he Bankruptcy Code itself makes clear that filing of a timely proof of claim is necessary for a holder of a secured claim to have an allowed secured claim. . . . While 11 U.S.C. § 506(d) provides that disallowance of a claim as an allowed secured claim solely on the ground of untimeliness does not void the lien securing the claim, disallowance does bar distributions on that claim under a confirmed plan.").

III. PRIORITY CLAIMS AND ADMINISTRATIVE EXPENSES

§ 291.1 Treatment of Priority Claims

United States v. Fowler (In re Fowler), 394 F.3d 1208, 1212 (9th Cir. 2005) (Tax debt incurred during a Chapter 11 case before conversion to Chapter 13 can be an administrative expense which must be paid in full with interest as a priority claim; if the tax is treated as a prepetition unsecured claim, it has eighth priority and is also entitled to payment in full under § 1322(a)(2) but without interest. "[T]he most important distinction between administrative expense tax claims and unsecured priority tax claims in Chapter 13 is that the IRS cannot recover interest on prepetition unsecured priority tax claims." The court does not explain the statutory source for the right to interest on administrative expenses other than to note that administrative expenses entitled to priority include the penalties and interest that accrued during the Chapter 11 case prior to conversion.).

§ 292.1 Taxes

United States v. Fowler (In re Fowler), 394 F.3d 1208, 1212 (9th Cir. 2005) (Unpaid FICA and FUTA taxes that accrued during Chapter 11 case before conversion to Chapter 13 are administrative expenses entitled to priority with penalties and interest. Taxes accrued before the petition would be entitled to eighth priority and payment in full through the Chapter 13 plan but without interest. The postpetition tax debt constitutes an administrative expense because it relates to "any tax incurred by the estate" under § 503(b)(1)(B)(i). "The first priority accorded to administrative expense taxes also extends to interest and penalties that accrue on that debt. . . . [T]he most important distinction between administrative expense tax claims and unsecured priority tax claims in Chapter 13 is that the IRS cannot recover interest on prepetition unsecured priority tax claims.").

Carlisle v. United States Dep't of Justice (In re Carlisle), 320 B.R. 796 (M.D. Pa. 2004) (Venue to challenge the method used by the IRS in assessing tax liability is appropriately in the tax court under 26 U.S.C. § 6213(a) and not in the bankruptcy court; debtor could but did not challenge the amount claimed by the IRS. Because the IRS claim is based upon a statute, not on a writing, the IRS is not required to provide documentation in support of its claim under Bankruptcy Rule 3001(c). Debtor's claim that he has no taxable income because he has no income from a foreign source is without merit. That the IRS agent signed the proof of claim but failed to include a "printed name" does not render the claim invalid.).

In re Kogut, 325 B.R. 400, 403 (Bankr. W.D. Ark. 2005) (Tax creditor bears the burden of proof that the tax claim asserted against a Chapter 13 debtor was a priority claim which must be paid in full under the plan. Debtor's Chapter 13 petition listed an obligation to Monroeville, Alabama as an unsecured non-priority claim to receive no distribution. The tax had been owed more than three years prior to the filing of the petition. If the tax owing to Monroeville were an excise tax, that is "an indirect tax, one not directly imposed upon persons or property but imposed on performance of an act, the engaging in an occupation, or the enjoyment of a privilege." it would be entitled to priority unless the claim were stale. "In contract, trust fund taxes are entitled to priority no matter when they became due. A trust fund tax . . . is 'a tax required to be collected or withheld and for which the debtor is liable in whatever capacity.'" Here, the creditor failed to establish that its debt was based on a trust fund tax and, accordingly, the creditor failed to establish that its claim was entitled to priority.).

In re Foltz, 324 B.R. 250, 254 (Bankr. M.D. Pa. 2005) (The Internal Revenue Service would be enjoined from pursuing a post-discharge levy against a debtor when the debtor's amended Chapter 13 plan provided for payment of one-third of the corporate liabilities for which the debtor had been assessed as a personally responsible officer and as to which the IRS did not object. The debtor's original Chapter 13 plan proposed to pay the IRS in full on account of trust taxes remaining unpaid from a business. The IRS filed a claim. Almost three years after confirmation, the debtor amended the Chapter 13 plan to provide that the debtor would be responsible for only one-third of the corporate liabilities for which he had been assessed as a personally responsible officer. The IRS received notice of the amended plan but did not object and the debtor completed payments under the plan, the IRS received the payments attributable to one of the debtor's businesses, York Finishing, but, because the IRS had not filed any claim relating to another of the debtor's businesses, Yorktown Construction, it had received no distribution for penalties related to that business. Subsequent to the discharge, the IRS assessed the penalty for Yorktown Construction and the debtor brought an action against the IRS. Because the IRS was scheduled as a creditor and the IRS received adequate notice of both its treatment and the relationship of the debtor to the various companies, the IRS's claim would be subject to discharge. "[I]n order to provide for an unsecured tax claim, the plan itself does not always have to specifically name the governmental creditor. Instead it may be 'sufficient if the plan provides for full payment of priority unsecured claims and payment of some percentage on nonpriority unsecured claims.' . . . The plan was confirmed thus binding the parties to its terms. When Debtor moved to amend the plan in 1994, the IRS would have been barred from filing a proof of claim alleging a new unrelated debt after confirmation of the plan. Further, it is clear that the plan was amended to provide that Debtor no longer would be paying the full amount of the allowed tax claim and intended to pay only one-third of the assessed penalty." The IRS, having failed to file a claim, was discharged when the debtor completed the plan.).

In re Stokes, 320 B.R. 821 (Bankr. D. Md. 2004) (Although Anti-Injunction Act does not prohibit bankruptcy court from considering debtor's objection to IRS's claim, IRS has discretion to refuse to accept amended returns filed years late and after IRS assessed penalties and interest based on original returns.).

In re Harrell, 318 B.R. 692, 695 (Bankr. E.D. Ark. 2005) (State income taxes for tax years 1996, 1997 and 1998 with respect to which the debtor filed tax returns postpetition on August 4, 2003 are not entitled to priority under § 507(a)(8)(A)(iii) and are dischargeable at the completion of payments in a Chapter 13 case. "[I]n a chapter 13 case, taxes that are unassessed but assessable but also of a kind described in section

523(a)(1)(B) or (C) are not entitled to priority under section 507(a)(8)(A)(iii) and will also be discharged upon completion of the plan, a result that occurs only in chapter 13.").

In re Peterson, 317 B.R. 532, 533–36 (Bankr. D. Neb. 2004) (Bankruptcy court orders IRS to "process and consider an offer of compromise" contained in plan. "The plan proposes to make an 'offer in compromise' to the Internal Revenue Service which would provide an initial payment of $500 and then the waiver by the debtor of hundreds of thousands of dollars of loss carry forward credits. . . . [T]he Internal Revenue Service has an official policy that it will not process an offer in compromise made by a taxpayer in bankruptcy. That policy, however, is not required by the Internal Revenue Code, and is not included in the Internal Revenue regulations. . . . That policy is clearly discriminatory with regard to individuals in bankruptcy. . . . The position taken by the IRS on this issue is set forth in a revenue procedure and in a notice from chief counsel. Neither of these carry the force and effect of law, and may not even be entitled to much deference. . . . In this case, the IRS may either process an offer in compromise, which the tax code authorizes any taxpayer to submit, or take seriously its stated position that it will, in good faith, consider accepting less than the bankruptcy code requires in a Chapter 13 plan."), *upon reconsideration*, 321 B.R. 259, 261–62 (Bankr. D. Neb. 2004) (On reconsideration, bankruptcy court sustains its earlier view that the IRS can be ordered to process a Chapter 13 debtor's offer in compromise as if the debtor was not in bankruptcy because the IRS guideline that prohibits the IRS from processing and offer in compromise from a Chapter 13 debtor is not a statute or treasury regulation and thus is not binding or mandatory. "Neither the Internal Revenue Code nor the Treasury Regulations contain the prohibition against accepting offers in compromise from taxpayers in bankruptcy. . . . [T]he IRS wants me to enforce a non-mandatory agency procedure so it does not have to entertain the debtor's offer in compromise. . . . [T]he IRS may either process an offer in compromise, which the tax code authorizes any taxpayer to submit, or take seriously its stated position that it will, in good faith, consider accepting less than the bankruptcy code requires in a Chapter 13 plan.").

§ 293.1 Trustee's Fees and Expenses

In re Shaw, 330 B.R. 113, 115, 116 (Bankr. D. Vt. 2005) (A Chapter 7 trustee is entitled to compensation on a *quantum meruit* basis for services performed in a Chapter 7 case that converted to Chapter 13 when the trustee discovered a fraudulent transfer and commenced an adversary proceeding to avoid the transfer. The debtor originally filed a Chapter 7 petition disclosing property with a value of $475,000 encumbered by $180,000 mortgage. The debtor listed the property as a tenancy by the entirety. The trustee undertook a title search and discovered that the debtor had conveyed his single ownership interest to tenancy by the entirety within a year of the filing of the Chapter 7 petition. The trustee commenced an adversary proceeding and the debtor converted to Chapter 13. "[T]he Court finds first, that but for the Trustee's efforts, the creditors in this case would not have received any dividend, either in a Chapter 7 case or a Chapter 13 case. The Court also finds that the Trustee's diligence in conducting and examining the title search, as well as his determination to initiate an adversary proceeding to void the pre-petition transfer of the Property, resulted in great benefit the Debtor's estate. . . . [the] trustee is entitled to a commission based upon the distribution to creditors in the case. . . . [T]he Court determines the amount of commission to be paid by applying the principles of *quantum meruit*." The court applied the lowest statutory commission, 3%, to the increase in value the trustee created in the case, $156,000.).

In re Silvus, 329 B.R. 193, 218, 221 (Bankr. E.D. Va. 2005) (A Chapter 7 trustee that makes no disbursements is not entitled to compensation when the case converts to Chapter 13 as a result of the trustee aggressively challenging the valuations given to assets by debtors. In a number of cases, a Chapter 7 trustee sought fees based upon a *quantum meruit* theory when the debtors converted to Chapter 13 once the trustee proposed to sell assets that the debtors had substantially undervalued. The court strictly construed § 326(a). Chapter 7 trustees are entitled to compensation only when the trustee distributes funds. Nor would *quantum meruit* justify a fee. "While Ruby's efforts may well have been valuable to these four bankruptcy estates in terms of a greater recovery being had by the creditors, Chapter 7 Trustees . . . are statutorily bound to perform

these duties. . . . [*Q*]*uantum meruit* cases, in addition to being cases based upon a contract, are also based upon an expectation of payment, which . . . should not exist on the part of the Chapter 7 Trustee. . . . It is not without substantial remorse and trepidation that this Court must answer the Chapter 7 Trustee's plea in the negative. . . . [T]he Court must found its decision not upon its own notions of 'sympathy' or 'fairness' but on the express provisions of the Bankruptcy Code.").

§ 294.1 Debtors' Attorneys' Fees

In re Cahill, 428 F.3d 536, 541 (5th Cir. 2005) (It was not error for a bankruptcy court to defer to the general order establishing a reasonable and customary fee for Chapter 13 cases when the amount was based upon a lodestar analysis and the attorney failed to establish that the services performed required an increased fee. Chapter 13 debtor's counsel sought an award of **$**3,758.08 for representing a debtor in a Chapter 13 case. This exceeded the reasonable and customary amount provided in a general order which, relying upon a lodestar analysis, had established a reasonable fee for representing Chapter 13 debtors. Section 330(a) permits a court to award compensation less than the amount requested. The precalculated lodestar amount contained in the general order found that the time typically spent on a Chapter 13 case was 5.7 attorney hours and 5.3 paralegal hours and that the reasonable and customary rates are $235 per hour for attorneys and $75 per hour for paralegals. The court found that the attorneys for the debtor spent "an unreasonable amount of time on the case, duplicated each others efforts, performed unnecessary work, were unprepared for the confirmation hearing, and were handling a case that presented no novel or complex issues" and, accordingly, the fee did not warrant an upward adjustment of the lodestar amount.).

In re Tahah, 330 B.R. 777, 781 (B.A.P. 10th Cir. 2005) (Where a bankruptcy court deviated from the "presumptive guidelines" to deny a Chapter 13 debtor's attorney's fees, it is obligated to analyze the fee request in accordance with § 330. The case was dismissed prior to confirmation and the debtor's attorney's requested fee of $2,027 was limited to $800 pursuant to local guideline. The debtor then filed a second Chapter 13 petition and the bankruptcy court limited the debtor's attorney's fees to $1,440 because debtor's counsel had received fees in the prior case. In this case "the bankruptcy court did not provide any basis for this Court to determine whether the fee award of an abuse of discretion. When fees are sought that exceed the amount of a presumptively reasonable fee, those fees must be reviewed under § 330, regardless of the 'extraordinary circumstances' standard contained in the bankruptcy court's Chapter 13 Guidelines.").

In re Smith, 331 B.R. 622, 630, 631, 633 (Bankr. M.D. Pa. 2005) (A "flat" or "no look" fee in a Chapter 13 case should compensate counsel for routine, normal and customary services and should encompass a procedure for compensating counsel for reasonable and necessary services which are not routine. When the debtors filed a Chapter 7 petition, agreeing to pay counsel $800 for services, they discovered that their mobile home was not subject to a perfected lien. They converted the case to Chapter 13, resulting in a flurry of litigation. Debtors' counsel filed an application for compensation in excess of that disclosed in the original Chapter 7 and sought $2,500 in fees as a "no look" or flat fee arrangement. "The volume of Chapter 13 cases has risen sharply while the preparation of petitions and accompanying documents has become more routinized and automated. Most services required of an attorney in a Chapter 13 case may be characterized as 'normal and customary.' . . . Accordingly, some courts have adopted local practice orders or rules permitting attorneys to be paid presumptively reasonable and standardized fees for basic legal services without filing a fee application." The flat fee must compensate counsel for normal and customary services but counsel should be free to seek additional compensation for non-routine services. . . . [T]here is an expectation that the amount of the fee will be sufficient to fairly compensate a competent attorney for rendering services routinely performed in a typical Chapter 13 case. . . . Most courts agree that counseling a debtor about various bankruptcy chapters as well as alternatives to bankruptcy is a routine service." Here, debtors' counsel sought compensation for oral and written communications with the debtors, preparation of amended schedules, communication with creditors, all of which were encompassed within routine Chapter 13 services. Similarly, preparation of routine motions is also encompassed within the flat fee. "Some of the expenditures of time were

self-inflicted because counsel did not take the prudent step of asking her client to provide a copy of the mobile home title or preform a lien check before the case was filed. . . . However, to the extent these matters were litigated and required hearings and submission of briefs, the court finds the services were not routine and, therefore, were outside the scope of the flat fee.").

