NEW YORK STATE BAR ASSOCIATION

SEMINAR ON

BRIDGING THE GAP

MAKING A SMOOTH TRANSITION

REPRESENTING A CONSUMER IN A BANKRUPTCY CASE:

AN OVERVIEW OF CONSUMER DECISIONS IN THE POST-BAPCPA ERA

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<u>INTRODUCTION</u>

These materials are a selection of limited topics covering the predominantly contested issues concerning the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act which amended Title 11 of the United States Code, with a specific focus on topics addressed in representation of debtors and creditors within the context of chapter 7 and 13.

The caselaw precedent included, predominantly represent cases from the Second Circuit as well as other Circuit Court of Appeal who have squarely addressed the highlighted issues.

It is with great appreciation that we thank Devin L. Palmer, Esq. of Boylan, Brown, Code, Vidgor & Wilson, LLP for his contribution to these materials.

I. <u>CREDIT COUNSELING AND ALLOWED DEBTORS</u>

***In re Giambrone,* 365 B.R. 386 (Bankr. W.D.N.Y. 2007)**

Can a debtor extend the completion of credit counseling post-petition based on the exigent circumstances of a pending foreclosure?

The Debtors, seeking Bankruptcy relief, entered their attorneys' office the night before the scheduled foreclosure sale of their home. They simply could not acquire a certificate of credit counseling before the foreclosure sale (as required under 11 U.S.C. §109(h)(1)), so the Debtors filed the bankruptcy petition that night and concurrently moved the court for an extension of time to complete credit counseling or waiver of the deadline pursuant to 11 U.S.C. §109(h)(3)(A)(i). The Debtors eventually received their certificate five days after the petition, and prior to the hearing date for the motion for extension of time.

Judge Bucki conceded a divide among bankruptcy judges as to whether an imminent foreclosure sale constitutes exigent circumstance. However, citing sources included various dictionary definitions of "exigent circumstances," the Court determined the term applicable under the instant facts. The Court specifically held:

> We would assume too much if we were to charge consumers with a conscious appreciation of the requirements for pre-bankruptcy credit counseling. If debtors reasonably attempt to obtain credit counseling during the interval between learning about this requirement and the occurrence of the exigent event, their exigent circumstances should merit a waiver.

The Court then tackled the tricky question of how the Debtors, who did in fact successfully acquire their certificate of counseling within five days from making their request, could satisfy the second requirement of 11 U.S.C. §109(h)(3)(A)(ii); namely that they "requested credit counseling services from an approved nonprofit budget and credit counseling agency, but [were] unable to obtain the services … during the 5-day period beginning on the date on which the debtor made that request." Turning to §109(h)(1), Judge Bucki concluded that the "deciding consideration is whether the debtor is able to complete the mandate for *pre*-bankruptcy counseling during the five days after the request for that service." Therefore, "the test is not whether the agency can provide a counseling session without five days, but whether in the context of the circumstances, the debtors can complete within five days the counseling that must otherwise occur prior to the exigent moment when a bankruptcy filing is necessary." Based on the foregoing, the Bankruptcy Court found the Debtors satisfied the waiver standard of 11 U.S.C. §109(h)(3)(A), and because they already obtained their credit counseling prior to the hearing date, had also fulfilled the requirements of 11 U.S.C. §109(h)(3)(B).

***In re Burch*, 2006 Bankr. LEXIS 3551 (Bankr. N.D.N.Y. 2006)**

Should a bankruptcy case filed by an ineligible debtor be stricken or dismissed?

Initially after BAPCPA's enactment, Bankruptcy Courts were divided on the issue of whether an ineligible debtor's bankruptcy case should be stricken (*i.e*. treating the case as a nullity), or dismissed, if the debtor is rendered ineligible to file a bankruptcy petition due to the debtor's failure to satisfy the pre-bankruptcy credit counseling requirements.

The Bankruptcy Court followed the majority view, and held that failure to satisfy pre-bankruptcy credit counseling prior to filing should result in that bankruptcy case being dismissed. *See In re Ginsberg*, 354 B.R. 644 (Bankr. E.D.N.Y. 2006) (holding the bankruptcy case should be dismissed); *but see, In re Anthony J. Rios*, 336 B.R. 177 (Bankr. S.D.N.Y. 2005); *In re Elmendorf*, 345 B.R. 486 (Bankr. S.D.N.Y. 2006) (Judge Morris found that if a debtor is ineligible, then he/she cannot actually commence a bankruptcy with which to dismiss – as such, the court "strikes" the proceeding under its inherent power under section 105); *In re Anthony J. Rios*, 336 B.R. 177 (Bankr. S.D.N.Y. 2005) (court struck the petition, rather than dismiss the case).

***In re Anthony J. Rios*, 336 B.R. 177 (Bankr. S.D.N.Y. 2005)**

Whether a chapter 7 debtor's failure to seek credit counseling as required by 11 U.S.C. §*109(h)(1) or seeks an extension of time to obtain the necessary credit counseling as set forth in* 11 U.S.C. §*109(h)(3) voids the bankruptcy completely, or merely renders the case subject to dismissal?*

The court struck the petition, rather than dismiss the case, finding that pursuant to 11 U.S.C. §109, only a debtor who had met the credit counseling requirement or made the appropriate certification to the court evidencing eligibility for an exemption was eligible to file a bankruptcy petition. Here the debtor was ineligible and rendered the debtor's case void *ab initio*.

Judge Morris noted Congress's intent under BAPCPA provided that "credit counseling is required *prior* to filing, as a prerequisite for bankruptcy relief, to provide putative debtors with the opportunity to make informed choices as to financial alternatives available, including the possibility of seeking bankruptcy protection." Judge Morris observed that a debtor may not be eligible for "the full panoply of protections" pursuant to 11 U.S.C. §362(c)(3) if the case is dismissed rather than stricken.

***In re Elmendorf*, 345 B.R. 486 (Bankr. S.D.N.Y. 2006), *vacated and remanded by Adams v. Zarnel (In re Zarnel)*, 619 F.3d 156 (2d Cir. 2010)**

Should a bankruptcy case filed by an ineligible debtor be stricken or dismissed?

In *Elmendorf*, the Bankruptcy Court found that due to the failure to complete pre-bankruptcy credit counseling, as required under §109(h), no bankruptcy case could have been commenced as the debtor was ineligible to file its petition. Based on this finding, the Bankruptcy Court struck the debtor's bankruptcy case, instead of dismissing it.

This case and two other unrelated cases were appealed to the Second Circuit. In its review of the issue, the Second Circuit noted that although a person could be ineligible to be a debtor under the Bankruptcy Code for failure to satisfy the strictures of § 109(h), the language of § 301 did not bar that debtor from commencing a case by filing a petition; it only barred the case from being maintained as a proper voluntary case under the chapter specified in the petition. As such, and having determined that a case was commenced, albeit by an ineligible debtor, the Second Circuit concluded that the automatic stay took effect when a petition was filed.

In its analysis however, the Second Circuit also noted that because the Bankruptcy Court determined that the cases were never commenced, it was not improper under the Bankruptcy Court's 11 U.S.C. §105(a) powers to find that the cases should be stricken.

Eventually, the Second Circuit reversed and remanded the decisions back to the Bankruptcy Court for further proceedings consistent with the Second Circuit's opinion.

***In re Nichols,* 362 B.R. 88 (Bankr. S.D.N.Y. 2007)**

Can an error of counsel excuse the requirements of 11 U.S.C. §109(h)(3)(B)?

The Bankruptcy Court was asked to determine "whether, under certain circumstances, noncompliance with 11 U.S.C. §109(h) can be excused, and if so, whether the Court can consider the admitted error of counsel in his interpretation of 11 U.S.C. §109(h)(3)(B) or the fact that counsel misfiled debtor's motion for a waiver under §109(h)(3)(B) when deciding whether to excuse noncompliance with §109(h)."

The Bankruptcy Court in *Nichols*, citing *Adams v. Finlay's* recognition of a court's power under 11 U.S.C. §105(a) to exercise discretion to prevent an abuse of process by striking rather than dismissing a bankruptcy, found that if the failure to file a credit counseling certificate is strictly the result of attorney error, then "enforcing a strict interpretation of 11 U.S.C. §109(h) would result in a manifest injustice for [the Debtors]."

In reaching its decision, the Bankruptcy Court disagreed with the Eastern District's ruling in *In re Ginsberg*, 354 B.R. 644 (Bankr. E.D.N.Y. 2006), which held that an attorney's ignorance of the credit counseling requirement was not a defense to the dismissal of the debtor's bankruptcy.

***In re Seaman*, 340 B.R. 698 (Bankr. E.D.N.Y. 2006)**

Should a bankruptcy case filed by an ineligible debtor be stricken or dismissed?

Judge Stong found that a debtor rendered ineligible pursuant to 11 U.S.C. §109(h) should have its case dismissed rather than striking the case. The United States Trustee sought to dismiss the case, but the Bankruptcy Court also considered whether to strike the petition as an alternative. The Bankruptcy Court contemplated the consequences of each alternative, and found that dismissal was a more clear and better option.

***In re Ginsberg*, 354 B.R. 644 (Bankr. E.D.N.Y. 2006)**

Should a bankruptcy case filed by an ineligible debtor be stricken or dismissed?

The court in following the reasoning in *In re Seaman* (*supra*), ordered the case dismissed for failure to comply with the credit counseling requirement prior to filing bankruptcy. The court found that attorney ignorance of the credit counseling requirement was not a defense.

***In re Swiatkowski*, 356 B.R. 581 (Bankr. E.D.N.Y. 2006)**

Should a bankruptcy case filed by an ineligible debtor be stricken or dismissed?

The Court held that (1) the debtor did not satisfy requirements for temporary exemption from credit counseling requirement, and (2) failure to comply with credit counseling requirement rendered debtor ineligible to be debtor under Code, warranting dismissal of his petition.

The Court observed that one of the requirements of the BAPCPA is that prior to filing, persons seeking bankruptcy protection must obtain credit counseling from an approved nonprofit budget and credit counseling agency. *See* 11 U.S.C. §109(h). The law is clear that, with limited exceptions, a debtor must obtain credit counseling prior to filing in order to be eligible to file a petition in bankruptcy.

The Court declined to follow that line of cases which “strike” rather than dismiss petitions for 11 U.S.C. §109(h) deficiencies. *See In re Seaman*, *supra*.

***In re Henderson*, 339 B.R. 34 (Bankr. E.D.N.Y. 2006)**

What circumstances are required to constitute “exigent circumstances” to warrant an exemption from credit counseling?

The Bankruptcy Court held that a pro se putative chapter 13 debtor's need to obtain legal counsel was not an “exigent circumstance,” pursuant to the Bankruptcy Code, which could warrant a temporary exemption from credit counseling requirements added to the Bankruptcy Code by BAPCPA.

The Bankruptcy Court in dicta, discussed the legislative purposes behind the addition of the credit counseling requirements. In its review, the Bankruptcy Court found that the purpose of the credit counseling requirement gives consumers in financial distress an opportunity to learn about the consequences of filing a bankruptcy petition before they decide to file for bankruptcy relief, which includes the potentially devastating effect it can have on a debtor’s credit rating.

The Court found that requirements for an exemption established by 11 U.S.C. §109(h)(3) are conjunctive, not disjunctive, and each must be satisfied by the putative debtor in order for the exemption to apply.

The Bankruptcy Court examined the standard for "exigent circumstances" and looked to *In re Childs,* 335 B.R. 623 (Bankr. D. Md. 2005). In *Childs*, the Bankruptcy Court observed that:

> The standard for exigent circumstances set forth in the statute is minimal. It requires only that the debtor state the existence of some looming event that renders prepetition credit counseling to be infeasible. The standard is not one of "excusable neglect" that would require the Court to delve into the reasons why the exigent circumstances occurred.

***In re Bristol*, 2009 U.S. Dist. LEXIS 7107 (E.D.N.Y. 2009)**

Is incarceration a "disability" which could trigger a credit counseling exemption under 11 U.S.C. §*109(h)(4)?*

The Bankruptcy Court dismissed the debtor's case for failure to comply with the credit counseling requirement. On appeal, the District Court held that the Bankruptcy Court properly dismissed the debtor's case because incarceration did not constitute a "disability" exempting the debtor from the credit counseling requirement. Moreover, the District Court noted that the debtor made no showing that he could not participate in a credit counseling session by telephone.

Relying on plain language of 11 U.S.C. §109(h)(4), the District Court found that the debtor's attempt to invoke the exception for "disability" to be unavailing.

The Second Circuit has never addressed this issue. Finding incarceration not to be a "disability" is consistent with "[t]he majority of courts which have considered the issue [and] have held that incarceration does not amount to a 'disability.'" *In re* Hubel, 395 B.R. 823, 825-26 (N.D.N.Y 2008).

***In re Hubel,* 395 B.R. 823 (N.D.N.Y. 2008)**

Is incarceration a "disability" which could trigger a credit counseling exemption under 11 U.S.C. §*109(h)(4)?*

Hubel, a prisoner under the jurisdiction of the State of New York Department of Correctional Services (DOCS) filed a voluntary petition along with an application for exemption from credit counseling pursuant to 11 U.S.C. §§109(h)(3) and (4). In his application, Hubel stated that he requested and received from the UST a list of eighteen approved credit counseling agencies, and subsequently contacted each. Only three responded, and of those three only one agreed to waive its fee. Unfortunately, that agency only offered its counseling in person (out of the question), over the internet (no internet access), and by telephone. According to Hubel, DOCS denied his permission to communicate to the agency by telephone. As such, the Debtor contended he had no access to credit counseling.

On appeal, the District Court found that 11 U.S.C. §109(h)(3) offered no relief as it merely provides a 45 day extension of time to complete the counseling, and clearly the debtor's circumstances were not going to change during that time period. The District Court aligned itself with the majority of court's that have held that incarceration is not a "disability" within the meaning of 11 U.S.C. §109(h)(4). The District Court explained that a disability refers to an "impairment that is inherent to the person, not one which is imposed by external conditions the alleviation of which would relieve the disability."

Based on the foregoing, the District Court affirmed the Bankruptcy Court's decision to dismiss the debtor's bankruptcy proceeding.

II. MEANS TEST

A. In conducting the means test under 11 U.S.C. §707(b), may a debtor claim a vehicle ownership expense for a vehicle that is not encumbered by debt or lease?

Ransom v. FIA Card Servs., N.A., **131 S. Ct. 716 (2011).**

In January 2011, the Supreme Court rendered a decision which decided a split among certain of the Circuit Courts of Appeal with regard to auto deductions when calculating the means test.

In an 8-1 decision (with Justice Scalia dissenting), the Supreme Court affirmed the holding of the Ninth Circuit Court of Appeals and found that debtors could not take a means test deduction for car payments if such debtor's car was owned free and clear.

The Supreme Court found that the use of the word "applicable" in the statute does in fact mean "actual," which is contrary to the holdings of the Seventh Circuit in *Ross-Tousey*, the Fifth Circuit in *Tate*, and the Eighth Circuit in *Washburn.* The Supreme Court further found that only expenses that the debtor ***actually*** incurs can be deducted during a means test calculation.

Therefore, because the debtor in *Ransom* did not have a lease or loan payments to make for his vehicle, he was not entitled to claim the corresponding means test deduction.

Ross-Tousey v. United States Trustee (In re Ross-Tousey)**, 549 F.3d 1148 (7th Cir. 2008), abrogated by *Ransom v. FIA Card Servs., N.A.,* 131 S. Ct. 716 (2011).**

Tate v. United States Trustee (In re Tate)**, 571 F.3d 423 (5th Cir. 2009), abrogated by *Ransom v. FIA Card Servs., N.A.,* 131 S. Ct. 716 (2011).**

eCAST Settlement Corp. v. Washburn (In re Washburn), **579 F.3d 934 (8th Cir. 2009), abrogated by *Ransom v. FIA Card Servs., N.A.,* 131 S. Ct. 716 (2011).**

B. Can payments on a vehicle, which will be surrendered post-petition, be included as costs in a Chapter 7 or Chapter 13 Means Test?

In re Osborne**, 374 B.R. 68 (Bankr. W.D.N.Y. 2007)**

In *Osborne*, the debtor's Statement of Intentions indicated he would be surrendering a vehicle to the respective secured creditor. The debtor however, included the costs of the vehicle in his "means test" calculation. The United States Trustee moved to dismiss the case based on a presumption of abuse under 11 U.S.C. §707(b)(2)(A).

The question before the Court was: “if a debtor files a statement of intention to surrender a secured asset such as a residence or vehicle, is it still permissible for the debtor to include on Question 42 of Subpart C of the Chapter 7 Means Test Form, payments due on that secured debt at the date of the petition when calculating the debtor’s average monthly payments on account of secured debts under 11 U.S.C. §707(b)(2)(A)(iii)(I).”

The Bankruptcy Court citing numerous other court decisions, found that the debtor could take the aforementioned deduction when calculating the “means test,” because as of the petition date the debtor still possessed and maintained the vehicle.

***In re Sackett*, 374 B.R. 70 (Bankr. W.D.N.Y. 2007)**

A chapter 13 trustee objected to a debtor’s plan citing improper “means test” calculations.

In a case under chapter 13 of Title 11, 11 U.S.C. §1325(b)(1)(B) specifically provides that any “means test” objection is determined as of the effective date of the plan (as opposed to the chapter 7 “means test” which is determined on the date of filing. Thus, the holding in *Osborne*, *supra*, was inapplicable here.

Therefore, because the Bankruptcy Court previously avoided a lien held by a secured creditor prior to the plan, the debtor could not include the secured debt payment to that creditor in the “means test” form. As such, the debtor’s attempt to include this secured debt payment in the “means test” calculation violated the disposable income test, and the Bankruptcy Court sustained the chapter 13 trustee’s objection, accordingly.

***Morse v. Rudler (In re Rudler)*, 576 F.3d 37 (1st Cir. 2009)**

11 U.S.C. §707(b)(2)(A)(iii)(I) of the means test allows a deduction from current monthly income of installment payments due on secured debt of property that the debtor plans to surrender.

C. Does a voluntary contribution to a retirement plan qualify as an “Other Necessary Expense?”

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

In the context of analyzing the means test, the debtor’s voluntary contribution to a retirement plan “does not qualify as an Other Necessary Expense” under 11 U.S.C. §707(b)(2).

III. PROPERTY OF THE ESTATE

***In re Borowiec,* 396 B.R. 598 (Bankr. W.D.N.Y. 2008)**

Is a debtor liable to a chapter 7 trustee for the amount of check issued pre-petition for real property taxes, when the check was posted four hours after the petition’s filing?

11 U.S.C. §521(a)(4) requires a debtor to surrender to the trustee all property of the estate, which is defined under 11 U.S.C. §541(a)(1) to include “all legal or equitable interests of

the debtor in property as of the commencement of the case." Chief Judge Bucki highlighted the fact that a transfer is deemed to occur as of the moment that the drawee bank honors the check. Citing UCC § 4-213, the Court held that a payor bank pays an item when the bank has "completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith."

Based on the foregoing, the Debtor's payment to the Town of Hamburg occurred post-petition, and the funds were property of the bankruptcy estate. However, 11 U.S.C. §542(c) specifically carves out this type of payment because it was made in good faith with no actual notice or knowledge of the bankruptcy. As such the Bankruptcy Court could not require the turnover of the actual payment to the Town of Hamburg.

However, the Bankruptcy Court can, and in this case did, award a judgment under *quantum meruit* against the debtor in the sum of $2,700 for unjust enrichment, not under for duty to surrender property under 11 U.S.C. §521(a)(4).

***In re Parker,* 2008 Bankr. LEXIS 1046 (Bankr. N.D.N.Y. 2008)**

Can a Chapter 7 trustee recover from the debtor the value of checks written pre-petition but negotiated by creditor's post-petition?

Prior to filing bankruptcy, the Debtor's checking account totaled $3,275.94. However, at that time the Debtor wrote separate checks that had not been negotiated prior to the petition date. Based on these written checks the Debtor accurately calculated that his account held roughly $2,500.00 at the time of the bankruptcy and claimed his exemption in that scheduled amount (a later bank statement confirmed that upon post-petition negotiation of the checks, there remained roughly $2,500). The Trustee claimed the monies in the Debtor's bank account, including the checks that were not negotiated at the time, became property of the estate under 11 U.S.C. §541(a)(1) as of the filing date. Therefore, the Trustee filed a Motion against the Debtor pursuant to 11 U.S.C. §542 for the value of the checks issued pre-petition.

Turning to New York law, the Court found a check is not considered absolute payment until it is honored by the drawee bank. As such, as of the date the bankruptcy was filed, the entire $3,275.94 balance in the account became an asset of the estate under 11 U.S.C. §541(a)(1). The Debtor contended that even if the funds were property of the estate, the Trustee's relief should be an Adversary Proceeding against the creditor's who received the funds, not the Debtor himself. The Court disagreed, citing the clear language of 11 U.S.C. §542(a) that requires the delivery of the property or the value of the property. While the Trustee does have an option to pursue each individual creditor to avoid the post-petition transfers under 11 U.S.C. §549, there is nothing prohibiting a Trustee from demanding payment directly from the Debtor. Based on the foregoing, the Court granted the Trustee a judgment against the Debtor in the amount of the bank account as of the petition date reduced by his $2,500 exemption.

Also within the decision, the Court approved the Trustee's right to recover a portion of the Debtor's tax refund attributable to the withholding of pre-petition income.

IV. EXEMPTIONS

CPLR §5206(a) – New York Homestead Exemption Amounts

Under the New York exemption system, the homestead exemption amount differs depending on the county in which the property is situated. The exemption amount is $150,000 for property in the counties of Kings, Queens, New York, Bronx, Richmond, Nassau, Suffolk, Rockland, Westchester, or Putnam. The exemption amount is $125,000 for properties in the counties of Dutchess, Albany, Columbia, Orange, Saratoga or Ulster. The exemption amount is $75,000 for properties in any other county in the state.

***Schwab v. Reilly*, 560 U.S. 770 (2010)**

Must a bankruptcy trustee object to the exemption claimed by the debtor that is valid on its face, yet ambiguous as to the property exempted?

On Schedule B of the Debtor's petition, the Debtor included business equipment which she valued at $10,718.00. On Schedule C, applying the Federal Exemption scheme, the Debtor exempted exactly $10,718.00, the purported value of the business equipment. The exemption as applied was proper, within statutory limits, and no objection to the exemption was filed. However, the Chapter 7 trustee filed an application seeking to sell the Debtor's business equipment. The Debtor filed an objection to the motion because the business equipment was "fully exempted," and could not be administered by the chapter 7 trustee. The motion to sell did not object to the exemption of the business equipment. The motion only sought to sell the equipment, so that the amounts received above the Debtor's exemption could be distributed to the Debtor's creditors.

The Bankruptcy Court denied the trustee's motion on the basis that the business equipment was fully exempt. The Chapter 7 trustee filed an appeal from the bankruptcy court decision and the District Court affirmed. The Trustee appealed to the Court of Appeals and the decision was affirmed.

On appeal to the Supreme Court, the decision was reversed. The Supreme Court held that when an exemption claimed by the Debtor is facially valid, the Trustee need not object to the exemption in order to liquidate property that has been claimed as exempt. Conversely, where a Debtor has no colorable basis to claim an exemption, the Trustee must object to the exemption claimed by the Debtor before liquidating the property. Additionally, the Court clarified that a Debtor can simply list the exempt value of property as either "fair market value (FMV)" or "100 percent of FMV" to indicate to the trustee that they intend to exempt the full market value of the property listed on Schedule B. Such a designation would make it clear to the Trustee that the Debtor intends to fully protect the property at issue. The Court's ruling gives a clear path to Debtors and their counsel on how to complete a Schedule C.

CFCU Cmty. Credit Union v. Hayward, *(In re Hayward)*, 552 F.3d 253 (2d Cir. 2009)

Can New York's $50,000 Homestead Exemption Amendment be applied retroactively?

The Second Circuit affirmed the numerous District Court rulings that held that the application of the Amendment retroactively does not violate the Contract Clause of United States Constitution, Article I, § 10. The Circuit found that legislative history weighed in favor of finding that the increased homestead exemption, from $10,000 to $50,000, applied retroactively to debts incurred prior to amendment's effective date. The court stated that the legislative history reflects an intent to adjust the homestead exemption to account for the inflation and bring it in line with current conditions and that the statue is remedial in nature. The Court continued, "New York debtor's ability to invoke the increased homestead exemption is determined…by the date upon which the debtor files his or her bankruptcy petition." The Second Circuit concluded, "The 2005 Amendment applies retroactively in post-enactment filings to contract-based debts that preceded its enactment. Furthermore, retroactive application of the exemption does not violate the constitutional rights of pre-enactment, contract-based creditors who have not reduced the debt owed to them to judgment."

***Greene v. Savage (In re Greene)*, 583 F.3d 614 (9th Cir. 2009)**

The monetary limits on homestead exemptions, pursuant to 11 U.S.C. §522(p), does not apply to property owned by a debtor acquired more than 1215 days before the bankruptcy petition, even if the debtor did not live there until a few days prior to filing. The Court found that "the act of recording a homestead or moving on to the property to establish residency is not an 'amount of interest acquired' for purposes of applying the monetary cap in §522(p)."

***Weber v. U.S.T.*, 484 F.3d 154 (2d Cir. 2007)**

The Second Circuit, on a matter of first impression, denied the direct appeal of a question certified by a bankruptcy court whether the recent increase in the New York state homestead exemption, from $10,000 to $50,000, applied retroactively. The court held a direct appeal of this sort should represent a conflict of such a nature that creates uncertainty in the bankruptcy courts. Here, the second circuit set forth that all three courts within the circuit considered the question and have held that New York's homestead exemption applies retroactively thus reaching the same conclusion. The review by the second circuit would not lead to a more rapid resolution of the case since the decision did not appear to be either manifestly correct or incorrect. Thus the court held there was no compelling reason for this court to address the issue and that prior consideration by the district court would be beneficial.

***In re Kaska,* 2009 Bankr. LEXIS 2895 (Bankr. N.D.N.Y. 2009)**

Can a debtor lose his homestead exemption based on mixed commercial use that occurred over a year prior to the bankruptcy?

The Debtor entered into a loan agreement with his aunt, whereby she provided him $100,000.00 toward his attempt at owning/operating a used car and ATV dealership. The business performed poorly and eventually shut down, and the Debtor's aunt eventually received a judgment based on her unsecured loan. The Debtor also transformed a portion of the "dealership" into an apartment where he resided. The Debtor's business closed and he continued to use the property strictly as his residence for over a full year prior to filing Bankruptcy. The Debtor claimed the equity in the real property exempt as his homestead, to which his aunt objected citing the Northern District's earlier decision of *In re Hager*, 74 B.R. 198 (Bankr. N.D.N.Y. 1987). In *Hager,* the debtor occupied real property that served as both his home and a commercial enterprise. The Court held that he may only take advantage of the homestead exemption for the portion of the property used as a home.

In *Kaska*, Judge Littlefield first noted that not all courts, including those within the Second Circuit follow the principal laid out in *Hager.* as to mix-use property. *See In re Vizentinis*, 175 B.R. 824 (Bankr. E.D.N.Y 1994). In addition, even under *Hager*, the property must be mix-use as of the petition date. Here, the Debtor had ceased using the property as anything but his residence for over a year proceeding the petition date. As such, the *Hager* analysis was inapplicable to reduce the benefit of the Debtor's homestead exemption.

In addition, the Debtor's aunt alleged that Mr. Kaska converted the non-exempt property into exempt property in violation of 11 U.S.C. §522(o). Among the elements that are required under §522(o) is actual fraud (rather than constructive intent to defraud) "lest otherwise innocent and permissible pre-petition planning be transformed into something nefarious." While a creditor may demonstrate actual fraud under §522(o) through the "badges of fraud" standard, in this case the Debtor's aunt could not meet such a standard. Based on the foregoing, the Court upheld the Debtor's homestead exemption.

V. HANGING PARAGRAPH

A. What happens to 11 U.S.C. §1325(a) since Congress removed 11 U.S.C. §506(a)?

Bankruptcy courts are divided as to what happens to a secured claim after 11 U.S.C. §506 was removed from 11 U.S.C. §1325(a)(*) (otherwise known as the hanging paragraph). The majority view is that creditors cannot divide their loans into secured and unsecured in the absence of 11 U.S.C. §506, and thus a surrender of the vehicle satisfies the loan in full. The minority view follows a contract theory that is based on the UCC, which entitles the creditor to an unsecured deficiency judgment after the surrender of the collateral, unless the contract provides that it is without recourse. The unsecured balance must be treated in the same manner as other unsecured creditors.

The issue in many instances is whether the hanging paragraph prevents a creditor with a purchase money security interest ("PMSI") in a "910-Vehicle" from obtaining a state law deficiency judgment against the debtor for the portion not covered by a sale of the surrendered vehicle?

Second Circuit

***In re Tompkins*, 604 F.3d 753 (2d Cir. 2010)**

The Second Circuit reversed and remanded the Bankruptcy Court for the Southern District of New York's (the "Bankruptcy Court") decision that held that pursuant to the court's decision in *In re Pinti*, (*infra*), debtors' plan could provide for surrender of vehicle securing "910 claim" in full satisfaction thereof.

Since *Pinti,* numerous Circuit Courts have upheld the creditor's right to file a claim for a remaining deficiency subsequent to sale of collateral. *See Tidewater Fin. Co. v. Kenney,* 531 F.3d 312 (4th Cir. 2008); *In re Long,* 519 F.3d 288 (6th Cir. 2008); *In re Wright,* 492 F.3d 829 (7th Cir. 2007); *Capital One Auto Fin. v. Osborn,* 515 F.3d 817 (8th Cir. 2008); and *In re Ballard,* 526 F.3d 634 (10th Cir. 2008).

The Bankruptcy Court wrote, with complete respect for these circuits and their interpretation as to the effect of the "hanging paragraph" on a 910 creditor's ability to seek an unsecured deficiency claim, the Bankruptcy Court's opinion differs. Its decision in *Pinti* addressed and rejected arguments that the right to an unsecured deficiency claim is determined by state law, as opposed to the Bankruptcy Code. *In re Pinti*, 363 B.R. at 378-381. Although other courts have disagreed, they have done so based upon arguments that the Bankruptcy Court considered and rejected in *Pinti.*

Subsequently, AmeriCredit appealed to the District Court, which then certified a direct appeal to this Court.

The Second Circuit recognized that there were two lines of cases deciding the hanging paragraph issue. One line of cases, originally decided by several bankruptcy courts (including the Bankruptcy Court for SDNY) after the initial passage of BAPCPA, holds that by eliminating 11 U.S.C. §506(a) there is no deficiency claim; the loan is secured only by the vehicle, and surrender of the collateral satisfies the loan. *See, e.g., In re Pinti, 363 B.R. 369* (Bankr. S.D.N.Y. 2007). The second line of cases, finds that a creditor can still pursue an unsecured claim for the deficiency. *See, e.g., Tidewater Fin. Co. v. Kenney,* 531 F.3d 312 (4^{th} Cir. 2008); *In re Long,* 519 F.3d 288 (6^{th} Cir. 2008); *In re Wright,* 492 F.3d 829 (7^{th} Cir. 2007); *Capital One Auto Fin. v. Osborn,* 515 F.3d 817 (8^{th} Cir. 2008); *In re Ballard,* 526 F.3d 634 (10^{th} Cir. 2008); *In re Miller*, 570 F.3d 633 (5^{th} Cir.2009); *In re Barrett*, 543 F.3d 1239; and *In re Wright*, 492 F.3d 829. A view now adopted by the Second Circuit.

The Second Circuit, citing *Butner v. United States*, 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979), reasoned that when there is an absence of controlling federal law, the rights of the creditor under state law are not disturbed. "[P]roperty interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Id.* at 55. Following the Supreme Court's reasoning, the Second found that AmeriCredit's contractual right to collect any deficiency, a right enforceable under state law, is a claim applicable in bankruptcy unless expressly disallowed.

Thus, the Second Circuit held that "[b]ecause both state law and the contract of the parties give AmeriCredit the right to an unsecured deficiency judgment, on the record presented to this Court it is entitled to an unsecured claim in the amount of $15,373.92."

<u>Other Circuits</u>

***Wright v. Santander Consumer USA Inc. (In re Wright)*, 492 F.3d 829 (7th Cir. 2007)**

The Seventh Circuit aligned itself with the minority view, reasoning that by eliminating 11 U.S.C. §506 from §1325(a), the parties are only left with their contractual rights. In doing so, the Court cited *Butner v. United States,* 440 U.S. 48 (1979), stating that "state law determines rights and obligations when the [Bankruptcy Code] does not supply a federal rule."

The Court recognized that when removing §506, "the fallback under *Butner* is the parties' contract, rather than non-recourse debt or no security interest." Thus the Court held that "[b]y surrendering the car, debtors gave their creditor the full market value of the collateral. Any shortfall must be treated as an unsecured debt." The creditor will be able to share, pro rata, in a distribution under the plan as the debtors other unsecured creditors.

***Capital One Auto Finance v. Osborn (In re Osborn)*, 515 F.3d 817 (8th Cir. 2008)**

The debtors argued the majority position and cite the fact that if they were to retain the vehicle under 11 U.S.C. §1325(a)(5)(B), the vehicle would remain fully secured, therefore the opposite must also hold true upon the surrender of the vehicle under 11 U.S.C. §1325(a)(5)(C).

The Eighth Circuit citing *Butner* and *Wright* disagreed with the debtors and the majority opinions and stated that unlike the retention option (§1325(a)(5)(B)), the surrender option (§1325(a)(5)(C)) does not mention full satisfaction of a PMSI.

The debtors further argued that bifurcation of the loan is prohibited by the Bankruptcy Code. After reviewing the debtor's position, the Court found that although the hanging paragraph removed bifurcation from §1325, the hanging paragraph does not effect state law rights. Moreover, the Court recognized that the retention and surrender options under 11 U.S.C. §1325(a)(5) have been specifically written differently by Congress into separate subparagraphs.

The debtor's final argument was that they can modify Capital One's claim under 11 U.S.C. §1322(b)(2). The Court disagreed stating that §1322(b)(2) does not allow modification for "the number, timing, or amount of the installment payments" set forth in the contract and further that state law does not bar deficiency claims. The Court thus declined to examine the effects of §1322(b)(2).

***Americredit Financial Services, Inc. v. Moore (In re Moore)*, 517 F.3d 987 (8th Cir. 2008)**

The Court stated that nothing in 11 U.S.C. §1325(a)(5)(C) states that a claim on a 910-Vehicle is considered satisfied when the vehicle is surrendered and the creditor is entitled to a deficiency judgment if allowed under state law. The Court held that since Arkansas law allows for a deficiency in this instance, Americredit was allowed a general unsecured claim.

***Americredit Financial Services, Inc. v. Long (In re Long)*, 519 F.3d 288 (6th Cir. 2008) (equity of the statute approach disagreed with by 5th Cir. 570 F.3d 633)**

The Sixth Circuit majority declined to adopt the "literal interpretation of the statute" method used by the *Wright* court. The Court found that *Wright* had been decided correctly, but for the wrong reasons. The Court further found that the *Wright* court's reliance on *Butner* court was misplaced because it did not compel "allowance" of the unsecured portion of the claim. Furthermore, the Court found that *Wright* failed to consider the underlying purpose of the Bankruptcy Code, which is a "uniform nationwide system by which claims are handled." Use of state law in determining certain claims, undermines the full purpose and objectives of the Bankruptcy Code.

The Court decided to employ a common law principle of interpretation known as "the equity of the statute" in order to fill the Court's perceived gap in § 1325(a) left by BAPCPA. The Court looked to the pre-BAPCPA code and applied those laws to the case before them. The Court held that the claims that are subject to the hanging paragraph, upon the surrender of the collateral, will be adjudicated and governed in the same manner as they would have been before Congress amended the Bankruptcy Code.

Judge Cox wrote separately because the Judge was in agreement with the Court's holding. He did however, disagree with the reasoning the Court used to support its ruling.

***DaimlerChrysler Financial Services Americas, LLC v. Ballard (In re Ballard)*, 526 F.3d 634 (10th Cir. 2008)**

The Tenth Circuit arrived at the same conclusion as the *Wright* and *Osborn* courts. The Court found that the hanging paragraph does not "abrogate" a creditor's right to an unsecured deficiency claim under state law. The Court found that the BAP and the bankruptcy court erroneously reasoned that the source of the deficiency claim was 11 U.S.C. §506. The Court, citing *Osborn,* found that the hanging paragraph did not prohibit bifurcation of claims; it only removed the Bankruptcy Code's vehicle for bifurcation. Thus, a creditor is free to seek a deficiency claim if the underlying contract and state law permit such a claim.

The debtors asked the Court to read the valuation that is set forth in 11 U.S.C. §1325(a)(5)(B), the surrender option. However, the Court refused to read the language of one statutory paragraph into the language of another, reasoning that if Congress intended to allow full satisfaction of a 910-Vehicle, they would have done so expressly. Moreover, in the absence of language linking "allowed secured claim" between §§1325(a) and 506(a), the phrase "allowed secured claim" in §1325(a) simply means that the claim is allowed under 11 U.S.C. §502 and secured by a lien under state law. Thus, the Court held that surrender of the vehicle can satisfy the requirements of the plan with respect to the secured portion of the surrendered 910-Vehicle. However, the creditor still has the ability to bring an unsecured deficiency claim if allowed by the underlying contract and state law.

***Tidewater Finance Company v. Kenney (In re Kenney),* 531 F.3d 312 (4th Cir. 2008)**

The Court states that "Congress has unambiguously eliminated the 910 creditor's access to a federal remedy under §506(a)." That said, the court asks whether the 910 creditor has a remedy under another body of law to obtain the remainder of the debt owed. The Court determined that its sister courts of the Seventh, Eighth and Tenth Circuits have all found that remedy in state law.

Relying heavily on *Butner* and *Wright*, the Court found that the hanging paragraph does not extinguish a creditor's deficiency after the surrender of a 910-Vehicle. The Court further recognized that although §506 was removed from §1325, nothing in §1325 removed the creditor's entitlement to its contractual rights and remedies. Thus, like the Seventh, Eighth and Tenth before it, the Court held that the creditor received full market value of the collateral upon surrender and any deficiency after the sale of the vehicle would be an unsecured claim in the bankruptcy plan.

***DaimlerChrysler Financial Services Americas, LLC v. Barrett (In re Barrett)*, 543 F.3d 1239 (11th Cir. 2008)**

The Court recognized that before *Wright*, the majority of case law favored full satisfaction of the 910 creditor's claim upon surrender of a 910-Vehicle. The Court then examined, in depth, the foregoing Circuit cases from the Seventh, Eight, Sixth, Tenth, and Fourth and found that the Court agreed with them with respect to the fact that the 910 creditor possesses a potential unsecured deficiency claim. Moreover, the Court stated that it had nothing to add to its sister courts' opinions, thus holding that the 910 creditor may pursue an unsecured deficiency claim upon the surrender of a 910-Vehicle.

***DaimlerChrysler Financial Services Americas, LLC v. