Official Publication Of The National Association of Chapter 13 Trustees

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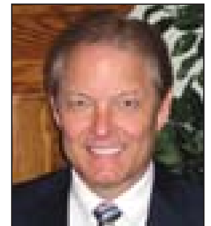
President's Message

CHAPTER 13 TRUSTEES HAVE THE TOOLS AND THE TALENT



Kevin R. Anderson
NACTT President

In private practice, I had a crusty, old partner who loved to punctuate his criticism, compliments, and arguments with movie quotes. One of his favorites when we were about to embark on a difficult case or had accomplished a courtroom victory came from *Ghostbusters* where, after the team of poltergeist pugilists vanquish the malevolent Gozer with their proton packs, Winston Zeddemore proudly exclaims, "We have the tools, and we have the talent!"[1]

The right combination of tools and talent is key to any successful enterprise, and I believe that the highest and best purpose of the National Association of Chapter 13 Trustees is to provide all involved in the Chapter 13 process – including legislators, judges, trustees, debtors counsel, creditors counsel, and their corresponding paralegals and staff – the tools and the talent to perform at the highest level of ethical and professional standards.

In Boston, at our recent annual seminar, the NACTT provided all attendees with a number of tools (including over 1,000 pages of first-rate materials) and an opportunity to hone their talents through an excellent program produced by Michael Joseph and executed by the NACTT Academy. For three days, the most qualified and nationally-recognized experts in Chapter 13 provided insight and expertise on such hot topics as the bankruptcy legislation process, disposable income, mortgage and 910-car claims, transferred claims, technology developments, and recent court decisions. Through its annual seminar, the NACTT remains the premier purveyor of Chapter 13 training and information.

On January 21-23, the NACTT will hold its trustee-only meeting in Salt Lake City, Utah. Robert Drummond, NACTT Secretary, is planning an excellent program that will provide Trustees with the specialized tools and talents needed to execute their ever-increasing responsibilities. Not only will Trustees enjoy an excellent educational program, but they will have the opportunity to take in an independent film at the Sundance Film Festival or enjoy the other amenities of Salt Lake City.

After reviewing the seminar evaluations for Boston, Debra Miller, NACTT Vice-President, has refined the format to put together our 45th Annual NACTT Seminar at the Gaylord Texan Hotel in Grapevine (Dallas) Texas, with 4.5 acres of climate-controlled indoor gardens and walkways. Debra has tentatively planned for special sessions on mortgage issues, advanced litigation techniques, and training for Trustee staff attorneys. More information will be forthcoming, but this is shaping up to be another excellent educational seminar on all things Chapter 13.

NACTT has also sponsored and produced successful seminars geared towards the particular "tools and talents" needed by the staff of Trustee offices. This year, Marilyn O. Marshall will again put on excellent Staff Symposiums in San Diego on March 18-19; New York City on April 8-9; and Chicago on May 27-28. Trustees should take advantage of this opportunity to get their people the training they need to perform their very specialized tasks.

This year, NACTT members have also been active in providing tools to Trustees and the Courts, as many Districts around the country are considering or have implemented procedures whereby the Chapter 13 Trustee monitors the disbursement of post-petition mortgage payments. Evidence suggests that such procedures increase the likelihood of debtors curing their mortgage and keeping their homes while providing all parties to the mortgage process with greater accuracy, transparency, and accountability. The NACTT continues to provide ongoing training and proposed procedures, forms, and rules to facilitate this process.

A new tool available to all Chapter 13 professionals is the NACTT Academy website (see http://considerchapter13.org), where subscribers can review the *Chapter 13 Case of the Day*, *Critical Case Comments*, *Chapter 13 Considerations*, *Variety of Views*, *Bankruptcy Ethics*, and other aids and insights from recognized experts in the consumer bankruptcy field. If you are not a member of the NACTT Academy, you are missing out on the most comprehensive educational resource dedicated exclusively to Chapter 13 issues.

The NACTT Executive Committee recently finished its annual strategic planning meeting, where we reviewed the past year and charted a course for the coming year to deal with coming challenges, including

[1] His other favorite quote, also from *Ghostbusters*, was, "Twenty-four hours a day, seven days a week, no job is too big, no fee is too big!" – but that is a motto more relevant to private practice.

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Trustee Retirement Announcement
Marion A. Olson, Jr.

Marion A. Olson, Jr.
Chapter 13 Trustee
San Antonio, TX

Marion A. Olson, Jr., Al to his friends and colleagues, has announced his retirement. It now seems fitting to look back on all that he has done in the field of bankruptcy, not only in his service area, but across the nation. This man has made a huge impact on so many lives.

Al was born and reared in San Antonio, graduated from the University of Texas and St. Mary's Law School and has spent his entire professional career there. Over thirty-three years ago, he was asked to become the Chapter 13 Trustee. Intrigued by the opportunity, he set out to learn everything he could to make his trusteeship successful. He always judged success by the number of people helped by his efforts, not by the number of cases filed. Many programs were implemented to empower and encourage debtors to successfully complete their repayment plans and enjoy a more secure financial future. The case completion rate his division is more than ten percentage points higher than the national average, and that is almost solely due to the extraordinary efforts of Al Olson and staff he has directed.

One of Al's most passionate efforts was his commitment to his debtor education program. He believed, from the beginning, that his role was not just to facilitate a repayment plan, but to provide a learning experience for the debtors that could positively change their financial lives. In the late 1970s, he established the second known education program in the entire country. Over the years, he was known as a powerful advocate for debtor education, even testifying before the House of Representatives in Washington, D.C. to encourage them to include debtor education in the revisions to the bankruptcy law. In 1998, he initiated the establishment of a non-profit organization known as the Trustees' Education Network which developed high-quality, standardized educational materials and implemented a train-the-trainer program to assist trustees as they began their education programs. He has served at the President of TEN since it inception.

Al has also been very active in the NACTT, serving as President 1984-85 and has held other offices as well as numerous committee positions. Al always considered it an honor and a privilege to participate in this organization of his peers.

For all who have benefited from Al's leadership and friendship, he will be sorely missed, but the legacy he leaves behind will be proudly carried on by those who succeed him.

Thanks and farewell from all of us, Al. Enjoy your well-deserved retirement! ◉

The NACTT Board is pleased to announce the establishment of the NACTT Marion Al Olson Endowment Fund For Debtor Education. The fund's mission is to promote debtor education throughout the United States and to assist trustees in need to establish or continue debtor education programs. If you would like to make a contribution in honor of Al, please send it to the NACTT, One Windsor Cove, Suite 305, Columbia S.C. 29223 noting it is for the Al Olson Endowment Fund.

WELCOME NEW TRUSTEES

Huon Le
Chapter 13 Trustee
Augusta, GA

Alice Whitten
Chapter 13 Trustee
Fort Worth, TX

NACTT welcomes **Huon Le** who, as of September 1, 2009, is the Standing Chapter 13 Trustee for Augusta, GA. Huon is filling the position left vacant when Barnee Baxter unfortunately passed away in March. Many of us are familiar with Huon from all of her excellent work with the Staff Symposiums and as a regular panelist at the NACTT Annual Seminars, and we look forward to her continued involvement with the NACTT. Huon is on the Trustee-Mail List and her direct e-mail is hle@chp13aug.org

On October 1, 2009, **Alice Whitten** became the Standing Trustee for the Northern District of Texas, Fort Worth Division, arising from an amicable split of Tim Truman's office. Alice has extensive experience as counsel for Americredit and in private practice along with a strong background in information technology. Alice is on the Trustee-Mail List and her direct e-mail is alicew@Ch13FTW.com.

TenTalk

FINANCIAL WELLNESS

Financial planning is the process of meeting one's life goals through the proper management of personal finances. A **financial** check-up contributes to evaluating progress toward goals, identifying future action steps, and providing motivation to change behavior. (*Barbara O'Neill*. **Journal of Family and Consumer Sciences**. Nov 2002.)

Providing live, in person money management classes to debtors is the most effective way of motivating debtors to change financial behavior!

O'NEILL'S TWELVE KEY COMPONENTS OF FINANCIAL WELLNESS:

1. **Financial Goals** – Goal planning is an essential ingredient in any financial plan, whether you are an individual or a business.
2. **Net Worth Calculation** – Everyone needs to know what they are worth. The net worth calculation tells you if your debts are too high in contrast to your assets.
3. **Cash Flow Analysis** – This tells a person a lot about their habits, gives them ideas on how to decrease expenses, and lets them know when to increase income.
4. **Spending Plan** – This helps a person track expenses and works in conjunction with the cash flow analysis.
5. **Financial Ratios** – This is a key piece of financial planning. Ratios will let you plan your emergency fund appropriately by using the liquidity ratio (current assets/current liabilities). A person will have a better understanding of their debt risks both for their mortgage and for their total debt.
6. **Credit Card Analysis** – No one should ever have more than 10 % of their annual gross pay on credit cards.
7. **Income Tax Analysis** – Everyone needs to know what their marginal tax bracket is. Good tax planning helps cash flow.
8. **Insurance Analysis** – If you do not plan for insurance, ***bankruptcy is right around the corner***. On the other hand there is such a thing as being over insured.
9. **Retirement Analysis** – One needs to plan for retirement and have a good understanding of what they will need per year in income, and how to fund that need.
10. **Investment Performance Analysis** – Without knowledge of investments most people leave their monies in low yielding investments.
11. **Asset Allocation Analysis and Rebalancing** – Many people get in trouble by not rebalancing their retirement funds, and often they have way too many assets in their own company's stock. **(Diversification)**
12. **Estate Planning Analysis** – Very important in states like California where large amounts of estate taxes are paid, but also important for lower income people to have a will and guardian for children and other survivors.

FOR MORE INFORMATION PLEASE CONTACT:
Scott Kehiaian at (336) 302-2067 or SKEHIAIAN@CHAPTER13GBORO.COM

TO ORDER MATERIALS CONTACT:
Aimee Hiers at (800) 445-8629 or Aimee@jee.com

PLEASE VISIT OUR WEBSITE AT: http://www.trusteenet.org

www.considerchapter13.org

Mid-Year Meeting - Trustee Only

The annual NACTT Mid-Year Meeting will be held January 21-23, 2010, in Salt Lake City, Utah. The meeting will be held at the Grand America Hotel, a five-star hotel located in downtown Salt Lake City. You can view this beautiful property's website at www.grandamerica.com. Outstanding presentations have been arranged, including a presentation by the Honorable Barry Russell, author of the *Bankruptcy Evidence Manual*. Judge Russell will be providing materials from the newest edition of his book - due out in November 2009. The Honorable Keith Lundin and Hank Hildebrand will also be presenting their Case Law Update. Thanks to the Trustees who are participating in various panels discussing such topics as The Paperless Office, ACH Payments and Personal Identifiers, The Challenges of Rising Costs and Declining Disbursements, and Chapter 13: The Chapter of Choice. There will also be a lunch program presentation on the history of the NACTT.

While we are in Salt Lake City, the participants may wish to attend a rehearsal of the Mormon Tabernacle Choir which rehearses every Thursday evening in the Mormon Tabernacle. The Sundance Film Festival will be conducted contemporaneously at various venues around Salt Lake City and Park City. The Utah Jazz play the New Jersey Nets on Saturday night following the conclusion of our seminar. Of course, nearby Park City offers world class skiing.

This year's Mid-Year Meeting will be both educational and entertaining. Plan on attending. ◉

Robert Drummond,
Chapter 13 Trustee,
Great Falls, MT

THE NATIONAL ASSOCIATION OF CHAPTER 13 TRUSTEES
APPLICATION FOR ASSOCIATE MEMBERSHIP

The undersigned hereby applies for Associate Membership in the National Association of Chapter 13 Trustees. Associate membership dues of $100 include a subscription to the quarterly publication NACTT Quarterly, plus notice of all seminars and right to participate as a member, but does not include voting rights.

DUES OF $100 PER YEAR, renewable annually, must accompany this application.
Membership period is October 1 through September 30.

Name: ____________________ E-mail Address: ____________________

Address: ____________________ City, State, Zip: ____________________

Telphone: ____________________ Fax: ____________________

Please check applicable box:

❑ Attorney: ____________________ ❑ Creditor: ____________________

❑ Court Officer: ____________________

❑ Organization: ____________________ ❑ Other: ____________________

Date: ____________________ **Signature of Applicant:** ____________________

Mail check and application or address changes to NACTT Headquarters:
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WELCOME NEW ASSOCIATE MEMBERS

Christine Herendeen, *Tampa, FL*
Amy McGrotty, *Fort Lauderdale, FL*
Victoria A. Ring, *Colorado Springs, CO*
Leif Isaiah Rubinstein, *Lake Ronkonkoma, NY*
Jonathon Blake Burford, *St. Louis, MO*
Christopher Patrick Reilly, *Austin, TX*

CALENDAR OF EVENTS

American Bankruptcy Institute
Detroit Consumer Bankruptcy Conference
November 11, 2009
Hyatt Regency - Dearborn, MI
For Information contact:
ABI at (703) 739-0800, or visit ABI World
atwww.abiworld.org
ABI, 44 Canal Center Plaza, Ste. 404
Alexandria, VA 22314

American Bankruptcy Institute
21st Annual Winter Leadership Conference
December 3-5, 2009
La Quinta Resort & Spa - La Quinta, CA
For Information contact:
ABI at (703) 739-0800, or visit ABI World
atwww.abiworld.org
ABI, 44 Canal Center Plaza, Ste. 404
Alexandria, VA 22314

American Bankruptcy Institute
2nd Annual Northeast Consumer Bankruptcy Winter Forum
January 18, 2010
Suffolk Law School - Boston, MA
For Information contact:
ABI at (703) 739-0800, or visit ABI World at
www.abiworld.org
ABI, 44 Canal Center Plaza, Ste. 404
Alexandria, VA 22314

American Bankruptcy Institute
15th Annual Rocky Mountain Bankruptcy Conference
January 21-22, 2010
Westin Tabor Center - Denver, CO
For Information contact:
ABI at (703) 739-0800, or visit ABI World at
www.abiworld.org
ABI, 44 Canal Center Plaza, Ste. 404
Alexandria, VA 22314

— NACTT 2010 Midyear Meeting —
January 21-23, 2010
The Grand American Hotel - Salt Lake City, UT
For Information contact:
NACTT at (800) 445-8629
or visit NACTT at www.nactt.com
One Windsor Cove, Suite 305, Columbia, SC 29223

American Bankruptcy Institute
Nuts & Bolts: Bankruptcy Fundamentals for Young and New Practitioners - West
March 4, 2010
Hyatt Regency Tampa - Tampa, FL
For Information contact:
ABI at (703) 739-0800, or visit ABI World at
www.abiworld.org
ABI, 44 Canal Center Plaza, Ste. 404
Alexandria, VA 22314

— NACTT 2010 Staff Symposium —
March 18 & 19, 2010
Marriott San Diego Hotel & Marina - San Diego, CA
For Information contact:
NACTT at (800) 445-8629, or visit NACTT at
www.nactt.com, One Windsor Cove,
Suite 305, Columbia, SC 29223

— NACTT 2010 Staff Symposium —
April 8 & 9, 2010
Marriott Marquis New York
For Information contact:
NACTT at (800) 445-8629, or visit NACTT at
www.nactt.com, One Windsor Cove,
Suite 305, Columbia, SC 29223

National Association of Bankruptcy Trustees
Spring Seminar
April 8-10, 2010
The Westin Savannah Harbor Golf Resort & Spa
Savannah, GA
For Information contact:
NABT at (800) 445-8629, or visit NABT at
www.nabt.com, One Windsor Cove, Suite 305
Columbia, SC 29223

American Bankruptcy Institute
28th Annual Spring Meeting
April 15-18, 2010
Gaylord National Resort & Convention Center
National Harbor, MD
For Information contact:
ABI at (703) 739-0800, or visit ABI World at
www.abiworld.org
ABI, 44 Canal Center Plaza, Ste. 404
Alexandria, VA 22314

Satori & Associates, Inc.
Annual 2010 User Seminar
April 20-22, 2010Atlanta, GA
For Information contact:
Satori & Associates, Inc.
664 Northumberland Drive
Alpharetta, GA 30004
(770) 667-6940 or email: Support@trustee13.com

NACBA 2010 Convention
April 29-May 1, 2010
San Francisco, CA
For Information contact:
NACBA 2300 M Street, Suite 800
Washington, DC 20037
barbara.andelman@nacba.org

— NACTT 2010 Staff Symposium —
May 27 and 28, 2010
Chicago, Illinois - Intercontinental Chicago
For Information contact:
NACTT at (800) 445-8629, or visit NACTT at
www.nactt.com, One Windsor Cove,
Suite 305, Columbia, SC 29223

Remarks at the NACTT's 44th Annual Seminar

Clifford J. White, III
Director, Executive Office for United States Trustees

I recently had the privilege of joining many of you at the 44th Annual Seminar of the NACTT in Boston. Though it was an added bonus that the meeting was held in my home state of Massachusetts, I always appreciate the opportunity to meet with you and provide updates on the work of the United States Trustee Program and our joint efforts to improve the administration of bankruptcy cases. In this article, I reiterate some of the major points I addressed in Boston and make note of a couple of decisions in the mortgage fraud and abuse area that have occurred since my talk.

* * * * *

Mortgage Fraud and Abuse

U.S. Trustee Program Initiative

Among the issues the NACTT and United States Trustees have cooperated on during the past year is attacking mortgage fraud and abuse. There is probably no issue that I personally have devoted more attention to over the past year than combating mortgage scams, both civilly and criminally. In fact, the number of criminal referrals we have made to United States Attorneys in these types of cases nearly doubled between 2007 and 2008.

Let me spend a few minutes describing our initiative in this area and providing some examples of our recent progress. We view our initiative as having three prongs. They are not all new. Some have been staples of our work for a long time. Importantly, chapter 13 trustees have been key partners for us in tackling each prong.

First, we combat debtor fraud. For example, recently we prosecuted a debtor, his attorney, and other co-conspirators who perpetrated a sham sale of the debtor's house so they could siphon off the loan proceeds and the debtor could continue to live rent free.

Second, we combat foreclosure rescue schemes. Like you, we are in a good position to uncover these types of operations because the bad actors often disguise themselves as bankruptcy petition preparers. I doubt there is a trustee here who has not come across a case in which a distressed homeowner was bombarded with offers to help stave off foreclosure, paid a handsome sum to a con artist who performed no useful services, and still lost the family home to foreclosure. To buttress our work in this area, we formed a special working group within the Program to assist our offices in finding and pursuing these really heart-breaking cases. And, we are making real progress.

The third prong is our newest prong, even though it is already two years old. We continue to combat mortgage servicer violations of the Bankruptcy Code. We aim to hold mortgage servicers to the same standard of completeness and accuracy in their filings that we do the debtors who owe them money.

We have undertaken a significant amount of litigation in this area. For example, on May 1, 2009, the bankruptcy court in the Northern District of Ohio ruled in our favor on a complaint against Countrywide Home Loans, Inc. The judge found that Countrywide's conduct in preparing court filings was "reckless" and reflected "an indifference to the truth." And, in the Southern District of Florida, the district court recently reversed the bankruptcy court's dismissal of the United States Trustee's adversary proceeding against Countrywide. The district court found that the United States Trustee had standing. In reversing the bankruptcy court, the district court held that we could seek sanctions for Countrywide's past misconduct, including injunctive relief to prevent future harm caused by Countrywide's practices and conduct.

We also recently prevailed in a case involving HSBC. In that case, the court criticized HSBC's use of a third-party electronic system to manage defaulted loans in bankruptcy, stating that its "thoughtless mechanical employment of computer-driven models and communications to inexpensively traverse the path to foreclosure offends the integrity of our American bankruptcy system."

Let me provide one final example of our mortgage servicer and creditor abuse enforcement efforts. I am pleased to announce that we have entered into a settlement agreement with a major lender to resolve complaints involving the bank's improper disclosure of more than 2,500 Social Security numbers on proofs of claims filed in bankruptcy courts in approximately 45 judicial districts. Under that agreement, the bank will notify affected debtors, file appropriate papers to correct the court filings, and take remedial steps to prevent a recurrence of these impermissible breaches of privacy. This case is one of many that we have taken in recent months

CONTINUED ON NEXT PAGE

against creditors who have failed to comply with legal requirements to protect the personal information of their customers in bankruptcy.

A couple of quick updates:

On July 31, 2009, in the case out of the Northern District of Ohio, the bankruptcy court issued its decision on remedies against Countrywide. Although the decision did not include our more robust request for an independent auditor and other corrective measures, the court did affirm its broad equitable powers and imposed additional paperwork requirements that must accompany Countrywide's proofs of claim. Countrywide has appealed the bankruptcy court's decision.

Our experience in the Ohio case and a number of other cases has taught us that the issue of remedies is a very difficult one for bankruptcy courts to address. Based upon the evidence we amass, bankruptcy courts will find liability and inveigh against improper industry practices. Securing the right remedy, however, has proved more difficult than obtaining a finding of liability. We will continue our efforts to expose significant mortgage servicer violations and to seek meaningful relief that will make the victims whole and spur the industry to correct its deficiencies once and for all.

We are particularly encouraged by a recent decision handed down in the Eastern District of Louisiana, upholding the bankruptcy court's imposition of sanctions against Wells Fargo for systematically filing flawed proofs of claim. The UST filed an amicus brief in that case, and I am gratified that the court agreed with us that the bankruptcy judge acted within her powers when she required Wells Fargo to audit and amend its proofs of claim.

Chapter 13 Minimum Standards for Mortgage Proof of Claim Review

One of our biggest challenges in attacking improper mortgage servicer practices is the ability to identify the right cases to bring. In the ordinary paper flow, we often do not see evidence that gives rise to knowledge of inaccurate proofs of claim or motions for relief from stay.

To help us address this issue, I came to your convention last summer and announced that we would work with the NACTT to develop Guidelines for Reviewing Mortgage Proofs of Claim. Chapter 13 trustees are in a good position to identify inaccuracies in creditor filings and either file objections or refer the matters to the United States Trustee.

Although the Guidelines were issued by us, we gratefully received much input from trustees and the NACTT in their development. In disseminating the Guidelines, and in many subsequent communications with United States Trustees and staff in the Program, I have emphasized that the USTP offices should apply them with two animating principles.

First, our primary objective is to catch bad mortgage servicers, not to play a game of "gotcha" on the chapter 13 trustee's evaluation. Second, USTP offices should exercise discretion in deciding which cases to bring. This requires coordination with chapter 13 trustees to make sure we get the kind of referrals we should act on in light of the overall circumstances in a district. In each district, USTs and chapter 13 trustees should consult about what kind of cases we are prepared to take, which cases chapter 13 trustees might tackle, and which cases do not merit action. There is no bright line test we can lay down from Washington. The goal is to make a difference and to improve bankruptcy practice, either with big cases or with much smaller cases, one district at a time.

Many of you have done much to address mortgage servicer violations of the Code. I commend you and thank you. Although I am leaving out scores of people who deserve public recognition, let me single out Ronda Winnecour for her work. Among other things, Ronda developed a checklist for trustees in reviewing proofs of claim. We are encouraging other trustees to consider adopting Ronda's checklist or a version of it. Let me also highlight the work of Andrea Celli. Not only has Andrea been a leader in identifying abusive cases, but she, along with Byron Meredith and Marge Burks, traveled to the Justice Department's National Advocacy Center in May to help train USTP staff on combating creditor abuse.

The mortgage fraud and abuse work you are doing is important. It makes a real difference for homeowners and for the integrity of the bankruptcy system. I encourage you to work in concert with your local UST office. Thank you so much for your continuing efforts.

Language Assistance Plan

On another important front, many of you are seeing a change for the better in our ability to accommodate non-English speaking debtors at section 341 meetings. We have contracts in place to provide tele-interpreter services in about 200 languages. The service is free and is readily available in nearly 250 meeting rooms. We have distributed conference quality speaker phones to the vast majority of these locations to make it easier for the interpretation and recording. We also are exploring options for providing service at locations that are not within our direct control.

I strongly encourage you to make full use of the tele-

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News from the Administrative Office

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December Amendments to Code, Rules, and Forms

A number of provisions of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the Official Bankruptcy Forms, and the Director's Procedural Forms will be amended effective December 1, 2009, in conjunction with the revision of time-computation under the Federal Rules. The amendments are summarized below along with links to additional information.

Bankruptcy Rules

Unless Congress acts to the contrary before December 1, most deadlines of less than 30 days in Bankruptcy Rules 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1, 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9027, and 9033 will be changed to multiples of seven and Rule 9006 will be rewritten to follow the template being adopted throughout the Federal Rules for computing time.

The deadlines will be amended as follows –

- 5-day periods become 7-day periods,
- 10-day periods become 14-day periods,
- 15-day periods become 14-day periods,
- 20-day periods become 21-day periods, and
- 25-day periods become 28-day periods.

The amendments are posted at http://www.uscourts.gov/rules/supct1208.html.

Bankruptcy Code

The 5-day deadlines in sections 109(h)(3)(A)(ii), 322(a), 332(a), 342(e)(2), 521(e)(3)(B), 521(i)(2), 704(b)(1)(B), 749(b), and 764(b) of the Bankruptcy Code will become 7-day deadlines. The amendments were included in Pub. L. 111-16, which was intended to offset the shortening effect of the new method of computing time. The law was signed by the President on May 7, 2009, and will be effective on December 1 at the same time as the rules amendments.

Official Bankruptcy Forms

Exhibit D to Official Form 1 will be amended effective December 1 to conform to the amendment of section 109(h)(3)(A)(ii) of the Code. The amended form will be posted on the pending changes page of the bankruptcy forms section of the Federal Rulemaking website at http://www.uscourts.gov/bankform/index.html.

Director's Procedural Forms

Pending review by the Advisory Committee on Bankruptcy Rules, Director's Forms B200, B210A, B231A, B231B, and B250E will be amended to conform to the time computation amendments. The amended forms also will be posted on pending changes page at http://www.uscourts.gov/bankform/index.html.

Other December Rules and Forms Amendments

In addition to the time-computation amendments, a number of other Bankruptcy Rules and Forms are scheduled to be amended effective December 1, 2009.

Unless Congress acts to the contrary, amendments to Bankruptcy Rules 2016, 4008, 7052, 9006, 9015, 9021, and 9023, and new Rule 7058 will be effective on December 1. A link to the new and amended rules is posted at http://www.uscourts.gov/rules/supct1208.html.

Amendments to Rules 7052 and 9021 and new Rule 7058 will result in the explicit adoption of the separate document requirement for judgments in adversary proceedings, but not in contested matters. As amended, Rule 4008 will require the use of new Official Form 27, the Reaffirmation Agreement Cover Sheet. The amendments to Rules 9015 and 9023 limit the time for filing certain post-judgment motions to 14 days rather than 28 days as set out in the Civil Rules, as amended. The amendments to Rules 2016 and 9006 are technical.

Pending review by the Bankruptcy Rules Committee, three new Director's Procedural Forms will be issued and five Director's Forms will be amended, effective December 1. The new forms are Form B250F, Summons in a Foreign Nonmain Proceeding, Form B18RI, Discharge in Individual Chapter 11 Case, and Form B261C, Judgment in an Adversary Proceeding. The new and amended forms will be posted on pending changes page at http://www.uscourts.gov/bankform/index.html.

Form B250F is issued to implement Bankruptcy Rule 1010(a) as amended in 2008 and Form B261C is issued to implement pending new Rule 7058. Form B18RI is issued as a result of the 2005 Bankruptcy Code amend-

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ments, which require that plan payments generally must be completed in a chapter 11 case before an individual debtor can receive a discharge. The Certificates of Service will be revised on the bankruptcy summonses, Forms B250A, B250B, B250C, B250D, and B250E, to conform to the provisions of Rule 7004 on who may serve a summons and complaint.

Rules Amendments Posted for Comment

Proposed amendments to Bankruptcy Rules 2003, 2019, 3001, 4004, and 6003; proposed new Rules 1004.2 and 3002.1; and proposed amendments to Official Forms 22A, 22B, and 22C have been published for comment. The proposed amendments and new rules, descriptions of the changes, and instructions for submitting comments are posted at http://www.uscourts.gov/rules/newrules1.htm

New Rule 1004.1 was republished after being revised on the basis of earlier comments. The new rule would require an entity filing a chapter 15 petition to state the country of the debtor's main interest and to list each country in which a case involving debtor is pending. The proposed rule would set a deadline for challenging the statement asserting the debtor's country of main interest.

As amended, Rule 2003 would require that written notice of the adjournment of a meeting of creditors and of the date and time to which the meeting is adjourned. The proposed amendment to Rule 2019 would expand the scope of the rule and its disclosure requirements in chapter 9 and chapter 11 cases. The proposed amendment to Rule 3001 prescribes in greater detail the supporting information required to accompany certain proofs of claim and, in cases in which the debtor is an individual, the consequences of failing to provide the information.

Proposed new Rule 3002.1 is intended to assist implementation of § 1322(b)(5) of the Code, which permits a chapter 13 debtor to cure defaults in a home mortgage and to maintain mortgage payments over the course of the debtor's plan. Subdivisions (a) and (b) would require the holder of a claim secured by the debtor's home to provide at least 30 days' notice of postpetition changes in the mortgage payment amount. Subdivision (c) requires a home mortgage creditor to give an itemized notice of any postpetition fees, expenses, or charges within 180 days after they are incurred, and it allows the debtor or trustee to challenge those additional charges within a year after notice is given. Subdivisions (d) - (f) establish a procedure for determining whether the debtor has cured any default and is otherwise current on the mortgage payments at the close of a chapter 13 case. Subdivision (g) specifies sanctions that may be imposed if the holder of a claim secured by the debtor's principal residence fails to provide the required information.

As amended, Rule 4004 would permit a party to seek an extension of time to object to the debtor's discharge under limited circumstances during the "gap" period between the deadline for objecting to the discharge and the issuance of the discharge. The proposed amendment to Rule 6003 would clarify that the 21-day waiting period before a bankruptcy court can enter certain orders at the beginning of a case, including an order approving employment of counsel, does not prevent the court from specifying an effective date for the order that is earlier than the date of its issuance.

Form 22A is amended to replace the references to "household" and "household size" on lines 19A, 19B, 20A, and 20B with reference to "number of persons" or "family size." The same changes are made on lines 24A, 24B, 25A, and 258 of Form 22C. Line 8 of Form 22A and line 7 of Forms 22B and 22C are amended to add an instruction that only one joint filer should report regular payments by another person for household expenses.

The introductory instruction to Part I of Form 22A is amended to reflect the Bankruptcy Code's ambiguities regarding application of means test exemptions in joint cases in which only one debtor is exempt. The amended instructions give debtors the choice of completing and filing separate forms if they believe this is required by § 707(b)(2)(C) of the Code. ◉

The Briar Patch Of Exemptions: US Supreme Court To Review In Re Reilly

The United States Supreme Court has granted certiorari to the Third Circuit's recent opinion regarding bankruptcy exemptions (In re Reilly[1]). It appears that once again the Court will have the opportunity to delve into the briar patch of exempted property and the resulting plight of Trustees in attempting to protect assets for the unsecured creditors and themselves from liability.

The facts of Reilly are fairly straight forward and will be familiar to anyone who routinely reviews debtors' schedules. The debtor is a self-employed caterer who filed Chapter 7 bankruptcy. On Schedule B, she listed "business equipment" valued at $10,718.00. On Schedule C she exempted the same business equipment for $10,718.00. In other words, the exempted and value amounts were identical, thus creating the underlying issue for the court. The Trustee did not object to the exemptions within the thirty day window prescribed by Rule 4003. After the thirty day deadline had run, the Trustee had an appraisal done on the property that showed it was actually worth $17,200.00. The Trustee then filed a Motion the sell the equipment, allow the debtor the exempted amount, and apply the balance to the bankruptcy estate. The debtor responded by asserting that the equipment was, in fact, fully exempt and that the Trustee, by failing to object, could not force a sale.

The Trustee's position was that he was not objecting to the propriety of the exemption itself—he conceded the debtor had a right to an exemption—but, rather the value of the property. As such, the time limit imposed by Rule 4003 was not applicable. The Trustee further argued that the imposition of Rule 4003's time limitation on a valuation issue would encourage debtors to undervalue assets in the hopes that a Trustee might inadvertently fail to object to the exemptions, thereby providing an unintended windfall for the debtors. The Court disagreed.

Relying on the seminal Supreme Court exemption case of Taylor v. Freeland & Kronz[2], the Third Circuit held that by listing the identical numbers in the valuation and exempted amount columns the Trustee was put on notice the Debtor intended to fully exempt the asset. The Court stated that the Trustee could have requested an appraisal within Rule 4003's time limits or,

> Alternatively, if he [Trustee] was not able to seek an appraisal within Rule 4003's 30-day time limit, he could have requested an extension before that deadline passed. But once Rule 4003's 30-day period elapsed without Schwab [Trustee] filing an objection or a request for an extension, the property became fully exempt from the bankruptcy estate regardless of its ultimate market value.[3] *[Trustee] added.*

Therefore, once the debtor signals an intention to fully exempt property by listing identical entries for both the value and exemption amounts, the Trustee must object to the exemptions within thirty days to prevent the asset from being fully exempt regardless of the true value.

The Third Circuit was not unaware of the potential pitfalls of this ruling but felt the benefits of establishing certainty in what property could be controlled by the debtor and when that control was established outweighed the risk of unethical debtors taking advantage of the system. As the Court determined, if the Trustee felt the debtor was acting in bad faith, there was recourse in other bankruptcy provisions and criminal law.

As mentioned earlier, the Supreme Court addressed a very similar issue in the 1992 Taylor case. In Taylor, the debtor had a pending employment discrimination lawsuit. In her schedules the debtor listed the value of the lawsuit as "unknown". The debtor's attorney and Trustee discussed the details of the lawsuit at length including the Trustee writing the debtor's attorney stating that he considered the potential proceeds of the lawsuit to be property of the estate. What the Trustee did not do, however, is object to the claimed exemptions within the thirty day window mandated by Rule 4003. After the thirty day deadline had passed, the employment discrimination case settled for $110,000.00, which the debtor claimed as exempt property. The Trustee then filed a Complaint seeking turnover of the proceeds, arguing that a failure to object to the exemptions did not preclude judicial inquiry altogether if there was a good faith question regarding the claimed exemptions. The Supreme Court found that while the debtor may not, by statute, have been entitled to an exemption of the full amount; the Trustee, by failing to object, created that result. In rejecting the Trustee's argument, the Court held that,

> Deadlines may lead to unwelcome results, but they prompt parties to act and they produce final-

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> ity. In this case, despite what respondents repeatedly told him, Taylor [Trustee] did not object to the claimed exemption. If Taylor [Trustee] did not know the value of the potential proceeds of the lawsuit, he could have sought a hearing on the issue, see Rule 4003(c) , or he could have asked the Bankruptcy Court for an extension of time to object, see Rule 4003(b). Having done neither, Taylor cannot now seek to deprive Davis and respondents of the exemption.[4]
> *[Trustee added]*

Therefore, the entire amount was exempted to the benefit of the debtor with Trustees nationwide left wondering how to proceed with questions arising from exemption issues.

These issues are not black and white and there are conflicting tensions surrounding the interests of the different parties. For instance, if the debtor has a civil lawsuit pending, the debtor/plaintiff's attorney in the civil case has a different agenda than the bankruptcy Trustee. The civil attorney will always maintain that a plaintiff's case is "worth" as much as may be credibly argued given the facts, even if all the parties involved know that a later settlement or judgment may be for a sum considerably less than the one stated in the prayer for relief. It is the nature of the beast to start from a position of overstated strength and compromise downward.

Conversely, in the debtor/plaintiff's bankruptcy case, the issue is reversed. From the standpoint of the lawsuit being an asset of the case, it behooves the debtor to present the lowest (within the bounds of reason) value possible to reduce what must be paid into the case. If these two numbers (lawsuit amount and/or bankruptcy amount) are different, the issue of good faith arises (at least in a Chapter 13 case). A clever defense attorney, for instance, could go to the bankruptcy filing, see what the debtor stated (under oath) as the value of the lawsuit and use it against the debtor in negotiations. That is why it is the inclination of any good plaintiff's attorney to respond with "$0.00" or "unknown" when pinned down as to what the case might be worth in the bankruptcy context. It keeps options open, doesn't damage the plaintiff's chances and allows greater flexibility in the civil suit. Unfortunately for the debtor, that approach wreaks havoc in the bankruptcy case because of the duties of the Trustee.

The Trustee has an ongoing fiduciary obligation to accurately calculate the assets of the debtor's estate for the unsecured creditors, regardless of the strategy driving the debtor's civil lawsuit. Without hard numbers listed on Schedules B and C it is very difficult to correctly analyze what should be required in the debtor's bankruptcy. An entry of "unknown" or "$0.00" is utterly meaningless in the bankruptcy context. Thus the conflict created is that the Trustee is trying to force the debtor to more accurately list the values in the schedules and the debtor resists because they either truly don't know or it may actually damage the chances of the civil lawsuit being successful.

The Court's concern in Taylor was that the debtor has a right to a "fresh start" which should include having a sense of finality regarding what property they may keep and use for their own benefit and what property is not for their use. The Trustee's interest is to protect the assets of the case for the benefit of the unsecured creditors based on the information available. The question, then, is how to resolve these conflicting interests in the most practical way possible.

What is troubling in the Taylor case (as well as its progeny Reilly), is the decision to extrapolate meaning from words with more than one interpretation. The Supreme Court decided that "unknown" meant "unlimited" and penalized the Trustee in Taylor for not objecting to the ramifications resulting from the use of that particular word. Now in Reilly, the Third Circuit has expanded this view by holding that since the amounts for "value" and "exemption" were identical, the Trustee was put on constructive notice that the debtor intended that to mean "unlimited". This is sliding down the rabbit hole with Alice by creating a moving target of what the debtor actually "meant" in her schedules, while the Trustees are left open to liability if they guess incorrectly as to the debtor's intent.

Debtors are clearly entitled to certain exemption amounts based on the jurisdiction in which the case is filed and that, in their own best interests, the debtors should claim those exemptions. While the Courts have stated their intention to provide clarity for the debtor regarding the issues surrounding exemptions, it should be just as important to the Court to stop the debtor (or anyone else for that matter) from realizing a windfall to which they were never entitled. The formulation now in place by the Court practically mandates that Trustees, in an abundance of caution, object to any and all exemption language that may be remotely suspected of more than one interpretation. This creates unnecessary work for the bankruptcy courts and hinders the efficient administration of cases.

In a case recently decided in July, 2009, a New Jersey United States District Court felt compelled to follow the ruling in Taylor, allowing a debtor to benefit from a scheduled value of a lawsuit as "unknown" (In re Booth[5]). The Court undertook a thorough analysis of

the case law on this issue, recognizing that while some courts have attempted to carve out exceptions to Taylor, the inescapable premise of the Supreme Court's ruling is that the Trustee must object to the debtor's exemptions within thirty days or risk forfeiting any later arguments. The Taylor ruling, in the District Court's view, left very little leeway for a Trustee to respond to an exemption issue after the thirty day window. While Taylor is not a new case, it still exerts a strong influence on exemption issues and bears revisiting.

Interestingly, the Court in Booth cited a Texas bankruptcy case whose ruling was consistent with Taylor, but also offered a more practical solution to the dilemma faced by Trustees. In a footnote, the Texas Judge suggested that,

> For circumstances involving pending litigation that has not yet been settled or concluded, requesting an extension of time seems highly preferable to the approach endorsed by *Mercer*. What length of extension would be appropriate? In order to avoid the necessity of successive extension motions, an extension for a period of thirty (30) days after the earlier of: (1) the filing of any motion by the trustee to approve a compromise or settlement of the cause of action to which the debtor's exemption claim related; or (2) the entry of any final judgment in such cause of action would seem appropriate.[6]

While Courts are obviously compelled to follow rulings by the United States Supreme Court there seems to be an awareness of the strain the Taylor ruling creates for Trustees. The suggestion offered by the Texas bankruptcy judge mentioned above is but one approach that would provide some needed common sense to the issue.

Another approach might be to simply insist that debtors provide accurate numbers and hold them accountable for the information they provide under oath. Determining the true value of a civil lawsuit is admittedly more of an art than a science but experienced civil court practitioners have a reasonable idea of what a cause of action might be worth and how to calculate it. Furthermore, of all the parties involved once the debtor files bankruptcy—i.e., the debtor, debtor's attorney, debtor's civil attorney and Trustee—the person who has the least amount of information on which to make an informed decision regarding the value of the civil lawsuit is the Trustee. If the debtor is required to put nominally accurate numbers in the schedules and is then held accountable for those numbers, much of this confusion would disappear. Trustees should (and do) object to entries on debtors' schedules that list a value or exemption amount of "$0", "unknown" or "$1" or exemption amounts that exceed the allowable limits. Those values and exemptions are clearly red flags and bear investigating because of the difficulty in correctly conducting the "best interests" test with inaccurate or incomplete information. If the Trustee then misses an objection that should have been filed, the debtor has a right pursuant to Rule 4003 to claim the property fully exempt.

On the other hand, holding a Trustee liable while giving the debtor an exemption to which they were never entitled because of a certain interpretation of the language used by the debtor is an untenable position in which to place the Trustee. Mixing a Trustee's fiduciary duty with ambiguity is toxic.

The Supreme Court is correct in underscoring the need for finality regarding this issue but putting Trustees in the position of triangulating the language used by debtors and objecting to every conceivable possibility cannot be the best way to achieve that goal. If, for instance, the debtor lists a lawsuit value as being "$450.00" and also exempts "$450.00" because that number reaches the limit of her exemptions, that should be the allowed exemption amount, regardless of what the debtor "meant" by putting "$450.00". As a practical matter, the responsibility of accurate numbers and information should be placed on the debtor, then hold the debtor to the numbers they put forth. The result would be that the parties are not left to determine the debtor's intent and sooner, rather than later, the information contained in the schedules would become more accurate.

One safeguard used in some bankruptcy districts is to require the debtor to offer to the Chapter 13 plan any lawsuit proceeds over and above the amounts specifically exempted. If Schedules B and C have realistic numbers in place, exempting the amount to which they are entitled, and the debtor is offering all unexempted proceeds to the plan, the interests of all the parties are protected. As an additional safety precaution, some Trustees object to any exemption of lawsuit proceeds with the goal being the submission of an Order specifically setting out the exempted amount. With that, there is an Order in place establishing the exempted amount along with a plan provision offering all unexempted amounts as an additional payment regardless of the actual value of the lawsuit. Again, this cannot be the most practical way to resolve these issues.

Another approach might be to have the bankruptcy Court schedule a Show Cause hearing for a debtor when a lawsuit settlement has been reached and a Motion to Approve Compromise, etc. has been filed. If the debtor is then required to amend Schedules B and

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C to more accurately reflect the results of the lawsuit, the Trustee has a second opportunity to object to the exemptions, ensuring that the interests of the unsecured creditors are protected.

By applying a more pragmatic approach to this issue (whatever that may be), the Supreme Court would allow the Trustees to focus on the objections to exemptions that are truly needed without the additional stress of trying to decide what the debtor may have meant. This would also benefit debtors by giving them a clear idea of how the potential asset of a lawsuit will be treated in their bankruptcy. The debtors would know how proceeds would be treated and what amounts, if any, might revert to them when the lawsuit settles or is reduced to a judgment. While there is genuine tension between the goals and strategy of a civil lawsuit and the requirements of the information needed in bankruptcy court, it is unavoidable when a debtor with a pending lawsuit submits themselves to the jurisdiction of the bankruptcy court.

With the Supreme Court now deciding to hear In re Reilly it is impossible to predict how they will modify or alter the ruling in Taylor. There are new Justices on the bench, the new bankruptcy law is in effect and the political climate has changed. With luck, the Court will take this opportunity to craft a practical, realistic solution that more fairly divides the responsibility of correct information and asset protection between the debtor and Trustee. By leading us out of the current "briar patch" of exemption issues, the Court has an opportunity to end needless and wasteful litigation stemming from confusion over the intent of the language used by the debtor. ◉

Footnotes:

1 In re Reilly, 534 F.3d 173 (3d Cir. Pa. 2008)

2 Taylor v. Freeland & Kronz, 503 U.S. 638 (U.S. 1992)

3 Reilly at 178.

4 Taylor at 644.

5 Booth v. Edwards (In re Booth), 2009 U.S. Dist. LEXIS 55401 (D.N.J. June 30, 2009)

6 In re Harrington, 306 B.R. 172, 178 (Bankr. E.D. Tex. 2003) at footnote 15 at 181.

THE WASHINGTON BEAT FROM THE HILL - EOUST - *CONTINUED FROM PAGE 12*

interpreter services. Signage is being posted in meeting rooms to make sure that debtors know the service is available free of charge, and our offices are engaging in outreach efforts to make sure the local bar is also aware of the free service. Your assistance in helping to spread the word would be greatly appreciated as well.

I am told that even those trustees who are like me, and are sometimes reluctant to try new things, are finding the service easy to use. Interpreters are readily available and the section 341 meetings proceed efficiently. There is no need to put cases with interpreters at the end of your docket. All debtors can be treated the same, with dignity, and have the same opportunity to hear questions and provide answers in their native language.

Inevitably, some issues or problems will arise. As they do, we certainly need to hear about them so we can implement the most effective language assistance program possible.

Technology in Section 341 Meetings

A small number of judges have raised with me the issue of improved technology in section 341 meeting rooms. They suggest that greater use of technology not only would support the court's long-term goal of going "paperless," but also would allow trustees to conduct meetings more efficiently and thoroughly.

I know that, as a group, chapter 13 trustees are quite tech savvy and together we have addressed a number of technological improvements, including the use of wireless access points in section 341 meeting rooms and courtrooms. While there can be no compromise of the security of personal information, to the extent that we can overcome security problems, and to the extent we can avoid high costs, we are willing to explore better use of technology at section 341 meetings.

To that end, I am pleased that the NACTT has agreed to participate on a working group we are putting together with staff from our Program and representatives of the NABT. Being able to draw on your expertise and experience will be extremely helpful as we consider our options.

* * * * *

I hope that your 44th Annual Seminar was productive and enjoyable. I firmly believe that the partnership of the NACTT and the United States Trustee Program has allowed us both to better achieve our mission, and I look forward to addressing issues of mutual concern in the coming year. ◉

Negative Equity And The Hanging Paragraph: A Creditor's Perspective

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As the four-year anniversary of the effective date of BAPCPA passes, a number of controversies springing forth from the amendments remain unresolved nationally. Among these unsettled disputes is the question of whether the financing of negative equity[1] in a retail installment contract destroys or dilutes the fully secured status otherwise afforded by the "hanging paragraph" of 11 U.S.C. § 1325(a).

Intended to "Restor[e] the Foundation of Secured Credit",[2] the hanging paragraph has met a number of challenges intended to temper its potency. Initially, the most notable challenge to the protections of the hanging paragraph was the assertion that it permitted a debtor to surrender collateral, at confirmation, in "full satisfaction" of the entire debt and, therefore, not allow the creditor an unsecured claim for any deficiency after the sale of the collateral. Although surrender in full satisfaction gained strong endorsements among bankruptcy courts throughout the nation, the Circuit Courts of Appeals considering the issue have resoundingly proclaimed that a creditor whose claim falls under purview of the hanging paragraph is entitled to an unsecured claim upon disposition of the collateral.[3] Similar to "surrender in full satisfaction," the negative equity issue has turned decidedly in the secured creditors' favor as the question progresses to the appellate court level.

Any discussion of the applicability of the hanging paragraph must begin with the language of the Code section. The hanging paragraph provides, in part:

> For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase-money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day [*sic*] preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor; . . . .
>
> 11 U.S.C. § 1325(a).

The hanging paragraph, therefore, requires that the creditor have a purchase-money security interest ("PMSI") to qualify for protection against bifurcation of its claim into secured and unsecured portions under 11 U.S.C. § 506. The Bankruptcy Code, however, fails to provide a definition of a PMSI. Consequently, most courts have turned to state law to define PMSI.[4]

A growing number of courts, especially those at the District and Circuit Court of Appeals levels, have interpreted state law, coupled with the purpose behind the enactment of the hanging paragraph, to find that the financing of negative equity does not temper or eliminate the protections of the hanging paragraph. The Second, Fourth, Tenth and Eleventh Circuits have determined that the Uniform Commercial Code's ("UCC") definition of PMSI includes negative equity.[5]

UCC § 9-103 sets forth the definition of a PMSI.[6] "A security interest in goods is a purchase-money security interest . . . [t]o the extent that the goods are purchase-money collateral with respect to that security interest. . . . 'Purchase-money collateral' means goods or software that secures a purchase-money obligation incurred with respect to that collateral. . . . 'Purchase-money obligation' means an obligation of an obligor incurred as all ***or part*** of the ***price*** of the collateral ***or for value given to enable the debtor to acquire*** rights in or the use of the collateral if the value is in fact used."[7] Accordingly, the test for a PMSI contains two prongs, either of which is sufficient for a component of the amount financed to qualify as a PMSI: 1) it must be part of the price of the collateral or 2) it must enable the debtor to acquire the new collateral.[8] Negative equity satisfies both of these prongs.

"Price", as contemplated in the UCC, is afforded a broad definition. Comment 3 to UCC § 9-103 defines the term "price:"

> [t]he "price" of collateral or the "value given to enable" includes obligations for expenses incurred in connection with acquiring rights in the collateral, sales taxes, duties, finance charges, interest freight charges, costs of storage in transit, demurrage, administrative charges, expenses of collection and enforcement, attorney's fees, and other similar obligations.

Although the Comment does not specifically enumerate negative equity, "the list is not exhaustive".[9] In fact,

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negative equity resulting from a trade-in is an expense "incurred in connection with acquiring rights in the collateral" along with the other listed costs and, therefore, a component of the price of the new vehicle.[10]

Similarly, the financing of negative equity resulting from a trade-in enables a debtor to acquire the new vehicle. "Enable" is ordinarily defined as "[t]o supply with the means, knowledge, or chance to be or to do something," or "[t]o make possible."[11] The financing of negative equity enables a debtor to purchase the new vehicle because it is "integral to the whole transaction in which the new vehicle [is] purchased."[12] In order to purchase a vehicle to *replace* the previous automobile, debtors are compelled to dispose of their previous vehicle and any obligations attendant to the financing of that vehicle. Debtors choose to incorporate the negative equity into the contract for the new vehicle and, in fact, are often compelled to do so to dispose of the obligation for the previous automobile and obtain the new one.

Comment 3 also requires "a close nexus between the acquisition of collateral and the secured obligation."[13] A close nexus exists between the financing of the negative equity and the purchase of the new vehicle because both were components of one "package deal."[14] "Payment of the trade-in debt was tantamount to a prerequisite to consummating the sales transaction, and utilizing the negative equity financing was a necessary means to accomplish the purchase of the new vehicle."[15] In fact, "[t]he very name 'trade-in' implies the two vehicle exchanges are linked."[16]

The finding that PMSI includes negative equity is confirmed by reference to other state and federal laws. A number of states have enacted statutes that govern the sale of motor vehicles through installment contracts. Often, these statutes specifically allow for the financing of negative equity and provide that negative equity is a component of the "price" of the new collateral.[17] For example, the Michigan Motor Vehicle Sales Finance Act ("MVSFA"), considers negative equity as "other necessary or incidental costs" of financing and as an element of the "price" of the new vehicle.[18] Read *in pari materia* with the UCC, statutes such as the MVSFA bolster the determination that the UCC's definition of PMSI includes negative equity.[19] A similar conclusion is reached with reference to the Truth in Lending Act ("TILA"),[20] which provides that negative equity must be disclosed as a component of the "total sale price" of the new vehicle purchased.[21]

A number of courts have decided the issue in favor of the secured creditor with little or no reference to the UCC or any other state law. One district court has found that the plain meaning of the hanging paragraph prevents the bifurcation of claims containing negative equity because the statute only requires a portion of the claim to be a PMSI to afford the entire claim the protection of the hanging paragraph.[22] The court determined that had Congress intended to limit the application of the hanging paragraph when the claim included negative equity, it would have added "*to the extent* the creditor has a purchase-money security interest" as it had in Sections 506(a) and 522(f).[23]

These interpretations of the hanging paragraph and PMSI comport with the intent of Congress in enacting the 2005 Amendments to the Bankruptcy Code. In "Restoring the Foundation for Secured Credit," Congress sought to replace "a contract-defeating provision such as § 506 (which allows judges rather than the market to value the collateral and set an interest rate, and may prevent creditors from repossessing) with the agreement freely negotiated between debtor and creditor."[24] Consequently, the central purpose of the hanging paragraph is to protect secured creditors bifurcation of their claims into secured and unsecured portions.[25] "If Congress did not intend for the hanging paragraph to apply to a trade-in's negative equity . . . , it would have the effect of excluding a substantial number of lawful auto finance transactions that were industry practice when BAPCPA was enacted . . . ."[26] This effect of excluding over one quarter of all new vehicle purchases could not have been contemplated because Congress "intended only good things for car lenders and other lienholders"[27] in the hanging paragraph.

The purpose of the 2005 Amendments has been crucial in courts' findings that negative equity does not eliminate the protections of the hanging paragraph. The Bankruptcy Court for the Southern District of Ohio, in *In re Hampton*, for example, followed the Sixth Circuit decision of *In re Long* and determined that *Long's* ruling that the principle of "the equity of the statute," which examines the public policy behind the statute, compelled it to find that the purpose of the hanging paragraph - to prevent the "cramdown" of obligations secured by motor vehicle purchased within 910 days of the bankruptcy filing – prevented negative equity from destroying the fully secured status enjoyed under the hanging paragraph.[28]

The plain meaning of the hanging paragraph and the state law definition of PMSI, coupled with Congress's intent in enacting the 2005 Amendments, indicate that negative equity does not affect the application of the anti-cramdown provision. The Circuit Courts of Appeals that have decided the issue have agreed with this conclusion. We wait to see, however, whether

this controversy will be settled nationally - as surrender in full satisfaction appears to have been - or whether one or more Circuit Court will buck the trend and create a split that can only be resolved by the Supreme Court. ◉

Footnotes:

1 Negative equity comes into play in 29 to 38 percent of all new motor vehicle purchases. *In re Graupner*, 537 F.3d 1295, 1303 (11th Cir. 2008)(compiling various sources). In order to purchase a new vehicle, the consumer often arranges to "trade-in" his or her old vehicle as part of the purchase transaction. In many instances, due to the rapid depreciation of most motor vehicles, the old vehicle is worth less than the outstanding balance on the old installment contract. To facilitate the purchase of the new vehicle and the trade-in of the old, this "negative equity" is incorporated into the installment contract for the new vehicle. Moreover, the payoff of the old obligation, which creates the negative equity, is necessary because "car dealers are generally unwilling to accept a trade-in with an outstanding lien because it makes it difficult for the dealer to resell the car." *In re Price*, 562 F.3d 618, 625 (4th Cir. 2009).

2 Section 306(b) of the 2005 Act, Pub.L. 109-8, 119 Stat. 23, 80 (Apr. 20, 2005); *In re Wright*, 492 F.3d 829, 832 (7th Cir. 2007).

3 *In re Wright*, supra; *Capital One Auto Fin. v. Osborn*, 515 F.3d 817 (8th Cir. 2008); *In re Ballard*, 526 F.3d 634 (10th Cir. 2008); *Tidewater Fin. Co. v. Kenney*, 531 F.3d 312 (4th Cir. 2008); *In re Long*, 519 F.3d 288 (6th Cir. 2008); *In re Barrett*, 543 F.3d 1239 (11th Cir. 2008); *In re Miller*, 570 F.3d 633 (5th Cir. 2009).

4 "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." *Butner v. United States*, 440 U.S. 48, 54 (1979).

5 *In re Peaslee*, 547 F.3d 177 (2nd Cir. 2008), question certified to New York Court of Appeals decided, *Reiber v. GMAC, et al.*, 2009 N.Y. LEXIS 2475, 2009 NY Slip Op 5197 (N.Y. June 24, 2009); *In re Price*, 562 F.3d 618 (4th Cir. 2009); *In re Ford*, 2009 U.S. App. LEXIS 17198 (10th Cir. August 3, 2009); *In re Graupner*, 537 F.3d 1295 (11th Cir. 2008)

6 "[The UCC] must be liberally construed and applied to promote its underlying purposes and policies," one of which is "to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties." *Price*, 562 F.3d at 628, citing UCC § 1-103(a).

7 UCC § 9-103 (Emphasis added)

8 *Graupner*, 537 F.3d at 1301.

9 *Graupner*, 537 F.3d at 1302.

10 *Price*, 562 F.3d at 627; see also, *Ford*, 2009 U.S. App. LEXIS 17198 at * 15 ("Collection and enforcement expenses and attorney's fees are costs incurred so that the creditor may realize the value of the security interest. The discharge of negative equity clears the title of the trade-in vehicle, permitting the creditor to realize the value of the vehicle it receives as part of the trade. Both categories of expenses allow the creditor to realize its benefit of the bargain.").

11 *Price*, 562 F.3d at 625, citing Webster's II New College Dictionary 377 (3d ed. 2005).

12 *Id.*

13 UCC § 9-103, Comment 3.

14 *Graupner*, 537 F.3d at 1302.

15 *Id.*

16 *Ford*, 2009 U.S. App. LEXIS 17198 at *13.

17 See e.g. Personal Property Law § 306[6] (New York); MCL 492.102, MCL 492.113a (Michigan); and (Georgia).

18 MCL 492.113a; MCL 492.102(10, 12); see also *In re Muldrew*, 396 B.R. 915, 924 (E.D. Mich. 2008).

19 *Graupner*, 537 F.3d at 1301; *Muldrew*, 396 B.R. at 924; *In re Horne*, 390 B.R. 191, 202-203 (E.D. Va. 2008)(Finding that both the Virginia Retail Installment Sales Act and the Federal Truth in Lending Act should be read *in pari materia* with the UCC because they are related to "price" in a retail installment contract.).

20 15 U.S.C. § 1601 et. seq.

21 Regulation Z, 64 F.R. 16614-01, 16617 (1999).

22 *In re Sanders*, 403 B.R. 435, 439 (W.D. Tex. 2009); see also, *In re Dale*, 2008 U.S. Dist. LEXIS 88959, n. 12 (S.D. Tex. Aug. 14, 2008); *In re John*, Case No. 08-11004 (Bankr. S.D. Ohio May 15, 2009); *In re Tyson*, Case No. 09-01179 (Bankr. W.D. Mich. May 29, 2009); but see *In re Westfall*, 376 B.R. 210 (Bankr. N.D. Ohio 2007)(Negative equity is not PMSI under "federal common law".).

23 *Sanders*, 403 B.R. at 439.

24 Section 306(b) of the 2005 Act, Pub.L. 109-8, 119 Stat. 23, 80 (Apr. 20, 2005); *In re Wright*, 492 F.3d at 832.

25 *Price*, 562 F.3d at 628.

26 *Graupner*, 537 F.3d at 1303.

27 *Long*, 519 F.3d at 294, quoting, KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY, 3D ED. 451.5-1 (2000 & Supp. 2007-1).

28 *In re Hampton*, 2008 Bankr. LEXIS 2551 at ** 9-11 (Bankr. S.D. Ohio 2008).

Does the IRS Have the Right to use Exempted Tax Overpayments to Setoff Pre-petition Debt?

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The National Association of Chapter 13 Trustees sponsored its First Annual Law Student Writing Competition in 2009. The competition was to encourage and reward original law student writing on issues concerning consumer bankruptcy and the law. Entrants were asked to submit an essay, article, or comment on an issue concerning Chapter13 of the bankruptcy code. Essays were required to be the law student's own work and not submitted for publication elsewhere.

The winner of the First Annual NACTT Law Student Competition was Paola L. Chiarenza. Her essay was published in the NACTT Quarterly, *Volume 20, No. 4, July/August/September issue, page 32.*

The following article earned an "Honorable Mention" designation. This article was submitted by Robert Griswold of the St. Johns School of Law, Class of 2010. He is the Managing Editor of the American Bankruptcy Institute Law Review."

In *U.S. v. White*, 365 B.R. 457 (Bankr. M.D. Pa. 2007), the US Bankruptcy Court for the Middle District of Pennsylvania addressed the issue of whether the Internal Revenue Service ("IRS") may setoff the entire pre-petition debt against pre-petition claims that have been declared exempt, or whether the IRS is only allowed to setoff up to the amount of the priority claim. The court held that the IRS may setoff the entire debt and is not limited to the amount of the priority claim.

The proper treatment of the IRS' setoff right in bankruptcy is unclear because of a possible conflict between sections 522(c) and section 553 of the Bankruptcy Code. Outside of bankruptcy, the IRS may normally offset tax overpayments (tax refunds) against a debtor's outstanding tax liability. *See* 26 U.S.C. § 6402(a) (2006). This right is typically protected in bankruptcy by the operation of section 553, which provides that Title 11 "does not affect any right of a creditor to offset a mutual debt" that arose before the commencement of the case against a claim that also arose before the commencement of the case. *See* 11 U.S.C. § 553 (2006). However, in an effort to ensure that a debtor in a bankruptcy proceeding has the ability make a fresh start, section 522 provides that certain assets may be declared exempt, protecting them from the reach of creditors. *See* 11 U.S.C. § 522 (2006). In order to protect these exempt assets from creditors, section 522(c) provides that exempt assets may not be "liable" during or after the bankruptcy proceedings for any debt that arose before the case, with some limited exceptions. *Id.* One of these exceptions "specifically subjects these exemptions to pre-petition, priority claims," *White*, 365 B.R. at 459, which is why priority debt is not barred from setoff by section 522.

The source of the conflict is that it is unclear how these two statutes work together when there is a pre-existing right to setoff against assets the debtor has declared exempt. If the IRS would have a valid right to offset the debt outside bankruptcy, but the debtor has declared the overpayment exempt, section 522(c) dictates that the IRS could not take more than the amount of priority debt. However, section 553 dictates that the bankruptcy code cannot alter the IRS' right to setoff. Whether the right of setoff of exempted assets is limited to the amount of the priority debt or whether it is allowed up to the full amount of overpayment is dependant on whether the court gives preference to section 553 or to section 522.

In *U.S. v. White*, the court acknowledged a split of authority regarding whether the IRS' right to setoff non-priority debt is allowed against exempt assets of the debtor or whether its right to setoff is limited to the amount of the priority claim, 365 B.R. at 461, but found the reasoning behind the cases allowing s etoff of the entire overpayment more compelling, *id.* at 463. In *White*, a debtor owed $8,922.40 to the IRS, $1,780.52 of which was considered priority debt. *Id.* The debtor filed for chapter 13 bankruptcy in February of 2004 and claimed as exempt a $3,148 tax overpayment for the 2003 tax year. *Id.* The IRS moved to lift the automatic stay in order to allow it to setoff the entire 2003 overpayment against its pre-petition tax claim. *Id.* In the decision appealed from, the Pennsylvania bankruptcy court allowed the IRS to setoff only to the extent of the priority debt, requiring the remainder of the overpayment to be returned to the debtor as a tax refund. *Id.* at 458–59. The district court reversed, holding that the IRS could setoff the entire 2003 overpayment. *Id.* at 463.

The court in *White* provides a brief overview of the reasoning used by both lines of cases. The next sections

will elaborate on the summaries provided by the court and will more fully explore the arguments on both sides of the issue. While both lines of cases make arguments using statutory interpretation, plain meaning and congressional intent, the arguments favoring setoff are more compelling. After the examination of the two lines of reasoning, further examination is made of the case *In re Gould*, a recent decision by the 9th Circuit Bankruptcy Appellate Pannell. S*ee Gould v. Gould (In re Gould)*, No. 05-50292, 2009 WL 465599 (9th Cir. BAP Feb. 11, 2009). The 9th Circuit is the highest court to speak on the matter and provides further compelling support in favor of setoff. Finally, in conclusion it is determined that giving preference to setoff over exemption by favoring section 553 over section 522 is most consistent with the plain meaning of the words, furthers the goals of the bankruptcy code and is a better approximation of congressional intent.

Decisions Favoring Exemption

The majority of courts give section 522 preference over section 553 and therefore allow setoff only to the extent of the priority debt. When there are mutual obligations that would normally permit setoff but the debt has been declared exempt, many courts find that there is a direct conflict between sections 553 and 522, which cannot resolved by looking at the plain meaning of the statutes. *In re Jones*, 230 B.R. 875 (Bankr. M.D. Ala. 1999) ("There is . . . an apparent conflict between § 522(c) and § 553(a)."). *But see In re Kitty Hawk, Inc.*, 255 B.R. at 427 (suggesting there is no conflict between sections 522 and 553). Because there is no plain meaning, these courts examine the conflict with tools of statutory interpretation, considers the congressional intent as indicated by the legislative history of these sections and examines relevant public policy considerations.

First, since there is no clear plain meaning, upholding the pre-existing right of setoff is at the discretion of the court. *See In re Tarbuck*, 318 B.R. 78, 85 (Bankr. W.D. Pa. 2004) ("It is within this court's discretion whether to permit setoff."); *In re Pace*, 257 B.R. at 919 (explaining that section 553's application "rests in the discretion of [the] court"); *In re Alexander*, 225 B.R. 145, 147 (Bankr. W.D. Ky. 1998) (stating section 553 is applied at discretion of the court). These courts argue that section 553 has been construed as being "permissive in nature, rather than mandatory." *In re Alexander*, 225 B.R. at 147. The court is therefore permitted to use its equitable discretion to determine whether to apply section 553. *In re Pace*, 257 B.R. at 919 (Bankr. W.D. Mo. 2000). Further, these courts would argue that even in cases where the requirements of setoff are met, the court should not allow the setoff if it would result in inequity or if it would be against public policy. *See FDIC v. Bank of Am. Nat'l Trust and Sav.*, 701 F.2d 831, 836–37 (9th Cir.1983).

The second argument used in favor of exemption is based on congressional intent. The Senate version of section 522 specifically allowed for exempted property to remain liable for discharged tax debts, but this wording was dropped before the law was enacted. *In re Alexander*, 225 B.R. at 150. Courts favoring exemption suggest that this would have provided a clear answer to the dilemma, and that the purposeful removal of this language indicates a clear congressional intent that exempt property would not be liable for the payment of dischargeable tax debts. *Id. But see In re Gould* 389 B.R. 105, 113 (Bankr. N.D. Cal. 2008) (suggesting that the language of the senate version describes a process distinct from setoff, discussed below).

Thirdly, courts favoring exemption utilize tools of statutory interpretation to justify favoring section 522 over section 553. These courts look to the presumption that statutes should be interpreted in a way that does not leave part of the act meaningless. This means that when there are two equally plausible interpretations of sections of a statute or act, and one interpretation would render one portion of the statute meaningless, but the other would give meaning to both, the latter is preferred. These courts suggest that allowing setoff of exempt assets would nullify section 522. *See, e.g., In re Alexander*, 225 B.R. at 149. To favor section 553 over section 522, these courts argue, would leave a debtor without any ability to exempt assets from reach by any creditor with a pre-existing right to offset. This seems to be a particularly weak argument for two reasons. First, there are five exceptions to section 522 given in the statute itself, but these exceptions do not make the statute meaningless. Second, a determination of whether a statute is a nullified by an interpretation must be based on whether it has meaning in any situation rater than whether it has meaning in this specific situation. Even if section 522 does not protect exempt assets from setoff, it still protects the exempt assets against any creditor that does not have a valid pre-existing right of setoff. By logic employed by these courts, any section containing any exception would be held to be a nullity. A provision that protects exempt assets from all but a small subset of creditors should not be seen as a nullity.

Finally, courts limiting setoff rights focus on the section 522 policy of providing a fresh start to debtors declaring bankruptcy by allowing some property to be off limits, ensuring that the debtor emerges from bank-

CONTINUED NEXT PAGE

ruptcy with the basic means to survive and the ability to make a fresh start. *See White*, 365 B.R. at 461. This fresh start policy is at the core of the purpose of bankruptcy law and should be protected.

Decisions Favoring Setoff

Courts permitting setoff on non-priority debt argue that the plain meaning of section 553 means it should override section 522(c). Section 553 provides that Title 11 "does not affect any right of a creditor to offset a mutual debt . . ." provided that the debts arose before the commencement of the case against a claim that also arose before the commencement of the case. Section 522 is a "section of the code" as described in section 553. Therefore, these courts reason that "the clear and unambiguous language of [section] 553(a)," *In re Kitty Hawk, Inc.*, 255 B.R. 424, 427 (Bankr. N.D. Tex. 2000), mandates that no section of the Code, including section 522(c), should affect the IRS' pre-existing right to setoff.

Courts favoring setoff use several methods of statutory interpretation to both support their argument and to counter the arguments made by the courts favoring exemption. According to the plain meaning of section 522, allowing setoff of exempted debts would not render either section meaningless or a nullity; section 522 is still effective against any creditor that does not possess a right to offset the debt. A right of offset has fairly stringent requirements. It requires a mutuality of parties, mutuality of obligation and for both to have arisen pre-petition. This means that section 522 is far from a nullity, and instead is effective against any creditor that does not meet these stringent requirements. *See In Re Bourne*, 262 B.R. 745 (Bankr. E.D. Tenn. 2001).

A second tool utilized by some courts is a presumption in favor of setoff. Setoff rights in bankruptcy are "'generally favored,' and a presumption in favor of their enforcement exists." *In re Gould* 389 B.R. 105, 113 (Bankr. N.D. Cal. 2008) (quoting *In re De Laurentiis Ent. Group, Inc.*, 963 F.2d 1269, 1277 (9th Cir.1992)). Such a presumption favors the interpretation that setoff should be permitted up to the whole claim.

Further support for the presumption in favor of setoff is found in section 542(b) of the Bankruptcy Code, which provides that "an entity that owes a debt that is property of the estate . . . shall pay such debt . . . except to the extent that such debt may be offset under section 553 of this title." 11 U.S.C. 542(b) (2006). This provision does not directly address the address the issue at hand because exempt property is not necessarily "property of the estate" and thus may not fall under section 542. *See White*, 365 B.R. at 462.

The decisions favoring setoff utilize legislative history for two purposes. First, these courts challenge the assertion made by courts favoring exemption that there is a clear congressional intent based on the elimination of portions of the Senate version of section 522. Second, these courts look to legislative history surrounding section 553 for support that congress favored setoff over exemption.

First, courts favoring setoff indicate that the legislative history to section 522 does not indicate any congressional intent regarding the issue of exception verses setoff. Although the legislative history indicated that a provision that specifically allowed for exempted property to remain liable for discharged tax debts was removed from the Senate version of section 522, the provision and surrounding discussion addressed debts in general and did not specifically mention setoff rights. The collection a unilateral debt is different than the offset of a mutual obligation and even clear congressional intent on the former does not mean that Congress also meant to address the latter or to influence the contest between sections 553 and 522. *See In re Gould* 389 B.R. at 123.

Even if the provision had been on point, the mere failure to enact a provision found in a preliminary version is not a clear indication of congressional intent. The courts favoring setoff suggest that Congress did not prohibit the setoff of exempt property, and thus the removal of the restriction is not a clear indication of congressional intent. *In re Martinez*, 258 B.R. at 367. There is only so much that can be made out of congressional inaction. While Congress did not enact the version that that would have explicitly allowed exempt property to remain liable for discharged taxes, the fact that this specific language was omitted is not conclusive evidence that congress intended the opposite. The court in Martinez suggests that where a plain meaning is present it trumps legislative history, which provides only a "cloudy" view of congressional intent. *Id*.

Second, the legislative history of § 553 "supports a reading giving general primacy to setoffs." *U.S. v. White*, 365 B.R. 457, 462 (Bankr. M.D. Pa. 2007). The history here reiterates the plain meaning of section 553; nothing in the bankruptcy code should affect a creditor's pre-existing right to setoff mutual debt. This legislative history lends further support to a presumption in favor of setoff.

While acknowledging that a fresh start is an important goal of bankruptcy courts, courts in favor of setoff note that there are many other exceptions to the debtor's exemption rights and that the fresh start policy is "not always paramount and is often subordinated to other social and economic concerns and

objectives." *See In re Bourne*, 262 B.R. at 757. The Bankruptcy Code reflects a balance between the fresh start for the debtor and providing a fair distribution of assets to creditors, and section 553 demonstrates that the fresh start policy does not "trump the common law rights of creditors of setoff of mutual debts." *In re Martinez,* 258 B.R. at 367.

In re Gould

A few months after *White* was decided, the U.S. Bankruptcy Court for the Northern District of California decided *In re Gould*, 385 B.R. 713 (Bankr. N.D. Cal. 2008). *In re Gould* was decided in favor of exemption as taking precedence over setoff, placing it at odds with *White*. Subsequently, however, *In re Gould* was withdrawn and amended. It was re-issued two months later, but it still favored exemption over setoff. However, on February 11, the Bankruptcy Appellate Pannell of the Ninth Circuit overruled the district court, holding that the specific facts of the case did not lead to a conflict between section 553 and 522. *See Gould v. Gould (In re Gould)*, No. 05-50292, 2009 WL 465599, at *8 (9th Cir. BAP Feb. 11, 2009). The Ninth Circuit goes on to suggest in dicta that in a case where a conflict between 553 and 522 does arise, 553 would be given preference. Doing so they present three further arguments not found in the other cases favoring setoff.

The first argument used is the presumption against interpretations that nullify sections of a statute. Section 553 does not create a right of setoff; it merely protects that right in bankruptcy when it is pre-existing. *Id at *9*. If section 553 is taken to mean that the right is protected at the discretion of the court then it has no meaning. It would merely suggest that the court should allow a right that already exists if it wants to. *See id.*

The second argument presented by the Ninth Circuit in *In re Gould* is that the language of section 553 is itself an indication of congressional intent that it controls. It is very sweeping language, and it shows that Congress intended to preserve the long-standing tradition of favoring exemption rights. *See id.*

Finally, the court provides another policy consideration in favor of setoff. If courts favor exemption over setoff, then creditors who have a right of setoff will need to challenge exemption filings in order to protect their interests. This would lead to excess litigation over exemptions that may have gone through unchallenged if creditors with a setoff right was not forced to challenge. *See id.*

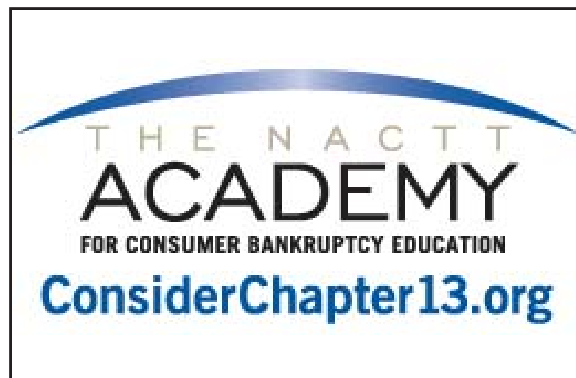
Conclusion

Both lines of cases present comprehensive arguments based on judicial precedent, statutory interpretation, congressional intent and public policy. Yet the arguments in favor of setoff seem distinctly stronger and more compelling. Both lines of cases use a rule against nullification, but it seems that rule 522 would still have significant meaning even if it were not effective against creditors with a right of setoff. On the other hand, rule 553 preserves a right, and if it were held to be preserved merely at the discretion of the court, then section 553 may as well not have been included as the result would be the same.

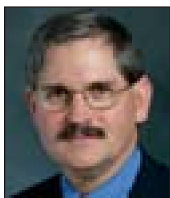
Many courts will not look at congressional intent if the plain text of the statute is clear. And it seems to several courts that the working of the two statutes is clear. Even if it were unclear enough that congressional intent and legislative history are appropriate, there is evidence of congressional intent going both ways. Some intent may be drawn from the act of removing language that may have offered guidance in the mater from the senate version of the bill, but there is dispute as to the relevance of the removed language in this dispute. Further, intent can be drawn in favor of setoff by a history of interpretation favoring setoff, the broad language of section 553 and even the legislative history of section 553 itself.

Both sides also claim compelling policy arguments. Bankruptcy is about providing a fresh start to debtors while providing some relief to creditors. The courts favoring exemption emphasize the fresh start policy whereas those favoring setoff emphasize relief to creditors. On top of this is that the practical considerations, and the Ninth Circuit at least suggests that setoff would result in greater judicial efficiency through less challenges to exemptions when creditors possess a right of setoff.

Although the line of cases favoring exemption is the majority rule, it seems clear that there is a definite trend away from the majority rule favoring exemption and towards the rule favoring setoff, which will now likely be further boosted by a favorable ruling by the Ninth Circuit Bankruptcy Appellate Pannell. ◉



Case Decisions



Henry E. Hildebrand, III
Chapter 13 Trustee,
Nashville, TN

1st CIRCUIT

In re Burbank, 401 B.R. 67, 72, 74, 75 (Bankr. D. R.I. 2009) (Votolato) ***A Chapter 13 debtor with above median income may deduct the IRS allowed ownership expense even when there is no secured debt on the motor vehicle; a Chapter 13 debtor may deduct payments for secured debt for real property that is to be surrendered under the plan.*** The debtors filed a Chapter 13 petition calculating their projected disposable income by claiming $978 per month of ownership expenses for two automobiles that they owned free and clear of any loans or lease payments and deducts for mortgage payments totaling $2,715 on two properties that they intended to surrender. The trustee objected to these deductions. The court found that the enactment of BAPCPA was an attempt by Congress to eliminate a perceived judicial abuse of the system by curtailing the "subjectivity and discretion of bankruptcy courts when calculating 'disposable income,' ...and it did so by mandating a rigid definition of the term 'disposable income,' in §1325(b)(2)." The court found that "the expenses specified in the Local Standards that are applicable to the debtor are the ones that match the debtor's locality and the number of cars in the household. The Burbanks live in Rhode Island and have two cars. The ownership expense applicable to them is $489 per month per car which is the amount they deduct in calculating their means test. ... [C]ar ownership expenses necessarily and typically include items such as depreciation, licensing, taxes, and insurance. ... [A]llowing a debtor who owns the vehicle, free and clear of secured debt, to deduct the ownership expense avoids arbitrary and unfair results. ... Otherwise, the debtor who pays off his/her car loan just before bankruptcy would not be able to take the deduction, while the debtor who has only one or two car payments remaining, as of the filing date, would be eligible to continue taking the deduction even after the contract is paid off." Additionally, a Chapter 13 debtor is entitled to take a deduction for payments for secured debts that are contractually due at the time the petition is filed irrespective of the debtor's intent to surrender the property. "[T]he term 'projected' modifies 'disposable income' and is not synonymous with the work 'anticipated' in this context. ... 'Projected disposable income' means 'disposable income,' as defined in Section 1325(b)(2), projected over the 'applicable commitment period.' ..." Permitting debtors to take deductions for secured debt property that they will not be paying for may be unfavorable to unsecured creditors but the statutory language is plain. It is far from absurd to hold that debtors with no disposable income have no projected disposable income. Congress made a deliberate decision to use an inflexible, objective formula, rather than to leave any judicial discretion in determining a debtor's ability to pay. Accordingly, the trustee's objection to confirmation was overruled.

Segarra-Miranda v. Acosta-Riveria, 557 F.3d 8, 13 (1st Cir. 2009) ***A bankruptcy court has discretion to refuse to "automatically dismiss" a case where a debtor fails to comply with the disclosure requirements of §521.*** The debtor originally filed a Chapter 13 petition and then converted to Chapter 7. The debtors did not initially disclose a cause of action that they held until six months after they had filed. The Chapter 7 trustee moved to settle the suit for $200,000, an amount adequate to pay all allowed claims and provide some surplus for the debtors. The debtors, feeling that this was inadequate, filed an application with the court to recognize that their case had been automatically dismissed pursuant to §521(i)(2) because they had failed to provide all of the payment advices and the statement of monthly net income required by BAPCPA. "We believe that it is possible to ... [preserve] the bankruptcy court's discretion to forgive compliance with disclosure requirements after the fact while at the same time preserving the authentic value of automatic dismissal. When a party moves under § 521(i)(2) for the entry of an order dismissing an incomplete petition, the court can do one of three things: dismiss the case, decline to dismiss the case if the good-faith exception for payment advices applies, ... or determine, in its discretion, that the missing information is <u>not</u> 'required under sub-section (a)(1).' ... Where, as here, a previously hidden asset has more than enough value to cover the entire universe of creditors' claims, dollar for dollar, dispensing with the disclosure of statements reflecting payment advices and/or monthly net income is both pragmatic and reasonable. Common sense suggests that Congress never intended to strip the bankruptcy court of the flexibility needed to respond intelligently to the emergence of such a circumstance

after the 45-day filing deadline has expired."

2nd CIRCUIT

In re Bostick, 400 B.R. 348, 352 (Bankr. D. Conn. 2009) (Weil) ***A Chapter 13 debtor who dissipates lottery winnings during the pendency of the Chapter 13 case and then converts to Chapter 7 would not be denied a discharge for such conduct.*** Four days after filing Chapter 13, the debtor won a $100,000 lottery from the Connecticut Lottery. The debtor deposited the net winnings of $70,298 into a savings account and proposed a Chapter 13 plan which would pay all unsecured claims in full, funding payments from her lottery winnings. At her meeting of creditors, the balance from the winnings had been reduced to $37,000 as a result of investments and expenses, including a Carnival Cruise vacation. In September of 2007, the debtor was unable to make further payments because she had spent the entire amount of the lottery winnings. The court converted the case to Chapter 7 at the request of the Chapter 13 trustee. The United States Trustee asserted that discharge should be denied under §727(a). The court disagreed. The lottery winnings were not property of the Chapter 7 estate by virtue of §348(f). "It is undisputed that the Lottery Winnings were 'property of the estate' during the Chapter 13 case pursuant to §1306(a)." Arguing that they remained property of the estate is inconsistent with both the provisions of §348(f) and their purpose. "If this case had been a Chapter 7 case from the beginning and the Debtor had acquired the Lottery Winnings, the Debtor's dissipation of that would have resulted not in a denial of discharge pursuant to §727(a)(2)(B) but, rather, dismissal of the case pursuant to §707."

3rd CIRCUIT

In re Brooks, 2009 WL189849, *6, (Bankr. E.D. Pa. January 27, 2009) (Fitzsimon) ***A claim filed by a creditor after the bar date would be subject to disallowance even though the debtor did not list the creditor and the creditor had no notice of the bar date; the obligation to the creditor would not be discharged.*** A law firm filed a proof of claim against a Chapter 13 debtor for $1,550.20 after the bar date for filing claims had passed. The debtor objected to the claim on a number of grounds, including that the claim was not timely filed. Pursuant to § 502(b)(9) and Rule 3002(c), a claim that is filed later than 90 days after the first date set for a meeting of creditors is subject to disallowance. Even though the debtor failed to list the law firm as a creditor, no grounds exists under the statute for the court to waive the bar date. "... [C]ase and statutory law are in agreement that a bankruptcy court may not extend the bar date in a Chapter 13 case. Bankruptcy Rule 9006(b)(3) provides that the court 'may enlarge the time for taking action [under Rule 3002(c)] only to the extent and under the conditions stated in those Rules.' ... None of these parameters allows a court to extend the bar date for circumstances such as these. ... Courts have held not only that 'Rule 3002(c) is strictly construed as a statute of limitations,' but further that 'there is no provision ... for extending the bar date simply because the creditor had no notice of the case.'" The debt to the law firm, however, would not be discharged. Section 523(a)(3)(A) excepts from discharge debts that are neither listed or scheduled in time to permit the creditor to timely filed a proof of claim unless the creditor had actual knowledge of the case.

In re Dixon, 2009 WL 151688, *8 (Bankr. E.D. Pa. January 20, 2009) (Sigmund) ***Chapter 13 debtors who fail to fully disclose the value and extent of their assets would have their cases dismissed for cause pursuant to §1307.*** The Dixons filed a Chapter 13 petition and did not file complete and accurate schedules by indicating that certain real property was co-owned with one debtor's mother when it was not, affixing a value to real estate which was substantially less than the value of the real estate, failing to accurately disclose balances in bank accounts, and failing to disclose ownership of all motor vehicles. It is well established that a lack of good faith may be cause for dismissal under §1307. "The privilege of bankruptcy relief is accompanied by specific statutory duties, the most basic of which is full and accurate disclosure of required information about the debtor's financial condition. This disclosure takes the form of schedules of assets and liabilities, income and expenditures and a statement of financial affairs. ... [T]he Debtors have at best adopted a cavalier attitude toward the filing of their schedules, leaving to the Court and creditors the unacceptable burden of ferreting out the true facts. ... The original Schedules were replete with material inaccuracies, failing to disclose vehicles owned and bank accounts held and misstating the ownership of [real estate]." It is appropriate, therefore, to dismiss the debtors' case. *Aff'd* 2009 WL 1798819 (E.D. Pa. June 15, 2009)

In re Lopatka, 400 B.R. 433, 438 (Bankr. M.D. Pa. February 17, 2009) (Opel) ***An above median income debtor whose disposable income is negative as calculated under the means test, is not precluded from proposing a three-year Chapter 13 plan.*** The debtor had no projected disposable income as calculated on the disposable income test and proposed a Chapter 13 plan with 36 payments of $320 per month. The trustee objected on the grounds that the debtor, with above

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median income, was required to propose a five-year plan. The court found that the "applicable commitment period" does not require that a debtor actually make payments for any particular period of time. The "applicable commitment period" is a multiplier in a formula that determines the amount of disposable income that must be paid to unsecured creditors. "[T]he formulaic components of the means test will sometimes yield arithmetic results which are at odds with a debtor's actual financial circumstances. Depending upon post-petition circumstances, employing the Current Monthly Income may either exaggerate or understate the debtor's available income." Section 1322(d) sets a maximum plan length. It is inconsistent to hold that §1325(b) would create a minimum temporal requirement when temporal length is only referenced in §1322(a). Accordingly, a debtor may propose a plan which is for a shorter duration than the "applicable commitment period".

5th CIRCUIT

In re Broussard, 2009 WL 1531817, *2, *4 (Bankr. W.D. La. May 29, 2009) (Summerhays) ***Section 1308(a) imposes a deadline for filing returns and does not exclude returns that are not yet due under the Internal Revenue Code.*** The Broussards filed Chapter 13 on January 6, 2009, and, by the time of their meeting of creditors on February 18, 2009, they had not filed their federal tax return for 2008. The IRS sought the dismissal of the case due to the debtors' failure to comply with §1308. "In the present case, it is undisputed that Debtors were required to file a federal tax return for the tax year ending December 31, 2008 under the Internal Revenue Code and that this 2008 return would fall within the four-year period covered by § 1308(a)." The debtors argued, however, that the Internal Revenue Code did not require them to file a return until April 15th, so the return could not be "due" at the time of their meeting of creditors. "Section 1308(a) imposes a specific deadline for filing returns covered by that provision's four-year period, and includes no language excluding returns that are not yet due under the Internal Revenue Code." The Code, by prescribing a mechanism for holding a meeting of creditors open depending on whether the return is past due supports the conclusion that §1308(a) governs the filing of returns regardless of whether the returns are due under the tax code. Here, the debtors did not request the trustee hold the 341 meeting open under §1308(b) and, accordingly, the case must be either dismissed or converted.

In re Burks, 2009 WL 103618, *7 (Bankr. N.D. Tex. January 13, 2009) ***A Chapter 7 debtor could not avoid the presumption of abuse under §707(b)(2) on the basis of a charitable contribution for which the debtor provided no proof that comparable charitable deductions had been made prior to the filing of the petition.*** The United States Trustee challenged the debtors' $433 monthly charitable contribution on the Form 22A, arguing that the debtors had failed to establish a past pattern of giving in a similar amount. "The Debtors' need or desire to make a $433 a month charitable contribution appears to have arisen post-petition. In short, the evidence does not allow the Court to conclude that the charitable contributions claimed here either promote the health and welfare of the Burks in any tangible way, or otherwise help in the production of income." Although the clear wording of §707(b)(1) expressly prohibits consideration of charitable contribution in determining whether a case should be dismissed, where, however, the debtor fails the "means test" of 707(b)(2), the debtor is bound by the deductions permitted by the Internal Revenue Service's national and local standards. The IRS permits charitable contributions as a necessary expense if it is a condition of the debtor's employment or meets the necessary expense test. By failing to do so, it was inappropriate for the debtor to subtract from income the contribution that the debtor did not regularly make and the presumption was triggered leading to the dismissal of the case.

In re Clingman, 2009 WL 367095 (Bankr. S.D. Tex. February 17, 2009) (Isgur) ***A Chapter 13 debtor should be allowed to budget payments in support of an elderly parent pursuant to §707(b)(2)(A)(ii)(II).*** The debtors calculated their disposable income by subtracting a payment of $613.44 per month which they paid toward one of their parent's mortgage and taxes on a home in Wyoming. The debtors' elderly parents had no source of income other than social security. The debtors had been making the payments to subsidize their elderly parents prior to the filing of the bankruptcy case. The trustee challenged the payment of a mortgage on a second home which was not the debtors. The court held, however, that the monthly expense of $613.44 was a continuation of an actual expense that was reasonable and necessary for the care and support of an elderly parent which is specifically permitted under §707(b)(2)(A)(ii)(II) and is accordingly allowable under §1325(b)(3).

In re Collier, 2009 WL 1024684, *7, *11 (Bankr. E.D. Tex. April 7, 2009) (Parker) ***A creditor whose attorney sent a demand letter to the debtor's attorney threatening legal action and who posted a sign disclosing the debt and demanding payment would be subject to pay damages, attorney's fees, and punitive***

damages for violation of the automatic stay. The debtor had an outstanding obligation to Hills Mobile Home Parts and Service of $984.23. Because of a mix up on the address to the creditor, written notice by the BNC or by the debtor was not provided to the creditor when the debtor filed a Chapter 13 petition. The debtor, however, repeatedly advised the creditor that he had filed Chapter 13 and that the claim would be paid. The debtor's attorney finally sent to the creditor a notice of bankruptcy case filing procured from PACER prompting Hill to retain an attorney. His attorney then sent a demand letter to the debtor's attorney, acknowledging the filing of the bankruptcy but demanding payment anyway and threatening to file a collection action. Three weeks later, Hill posted a sign outside of his business location, visible from the roadway, which stated "Brad Collier owes me $984.23. Will you please come and pay me!" This sign was displayed for 21 days. Although the court found that an initial series of inquiries by Hill seeking confirmation of the bankruptcy did not rise to a stay violation, once Hill was advised of the bankruptcy filing, the posting of the demand letter to the debtor's bankruptcy attorney and the posting of the sign were intentional and deliberate violations of the automatic stay. The court rejected Hill's argument that the sign did not constitute a violation of the stay. "While embarrassing the Debtor in their shared community was certainly a motive of the Defendant, the Court finds that such a motive had an objective – to coerce the Debtor into paying his debts. Had the sign contained only factual information regarding the existence of the debt, Hill's defense might resonate more. ... The exclamation mark transforms the sentence into a directive, which demands that the Debtor pay the debt." This action clearly violated the automatic stay. Although no award is warranted for mere anger for embarrassment, the emotional damages suffered by the debtor were compensable in the amount of $1,500. In addition, the attorney's fees incurred by the debtor, totaling $15,750, was part of the award to be paid by Hill. Hill's liability is clear. "(1) he elected to avoid making any inquiry with Court to confirm the information that he had received from the Debtor or to answer any remaining doubts that he may have had about the bankruptcy case; and (2) he elected instead to send a demand letter to the Debtor based upon erroneous assertions that would have been corrected had he chosen to make any inquiry of the bankruptcy court." Both the posting of the sign and the mailing of the letter constitute egregious behavior that cannot be tolerated or excused.

In re Russell, 402 B.R. 188, 193 (Bankr. N.D. Miss. January 23, 2009) (Olack) ***A debtor's action against a creditor for improper disclosure of personal identifying information on a proof of claim is a core matter and need not be arbitrated as provided in the underlying contract.*** Queen City filed a proof of claim with a copy of its contract with the debtor attached to the proof of claim. The contract was not redacted and disclosed personal identifiers, such as the debtor's date of birth, social security number, telephone number, and an account number. The debtor sought to restrict public view of the proof of claim and also initiated an adversary against Queen City asserting an objection to the claim, a violation of the Gramm-Leach-Bliley Act, contempt of court, violation of Rule 9037, F.R.B.P., invasion of privacy, and intentional infliction of emotional distress. Queen City argued that the issues were subject to arbitration per its contract and sought to compel such. The bankruptcy court "has discretion to override an arbitration agreement only if it finds that the proceedings are based on provisions of the Bankruptcy Code that 'inherently conflict' with the Federal Arbitration Act or that arbitration of the claim would necessarily jeopardize the objectives of the Bankruptcy Code." The causes of action asserted by the debtors are ones which predominantly arise under the bankruptcy case. Although not every cause of action asserted by the debtors arose from the Bankruptcy Code, the thrust of the complaint is that Queen City violated Bankruptcy Rules and orders regarding privacy of personal information. Enforcement of the arbitration clause would conflict with the purposes of the Bankruptcy Code which includes the goal of centralized resolution of bankruptcy issues. Accordingly, the creditor's motion to compel arbitration was denied.

In re Wilson, 2009 WL 204672, *4 (Bankr. E.D. La. February 6, 2009) (Magner) ***The United States Trustee has standing to pursue discovery against a mortgage servicer for misconduct even where the underlying motion for relief was denied.*** Option One filed a motion for relief from the automatic stay against the debtor with affidavits indicating the debtor had failed to make four post-petition installment payments. The debtor opposed the relief and, at the hearing, Option One admitted that it had received payments but still asserted that it was entitled to relief from the automatic stay. The motion was denied and the court issued an order to show cause. The U.S. Trustee sought to conduct discovery in connection with the show cause hearing. Exploring the misconduct of a creditor constitutes a core bankruptcy matter under §157(b)(2)(A), (G), (K), and (O). "The issues arose in the context of two motions for relief from stay. Option One, acting through its representatives and counsel, presented false

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information to the Court in both pleadings and an affidavit of default. Although the Court denied the relief requested, it maintains jurisdiction to consider collateral matters that emanate from the Motions as well as the administration of the case." The court found persuasive *In re Countrywide Home Loans, Inc.*, 384 B.R. 373 (Bankr. W.D. Pa. 2008) in holding that the United States Trustee has standing under the "deliberately broad language of §307". The court held that the "provisions of §586(a) are intended to compliment the broader grant of power provided by §307."

7th CIRCUIT

In re Johnson, 400 B.R. 639, 648 (Bankr. N.D. Ill. January 23, 2009) (Wedoff) ***To determine a debtor's projected disposable income, the Current Monthly Income is a starting point and a debtor must supplement the information on Form 22C with a statement of any changes in the Current Monthly Income anticipated during the applicable commitment period.*** The Chapter 13 trustee objected to the Johnsons' proposed plan because they committed $3,705 per month over a 60-month period based upon the net income after subtracting expenses on Schedule J from Schedule I. Mrs. Johnson, having received worker's compensation benefits during the six months prior to filing, projected her income as less than her portion of the Current Monthly Income which, the trustee noted, would have required a 100% pay back to unsecured creditors. The court rejected the "conclusive approach" of *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868 (9th Cir. 2008) for the "presumptive approach" in *Coop v. Frederickson (In re Frederickson)*, 545 F.3d 652 (8th Cir. 2008) and *Hamilton v. Lanning (In re Lanning)*, 545 F.3d 1269 (10th Cir. 2008). "[T]he language of §1325(b) itself does not align with a payment obligation based on pre-filing income. Section 1325(b) requires a debtor's plan to devote to payment of unsecured claims the 'projected' disposable income 'to be received during the applicable commitment period beginning on the first date payment is due under the plan.' ... [T]he word 'projected' – which is not defined in the Bankruptcy Code – implies a prediction of what is likely to occur in the future, rather than a computation based on potentially outdated information from the past." Judge Wedoff noted the conflict between the definitional portion of "Current Monthly Income" and the prospective application of §1325(b). He held that the provisions of §1325(b) were a more specific statute which should be given precedent over the general definition of Current Monthly Income as a general statute. Because Schedules I and J require a disclosure of changes in the reported information which is anticipated to occur, Schedule I may be consulted in order to more accurately determine the changes from the debtor's statement of Current Monthly Income that will be expected in the future. The debtors' Chapter 13 plan was, accordingly, confirmed.

In re Knighton, 2008 WL 5644891, *3, *4 (Bankr. N.D. Ill. November 14, 2008) (Barbosa) ***The unexempted portion of the debtors' tax refund was disposable income and must be committed to the debtors' Chapter 13 plan.*** The debtors' Chapter 13 plan was confirmed in September 2007. In 2008, the trustee filed a motion to modify the plan to increase the plan payments by $452 because the debtors received $2,452 as a 2007 tax refund. The trustee argued that the refund was disposable income and the refund amount above $2,000 must be allocated to the plan. The debtors argued that the amount they paid a tax preparer, $350, should reduce the amount that is committed to the plan. The court found that "confirming a modified plan that reflects a significant increase in available income and a commensurately increased payout to unsecured creditors comports with [the] good faith requirement. ... Moreover, 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 under the plan. ... In this case, the Trustee proposed a modified plan that increased the monthly payments by $452 and allowed Debtors to maintain the remaining $2,000 from their 2007 tax return. ... Under the facts of this case ... tax refunds are considered to be disposable income and must be applied to the Chapter 13 plan because they were not properly exempted prior to confirmation."

In re Tolbert, 2009 Bankr. Lexis 1021 (Bankr. N.D. Ind. May 7, 2009) (Klingeberger) ***Creditors are entitled to ten days minimum notice of a hearing on an application to impose or extend the automatic stay under 362(c).*** The debtor filed a Chapter 13 petition on April 23, 2009 and simultaneously filed an emergency motion to impose the automatic stay under §362(c)(4), noting that a sheriff's sale was scheduled on the debtor's residence on May 1, 2009. The court found that the debtor had not provided adequate time for notice to be remitted to secured creditors. The court noted that a two or three day mailing time period would preclude a creditor from actually receiving notice until April 29, 2009 for a hearing on April 30th. It is impossible, however, to provide an opportunity for a hearing with respect to the imposition of the automatic stay with such short notice or preparation time. Accordingly, the debtor's application for an imposition of the stay was denied.

8TH CIRCUIT

In re Booth, 399 B.R. 316, 323, 325, 328 (Bankr. E.D. Ark. 2009) (Taylor) ***A Chapter 13 plan may provide that a mortgage servicer deem prepetition arrearages as contractually current at confirmation, apply arrearage payments to arrearages, apply post-petition payments to the month in which they are designated, but may not require court approval for the assessment of fees, or require the mortgage servicer to notify the trustee, debtors, and attorney for the debtors of changes in payments.*** The debtor's Chapter 13 plan proposed to cure a prepetition default and maintain payments to a mortgage held by Taylor Bean and Whitaker, and contained plan provisions relating to the administration of the mortgage as to which the mortgagee objected. Contrary to the debtor's proposed plan provisions, the mortgagee has the right to assess appropriate fees pursuant to its agreement with the debtor. It is not required to obtain court approval prior to the assessment of such fees and charges. "An injunction that both modifies the mortgage company's rights and invokes a procedure not required under the Bankruptcy Code is an inappropriate plan provision." The plan requirements that the mortgage creditor deem prepetition arrearages as contractually current so that no post-petition delinquency status is declared, that the creditor apply payments on the prepetition arrearage only to the arrearage, and that it apply payments made during the plan to the month in which they are designated are appropriate and do not infringe on the underlying rights of the mortgage holder. "[T]he duties imposed by the language used in the Plan regarding the application of payments do not impermissibly modify Taylor Mortgage's rights. They simply translate into reality the statutory scheme contemplated in 11 U.S.C. §1322(b)(2) and (5) as sanctioned by 11 U.S.C. §524(i)." The Bankruptcy Code specifically permits a debtor to cure prepetition arrearages over a reasonable time. This is a right not available under state law and it is created by the Bankruptcy Code. In order for this section to have practical effect, the plan proposed by the debtor sought to implement the Code provision. The court did, however, reject the plan provision requiring the mortgagee to notify the trustee, the debtors, and the debtors' attorney of any changes in the interest rate, changes in the taxes or insurance because the multiple noticing was inconsistent with the provisions of the underlying contract. The mortgage specifically limited notice requirements to one address. The plan provision requiring multiple notices was inconsistent with this mortgage requirement. "If the debtor is informed, then the debtor must so inform the trustee. It is inappropriate, and nowhere statutorily sanctioned, to put this additional burden on the mortgage company." It was also inappropriate to put language requiring the creditor to comply with § 524(i), since compliance with the law is assumed.

In re Greaves, 2009 WL 750285, *3, *8 (Bankr. D. Neb. March 17, 2009) (Saladino) ***Where a Chapter 13 debtor has voluntarily reduced income by becoming a full time student but is nonetheless expected to graduate during the pendency of the case, it is inappropriate to determine the debtors' disposable income simply by subtracting expenses on Schedule J from the debtors' current income on Schedule I; a Chapter 13 debtor with projected increased income must pay at least what is listed on the 22C, if not more.*** The debtors calculated their disposable income on Form 22C recognizing that Mr. Greaves had been employed in the six months prior to filing. After filing, however, he became a full time student and was expected to graduate in 2009. Accordingly, his Schedule I income was substantially less than the 22C income. The trustee objected, noting that the debtors were expected to have an increase in income and it was inappropriate to depart from the calculated disposable income on the 22C. Under the Eighth Circuit decision in *Coop v. Frederickson (In re Frederickson)* 545 F.3d 652 (8th Cir. 2008), the means test calculation on Form 22C is merely a starting point and changes in a debtor's circumstances should be considered at the time disposable income is calculated. "[T]he Eighth Circuit Court of Appeals has interpreted 'projected disposable income' as a mandate to the bankruptcy court to make a 'reality-based determination' of how much a debtor can afford to pay. ... Debtors can afford to pay substantially more than their proposed to pay pursuant to their plan. Mr. Greaves will graduate from college soon with a degree in nursing. That degree should enable him to earn substantially more money than he has made in the past, including the 6-month current monthly income calculation. Thus, looking at Debtors' financial situation realistically, it is clear that they have the ability to pay substantially more than the calculation set forth in Schedules I and J, as well as on Form 22C." The trustee's objection to confirmation was sustained.

9th CIRCUIT

In re Dunn, 399 B.R. 909, 910 (Bankr. W.D. Wash. 2009) (Brandt) ***A Chapter 13 plan proposing immediate relief from the stay but precluding a foreclosure sale until a specified date does not modify the rights of a creditor secured solely in the principal residence of the debtor where a foreclosure sale could not be effected prior to the sale date.*** The debtor's Chapter

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13 plan, filed in February of 2008, proposed to sell the debtor's real estate on or before April 30, 2009 in order to pay mortgage creditors in full. As the court noted, "[t]his is not a familiar 'house saver' plan in which debtor's propose to cure delinquencies over the life of the plan while continuing to make regular payments. Rather, it is in the nature of a 'Hail Mary' plan thrown in hopes of salvaging something out of a grim (even in Seattle) real estate market and a stringent economy." By providing for immediate relief from the automatic stay, the mortgage creditor is free to initiate foreclosure action. By precluding a foreclosure sale until April 30, 2009, the plan did not deprive the creditor of any of its rights since, under Washington law, it takes a minimum of 120 days to foreclose nonjudicially after an initial notice of default and the mortgage creditor could not effect a foreclosure sale in the time prescribed by the debtor's plan. The deadline sale date is less than 120 days after the confirmation hearing. Accordingly, the plan was confirmed over the objection of the mortgage creditor.

In re Leach, 2009 WL 1010552, *8, *9 (Bankr. D. Mont. February 26, 2009) (Kirscher) ***Proceeds generated from a sale of an asset prior to the filing of a Chapter 13 petition are not included in "income" for purposes of determining a debtor's Current Monthly Income.*** During the six-month period prior to the filing of their Chapter 13 petition, the debtors sold two motor vehicles for total proceeds less than the original cost of the vehicles and the debtors used such proceeds to purchase substitute vehicles. The Chapter 13 trustee objected because their calculation of their projected disposable income did not include the proceeds generated from the sales of these vehicles. The court, applying a mechanical test to determine the reasonableness of the debtors' expenses in calculating disposable income, noted that the "cost basis" of the vehicle should not be deducted from the debtors' Current Monthly Income for purposes of determining the debtors' projected disposable income. The proceeds, however, did not constitute income and the proceeds should not have been included in the debtors' statement of income from other sources in the calculation of their Current Monthly Income. "The Leaches simply sold their personal vehicles and used the proceeds to purchase replacement vehicles, from which the Trustee argues the gross sale proceeds from the sale of the two vehicles must be included in 'current monthly income' since the sale occurred within six months of the date of the filing of the petition." The "means test" is the heart of BAPCPA and was a Congressionally-imposed income/expense screening mechanism intended to insure that debtors repay creditors the maximum amount they can afford. "By including the proceeds derived from the sale of Debtors' personal, non-business, non-investment, vehicles within six months of the filing of their bankruptcy case that were used to purchase two new vehicles prior to filing bankruptcy, Debtors would be overstating their income that would be available for plan payments. The proceeds from Debtors' two vehicles are not income for purposes of calculating CMI. Such proceeds are not derived from capital, labor or a combination of both and are not derived from employment, investments, royalties, gifts, and the like. The proceeds are also not replacement income."

In re Midgley, 2009 WL 960380, *4, *5 (Bankr. D. Ore. January 7, 2009) (Brown) ***Where a Chapter 13 trustee becomes aware of an increase in the debtor's income, it is appropriate for the trustee to file a motion to modify the plan under §1329 to increase the debtor's payments.*** The debtors' Chapter 13 plan was confirmed in 2005 requiring the debtors to pay $455 per month for 36 months. The order confirming the plan required the debtors to report to the trustee any change in income that exceeds more than 10% the amount disclosed on Schedule I and also required the debtors to submit tax returns to the trustee. When the debtors failed to provide tax returns, the trustee requested them and determined that the debtors' gross income had increased by 31% in 2005 and 34% in 2006. The trustee then filed a modified plan, requiring the debtors to pay an additional $19,500 to the trustee after all payments under the first 36 months had been satisfied. A modification of a plan to increase distribution to a class of creditors is not prohibited by the doctrine of *res judiciata*. The Ninth Circuit B.A.P. rejected the argument that a modification of a confirmed plan required a showing of a "substantial change in the debtors' circumstances." Modification pursuant to § 1329 provides a mechanism to change the binding effect of §1327. The debtors' failure to comply with the terms of their plan with respect to providing tax returns and their ability to pay more to their creditors than they were currently paying support the trustee's application to modify the plan. The trustee's proposed plan complies with all the requirements of §§1322(a)(b) and 1325(a). "The Trustee, after investigating the Debtors' financial affairs, concluded that they had the ability to increase the distribution to unsecured creditors but had not done so. In light of that information, the Trustee had an obligation to the creditors to file a modified plan which would maximize the distribution creditors would receive." The modified plan would be confirmed.

In re Reyes, 401 B.R. 910, 913 (Bankr. C.D. Cal. 2009) (Carroll) ***Above median Chapter 13 debtors are not permitted to deduct secured debt payments attributable to a junior lien on the debtors' residence which the debtors intend to strip as wholly unsecured; debtors are entitled to take a vehicle ownership allowance under***

the local standard or their actual vehicle ownership expense, whichever is less. The debtors proposed a Chapter 13 plan, calculating their disposable income based upon taking a deduction for monthly payments payable to a junior lien on their residence which their Chapter 13 plan proposed to strip as being wholly unsecured. They also took a deduction for the full vehicle ownership allowance under the IRS local standards for lease payments on a jeep even though their actual lease payments were less. The Chapter 13 trustee objected to confirmation. The court agreed with those courts that have calculated projected disposable income by prohibiting a debtor from deducting from Current Monthly Income secured debt payments on real property which the debtor intends to surrender. "While the Chapter 7 calculation to determine whether a presumption of abuse arises under §707(b)(2) is made as of the date of the petition, §1325(b)(1) specifically requires the court, upon objection, to make the determination whether the Chapter 13 debtor is committing all projected disposable income 'as of the effective date of the plan.' ... Second, the Chapter 13 plan effectively creates a new contract between the debtor and secured creditor, so no payments are scheduled as contractually due to a secured creditor if the plan proposes a surrender of collateral." The debtors were entitled to take a vehicle ownership allowance under the local standards for a 2006 Jeep Liberty that was subject to a lease with Chrysler Financial. The amount that they are allowed to deduct, however, is not the full amount on the IRS website. Congress' decision to apply the IRS standards an incorporate them within the Bankruptcy Code suggests that court should look at how the IRS would apply those standards in similar circumstances. The IRS collection financial standards clearly state that a taxpayer is allowed the standard for ownership and operating costs or the amounts actually spent, whichever is less. Applying the IRS standards consistent with the method by which the Internal Revenue Service would apply these standards, as required by Congress, precludes debtors from deducting vehicle ownership expenses in excess of their actual expense. The debtors would be permitted to deduct the vehicle ownership allowance under the local standard or their actual vehicle ownership expense, whichever is less.

11th CIRCUIT

In re Becquer, 407 B.R. 435, 439, 441(Bankr. S.D. Fla. January 14, 2009) (Mark) ***Projected disposable income contemplates a forward look and in calculating the projected disposable income for a Chapter 13 debtor, a debtor must use the expenses under the standards proscribed in §707(b)(2).*** In two unrelated cases, the debtors' Form B22C calculation of income based on their average gross income for the six months prior to filing understated their projected income because one debtor was only employed for three months prior to filing and another debtor had excluded his wife's income earned prior to their marriage. The court followed *In re Lanning*, 545 F.3d 1269 (10th Cir. 2008) in holding that the "forward looking" approach for calculating a debtor's income was appropriate. "'As of the effective date of the plan' implies a forward look at actual financial circumstances at confirmation, when the plan becomes effective. ...Similarly, the phrase 'income to be received in the applicable commitment period' suggests a forward looking approach. Finally, the ordinary meaning of the word 'projected,' namely calculating or estimating something in the future, lends further support to the forward looking approach." Expenses which are deducted from income to calculate "projected disposable income" must derive from the means test expenses as established in § 707(b)(2) rather than the expenses listed in Schedule J. "This Court recognizes that Schedule J expenses may be more realistic and those courts adopting the forward looking approach have certainly embraced realism on the income side. Indeed, using means test expenses will result in some debtors still being forced to pay more than they can actually afford and others getting a windfall, a result the forward looking courts seek to avoid. Still, this Court finds no way to avoid the problem. Unlike, on the income side, on the expense side courts simply have no discretion to substitute actual expenses for the national standards mandated by Congress."

In re Broadus, 2009 WL 348859, *3 (Bankr. S.D. Ala. January 29, 2009) (Mahoney) ***Interest that is required to be paid on a secured claim to the IRS, but is not paid, survives the discharge.*** The debtor's Chapter 13 plan, as amended, proposed to pay the Internal Revenue Service in full on its priority and its secured claims. The stipulation between the debtor and the IRS required the secured claim to be paid in full "with interest at the Title 26 rate" in equal monthly payments. The proof of claim by the IRS asserted a secured claim of $63,896.86 but the claim did not disclose the interest rate. The Trustee paid the full amount of the claim and the debtor received a discharge but the Trustee failed to pay interest on the secured claim. The court found that the unpaid interest due on the IRS claim was not discharged merely because the debtor reached the end of the Chapter 13 plan. That the interest rate or interest amount was not included on the proof of claim did not change this result. The interest does not have to be provided for in the proof of claim in order for the debtor to liable for it. The interest liability to which the debtor agreed was owed to the IRS, as stated on a stipulation, and must be paid. "Where that money is to come from

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is less precise. The trustee may attempt to recoup money disbursed through the plan to pay the interest liability, or the debtor may choose to pay the debt outside the plan or file a new case and plan."

In re Geller, 2009 WL 361379, *2 (Bankr. M.D. Fla. January 6, 2009) (Jennemann) ***A debtor's attorney would be required to disgorge all fees received when the attorney filed a disclosure statement with the initial petition failing to disclose payments received; subsequent amendment did not cure the defect.*** When the debtors filed a Chapter 13 petition, their attorney filed a blank disclosure of compensation, affirmatively stating that he had agreed to accept zero dollars for legal services, had received zero dollars from the debtors, and the balance due was zero. When the trustee learned that the debtors had paid their attorney $1,300 prior to the filing and had agreed to pay him a total of $2,300, the trustee filed an application for disgorgement of funds and sanctions. Following the filing of the application, debtors' counsel amended the disclosure statement to properly reflect the fees that had been paid and the amounts that had been promised. "The amendment simply came too late. Mr. Thomas did not make a mere error. He failed to properly review the pleadings, particularly his own Disclosure of Compensation, before he filed the case. He did not make the required disclosure until approximately 11 weeks after filing the debtors' case, after filing a Chapter 13 plan ... , after filing still incomplete schedule amendments ... , after seeking to withdraw as the debtors' attorney ... , and, most relevantly, after the Chapter 13 trustee filed the motion noting the nondisclosure. Although the court finds that Mr. Thomas was not attempting to intentionally conceal his fee agreement with the debtors and, as such, no sanctions are appropriate, the Court does conclude that disgorgement of the $1,300 undisclosed fees is merited. Mr. Thomas could have avoided this result by proofreading the pleadings and correcting the mistake of failing to disclose his fees. He was perhaps sloppy but not guilty of any concealment or egregious act meriting sanctions."

In re Santiago, 404 B.R. 564 (Bankr. S.D. Fla. March 30, 2009) (Isicoff) ***A creditor asserting the protections of §1322(b)(2) bears the burden of proof that its claim is entitled to protection from modification.*** At the time the debtor filed a Chapter 13 petition in May of 2008, the debtor owned three pieces of real estate. The debtor asserted that he lived in Homestead, proposed to surrender property at Cape Coral, and proposed to "cram down" a claim secured by property at Lehigh Acres to its value of $90,000. SunTrust asserted that its claim secured by the LeHigh Acres property was protected from cram down under § 1322(b)(2) and the debtor must pay its full claim of $205,732.17. Whether the Lehigh Acres property or the Homestead property was the debtor's residence is a question of fact. The Lehigh Acres property was not the debtor's principal residence when the mortgage was created because the document contained a covenant that the property was a "second home." The debtor first had moved into the Lehigh Acres property and then moved to the Homestead property only a month prior to the filing of the petition. The burden was on the mortgagee to establish that the Lehigh Acres property was the debtor's primary residence on the petition date which the mortgagee failed to do. Although the evidence demonstrated that the Debtor had intended to make the Lehigh Acres property his home, that move was unsuccessful and he moved back to Homestead. That the debtor may desire to later move to the Lehigh Acres property is not dispositive of the issue as to whether the debtor's principal residence was the Homestead property or the Lehigh Acres property at the date of filing. Because the mortgagee failed to establish that the Lehigh Acres property was the debtor's residence, the mortgage is not protected from modification. ◉

FROM THE PRESIDENT - *CONTINUED FROM PAGE 5*

Trustee due process, the UST Handbook for Chapter 13 Trustees, changing caseloads, and possible bankruptcy legislation. We will all need to be the "sharpest tools in the shed" to deal with these demanding issues.

Approximately one year ago, our economy experienced one of its most jarring transitions ever, impacting millions of individuals around the nation, the repercussions of which continue to reverberate and influence all aspects of the Chapter 13 practice. As they always have, Chapter 13 Trustees rose to the challenge to fulfill their responsibilities under the Bankruptcy Code and to facilitate between debtors and creditors a fair return in exchange for a fresh start. This coming year, NACTT will continue to provide bankruptcy professionals with the ability to sharpen their tools and augment their talents to meet the ever-changing challenges of the Chapter 13 practice. I look forward to working with you in this great endeavor. ◉

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