In re Johnson, 331 B.R. 534, 536 (Bankr. W.D.N.Y. 2005) (Chapter 13 debtor's attorney may not receive supplemental fees in excess of the "no look" fee originally awarded. When the debtor's attorney sought an additional fee of $150 to compensate him for two necessary adjournments and time required to respond to a trustee's motion, the court considered the extent to which those services were included within the original "no look" fee "Entitlement to an additional fee depends not only upon the performance of unexpected legal tasks, but also upon the totality of all services rendered. Thus, the mere delivery of extra services will not necessarily justify additional fees." The services for which extra compensation was sought were services encompassed within the original "no look" fee and additional compensation is not justified.).

In re Balderas, 328 B.R. 707, 733–34 (Bankr. W.D. Tex. 2005) (A "flat fee" of $2,500 for debtors' attorney's services is reasonable and includes post-confirmation services for one motion for relief from stay on the debtors' residence, one moratorium request, and general post-confirmation contact with the debtors; subsequent motions for relief from stay, modifications, and suspensions would be paid additional amounts on top of the flat fee. Chapter 13 debtors sought a modification of the plan subsequent to confirmation and debtors' counsel requested an attorney's fee of $350. The court examined the entire method by which attorneys are awarded fees and by which such fees were paid. Fees for services of a debtor's attorney subsequent to confirmation are not paid by the debtor. "The debtors have not actually footed the bill for the services they have received, however—their creditors have borne that economic cost. The debtors pay the same plan payment, regardless to whom that payment is distributed. It is the creditors (especially secured creditors) who are directly and adversely affected by the diversion of plan payment distributions to pay the debtors' lawyer for additional services." Fees incurred by a debtor's attorney may be for services in representing the interests of the debtor but to be awarded must be based on the benefit and necessity of the services to the debtor. If they were duplicative or were not reasonably likely to benefit the debtor's estate, or were not necessary for the administration of the estate they may not be awarded. Where the debtor proposed a Chapter 13 plan which was inherently unfeasible, imposing additional administrative claims on creditors to cure the debtor's inability to sustain the obligations of the plan is not reasonable. Debtors' counsel's effort to combine a fee for responding to a motion for relief from stay and a fee for a modification of the plan was duplicative since one inherently involved the other. A "flat fee" should include defending or responding to a motion for relief from stay on the debtors' principal residence and one request for a moratorium of post-confirmation payments. Every application for additional fees must contain in the title of the application, how many fee applications had been made and the total of fees previously awarded by the court. The flat fee "include[s] the preparation of schedules and statements of affairs, the Chapter 13 plan, attendance at the first meeting of creditors, such communication, correspondence, and consultation as is appropriate to properly represent the debtors in order to accomplish the requisite steps to get to confirmation, and filing other routine and quasi-routine motions, such as motions to avoid liens under § 522(f) and filing motions for pre-confirmation payment moratoriums. In addition, the flat fee will include representing the debtor in responding to a motion for relief from stay on the debtor's principal residence, regardless when such motion is filed in the case. . . . If a given case generates an extraordinary amount of work . . . counsel is always free to request more than the ***prima facie*** reasonable fee. The trustee will decline to recommend confirmation in such cases, triggering a confirmation hearing." The court further prohibited any future fee payments to be made as an "initial distribution." The court required all fees to be paid in monthly installments which cannot exceed $100 per month.).

In re Perez, 327 B.R. 94 (Bankr. E.D.N.Y. 2005) (Attorney whose license had been suspended by the Appellate Division of the New York Supreme Court was ordered to reimburse the $350 received from the debtor for preparing a response to a motion for relief from the stay that was signed by the debtor but prepared

by the suspended attorney. Attorney was also referred to the Supreme Court for sanctions for practicing law during a period of suspension.).

In re Ferguson, 326 B.R. 419, 423 (Bankr. N.D. Ohio 2005) (A "foreclosure negotiator" or "foreclosure mediator" was involved in the unlawful and unauthorized practice of law and its claim would be disallowed in a debtor's Chapter 13 case. The debtor was faced with a foreclosure judgment and consulted with a self styled "loss mitigation and foreclosure negotiation" professional who agreed to negotiate on her behalf to settle the legal actions and cancel the foreclosure. Ultimately, the debtor filed a Chapter 13 petition which stayed the foreclosure. The "foreclosure negotiator" filed a proof of claim to which the debtor objected. "The unauthorized practice of law occurs when a non-attorney acts as an intermediary to advise, counsel, or negotiate on behalf of an individual or business in an attempt to resolve a collection claim between debtors and creditors. . . . Brown intended to insert himself between debtor and the mortgage company as an intermediary to advise, counsel, and negotiate on her behalf. A non-attorney who attempts to settle a pending lawsuit on behalf of one of the litigants is engaged in the unauthorized practice of law." That Brown further demonstrated his "consummate legal ineptitude" by requesting additional fees for the unauthorized practice of law in the debtor's Chapter 13 case only highlights the necessity of enforcing the prohibition on the unauthorized practice of law.).

In re MacKay, 323 B.R. 903, 907 (Bankr. M.D. Pa. 2005) (A debtor's attorney's fees incurred in representing a debtor while the case was a Chapter 13, would be accorded administrative priority status after the case converted to Chapter 7; services performed for the debtor during the initial Chapter 7 would be subject to discharge. The debtor initially filed a Chapter 7 case and then converted the case to Chapter 13. During the pendency of the Chapter 13, debtor's counsel was involved in a venue contest. The debtor reconverted to Chapter 7 and counsel applied for fees. Although it was acknowledged that the Chapter 7 administrative claims would have first priority, fees for services provided for the benefit of the debtor during the Chapter 13 would be afforded administrative status. Section 348(d) "provides that all claims against the estate or the debtor that arise after the order for relief but before conversion of the case, other than those claims specified in § 503(b), are treated for all purposes as if the claim had arisen immediately before the date of the filing of the petition. The attorney's fees incurred during the initial Chapter 7 do not fall under the provisions of § 330. . . . This leaves the attorney's fees [during the 7] with a designation of being treated as a pre-petition debt." For services during the Chapter 13 case, those fees would be allowed under § 330(a)(4)(B), thus specified in 503(b), and would be accorded administrative status after conversion.).

In re Chapman, 323 B.R. 470 (Bankr. W.D. Wis. 2005) (Additional fee of $2,000 above the $1,200 "no look" fee did not require a fee application under Bankruptcy Rule 2016(a) because the $2,000 was paid from the exempt proceeds of a postpetition lawsuit settlement; however, debtors' counsel was required to amend the 2016(b) disclosure to reveal the payment within 15 days and disgorgement of half of the $2,000 was appropriate when debtors' counsel misrepresented whether the $2,000 was held in a trust account pending hearing of the (unnecessary) fee application.).

In re Schraner, 321 B.R. 738, 741 (Bankr. W.D. Wash. 2005) (Debtors' attorney's application for $1,315 for legal fees incurred in objecting to five claims is reduced by $1,000—$250 for each of four objections that were denied, including three that "should not have been filed.").

In re Waldorf, No. 02-14899, 2005 WL 419714 (Bankr. M.D. Fla. Feb. 4, 2005) (unpublished) (Substitute counsel's fee request for $4,500 is reduced to $1,500 and counsel is ordered to disgorge $1,500 already received from the debtors when substitute counsel failed to file Rule 2016 disclosure that debtors paid $1,000 retainer and $2,000 during the course of the Chapter 13 case.).

In re Imler, No. 02-90582, 2005 WL 670348 (Bankr. C.D. Ill. Feb. 3, 2005) (unpublished) (Debtors' attorney's request for compensation for 33.2 hours of attorney time was not supported by the fee itemization

filed by counsel and does not support an award of fees beyond the $1,500 already allowed. Many of the time entries were not described sufficiently, services were lumped together and the court could not make a reasonableness determination from the itemization.).

In re Walker, 319 B.R. 917, 920–22 (Bankr. S.D. Ga. 2004) ("No look" fee of $1,500 has many salutary effects but one of the down sides is that debtors' attorneys are awarded for overcharging in simple cases; on trustee's objection, debtors' attorneys' fees are reduced from $1,500 to $1,000 in three similar small Chapter 13 cases. Each of the cases called for payments totaling between and $3,000 and $4,000 with a $1,500 attorney's fee and dividends to unsecured creditors ranging from 21% to 88%. Evidence indicated that debtors' counsel spent approximately six and one-half hours on each case. "Local Rule . . . provides for automatic approval of a request for attorney fees up to $1,500 in the absence of an objection (the "no look fee"). . . . The Rule merely states that a fee of $1,500 will be approved in the absence of an objection. . . . [I]t also instructs attorneys that they are required to reduce their fees in conformance with the Rules of Professional Conduct 'when the amount and nature of the debts or other relevant factors result in the expenditure of substantially less attorney's time.' . . . Thus, the Rule does not set a fee, but rather acknowledges that $1,500 typically will be reasonable fee. The Rule's guiding principle is that most Chapter 13 cases are very similar . . . . [A]pplications in typical cases result in similar fee awards. . . . [I]n the interest of administrative convenience that benefits the Court, the debtor, and the attorney, the Court is essentially trusting the attorney to comply with his professional obligation to seek a fee no greater than that to which he is entitled. The Court should not have to examine routine fee applications so long as the debtor's attorneys are honest in their dealings. . . . The benefit of the 'no look' fee is well-known. The detriments, however, are less apparent. . . . Relying on the Local Rule, Mr. Royals has asserted that $1,500 is appropriate in every case. . . . [T]he Rule itself anticipates the fact that greater or lesser fees may be appropriate. . . . [T]he establishment of a 'no look' fee appears to discourage responsible billing judgment on the part of debtor's counsel and increases the costs of a Chapter 13 case for a debtor who is least able to financially pay . . . . Another troublesome aspect of the 'no look' fee is the chilling effect it has on fee competition in the marketplace. . . . [T]he Rule has, as a matter of practice, led to the establishment of $1,500 as the standard fee in Chapter 13 cases. Luckily, this unintended consequence is not unfair in most cases. . . . [D]ebtors with less complex cases end up unfairly subsidizing the cost of more complex cases. . . . The 'no look' fee serves a useful purpose in most cases. Regretfully, it inspires abusive mischief in some. . . . A fee of $1,000 will be awarded in each of these cases.").

§ 295.1 Utilities
§ 296.1 Leases and Executory Contracts

In re Mandel, 319 B.R. 743, 745 (Bankr. S.D. Fla. 2005) (Postpetition apartment rent is an expense of administration notwithstanding that the debtor rejected the lease because schedules indicated that the debtor used the apartment to generate income. Debtor was self-employed and working out of the same address as his residential apartment generating income from "frame sales." Landlord moved for an award of an administrative expense when debtor stopped paying rent. Debtor responded by immediately rejecting the lease. "The Eleventh Circuit has held . . . that there must be an actual, concrete benefit to the estate before a claim is allowed as an administrative expense. . . . [T]he Debtor's post-petition occupation of the Apartment has conferred an actual, concrete benefit upon the estate because the Debtor was self employed, using the Apartment in his business to generate income to pay the creditors of the estate.").

§ 297.1 Failed Adequate Protection
§ 298.1 Miscellaneous Administrative Expenses and Other Priority Claims

In re Tirado, 329 B.R. 244, 250 (Bankr. E.D. Wis. 2005) (Section 1327 does not preclude the award of an administrative fee to an individual who facilitated the rental and sale of the debtor's property. Debtor's Chapter 13 plan was confirmed requiring the debtor to maintain payments on a mortgage paid directly.

During the pendency of the case, the debtor located a tenant for the property, facilitating the debtor's ability to make mortgage payments. The debtor sold the property to the tenant resulting in a greater distribution to creditors. An individual who had assisted the debtor in locating the tenant and obtaining financing sought an administrative claim for such services. The trustee objected on the grounds that the individual was not a professional and had not obtained prior court approval or appointment for such services. The court rejected the trustee's argument. "Congress, through the use of plain and unambiguous language, has limited the scope of § 327 to trustees. Although Chapter 11 debtors in possession have also been included under § 327 via § 1107, and Chapter 12 debtors must comply with § 327 pursuant to § 1203, there is no corresponding section of Chapter 13 making § 327 applicable to Chapter 13 debtors. Therefore, § 327 of the Bankruptcy Code simply does not apply to Chapter 13 debtors who seek to employ professionals. The requirements of § 327 would be triggered by a Chapter 13 trustee's application to employ a professional, but in this case, Jenkins' services were rendered to the Debtor, not the trustee." Although the debtor should have sought advance approval from the trustee or the court before agreeing to pay Jenkins for services, pursuant to the confirmation order, the failure to seek approval is not sufficient to deny all compensation to Jenkins.).

§ 299.1 Postpetition Interest on Priority Claims

United States v. Fowler (In re Fowler), 394 F.3d 1208, 1212 (9th Cir. 2005) (Unpaid FICA and FUTA taxes that accrued during a Chapter 11 case prior to conversion to Chapter 13 are administrative expenses entitled to priority and full payment with interest and penalties. "Postpetition tax debt may constitute an administrative expense if it relates to 'any tax incurred by the estate,' except certain defined taxes . . . The first priority accorded to administrative expense taxes also extends to interest and penalties that accrue on that debt. . . . A Chapter 13 confirmation [*sic*] plan must provide that administrative expenses, including penalties and interest, be paid in full as priority claims. . . . [A] tax that is prepetition and unsecured is generally given eighth priority. . . . These eighth priority tax claims are also paid in full over the term of the Chapter 13 plan without interest. . . . [T]he most important distinction between administrative expense tax claims and unsecured priority tax claims in Chapter 13 is that the IRS cannot recover interest on prepetition unsecured priority tax claims.").

§ 300.1 Secured Priority Claims?
§ 301.1 Alimony, Maintenance and Support in Cases Filed after October 22, 1994

In re Diaz, 330 B.R. 875, 879 (Bankr. M.D. Ga. 2005) (Court would set aside a default judgment to determine the dischargeability of an alleged child support obligation when the counsel for support agency indicated he represented the agency and not the child support creditor. Debtor initiated an adversary proceeding to determine the dischargeability of an alleged child support obligation. He named Sharon Mock and National Child Support Center. Only National Child Support responded and appeared at the pre-trial conference. At the conference, counsel for National Child Support indicated he was not representing Ms. Mock. When a default judgment was entered, counsel sought to set it aside, indicating he had mis-spoken. "In the present case, counsel for Ms. Mock made a mistake of fact in filing a response under the wrong name, not a mistake of law. The delay was not significant and did not result in prejudice to Mr. Diaz. In addition, there has been no evidence of bad faith on the part of Ms. Mock or her attorney.").

In re Mclaughlin, 320 B.R. 661, 666 (Bankr. N.D. Ohio 2005) (Attorney fees awarded by state court in litigation with the debtor to obtain child support are part of the priority claim and entitled to full payment in a Chapter 13 case. "[T]he subject attorney fees are clearly intertwined with Thomas' litigation to obtain child support, which is a nondischargeable obligation in bankruptcy proceedings. Herein, the attorney fees constitute a part of the subject priority claim and is entitled to § 507(a)(7)(B) treatment.").

IV. POSTPETITION CLAIMS

§ 302.1 Postpetition Claims

United States v. Fowler (In re Fowler), 394 F.3d 1208, 1212–14 (9th Cir. 2005) (FICA and FUTA taxes that accrued during a Chapter 11 case before conversion to Chapter 13 are administrative expenses entitled to priority and full payment with interest and penalties. "Postpetition tax debt may constitute an administrative expense if it relates to 'any tax incurred by the estate,' except certain defined taxes . . . The first priority accorded to administrative expense taxes also extends to interest and penalties that accrue on that debt. . . . [Section] 1305 does not govern priority status. . . . Section 1305 requires only what it says—that for purposes of allowing or disallowing a creditor's claim, the claim is treated as if it arose prepetition. It does not address the statutory treatment of the claim itself once it has been allowed into the bankruptcy proceeding. A § 1305 claim is not automatically determined as if it were a prepetition claim for all purposes.").

In re Henning, No. 02-21047, 2005 WL 613403, at *3 (Bankr. W.D.N.Y. Mar. 17, 2005) (unpublished) (Debtor was permitted to abandon his interest in 41 rental properties pursuant to the Chapter 13 plan but any claims of the City of New York with respect to expenses incurred to prevent danger to the public were not postpetition claims under § 1305 but were debts that remained the personal liability of the debtor during the Chapter 13 case and after discharge in the Chapter 13 case. "The Court never intended nor would it have required the City to file post-petition claims, since . . . under Section 1305 the post-petition claims in question were not otherwise allowable and all post-petition claims are filed at the election of the creditor." The City could have filed claims during the Chapter 13 estate to collect the expenses to cure dangerous conditions at the abandoned properties but was not required to do so by the court order that approved the abandonment. The City's choice not to seek expenses from the Chapter 13 estate benefitted the debtor's other creditors.).

V. OTHER CLAIMS QUESTIONS

§ 303.1 Alimony, Maintenance and Support in Cases Filed before October 22, 1994

§ 304.1 Claims for Creditors' Attorneys' Fees

Educational Credit Mgmt. Corp. v. Barnes, 318 B.R. 482 (S.D. Ind. 2004) (18.05% flat rate collection costs added to student loan claim under 34 C.F.R. § 682.410(b)(2)(I) is not unconstitutional because cost averaging is not arbitrary or capricious and percentage is less than maximum allowed by student loan contract.).

In re Jacobs, 324 B.R. 402, 409–11 (Bankr. N.D. Ga. 2005) (Condominium association's claim for $4,132.95 for attorney fees and expenses that began when the debtor was less than $325 short in payments is not reasonable and is reduced to $2,127.25. "[T]hat the Association could lawfully exercise its legal remedies after the Debtor's default does not automatically mean that their exercise was necessary or that attorney's fees incurred in doing so are 'reasonable attorney's fees actually incurred' . . . . [A]nalysis of the reasonableness of the Association's reasonable costs begins with the startling fact that post-judgment, prepetition legal services costing $3,474.70 increased its receipts by only $56.44. The fees and expense are more than five times the missed payments that led to the judgment and exceed even the amount of the judgment itself. There is a serious disparity between the fees charged . . . and the amount involved and results achieved on the other. . . . [T]he huge variance is not explained by litigiousness on the part of the Debtor. . . . The grossly disproportionate legal costs arise from the utter failure of either side to communicate with the other. . . . The parties collectively, aided and abetted by their lawyers, have managed to turn a potentially solvable problem of relatively modest proportions into a huge and costly mess. . . . The Association incurred far more fees and expenses than necessary in an ill-considered and ineffective effort to collect. For her part, the Debtor foolishly failed to pursue communication with the Association or its attorneys. . . . [I]n the absence of evidence of any serious effort by an Association representative or its lawyers to at least attempt some non-judicial communication with the Debtor or collection outside of legal process, the Court concludes that the Association has failed to show that it was necessary to pursue post-judgment collection remedies . . . . The Association's

own self-interest should have prompted someone to wonder why it was spending hundreds and eventually thousands of dollars to collect from someone who kept on paying.").

In re Valdez, 324 B.R. 296, 301 (Bankr. S.D. Tex. 2005) (A mortgage creditor would be denied attorney's fees for pursuing a motion for relief from stay in a Chapter 7 case where there was substantial equity in the debtor's property and there was no cause asserted to obtain relief from the stay. "Filing a motion for relief from the stay is ordinarily a prudent action taken by a secured creditor when the debtor is in default. Not filing such a motion may be commercially ***irresponsible*** by failing to protect collateral. However, it is not prudent to seek relief under § 362(d)(2) if the attorney's time is spent on unnecessary or duplicative work, or an attorney's excessive caution or overzealous advocacy. . . . Additionally, it is not prudent to seek relief under 362(d)(2) if the debtor retains substantial equity in the property and no independent cause for relief is alleged under 362(d)(1)." Because seeking relief was not commercially reasonable, it was commercially imprudent, and the cost for pursuing such motion cannot be considered reasonable under § 506(b). The debtor should not be required to pay fees and costs pursuant to § 506(b) for a motion brought with no chance of success.).

In re Evans, 322 B.R. 429, 438 (Bankr. W.D. Wash. 2005) (Citing *ECMC v. Barnes,* 318 B.R. 482 (S.D. Ind. 2004) with approval, ECMC can include the collection charges described in 34 C.F.R. § 682.410(b)(2) in its proof of claim for collection of a student loan debt. "The Court finds persuasive the reasoning employed in the *Barnes* decision, and for the reasons stated therein . . . concludes that the DOE's interpretation of 'reasonable' collection costs is itself reasonable and that the assessment of those costs under the circumstances of these cases does not afford a basis for disallowance of those costs under Bankruptcy Code § 502(b)(1)." Because the debtor was eligible for loan rehabilitation under 34 C.F.R. § 682.405, collection costs may not exceed 18.5% of the unpaid principle and accrued interest.).

In re Nair, 320 B.R. 119, 124–29 (Bankr. S.D. Tex. 2004) (J. Ward Holliday, counsel for Triad Financial Corporation, violated Bankruptcy Rule 9011 by submitting agreed orders for relief from the stay that included allowance of $550 attorney fees when Triad's claim was undersecured. Triad was an undersecured creditor and requested attorney fees in its postconfirmation motion for relief from the stay. An agreed order was submitted that resolved the relief stay request and provided that the debtor would pay movant's attorney fees in the amount of $550. "[T]his Court concludes that Triad's request for attorney's fees was not justified by 'existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.' Instead, the request was made in the anticipation that it would not be scrutinized by the Court because it was filed as an agreed order. . . . [T]he American Rule applies with equal force in motions for relief from the automatic stay. . . . Inasmuch as the allowance of attorney's fees under § 506(b) is governed by the same phrase as the allowance of interest, the general prohibition against recovery of attorney's fees under the American Rule applies to bar recovery of Triad's attorney's fees. . . . Section 502(b) requires claims to be determined 'as of the date of the filing of the petition.' . . . Inasmuch as the attorney's fee claim did not exist 'as of the date of the petition,' it cannot be allowed. . . . Each week, there are approximately 200 agreed orders or default orders issued on motions for relief from the stay. . . . Bankruptcy Judges must be able to rely on counsel's compliance with Fed. R. Bankr. P. 9011. When reviewing an agreed order, the Court should be able to rely on counsel's representation that the contents of the agreed order are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal [of] existing law or the establishment of new law." Bankruptcy court enjoined Holliday from filing any pleading or proposed order in the United States Bankruptcy Court for the Southern District of Texas seeking an award of attorney fees for a creditor with a lien on a vehicle that is undersecured. Within 60 days, Holliday was ordered to adopt similar procedures in all filings by his law firm throughout the United States.).

Stewart v. Capital City Mortgage Corp. (In re Stewart), Nos. 00-00046, 02-10020, 2004 WL 3130573 (Bankr. D.D.C. Nov. 10, 2004) (unpublished) (Oversecured mortgage holder is entitled to recover contractual attorney fees for in-house counsel's work consistent with modified deed of trust and fees must be reasonable. Capital City was disallowed legal fees for any period before any breach or instance of default that would allow

recovery. Many claims for attorney fees were not documented and were disallowed. In-house counsel fees could not be charged at the market rate of an outside counsel. Most of the charges listed by Capital City were unreasonable and unsupported by any evidence. There was no provision in the modified deed of trust for interest on attorney fees. Six hundred and eighty dollars for preparing a simple proof of claim was unreasonable. Capital City was disallowed attorney fees with respect to litigated matters that Capital City lost.).

§ 305.1 Nonrecourse Claims and Claims Discharged in Prior Bankruptcy Case
§ 306.1 Truth-in-Lending and Other Consumer Protection Statutes

Yarnall v. Four Aces Emporium, Inc. (In re Boganski), 322 B.R. 422, 429 (B.A.P. 9th Cir. 2005) (Pay day lender failed to establish "bona fide error defense" under TILA when employee understated APR and no action was taken to correct the mistake. That Chapter 13 trustee made partial payment on the claim before filing an adversary proceeding did not provide a defense under TILA. "[T]he TILA action is distinct from the allowance of the claim.").

In re Merriman, 329 B.R. 710, 722, 726 (D. Kan. 2005) (Even where a mortgage creditor had violated TILA, giving a debtor the right to rescind the mortgage transaction, the court would condition the release of the mortgage lien upon the tender of the post-recision amount by the debtor. The Chapter 13 debtor proposed to rescind Beneficial's mortgage because of violations of TILA. The debtor argued that the rescission was automatic and the lien should be released, and that Beneficial's right to the tender of the proceeds of the loan, less damages, was merely a claim in the Chapter 13 case. Although the court acknowledged that upon rescission the borrower is not liable for any finance or other charges and the security interest given by the borrower becomes void, TILA permits a court to modify the remedies granted in the statute. "Rescission . . . is an equitable remedy. Its relief, in design and effect, is to restore the parties to their pre-transaction positions. . . . The TILA requires the lender to return the finance charge and take steps to terminate the security interest first, before requiring the borrower to pay off the principal balance. This allows the borrower to seek a new loan . . . In this case, Merriman is attempting to use an equitable remedy to create a legal right to effectively strip Beneficial's mortgage lien, a right she is not accorded under bankruptcy law. . . . The Court concludes that Beneficial's mortgage lien was not automatically void upon Merriman's giving notice of rescission to Beneficial. In so ruling, the court joins the majority of courts in concluding that TILA . . . authorize(s) it to modify the procedure for rescission by conditioning the avoidance of a lender's mortgage lien on tender of the post-rescission amount by the borrower.").

In re Hopkins, 328 B.R. 575 (Bankr. D. Utah 2005) (Filing of a proof of claim and a motion for relief in a Chapter 13 case satisfies Utah's One Action Rule and no separate adversary or law suit need be filed to enforce a deficiency. The Chapter 13 debtor had pledged her home and development property to secure a loan to the credit union. After the credit union successfully foreclosed on the development property, the debtor argued that state law, requiring an assertion of a deficiency to be made within 3 months after foreclosure, had not been satisfied and the pursuit of a deficiency should be denied. The court disagreed, noting that the filing of a proof of claim and the filing of a motion for relief relating to the property was sufficient to put the debtor on notice of the creditor's intent to collect on the deficiency, all that is required under state law.).

In re Bayless, 326 B.R. 411, 418 (Bankr. E.D. Mich. 2005) (Where a creditor, financing the installation of windows, a roof, and siding on the debtor's residence, failed to comply with the Michigan Home Solicitation Sales Act by failing to provide a notice of a right to cancel, the court would hold that the lien was rescinded but would condition the rescission on the borrower paying the reasonable value of the siding installed. The court found, after a trial, that the debtor had never received a notice of cancellation form, a requirement under state law. The creditor had not demanded return of goods delivered within 20 days of the notice of cancellation, so the goods became the property of the buyer. The court held, however, that "to allow Debtors to retain these improvements without paying the amount owed . . . would be an inequitable and uncalled for

result. . . . While rescission may be appropriate under the above-cited provisions of the MHSSA, the Court also holds that a corresponding condition to rescission must be payment to Blue View of the fair value of the improvements received." Accordingly, the debtor was required to pay just the original purchase price as a condition of the confirmation of his Chapter 13 plan.).

In re Miller, 320 B.R. 203 (Bankr. N.D. Ala. 2005) (Court would fashion an equitable mortgage on the Chapter 13 Debtor's property when the mortgage closing had been rescinded by the Debtor under the Truth-In-Lending Act; the Debtor was not capable of returning the funds advanced by the mortgagee. The Debtor obtained a refinancing from GreenTree Financial which placed a lien on her home. The Debtor then attempted to rescind the mortgage obligation but GreenTree had already funded the repayment of the first and second mortgages on the property and satisfied other obligations with the proceeds of the loan. After the Debtor filed for relief under Chapter 13, the mortgagee sought relief from the stay and the Debtor challenged the validity of the mortgage. Because GreenTree had advanced funds on behalf of the Debtor and because the Debtor was incapable of returning the proceeds of the loan that were required as a result of the loan transaction, the court found that Alabama law would impose an equitable mortgage on the real estate. Any valid recision is conditioned upon the return to GreenTree of loan proceeds disbursed after the closing. It is clear that the Debtor actually sought the loan and obtained the full benefit of the transaction. It is also clear that the Debtor intended to create the mortgage to secured the obligations. Accordingly, an equitable mortgage exists and, due to the failure of the Debtor to provide adequate protection of the creditor's interest in the property, GreenTree would be granted relief from the stay.).

Ephraim v. Provident Bank (In re Ephraim), 318 B.R. 419 (Bankr. N.D. Ill. 2004) (Action under Illinois Interest Act alleging excessive fees charged by mortgage lender is dismissed because Illinois statute limiting add-on charges was repealed by implication with respect to real estate mortgages.).

§ 307.1 U.C.C. and Other Commercial Law Questions

Oaks v. Bank One Corp. (In re Oaks), No. 04-5116, 2005 WL 293677 (6th Cir. Feb. 8, 2005) (unpublished) (Debtor failed to prove that Tennessee law required a lessor to give notice before disposing of a car repossessed under a defaulted car lease. Debtor also failed to prove that sale of car at 53% of Blue Book value was commercially unreasonable.).

§ 308.1 Miscellaneous Claims Issues

In re Stetar, 323 B.R. 646 (Bankr. W.D. Pa. 2005) (Chapter 13 debtor's objection to claim filed by her brother is sustained because brother's claim was previously rejected by state Orphan's court. State court rejected brother's claim as one based on a mistake of law while acting in a fiduciary capacity for which the fiduciary has no right to recovery. Alternatively, bother's claim was barred by collateral estoppel.).

In re Dunbar, No. 03-GK-03506-PMG, 2005 WL 852585 (Bankr. M.D. Fla. Mar. 30, 2005) (unpublished) (With the exception of $413.54, Wells Fargo/Norwest Mortgage accounted for all payments in the debtor's prior Chapter 13 case and "other fees" in the amount of $4,016.33 charged against debtor's account for foreclosure costs in the current bankruptcy case.).

Wilson v. Smith (In re Smith), 321 B.R. 75 (Bankr. M.D. Fla. 2005) (Unliquidated claims against Chapter 13 debtor for professional negligence, constructive fraud and breach of fiduciary duties are estimated by the bankruptcy court at $449,850 and $172,118.).

PART 7: CONVERSION AND DISMISSAL

§ 309.1 Summary of Part 7

I. STATUTES AND RULES

§ 310.1 11 U.S.C. § 1307: Conversion and Dismissal
§ 310.2 11 U.S.C. § 706: Conversion to Chapter 13
§ 310.3 11 U.S.C. § 1112(d): Conversion to Chapter 13
§ 310.4 11 U.S.C. § 348: Effects of Conversion
§ 310.5 11 U.S.C. § 349: Effects of Dismissal
§ 310.6 Bankruptcy Rule 1017: Procedure for Conversion or Dismissal
§ 310.7 Bankruptcy Rule 1019: New Lists, Reports and So Forth

II. CONVERSION TO CHAPTER 7

A. PROCEDURE AND GROUNDS FOR CONVERSION

§ 311.1 Conversion by Debtor
§ 311.2 Conversion on Request of Creditor or Trustee
§ 312.1 Cause for Conversion
§ 312.2 Conversion Sua Sponte
§ 312.3 Automatic Conversion: The "Drop Dead" Clause

B. EFFECTS OF CONVERSION

1. IN GENERAL

§ 313.1 New Schedules, Statement, Meeting of Creditors and Deadlines
§ 314.1 On Postpetition Claims
§ 314.2 On Relief from Stay

2. ON ENTITLEMENT TO POSTPETITION PROPERTY

§ 315.1 In Cases Filed before October 22, 1994
§ 316.1 In Cases Filed after October 22, 1994

In re Brinkley, 323 B.R. 685 (Bankr. W.D. Ark. 2005) (Life insurance proceeds following the death of one Chapter 13 debtor payable to his debtor spouse when death occurred more than 180 days after the filing of the Chapter 13 petition would not be property of the estate when the debtor converted to Chapter 7. The debtors jointly filed a Chapter 13 petition in October of 2003. In June of 2004 one debtor died. The surviving debtor spouse was entitled to $64,000 in proceeds from a life insurance policy on his life. The surviving debtor converted to Chapter 7 in July of 2004 and the Chapter 7 trustee sought turnover of the insurance proceeds. Although § 1306 of the Code expands the 180 day inclusionary period for property of the estate in a Chapter 13 case since it includes all property that the debtor acquires after the commencement of the case, and as a general rule property that is not abandoned or administered remains property of the estate, pursuant to § 348(f) property that comes into the estate only because of § 1306(a) is not included in the estate of a converted case. Congress' intent was to avoid penalizing debtors for attempting Chapter 13 cases so as to place them in the same economic position they would have been in had they filed Chapter 7 originally. The absence of bad faith, therefore, the insurance proceeds were not property of the Chapter 7 estate.).

In re Woodland, 325 B.R. 583 (Bankr. W.D. Tenn. 2005) (The "equity" that developed in a debtor's automobile as a result of the satisfaction of the lien during a Chapter 13 case, would not be property of the Chapter 7 estate at conversion. When the debtor filed a Chapter 13 petition, there was no equity in an automobile because it was subject to a lien. During the Chapter 13 case, the lien was satisfied through periodic payments. When the debtor converted to Chapter 7, no lien remained and the Chapter 7 trustee sought to compel the turnover of the automobile for sale. Court held that the equity in the vehicle that existed at the time of the Chapter 7 conversion was an after acquired interest of the debtor. Because of the provisions of § 348(f)(1), property acquired by the Chapter 13 estate or by the debtor after the Chapter 13 petition does not become property of the Chapter 7 estate if the conversion was in good faith. Further, that section provides that the secured claim is reduced by the amounts paid in a Chapter 13 case. Thus, when the lien was fully satisfied,

it does not spring back into force and the pre-conversion acquisition of equity never comes into the Chapter 7 estate. Trustee's application would be denied.).

In re Nichols, 319 B.R. 854, 857 (Bankr. S.D. Ohio 2004) (Citing § 348(f) and legislative history, equity in a car created by payments during the Chapter 13 case is not property of the Chapter 7 estate at conversion. At the filing of the Chapter 13 case, the debtor listed a car valued at $19,000 subject to a debt of nearly $30,000. There was no equity in the car. Debtor paid the entire secured portion of the car loan during the Chapter 13 case before conversion. At conversion, there was substantial equity in the car and the Chapter 7 trustee sought to administer the asset. Acknowledging a split of authority, the bankruptcy court found § 348(f) to be ambiguous with respect to whether property of the estate in the Chapter 7 case included equity created by payments from the debtor's earnings during the Chapter 13 case. The court then looked to legislative history and found that "Congress did not intend that a chapter 13 debtor should lose the benefit of any equity accrued in an asset because of said debtor's compliance with the chapter 13 plan payments. As such, we believe the policy of not including such equity in the estate assets at the time of conversion to a chapter 7 is the better view and furthers the policy of encouraging debtors to file chapter 13 cases to attempt to repay their debts.").

§ 316.2 Bad Faith Conversion

3. ON EXEMPTIONS AND LIEN AVOIDANCE

§ 317.1 Exemptions at Conversion

In re Fonke, 321 B.R. 199, 205–09 (Bankr. S.D. Tex. 2005) (Conversion from Chapter 13 to Chapter 7 does not trigger a new period for objection to exemptions because to allow a new period for objections would conflict with § 522(c) which creates a substantive right for the debtor by eliminating the liability of exempt property for prepetition debts. "[T]he Debtor properly filed for exemptions without objection. Accordingly, pursuant to § 522(*l*), the property is deemed exempt. Because of its [*sic*] exempt, the property have left the estate and vested in the Debtor. Further, pursuant to § 522(c), the property is not liable for any prepetition debts during the course of the case. . . . Under a plain reading of § 348(f)(1), the property of the estate would consist of all of the debtor's property as of the filing of the petition. Therefore, because there was no exempt property on the petition date, § 348(f) appears to restore or recapture subsequently exempted property, and thus bring it back into the estate. . . . [S]uch a reading of § 348(f) appears to be in direct contradiction with § 522(c). Based on a plain reading of § 522(c), the property that was previously exempted in the case cannot be subject to liability for prepetition debts unless the case is dismissed. . . . [I]n determining the issue of liability of exempt property for prepetition debts, § 522(c) is the more specific statute. Therefore, § 522(c) trumps § 348 as to whether previously exempted property may be liable for prepetition debts by being recaptured by the estate. . . . Section 522(c) creates a substantive right for the debtor by eliminating liability of exempt property for prepetition debts. Therefore, if Rule 4003(b) were interpreted to create a right to object to previously exempted property, it would modify this substantive right by subjecting the protected property to prepetition liability. . . . [T]he deadline to object to exemptions does not recommence upon the conversion of a case from chapter 7 to chapter 13.").

§ 318.1 Lien Avoidance at Conversion

4. ON SECURED CLAIMS

§ 319.1 In Cases Filed before October 22, 1994

§ 320.1 In Cases Filed after October 22, 1994

Lomagno v. Salomon Bros. Realty Corp. (In re Lomagno), 320 B.R. 473, 482 (B.A.P. 1st Cir. 2005) (A foreclosure sale conducted after the dismissal of the debtors' Chapter 13 case but prior to the appellate decision reversing the dismissal would be a valid sale; absent a stay pending appeal, the automatic stay is not in place after the dismissal and it would be inappropriate to retroactively impose the stay. Following the dismissal of the debtors' Chapter 13 case, the decision was appealed and ultimately reversed by the

Bankruptcy Appellate Panel. During the period of time between the dismissal and the reversal, the debtors' home had been subject to foreclosure. The debtors argued it was error for the bankruptcy court not to retroactively impose the stay when the dismissal was reversed. "[W]hen the bankruptcy court entered its order of dismissal on March 10, 2003, the automatic stay was immediately terminated, irrespective of the debtors' right of appeal. Salomon's foreclosure did not violate the automatic stay because the stay was not in effect at the time the foreclosure took place. We decline to give retroactive effect to the automatic stay. Because the debtors failed to obtain a stay pending appeal . . . Salomon was entitled to enforce its rights as a creditor."), *aff'd,* 429 F.3d 16 (1st Cir. 2005).

In re Nichols, 319 B.R. 854, 857 (Bankr. S.D. Ohio 2004) (Equity that accrued during the pendency of the Debtor's Chapter 13 case as a result of the pay down on an auto loan would not be property of the Chapter 7 estate subject to liquidation and distribution to unsecured creditors by the Chapter 7 trustee. "Congress did not intend that a Chapter 13 debtor should lose the benefit of any equity accrued in an asset because of said debtor's compliance with the Chapter 13 plan payments. As such, we believe the policy of not including such equity in the estate assets at the time of conversion to a Chapter 7 is the better view and furthers the policy of encouraging debtors to file Chapter 13 cases to attempt to repay their debts.").

III. CONVERSION TO CHAPTER 11

§ 321.1 Standing, Procedure and Grounds for Conversion to Chapter 11

§ 322.1 Strategic Considerations: Costs and Benefits of Conversion to Chapter 11

IV. CONVERSION TO CHAPTER 12

§ 323.1 Standing, Procedure and Strategic Considerations

V. CONVERSION TO CHAPTER 13

A. CONVERSION FROM CHAPTER 7 TO CHAPTER 13

§ 324.1 Procedure

§ 325.1 Absolute Right of Debtor?

Copper v. Copper (In re Copper), 426 F.3d 810 (6th Cir. 2005) (A debtor does not have an absolute right to convert from Chapter 7 to Chapter 13 if the Chapter 13 petition would be dismissed for lack of good faith. The Chapter 7 debtor who had engaged in a long process of avoiding his obligations to his former spouse and provided inaccurate information concerning his assets, sought to convert to Chapter 13. If the bankruptcy court finds that a debtor's request for conversion was made in bad faith or represents an attempt to abuse the bankruptcy process, the conversion can be denied. Such was the case presented by the debtor.).

Pequeno v. Schmidt (In re Pequeno), No. 04-40573, 2005 WL 513466 at *4 (5th Cir. Mar. 4, 2005) (unpublished) (Citing *Martin v. Martin (In re Martin),* 880 F.2d 857 (5th Cir. 1989), "[t]he statutory language makes it clear that the right to convert is absolute and unqualified.").

In re Porreco, 333 B.R. 310, 313 (Bankr. W.D. Pa. 2005) (Although a Chapter 7 debtor does not have an absolute right to convert to Chapter 13, where the debtor is acting in good faith, proposes a confirmable plan, the creditors are not prejudiced, and conversion does not disrupt the administration of the estate, conversion should be permitted. The debtor filed a Chapter 7 petition listing no income and showing a disputed creditor, her former husband, with whom she was involved in a longstanding equitable distribution contest in state court. When the Chapter 7 trustee proposed to settle the equitable distribution claim, the debtor sought to convert to Chapter 13. A Chapter 13 debtor's "right to convert from a Chapter 7 case to a Chapter 13 case . . . [is limited] only under extraordinary circumstances in which conversion is sought in bad faith, or in which the totality of the circumstances on the date of filing the motion for conversion gives rise to significant potential prejudice to creditors regardless of any consideration of bad faith." Here, the debtor had obtained employment and proposed a 100% dividend to unsecured creditors. Debtor was required, however, to compensate the Chapter 7 trustee for the work that the trustee had performed in negotiating the proposed settlement.).

In re Kuhn, 322 B.R. 377, 391–98 (Bankr. N.D. Ind. 2005) (Acknowledging split of authority, debtor's right to convert from Chapter 7 to Chapter 13 under § 706(a) is not absolute but is conditioned: "The Court thus adopts a te st that would preclude or condition a debtor's right to convert from a Chapter 7 case to a Chapter 13 case under 11 U.S.C. § 706(a) only under extraordinary circumstances in which conversion is sought in bad faith, or in which the totality of circumstances on the date of filing the motion for conversion give rise to significant potential prejudice to creditors regardless of any consideration of bad faith. . . . [T]he issue for review of the conversion motion under 11 U.S.C. § 706(a) does not encompass the issue of ultimate compliance of a plan under the criteria of Chapter 13 . . . . [T]he Court will view infeasibility of a proposed Chapter 13 plan to be a factor in 'bad faith' analysis only if on the date of the filing of the conversion motion there is no possible set of circumstances which could reasonably exist when the Chapter 13 plan is submitted for confirmation that would allow the court to confirm any plan in the debtor's contemplated Chapter 13 case." Court notes that "there was obviously a growing awareness among bankruptcy judges that the 'absolute' right analysis created the potential for serious abuse, and thus more and more cases began to condition the 'right' to prevent the potential for abuse. . . . [B]y far the majority of more recent decisions on this issue . . . rely on either bad faith or extreme circumstances as grounds for denying conversion." The statutory analysis in support of this outcome is: "the use of the word 'right' does not have any connotative quality as to the extent of the 'right,' and thus does not compel a construction that this right is 'absolute.' . . . Isn't it interesting that in the context of dismissal at the debtor's request, the statutes are worded as requiring the court to obey the debtor's 'right to dismiss', but that there is no similar directive *to the court* in the context of a conversion requested by a debtor? . . . [A] conversion from either Chapter 12 or 13 to Chapter 7 upon request of the debtor is automatic—no court order is required. However, not so with a conversion requested by the debtor under 11 U.S.C. § 706(a)." In this case, it was neither bad faith nor extreme circumstances that the debtor sought to convert a case in which she claimed an exemption in entireties property that had also been ambiguously claimed exempt by her estranged husband in a separate Chapter 7 case. That the trustee in the estranged husband's case intended to challenge the exemption in the husband's case, but needed first to defeat conversion of the debtor's case was not a circumstance sufficient to bar conversion of the debtor's case to Chapter 13.).

In re Arcella-Coffman, 318 B.R. 463 (Bankr. N.D. Ind. 2004) (Ineligibility under § 109(e) bars voluntary conversion from Chapter 7 to Chapter 13.).

§ 326.1 Effects of Conversion from Chapter 7 to Chapter 13

In re Czykoski, 320 B.R. 385 (Bankr. N.D. Ind. 2005) (Chapter 7 trustee and United States Trustee had standing to prosecute motion to dismiss for failure of the debtor to appear at the Chapter 7 meeting of creditors; conversion to Chapter 13 did not moot the motion to dismiss and debtors' counsel's mistaken belief that conversion did moot that motion is not mistake, surprise or excusable neglect for purposes of relief from the order of dismissal.).

In re Barnes, No. 04-00426, 2004 WL 3135459, at *3 (Bankr. D.D.C. Dec. 10, 2004) (unpublished) (At conversion from Chapter 7 to Chapter 13, the clerk was supposed to give notice of the deadline for filing proofs of claim but the notice sent to creditors left blank the space where the claims bar date should have been entered; notwithstanding the clerk's mistake, the bankruptcy is without statutory authority to fix a new deadline for the filing of proofs of claim. "Here creditors were sent notice of the conversion of the case and of the date of the meeting of creditors . . . . They were not misled as to the bar date, and could have inquired regarding what the bar date was. It is highly unlikely that any creditors will be able to show that [they] exercised sufficient diligence to permit equitable tolling [to] apply to them.").

B. CONVERSION FROM OTHER CHAPTERS TO CHAPTER 13

§ 327.1 Conversion from Chapter 11 to Chapter 13

United States v. Fowler (In re Fowler), 394 F.3d 1208, 1212–14 (9th Cir. 2005) (FICA and FUTA taxes that accrued during a Chapter 11 case before conversion to Chapter 13 are administrative expenses entitled to priority and full payment, together with penalties and interest. "Postpetition tax debt may constitute an administrative expense if it relates to 'any tax incurred by the estate,' except certain defined taxes . . . [Section] 348(d) requires that § 503(b) administrative expense claims retain their preconversion priority status in conversion under § 1112. . . . Section 1305 requires only what it says—that for purposes of allowing or disallowing a creditor's claim, the claim is treated as if it arose prepetition. It does not address the statutory treatment of the claim itself once it has been allowed into the bankruptcy proceeding. A § 1305 claim is not automatically determined as if it were a prepetition claim for all purposes.").

§ 327.2 Conversion from Chapter 12 to Chapter 13

C. RECONVERSION TO CHAPTER 13

§ 328.1 Reconversion from Chapter 7 or Chapter 11 to Chapter 13

In re Manouchehri, 320 B.R. 880 (Bankr. N.D. Ohio 2004) (Notwithstanding the plain language of § 706(a) and legislative history indicating that there is no right of reconversion once a Chapter 13 case has been converted to Chapter 7, bankruptcy court has discretion whether to allow reconversion to Chapter 13; debtor's failure to turn over cars to the Chapter 7 trustee and other evidence of "disingenuous motivations" deny the debtor reconversion.).

VI. DISMISSAL

A. DISMISSAL BY DEBTOR

§ 329.1 Procedure, Timing and Form

§ 330.1 Absolute Right of Debtor?

In re San Giovanni, 325 B.R. 343, 345 (Bankr. D.N.H. 2005) (In the absence of fraud, misuse of the bankruptcy system, or extreme circumstances, a Chapter 13 debtor has the right to dismiss the case even when a creditor has requested the case be converted to Chapter 7. The debtor was incarcerated at the time of the Chapter 13 filing and was subsequently convicted and the attorney general of the state of New Hampshire had approximately $300,000 in his possession as to which the debtor may have had a claim. The debtor requested a voluntary dismissal and objecting parties argued that it would make it easier for creditors to sort out their various claims were the debtor to remain in bankruptcy. "While this may be true, this Court believes that that factor alone cannot overcome the language of § 1307(b) and that to deny dismissal there must be a showing of a material abuse of the bankruptcy system.").

§ 331.1 Strategic Considerations: Consequences of Voluntary Dismissal

B. DISMISSAL ON REQUEST OF PARTY IN INTEREST

§ 332.1 Procedure, Timing and Form

Barcus v. Schneider (In re Schneider), No. 03-35735, 2005 WL 1394997, at *1 (9th Cir. June 14, 2004) (unpublished) (Creditor cannot use a motion to dismiss based on fraud as a way around the 180-day limitation on revocation of an order of confirmation procured by fraud under § 1330(a). Chapter 13 plan was confirmed in April 2001. In November 2001, a creditor learned that debtor had committed perjury by testifying that the signature on a letter was genuine when in fact it was forged. More than a year later, in November 2002, the creditor filed a motion to dismiss based on the debtor's perjury. "Barcus seeks to bypass revocation, which is time-barred, and jump to dismissal. We decline to circumvent the Bankruptcy Code's procedures for addressing fraudulent procurement of a Chapter 13 confirmation, especially when doing so would fly in the face of an express time limitation. The 180-day limit for filing a request for revocation of a Chapter 13 plan,

11 U.S.C. § 1330(a), bars Barcus's motion to dismiss, which was filed approximately a year after the 180 days had run.").

In re Wheeler, 323 B.R. 758 (Bankr. W.D. Wash. 2005) (Citing *Tennant v. Rojas (In re Tennant)*, 318 B.R. 860 (B.A.P. 9th Cir. 2004), "strict compliance" order that denied confirmation and required the debtor to file missing pay stubs within 30 days else the Chapter 13 petition would be dismissed without further hearing is an appropriate procedure for dismissal under § 105(a) when a Chapter 13 debtor has not filed documents required by the Bankruptcy Code or by local rules; dismissal after a debtor fails to comply with a strict compliance order is not a dismissal under § 1307 but is a form of sua sponte dismissal in accordance with § 105(a).).

§ 333.1 Cause for Dismissal—In General

In re Moore, 319 B.R. 504, 517 (Bankr. S.D. Tex. 2005) (Bankruptcy court puts debtor's bar on notice that Chapter 13 cases will be dismissed based on delay that is prejudicial to creditors when counsel is not prepared to prosecute confirmation of a plan on the date set for the confirmation hearing. "[T]he debtor and counsel must be prepared to carry the burden of proof for plan confirmation on the assigned date of the confirmation hearing. If the debtor and counsel are unable to do that, if the failure is without good reason, and if the delay is prejudicial to creditors, then the Court may dismiss the case. Failure to review the claims docket, failure to file timely objections to claims and motions to value collateral, and any other failure to comply with the Initial Order are very substantial factors that the Court will consider in determining whether there is unreasonable delay prejudicial to creditors.").

§ 334.1 Cause for Dismissal, Including Bad-Faith, Multiple and Abusive Filings

Sullivan v. Solimini (In re Sullivan), 326 B.R. 204, 211 (B.A.P. 1st Cir. 2005) (Bankruptcy court appropriately dismissed fourth Chapter 13 case with bar to refiling for 180 days pursuant to §§ 105(a) and 349(a) when series of cases were filed in a bad faith effort to avoid paying a judgment. "We explicitly adopt the totality of the circumstances test and conclude that the obligation of good faith is imposed on the debtor at two stages of a Chapter 13 proceeding. First, a debtor must file the Chapter 13 petition in good faith. . . . [U]nder § 1307(c), the objecting creditor has the burden of proof." BAP rejects *In re Keach*, 243 B.R. 851 (B.A.P. 1st Cir. 2000) to the extent it suggests that examination of a Chapter 13 debtor's good faith is a more limited inquiry.).

In re Wigley, 333 B.R. 768, 781 (Bankr. N.D. Tex. 2005) (Failure of a Chapter 13 debtor to pay postpetition trust tax payments owed by a corporation in which the Chapter 13 debtor was a responsible party constituted cause justifying dismissal of the case. "By seeking the protections and benefits offered by the Bankruptcy Code, while continuing their unscrupulous pattern of tax evasion, the Debtors have willfully avoided their postpetition obligations, thus acting in direct contravention of the fundamental purposes underlying Chapter 13 reorganization. The Debtors' conduct evidences a lack of good faith, causing this Court to include that the Debtors are not deserving of the fresh start." The dismissal was accompanied by a prohibition on refiling for one year.).

In re Oliver, 323 B.R. 769, 773–75 (Bankr. M.D. Ala. 2005) (Seventh Chapter 13 case filed in violation of injunction against refiling at dismissal of sixth case is dismissed with a bar to refiling for two years and debtor's counsel is sanctioned with a $500 fine for failing to check the court's records or PACER. "[S]erial filing of bankruptcy petitions, in bad faith, may subject an attorney to the imposition of sanctions, even if the filing did not violate an injunction. . . . [T]his court has experienced . . . an 'epidemic' of serial Chapter 13 filings. . . . Lawyers should not be permitted to gain a competitive advantage in the marketplace by lowering their ethical standards. This Court has observed time and again this process of lawyer shopping coupled with serial filing. The lawyers should be something more than a mere scrivener for her client. A lawyer may not

take his client's word concerning previous bankruptcy filings when it is so easy to check the Court's records. If, as here, a client has filed six previous Chapter 13 cases all of which failed, one should reasonably ask, why a seventh case will succeed. . . . [A] monetary sanction is necessary here to achieve the Court's purpose of deterring lawyers from filing petitions in bankruptcy in violation of an injunction. . . . In addition, the Court finds sufficient cause to impose a two-year injunction against refiling against a Debtor who concealed the existence of an injunction from his lawyer, causing the filing of yet another bankruptcy petition in bad faith.").

In re Grischkan, 320 B.R. 654 (Bankr. N.D. Ohio 2005) (Cause for dismissal of fourth Chapter 13 case filed to stop a foreclosure including that the debtor failed to make mortgage payments for nearly six years, filed serial bankruptcy cases to stop foreclosures, failed to fund the previous cases yet claimed improved financial circumstances in latest case.).

In re Brown, 319 B.R. 691, 693 (Bankr. M.D. Ala. 2005) (Three petitions filed within 24 months, the third one filed in violation of a 180-day bar to refiling at dismissal of the second case is a flagrant abuse of bankruptcy and bad faith. "Multiple or repeated bankruptcy filings do not constitute ***per se*** bad faith, however a debtor's history of filings and dismissals may be evidence of bad faith. . . . The primary evidence of bad faith in this case is the Debtors' successive bankruptcy filings.").

In re Norton, 319 B.R. 671, 674 (Bankr. D. Utah 2005) (Ninth unsuccessful pro se Chapter 13 case is dismissed with prejudice based on debtor's "defiant and abusive behavior.").

§ 335.1 Cause Not Found
§ 336.1 Strategic Considerations

In re Thomson, 329 B.R. 359, 362 (Bankr. D. Mass. 2005) (A Chapter 13 debtor's attorney violated Rule 11 when he submitted a response to the trustee's motion to dismiss by denying the trustee's assertion that the debtor was in arrears. The Chapter 13 trustee filed a motion to dismiss for nonpayment. Debtor's counsel filed a response, denying the trustee's motion because he had been unable to contact his client. By denying the trustee's motion, however, without verifying the accuracy of the denial, debtor's counsel violated Rule 11. "He did not offer any evidence that his client had been making the Chapter 13 plan payments. Nor did he intimate that he conducted any sort of investigation into whether or not his client had made the payments. . . . Attorney Howard failed to conduct a 'reasonable inquiry' before the denying the factual allegations . . . and therefore violated Rule 9011(b)(4) when he signed and filed the response to the Motion." As sanctions, the court ordered counsel to attend eight hours of continuing legal education on ethics to be completed within six months.).

§ 337.1 Sua Sponte Dismissal

Tennant v. Rojas (In re Tennant), 318 B.R. 860, 869–71 (B.A.P. 9th Cir. 2004) (Sua sponte dismissal for failure to file statement of affairs within time required by "comply order" was appropriate notwithstanding § 1307(c)(9) and Rule 1017(c). When debtor did not file complete schedules, plan and statement of financial affairs, clerk issued "Order to Comply with Bankruptcy Rules 1007 and 3015(b) and Notice of Intent to Dismiss Case under 11 U.S.C. § 109(g)(1)." Order gave debtor 15 days to file missing documents or face dismissal with restrictions on refiling for 180 days. Debtor filed all of required documents except statement of financial affairs, which according to a declaration of counsel, was missing by mistake. "[Section 1307(c)(9)] authorizes only the United States trustee to move for a dismissal of Debtor's bankruptcy case and excludes other parties in interest from doing so. The restrictive language in Section 1307(c) must be considered in light of the language of Section 105(a) . . . . The court can dismiss a case sua sponte under Section 105(a). . . . Section 105(a) makes 'crystal clear' the court's power to act sua sponte where no party in interest or the United States trustee has filed a motion to dismiss a bankruptcy case. . . . The language of Section 105(a) is unambiguous. The statute was revised in 1986 to overrule prior decisions prohibiting a court

from acting sua sponte when the statute authorized only a party in interest to act. . . . This compels the conclusion that the requirement 'only on request of the United States trustee' in Section 1307(c)(9) does not preclude the court from acting sua sponte. The section is intended to restrict any other party in interest, but not the court. . . . The court's authority to dismiss a bankruptcy case sua sponte under Section 105(a) is not restricted by Rule 1017(c) . . . Rule 1017(c) is only applicable if the court dismisses a case on a motion pursuant to . . . 1307(c)(9). It does not govern the procedure if the court chooses to proceed under its authority to act sua sponte in accordance with Section 105(a). . . . [I]f a case involves only very narrow procedural aspects, a court can dismiss a Chapter 13 case without further notice and a hearing if the debtor was provided 'with notice of the requirements to be met.' . . . Thus, a procedure is 'perfectly appropriate' that notifies the debtor of the deficiencies of his petition and dismisses the case sua sponte without further notice and a hearing when the debtor fails to file the required forms within a deadline.").

In re Wheeler, 323 B.R. 758, 765 (Bankr. W.D. Wash. 2005) (Dismissal without further hearing pursuant to a "strict compliance" order denying confirmation that required the debtor to file two consecutive pay stubs within 30 days else the Chapter 13 petition would be dismissed was a permitted sua sponte dismissal under § 105(a). Citing *Tennant v. Rojas (In re Tennant),* 318 B.R. 860 (B.A.P. 9th Cir. 2004), "the Trustee, or a creditor, may utilize a strict compliance order that allows the Court's sua sponte dismissal of a Chapter 13 case without further notice, in accordance with 11 U.S.C. § 105(a).").

C. EFFECTS OF DISMISSAL

§ 338.1 In General

In re Williams, 333 B. R. 68, 74 (Bankr. D. Md. 2005) (The filing of a Chapter 13 petition subsequent to a Chapter 7 discharge does not equitably toll the time in which a debtor must wait in order to obtain a subsequent Chapter 7 discharge. The debtor filed a Chapter 7 petition in October of 1996 and subsequently filed three separate Chapter 13 cases all of which were dismissed. The debtor then filed a Chapter 7 case in March of 2004. Tidewater Finance asserted that the debtor was barred from obtaining a discharge because of the principle of equitable tolling. "Section 727(a)(8) precludes a debtor from obtaining multiple Chapter 7 discharges more frequently than at six year intervals. The section seeks to prevent creation of a class of habitual debtors who would rid themselves of their debts by going through bankruptcy every time they found themselves unable to pay their debts. . . . Section 727(a)(8) is not a statute of limitations for the assertion of some right. . . . It is neither a limitations period for action by a party nor like the three year look back period for tax claim priority. . . . Section 727(a)(8) does not make a debtor ineligible to file a bankruptcy petition for a period, such as the 180 day period . . . . Nothing in the statute or legislative history indicates that § 727(a)(8) was intended to be a deadline for a creditor or class of creditor to assert claims.").

In re Brown, 319 B.R. 898 (Bankr. M.D. Ga. 2004) (On the rationale that payments to the Chapter 13 trustee prior to confirmation are a sort of "adequate protection" for a car lender, when Chapter 13 case is dismissed before confirmation, money held by the Chapter 13 trustee is distributed to secured creditors rather than returned to the debtor.).

In re Davis, No. 04-30002-DHW, 2004 WL 3310531, at *2 (Bankr. M.D. Ala. June 16, 2004) (At dismissal before confirmation, bankruptcy court retains jurisdiction to determine disposition of funds held by the Chapter 13 trustee and § 1326 trumps a garnishment of the Chapter 13 trustee to collect a prepetition debt. "[Section] 1326(a) is clear an unambiguous with regard to the disposition of the funds. The trustee has a statutory obligation to return the funds to the debtor. 11 U.S.C. § 1326 preempts the state court garnishments statute. This disposition of the money . . . fosters the policy of encouraging debtors who are financially able to repay their debts to file chapter 13. It ensures that debtors who attempt chapter 13 will not be penalized for an unconfirmed attempt. . . . Holding to the contrary would create a 'race to the trustee' and effectively ignore the statutory mandate to return the money to the debtor.").

Sullivan v. Solimini (In re Sullivan), 326 B.R. 204, 211 (B.A.P. 1st Cir. 2005) (Where the debtor filed four successive Chapter 13 cases, all of which were dismissed, with the apparent purpose of obtaining surplus proceeds from the foreclosure of her real estate through the voiding of the lien of a judgment creditor, it was appropriate for the bankruptcy court to dismiss the case with a bar on refiling for 180 days. Court adopted the totality of the circumstances test and concluded that "the obligation of good faith is imposed on the debtor at two stages of a Chapter 13 proceeding. First, a debtor must file the Chapter 13 petition in good faith. . . . Second, the debtor must file the Chapter 13 plan in good faith. . . . The only distinction is that under § 1307(c), the objecting creditor had the burden of proof, while under § 1325(a)(3), it is the debtor's burden. In the debtor's repeated filings, she did not disclose prior filings, did not have sufficient disposable income to fund a Chapter 13 plan, failed to make payments to the trustee, and failed to produce documents requested by the trustee. From these circumstances, it was appropriate for the court to infer that the debtor's sole purpose in seeking Chapter 13 relief was to void the creditor's judgment lien and obtain the surplus proceeds from the foreclosure sale.).

In re Oliver, 323 B.R. 769, 774–75 (Bankr. M.D. Ala. 2005) (Citing § 349(a) and Bankruptcy Rule 9011, seventh bankruptcy petition filed in violation of an injunction that bared refiling entered at dismissal of sixth case is dismissed with prejudice to refiling for two years and debtor's counsel is sanctioned with a $500 fine. Debtor's counsel admitted that it was not her policy to check court's records but rather to rely upon representations of the debtor with respect to prior filings. "A lawyer may not take his client's word concerning previous bankruptcy filings when it is so easy to check the Court's records. . . . Injunctions against refiling are, in this Court's experience, the most commonly used sanction against abusive bankruptcy filings. where, as here, a Debtor willfully violates an injunction, and where, as here, his lawyer does not conduct an adequate investigation into the facts and circumstances of previous bankruptcy filings, the Court's ability to protect the integrity of its process is undermined. Given the Debtor's history of abusive bankruptcy filing and the manipulation of his lawyer, the Court is of the view that an injunction against refiling for a period of two years is appropriate. . . . While the Court has considered barring future discharges, it will decline to do so here.").

In re Grischkan, 320 B.R. 654, 659–61 (Bankr. N.D. Ohio 2005) (Fourth bankruptcy case filed on the eve of foreclosure after six years of failure to pay mortgage payments justifies sanctions against refiling under § 109(g)(1), § 105(a) and § 349(a). "The debtor is a serial filer. This is his fourth bankruptcy filing in three years . . . . The debtor repeatedly failed to fund his previous cases. The filing of each case was clearly timed to stop scheduled sheriff's sales. . . . The debtor's actions have adversely affected the lender. . . . The debtor's actions constitute a failure to appear before the court in proper prosecution of the case and merit the imposition of a 180-day bar against re-filing under § 109(g)(1). Additionally, the debtor's filing amounts to an abuse of the bankruptcy process and the imposition of a 180-day bar against re-filing is also appropriate under § 105(a). Finally, the debtor's egregious treatment of the lender and his filing of the present case in bad faith constitutes sufficient cause for the imposition of a 180-day bar against re-filing under § 349(a).").

In re Scruggs, 320 B.R. 94, 97 (Bankr. D.S.C. 2004) (Chapter 13 case filed after discharge but while prior Chapter 7 case was being administered as an asset case is "dismissed with prejudice to bar a further filing under Chapter 13 for a period of forty-five (45) days from the entry of this Order.").

In re Merayo, 319 B.R. 883, 885, 886 (Bankr. E.D. Ark. 2005) (In the absence of evidence of "egregious conduct," order dismissing a prior case "with prejudice" means the bar to refiling for 180 days in § 109(g). Prior bankruptcy case, debtor's second Chapter 13 petition, was dismissed in an order that stated "the Debtor's case is hereby dismissed with prejudice." The prior dismissal order did not refer to § 109(g) or specify any period during which the debtor was barred from refiling. The debtor filed a third case more than 180 days after the dismissal of the second case and several motions to dismiss were filed. Citing *Colonial Auto Center v. Tomlin (In re Tomlin),* 105 F.3d 933 (4th Cir. 1997), the bankruptcy court has authority under § 349 to

dismiss a case with prejudice that would bar the debtor from any relief from any chapter in any subsequent case but that form of dismissal with prejudice is "a drastic remedy which should only be used in extreme circumstances." Here, the prior case was dismissed because the debtor failed to appear at a hearing on a motion to dismiss and an objection to confirmation. There was no proof of egregious conduct. "[U]nder these circumstances, the phrase 'with prejudice' was meant to bar a refiling within the 180-day period provided by 11 U.S.C. § 109(g).").

In re Brown, 319 B.R. 691, 694 (Bankr. M.D. Ala. 2005) ("Flagrant abuse" of the bankruptcy process—three bankruptcy cases in 24 months, the third one filed in violation of a 180-day bar to refiling at dismissal of the second case—justifies dismissal with prejudice to the discharge of all debts in any future bankruptcy case and with a bar to refiling for two years. "The Court recognizes that this is an extraordinary sanction that should be reserved only for the most egregious abuses of the bankruptcy process. By the term dismissal with prejudice, the Court means that in the event the Debtors file another bankruptcy case in the future, the debts presently owed are nondischargeable. . . . Because this case has involved a flagrant abuse of the bankruptcy process, the Debtors are enjoined from filing a bankruptcy petition anywhere in the United States for a period of two years from the date of this order. The Court joins with the majority of lower courts, that rely upon the authority provided by §§ 105(a) and 349(a) of the Bankruptcy Code, to prohibit a serial filer from filing petitions for a time period exceeding 180 days.").

In re Norton, 319 B.R. 671, 674 (Bankr. D. Utah 2005) ("[D]efiant and abusive behavior" justifies dismissal of pro se debtor's ninth unsuccessful Chapter 13 bankruptcy case with "the extraordinary sanction of permanently barring the Debtor's debts from future discharge under 11 U.S.C. § 349(a).").

§ 340.1 Reinstatement after Dismissal

Lomagno v. Salomon Bros. Realty Corp. (In re Lomagno), 320 B.R. 473, 479–81 (B.A.P. 1st Cir. 2005) (Automatic stay terminated when Chapter 13 case was dismissed and reversal of dismissal on appeal did not retroactively reinstate the stay to invalidate a foreclosure sale; "due process" exception does not apply because debtor knew about the dismissal and failed to obtain a stay pending appeal. "Courts deciding the issue have generally held that the reinstatement of a dismissed bankruptcy case does not retroactively reimpose the automatic stay. . . . Several courts have concluded that reinstatement of a dismissed bankruptcy case does not affect the validity of a creditor's actions taken during the period the case was dismissed, ***unless there was a violation of due process rights.***" . . . The First Circuit has concluded, without considering a due process exception, that the reinstatement of a dismissed bankruptcy case does not retroactively reimpose the automatic stay. . . . [W]e conclude that the due process exception, if it were to be applied in the First Circuit, should not be applied to the facts of this case. . . . Unlike what occurred in [*Great Pacific Money Markets, Inc. v. Krueger (In re Krueger)*, 88 B.R. 238 (B.A.P. 9th Cir. 1988)], [*In re Johnson*, 210 B.R. 134 (Bankr. W.D. Tenn. 1997)], and [*In re Acosta*, 181 B.R. 477 (Bankr. D. Ariz. 1995)], the Debtors in the present case were aware of the dismissal and the foreclosure in time to protect their rights.").

PART 8: DISCHARGE

Eden v. Robert A. Chapski, Ltd., 405 F.3d 582, 587, 588 (7th Cir. 2005) (The state court has concurrent jurisdiction to determine the dischargeability of a debt; where the Chapter 13 debtor failed to initiate an adversary action to determine the dischargeability of attorney's fees awarded to his ex-spouse's attorney, state court was free to determine the dischargeability of the obligation after the debtor received a discharge. The debtor commenced a divorce proceeding in 1994 and then filed Chapter 13 bankruptcy in 1996. The debtor listed Chapski as the holder of a disputed claim for attorney's fees that had been awarded by the state court. The state court had awarded Chapski attorney's fees of $17,500 and the bankruptcy court ordered that the pre-petition or post-petition claim of Chapski could be paid only pursuant to the confirmed plan, any attempt to collect that would be subject to the automatic stay, and because the debtor's wages were property of the estate, they were protected by the automatic stay. No further action took place and after the debtor received a discharge, Chapski pursued collection in state court. The state court held that the attorney's fee award was in the nature of support and therefore nondischargeable. During the bankruptcy court litigation, the bankruptcy court itself "never rendered a ruling as to the dischargeability of this pre-petition debt. . . . [A] creditor can wait until after the debtor has been discharged from bankruptcy to litigate the dischargeability of the debt owed to the creditor, as Eakins and Chapski did here. . . . The Kane County court had concurrent jurisdiction to determine whether Eden's debt for attorney's fees was dischargeable, and nothing in the bankruptcy court's [earlier] order precluded the state court from exercising its concurrent jurisdiction.").

Wan v. Discover Fin. Servs., Inc., 324 B.R. 124, 127–28 (N.D. Cal. 2005) (In an adversary proceeding objecting to the dischargeability of credit card debt under § 523(a) in a Chapter 13 case after conversion from Chapter 7, debtor's counterclaim that the creditor violated the Fair Debt Collection Practices Act by sending a letter to the debtor's counsel during the Chapter 7 case inquiring whether the debtor intended to repay the credit card charges at the time incurred is dismissed because "[a]pplying the FDCPA to the communication between Greenwood's counsel and Wan's Counsel would disrupt the careful balance between the interests of debtors and creditors that was of central concern to the Ninth Circuit in [***Walls v. Wells Fargo Banks***, 276 F.3d 502 (9th Cir. 2002)].").

In re Estrada, 322 B.R. 149, 152–55 (Bankr. E.D. Cal. 2005) (Disagreeing with *In re Green*, 321 B.R. 725 (Bankr. D. Nev. 2005), and sticking with *In re Avery*, 272 B.R. 718 (Bankr. E.D. Cal. 2002), the Chapter 13 discharge will not routinely be entered until after the trustee's final report and account have been noticed to creditors and approved by the court; in the unusual situation where there is no doubt that the debtor has completed payments under the plan, but the final report is delayed for an administrative reason, on motion of the debtor, the discharge can be entered in a Chapter 13 case before approval of the final report. "This court's practice of entering chapter 13 discharges in connection with its approval of final reports and accounts have been criticized in *In re Green* . . . . That court held that a chapter 13 discharge should not be linked to the approval of the trustee's final report and account. This court respectfully disagrees. . . . The better alternative is to serve the final report and account, see if there are objections, resolve any objections, and then approve the final report and account and enter a discharge.").

In re Green, 321 B.R. 725, 728 (Bankr. D. Nev. 2005) (Rejecting *In re Avery*, 272 B.R. 718 (Bankr. E.D. Cal. 2002), it is not appropriate to delay entry of discharge in a Chapter 13 case pending notice and opportunity to object to the trustee's final report. "The Court finds the rationale in *Avery* unpersuasive. The Bankruptcy Code provides that a chapter 13 debtor is entitled to receive a discharge promptly after completing his plan payments. *See* 11 U.S.C. § 1328(a). IF the Trustee believes the payments have been completed, he should certify to the court that the discharge should be issued. . . . The issuance of a discharge within 30 days to 45 days of plan payment completion would qualify as the prompt issuance of a discharge. . . . [A]lthough Rule 5009 may well suggest that a final report should not be approved without prior notice and opportunity to object to creditors, no such inference may be drawn with respect to the issuance of a chapter 13 debtor's

discharge. Nothing in the Bankruptcy Code or Rules ties the issuance of the debtor's discharge to approval of the final report. . . . Section 1328(a) appears to reflect a contrary will: i.e., that the issuance of the discharge not be deferred until the final report is approved. . . . Why . . . impose on all chapter 13 debtors a four to six month waiting period before they receive their discharge on the remote chance that a mistake has been made, particularly a mistake than can be corrected later?").

III. DISCHARGE AFTER COMPLETION OF ALL PAYMENTS

A. EXTENT OF FULL PAYMENT DISCHARGE

§ 344.1 Broadest Discharge Available

Wan v. Discover Fin. Servs., Inc., 324 B.R. 124, 128 (N.D. Cal. 2005) (Without discussion of the fact that credit card debt is dischargeable in a Chapter 13 case, in the context of an adversary proceeding filed by a credit card creditor under § 523(a) objecting to the dischargeability of a credit card debt in a Chapter 13 case after conversion from Chapter 7, debtor's Fair Debt Collection Practices Act counterclaim is properly dismissed because applying the FDCPA to a letter from the creditor's counsel to the debtor's counsel during the Chapter 7 case "would disrupt the careful balance between the interests of debtors and creditors that was of central concern to the Ninth Circuit in [***Walls v. Wells Fargo Banks,*** 276 F.3d 502 (9th Cir. 2002)].").

B. EXCEPTIONS TO FULL-PAYMENT DISCHARGE

§ 345.1 Alimony, Maintenance or Support

Eden v. Chapski (In re Eden), No. 03 C 9033, 2004 WL 793554 (N.D. Ill. Apr. 13, 2004) (unpublished) (Chapter 13 debtor's post discharge adversary proceeding to determine dischargeability of attorney fees awarded to ex-spouse in postpetition domestic relations order was properly dismissed because state court determined that the attorney fee award was nondischargeable and state court had concurrent jurisdiction to make that determination.), ***aff'd,*** 405 F.3d 582 (7th Cir. 2005) (Illinois domestic relations court had concurrent jurisdiction to determine the nondischargeability of an award of attorney fees during the Chapter 13 case; award of fees did not violate the automatic stay because of § 362(b)(2)(A)(ii). Debtor and/or ex-spouse could have filed an adversary proceeding in the bankruptcy court to determine the dischargeability of the fee award but neither did during the Chapter 13 case. The state court acted first and the debtor's retreat to the bankruptcy court after losing the dischargeability question in state court did not upset the state court judgment of nondischargeability.).

§ 346.1 Student Loans

Ruehle v. Educational Credit Mgmt. Corp. (In re Ruehle), 307 B.R. 28, 32–37 (B.A.P. 6th Cir. 2004) (Discharge order is vacated 21 months after entry because confirmed plan finding undue hardship denied student loan creditor due process. "Pursuant to Bankruptcy Rules 4007 and 7001(6) an action to determine dischargeability of a debt must be brought as an adversary proceeding. . . . There is no authority in the Bankruptcy Code or Bankruptcy Rules for including a discharge by declaration provision in the Debtor's plan. . . . [W]e choose to follow the growing trend finding that the student loan lender has been denied due process where a debtor attempts to discharge a student loan through a discharge by declaration provision. . . . The Debtor took her chances in trying to discharge a non-dischargeable debt by a process that is inconsistent with the Bankruptcy Code and Bankruptcy Rules."), ***aff'd,*** 412 F.3d 679 (6th Cir. 2005).

In re Hanson, 397 F.3d 482, 484–87 (7th Cir. 2005) (Embracing ***Banks v. Sallie Mae Servicing Corp. (In re Banks),*** 299 F.3d 296 (4th Cir. 2002) and ***Poland v. Educational Credit Management Corp. (In re Poland),*** 382 F.3d 1185 (10th Cir. 2004) and rejecting ***Great Lakes Higher Educational Corp. v. Pardee (In re Pardee),*** 193 F.3d 1083 (9th Cir. 1999), ECMC is entitled to relief in 2003 from discharge order entered in 1997 using erroneous form that discharged student loans. Chapter 13 case filed in November 1992 listed only student loan debt. Student loan creditor filed timely proof of claim and received 19% payment through the

plan. Discharge order entered in September 1997 provided that student loans were excepted from discharge only if discharge was granted prior to October 1, 1996. "Unfortunately, the discharge order reflected an October 1, 1996 sunset provision that already had been repealed by Congress. . . . [C]ases like [***Andersen v. UNIPAC-NEBHELP (In re Andersen),*** 179 F.3d 1253 (10th Cir. 1999),] and ***Pardee*** permit debtors to flout both substantive and procedural provisions of the Bankruptcy Code and Rules through a meaningless incantation of undue hardship in their proposed plans. . . . [***Tennessee Student Assistance Corp. v. Hood***, 541 U.S. 440, 124 S. Ct. 1905, 158 L. Ed. 2d 764 (2004)] . . . noted that § 523(a)(8) does not require a summons and that a debtor could proceed by motion in the absence of Bankruptcy Rule 7001(b). . . . We do not hold that the due process clause requires the service of a summons and adversary proceeding prior to the discharge of student loan debt. Rather, 'we merely confirm that where the Bankruptcy Code and Bankruptcy Rules require a heightened degree of notice, due process entitles a party to receive such notice before an order binding the party will be afforded preclusive effect.' . . . Due to the lack of compliance with the Bankruptcy Code and Rules, the bankruptcy discharge order was void and ECMC was properly granted relief pursuant to Rule 60(b)(4).").

Oyler v. Educational Credit Mgmt. Corp. (In re Oyler), 397 F.3d 382, 385–86 (6th Cir. 2005) (Adopting ***Brunner v. New York State Higher Education Services Corp.,*** 831 F.2d 395 (2d Cir. 1987), debtor underemployed as a pastor of Messianic Jewish church fails second prong. "Applying the ***Brunner*** test, . . . Oyler fails its second prong, because he has shown no 'additional circumstances . . . indicating that this state of affairs is likely to persist for a significant portion of the repayment period.' Such circumstances must be indicative of a 'certainty of hopelessness, not merely a present inability to fulfill financial commitment.' . . . They may include illness, disability, a lack of useable job skills, or the existence of a large number of dependents. . . . And, most importantly, they must be beyond the debtor's control, not borne of free choice. . . . Choosing a low-paying job cannot merit undue hardship relief.").

Durrani v. Educational Credit Mgmt. Corp. (In re Durrani), 311 B.R. 496, 503, 505–09 (Bankr. N.D. Ill. 2004) (On reconsideration, 51-year old debtor with diabetes, high blood pressure, poor vision and osteoarthritis is entitled to undue hardship discharge of more than $58,000 of student loans notwithstanding eligibility for Income Contingent Repayment Plan. Applying ***Brunner v. New York State Higher Educ. Servs. Corp. (In re Brunner),*** 831 F.2d 395 (2d Cir. 1987), "if Durrani made the minimum ICRP payment of $331, the loan would never be paid off but instead would continue to grow. . . . Durrani cannot maintain a minimal standard of living and repay this loan. . . . [T]he availability of the ICRP cannot be a magic wand that when waved precludes discharge of a student loan debt. . . . The fact that a debtor can afford the monthly ICRP payment is not dispositive as to whether she can maintain a minimal standard of living while repaying her student loan. . . . The court must also take into account the considerable tax burden that will be borne by Durrani if she does participate in the ICRP for the full 25 year term. The ICRP provides that any portion of the debt that is not paid will be discharged at the end of 25 years. However, that discharge of indebtedness, unlike a discharge in bankruptcy, results in income that Durrani would have to recognize for taxable purposes. . . . Although Durrani will never be able to pay off this loan, she will be burdened by a huge and growing obligation that remains on her credit record . . . . Courts must not turn to the ICRP as a substitute for the thoughtful and considered exercise of [§ 523(a)(8)] discretion. To do so would be to abandon all decision-making responsibility and convert a §523(a)(8) adversary into a rote and meaningless exercise." That the debtor completed payments under her Chapter 13 plan paying 10% of the principal amount of the student loan "is strongly indicative of Durrani's good faith and her commitment to repay her debts."), ***aff'd,*** 320 B.R. 357 (N.D. Ill. 2005).

In re Coleman, 333 B.R. 841, 849 (Bankr. N.D. Cal. 2005) (The court is not precluded from determining the dischargeability of a student loan obligation in a Chapter 13 case at the beginning of the case. "[T]o require the dischargeability determination to be postponed until the debtors's Chapter 13 plan payments are completed would make Chapter 13 less attractive to debtors with student loans than Chapter 7 where the determination could be made promptly. This would be contrary to Congressional intent to encourage debtors to choose

Chapter 13 over Chapter 7. . . . Further, a determination at a relatively early stage of the bankruptcy case may be of significant import to a Chapter 13 debtor. . . . If the debtor does not prevail, early resolution of the issue may enable a debtor to modify its plan to propose payments to the creditors and thereby prevent the accrual of additional interest and penalties.").

In re Strahm, 327 B.R. 319 (Bankr. S.D. Ohio 2005) (A Chapter 13 debtor is not precluded from seeking a "hardship discharge" of a government guaranteed student loan early in the Chapter 13 case. The debtor filed a Chapter 13 plan proposing a 1% dividend to unsecured creditors with payments over 36 months. One month after confirmation, the debtor initiated an adversary proceeding seeking to declare that the student loan she owed was nondischargeable as imposing an undue hardship. The creditor argued that the debtor could only bring such action at the conclusion of the Chapter 13 case. The court denied the creditor's motion to dismiss. Adopting the holding in *Ekenasi v. Educational Res. Inst. (In re Ekenasi),* 325 F.3d 541 (4th Cir. 2003), the court cautioned that seeking a declaration of a discharge of a student loan early in a Chapter 13 plan would face substantial difficulties to demonstrate that repayment of a student loan at the end of the Chapter 13 plan would impose an undue hardship. Nothing in the statute or the rules precludes a debtor from seeking an early determination.).

Washington v. Educational Credit Mgmt. Corp. (In re Washington), 318 B.R. 405 (Bankr. W.D. Tenn. 2004) (In Chapter 13 cases filed before October 7, 1998, seven-year provision of former § 523(a)(8)(A) applies and seven years is tolled for the time during which the debtor was in Chapter 13 cases.).

§ 347.1 Driving While Intoxicated
§ 348.1 Criminal Restitution and Criminal Fines
§ 349.1 Claims Not Provided for by the Plan or Disallowed under § 502

In re Ellett, 328 B.R. 205, 207 (E.D. Cal. 2005) (Where the schedules included an improper social security number, the Chapter 13 plan did not "provide for" the tax obligation of the California Franchise Tax Board and its debt was not discharged. The debtor listed an incorrect social security number when filing a Chapter 13 petition and the FTB did not discover the filing until after the bar date for filing claims. When the FTB sought to recover the taxes after the discharge, the debtor sought to enjoin such action. "A Chapter 13 discharge is limited to debts 'provided for by the plan.' . . . '[T]he phrase "provided for" . . . simply requires that for a claim to become dischargeable the plan must "make a provision for it", i.e., deal with it or refer to it.' *Lawrence Tractor Company v. Gregory,* 705 F.2d 1118, 1122 (9th Cir. 1983) . . . [H]owever, simply making a provision for the debt alone is insufficient; a claim is not 'provided for' unless the creditor is notified in a timely manner of the bankruptcy proceeding." Because the debtor disclosed inaccurate information in violation of the requirement that he disclose his correct social security number, the debtor did not provide effective notice, and the debtor's Chapter 13 plan could not have made adequate provision for the FTB. The FTB obligation was not subject to the discharge.).

In re Bryant, 323 B.R. 635, 643–45 (Bankr. E.D. Pa. 2005) (Plan that provided for mortgage holder that "Bal Paid in Full$41,471.59" discharged mortgage holder's lien at the completion of payments in a prior Chapter 13 case and the discharge in the prior case discharged the lien except to the extent of escrow advances, costs and fees incurred by the mortgage holder after confirmation. "Discharge of a debt under § 1328(a) does not depend on whether the creditor holds an allowed claim. If the debt is 'provided for' in the Plan and absent any exception to discharge, it is discharged without regard to whether the creditor's claim was allowed or even if the creditor received distribution under the confirmed plan. . . . In *Rake v. Wade,* . . . the United States Supreme Court considered the meaning of 'provided for' under a plan . . . . Under the Supreme Court's plain language understanding of 'provided for,' there can be no question that Claimant's claim was provided for under the confirmed Plan. The Plan expressly mentioned it and set forth its treatment. . . . The confirmed Plan also dictates whether the lien that secures the debt will be discharged. . . . Section 1327(c) provides . . . vesting shall be free and clear of any claim or interest of any

creditor provided for by the plan. . . . Since a 'lien' is a 'claim' in a Chapter 13 case . . . whether a secured creditor's lien rights survive confirmation depends upon whether the plan 'provides for' the lienholder. . . . Upon confirmation all lien rights were defined by the Plan and upon completion of the payments under the Plan . . . the identified debt . . . was paid in full. Thus, the lien that secured that debt and which was retained for the life of the Plan did not survive the Debtor's discharge.").

§ 350.1 Postpetition Claims

In re Henning, No. 02-21047, 2005 WL 613403, at *3 (Bankr. W.D.N.Y. Mar. 17, 2005) (unpublished) (Expenses incurred by the City of New York to protect the public from imminent danger when Chapter 13 debtor was permitted to abandon his interest in 41 rental properties were preserved by the order of abandonment and could have been asserted as claims against the Chapter 13 estate; however, bankruptcy court never intended to require the City to file postpetition claims under § 1305 and the City's choice not to do so did not prejudice the City's right to collect the claims for expenses after abandonment from the debtor after completion of payments and discharge in the Chapter 13 case. Order permitting the debtor to abandon the rental properties provided that the City if required to expend funds after abandonment to cure dangerous conditions at the abandoned properties could file claims against the debtor's Chapter 13 estate. The City didn't file claims during the Chapter 13 case but did sue the debtor in state court after discharge for the expenses of demolition of two of the properties. "The Court never intended nor would it have required the City to file post-petition claims.").

§ 351.1 Long-Term Debts

IV. HARDSHIP DISCHARGE: DISCHARGE BEFORE COMPLETION OF ALL PAYMENTS UNDER PLAN

§ 352.1 In General

In re Grice, 319 B.R. 141, 146 (Bankr. E.D. Mich. 2004) (Hardship discharge not precluded by debtor's failure to increase payments when actual income turned out greater than projected disposable income; court declines to impose non-statutory lack of good faith or improper conduct condition on hardship discharge. Projected disposable income at confirmation was $2,160 per month. According to income tax returns, actual monthly income during first and second years after confirmation was $2,668 and $3,651. Debtor was diagnosed with cancer, forced to retire, and then moved for hardship discharge. "The Trustee characterizes the Debtor's failure to pay the additional income into the plan as a misuse of property of the estate and an indication of a lack of good faith. . . . The Court rejects the contention that the Debtor has somehow misappropriated property of the estate. The Debtor's plan . . . provides that, under § 1327(b) of the Bankruptcy Code, all property of the estate vested in the Debtor upon confirmation. . . . The Debtor's income only became property of the estate to the extent that the income was projected disposable income. . . . The additional income, which was not projected as of confirmation, never became projected disposable income and remained vested in the Debtor. Neither the Code nor the confirmed plan obligated the Debtor in this case to pay the additional income to the Trustee. Therefore, her failure to do so does not evidence a lack of good faith or improper conduct that prevents a hardship discharge. The Court also does not agree that motions for hardship discharges should only be granted where there are 'catastrophic circumstances' and examined with 'special vigilance' or 'gravity' as the Trustee suggests. The statute simply does not set the bar so high. It does not require death, catastrophe, or maximum misery or suffering. Instead, it focuses on accountability in § 1328(b)(1). The Court declines to elevate this explicit statutory requirement.").

§ 353.1 Circumstances for Which the Debtor Should Not Justly Be Held Accountable

In re Grice, 319 B.R. 141, 143–46 (Bankr. E.D. Mich. 2004) (That disposable income turned out to be greater than projected at confirmation is not a circumstance which bars hardship discharge; failure to remit tax refunds was a matter for which debtor should justly be held accountable. "When she filed her chapter 13 case,

the Debtor projected monthly income of $2,160 in Schedule I. According to the Debtor's 2000 and 2001 income tax returns, the Debtor's actual monthly income during those years was $2,668 and $3,651 . . . . The Trustee contends that the Debtor has failed to complete her plan payments because she did not pay her additional actual income into the plan. Because this failure was not related to her cancer diagnosis and forced retirement, but instead was within the control of the Debtor, the Trustee concludes that the Debtor should justly be held accountable for her failure to complete her plan payments. . . . Irrespective of any increases in income that the Debtor may have received prior to her illness, there is nothing in the record to contradict the Debtor's statements that she was diagnosed with cancer and, as a result, she was forced to retire and could no longer make the required plan payments. . . . Unlike the Debtor's failure to complete the bi-weekly payments, the Court finds that the Debtor should justly be held accountable for her failure to pay her income tax refunds into the plan. However, the Debtor appeared willing to make good on those payments and the Court will require her to do so.").

§ 353.2 Best-Interests-of-Creditors Test
§ 353.3 Modification Is Not Practicable

In re Schlottman, 319 B.R. 23, 26 (Bankr. M.D. Fla. 2004) (Although life insurance proceeds upon death of a joint debtor more than 180 days after the petition do not become property of the Chapter 13 estate, the surviving joint debtor is not entitled to a hardship discharge because it has not been shown that modification is impracticable. "[T]he money she received from a settlement of the life insurance policy would be more than ample to satisfy in full, all of the allowed claims. . . . [I]t is appropriate to consider the availability of these funds and to devote some of it to the Plan. . . . [S]he is not entitled to a hardship discharge unless she is able to establish that the funds received under the life insurance policy are reasonably necessary for her support and maintenance, or for the support of defendants she has, if any.").

§ 354.1 Exceptions to Hardship Discharge

V. WAIVER AND REVOCATION OF DISCHARGE

§ 355.1 Waiver of Discharge
§ 356.1 Revocation of Discharge and Relief from Discharge Order

Ruehle v. Educational Credit Mgmt. Corp. (In re Ruehle), 307 B.R. 28, 31, 32–34 (B.A.P. 6th Cir. 2004) (Twenty-one months after discharge and more than four years after confirmation, student loan creditor is granted Rule 9024 relief from provision that "excepting the aforementioned educational loans from discharge will impose an undue hardship on the debtor and the debtor's dependents. Confirmation of debtor's plan shall constitute a finding to that effect and that said debt is dischargeable. . . . There is no authority in the Bankruptcy Code or Bankruptcy Rules for including a discharge by declaration provision in the Debtor's plan. . . . [N]either [*Andersen v. UNIPAC-NEBHELP (In re Andersen),* 179 F.3d 1253 (10th Cir. 1999) and *Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee),* 193 F.3d 1083 (9th Cir. 1999),] looked into the deeper concept of whether the lenders had received notice reasonably calculated to apprise the lenders of the fact that their rights were in jeopardy and neither circuit considered whether the lender's due process rights had in fact been violated. . . . [W]e choose to follow the growing trend finding that the student loan lender has been denied due process where a debtor attempts to discharge a student loan through a discharge by declaration provision."), ***aff'd,*** 412 F.3d 679 (6th Cir. 2005).

In re Hanson, 306 B.R. 241, 243 (Bankr. W.D. Wis. 2003) (Student loan creditor is granted relief from form discharge order that mistakenly discharged student loans. Chapter 13 case was filed on November 27, 1992 and debtor completed payments in August of 1997. In September of 1997, bankruptcy court entered out-dated discharge order form that excepted student loans from discharge only in cases in which discharge was granted "prior to October 1, 1996." The outdated form reflected the possibility that the exception to discharge for student loans in Chapter 13 cases would sunset on October 1, 1996. The sunset provision was repealed on July 23, 1992. "The discharge order in this case was incorrect and misstates the law. To the extent that it does

so it is void. To remove the void portion the discharge order must be modified."), *aff'd,* 308 B.R. 903, 905–06 (W.D. Wis. 2004) ("Rule 60(b)(4) permits relief from judgment where the original judgment is void. . . . Appellee had no notice or opportunity to be heard on the dischargeability of its debt. . . . [T]he debtor made no showing or suggestion of undue hardship . . . . [I]t was discharged because the clerk used an outdated form. . . . [T]he plan was proposed in the hope that § 523(a)(8) would be repealed prior to completion of the plan and the student loan debt would be rendered dischargeable. . . . [U]nlike [*Andersen v. UNIPAC-NEBHELP (In re Andersen),* 179 F.3d 1253 (10th Cir. 1999),] and [*Great Lakes Higher Education Corp v. Pardee (In re Pardee),* 193 F.3d 1083 (9th Cir. 1999),] this debtor did not include a plan provision which purported to find undue hardship or discharge the debt. . . . The discharge order was void because its entry was inconsistent with the requirements of due process."), *aff'd,* 397 F.3d 482, 487 (7th Cir. 2005) ("We do not hold that the due process clause requires the service of a summons and adversary proceeding prior to the discharge of student loan debt. Rather, 'we merely confirm that where the Bankruptcy Code and Bankruptcy Rules require a heightened degree of notice, due process entitles a party to receive such notice before an order binding the party will be afforded preclusive effect.' . . . Due to the lack of compliance with the Bankruptcy Code and Rules, the bankruptcy discharge order was void and ECMC was properly granted relief pursuant to Rule 60(b)(4).").

VI. EFFECTS OF DISCHARGE

§ 357.1 In General, Including Discharge Hearing and Discharge Injunction

In re Jasper, 325 B.R. 50, 54, 55 (Bankr. D. Me. 2005) (It was not a violation of § 525(a) for a credit union to revoke membership privileges to a Chapter 13 debtor that "caused a loss" to the credit union. The Dowdoinham Federal Credit Union instituted a policy that reserved to the credit union the right to terminate services when a member created a loss for the credit union in excess of $25. The debtor's Chapter 13 plan was confirmed proposing a 5% dividend to unsecured creditors and the credit union was a substantial creditor. Following confirmation, the credit union revoked the debtor's membership privileges. The court concluded that membership in the credit union was not a license, permit, charter, franchise, or similar grant to the debtor. Because § 525(a) limited its application to such instances, the credit union would not be liable for a violation of 525(a). The court noted that the interests protected under § 525(a) are those that are "unobtainable from the private sector and essential to a debtor's fresh start. For instance, a real estate license, state university transcript, or driver's license may only be obtained from a particular governmental unit." Credit unions revocation of check cashing privileges, ATM transactions, online banking, and minimum account balances are widely available and, even though the debtors may pay slightly more for banking services, the privileges granted by membership were not encompassed within § 525(a). "Whereas the class of activities protected under § 525(a) are limited to those that are peculiarly governmental functions, i.e., for which a citizen must resort to the government, the services offered by BFCU are generally available at credit unions and banks. They do not fall within § 525(a)'s ambit." (emphasis in original).).

§ 358.1 On Liens

Allen v. Green Tree Servicing LLC (In re Allen), 122 Fed. Appx. 96 (5th Cir. 2004) (Plan that provided full payment of lien secured by manufactured home did not discharge lien when debtor completed payments without paying full value of lien; lienholder was entitled to relief from stay to foreclose after completion of payments under confirmed plan.).

In re Bryant, 323 B.R. 635, 643–45 (Bankr. E.D. Pa. 2005) (Confirmed plan that clearly provided that mortgage holder would be paid in full $41,471.59 discharged the mortgage holder's lien at the completion of payments except to the extent there remained unpaid postconfirmation escrow advances, costs and other expenses. "The language of the plan is clear: 'bal in full$41,471.59.' . . . Under the holding in [*In re Szostek,* 886 F.2d 1405 (3d Cir. 1989)], Claimant is bound by the Plan, and the fact that the amount is incorrect to pay the claim in full as stated in the proof of claim post-confirmation would not compel a different

result. . . . Under the Supreme Court's plain language understanding of 'provided for,' there can be no question that Claimant's claim was provided for under the confirmed Plan. The Plan expressly mentioned it and set forth its treatment. . . . The confirmed Plan also dictates whether the lien that secures the debt will be discharged. Section 1327(b) provides that confirmation vests all of the property of the estate in the debtor except as otherwise provided in the plan or confirmation order. Section 1327(c) provides that such vesting shall be free and clear of any claim or interest of any creditor provided for by the plan. . . . Since a 'lien' is a 'claim' in a Chapter 13 case, *Johnson v. Home State Bank,* . . . whether a secured creditor's lien rights survive confirmation depends upon whether the plan 'provides for' the lienholder. . . . Upon confirmation all lien rights were defined by the Plan and upon completion of the payments under the Plan . . . the identified debt . . . was paid in full. Thus, the lien that secured that debt and which was retained for the life of the Plan did not survive the Debtor's discharge. . . . The discharge of the claim in satisfaction of the lien securing the discharged debt only pertain to the obligation as of the confirmation date. Debtor acknowledges that she did not pay taxes or insurance in the post-confirmation period.").

§ 359.1 On Administrative Expenses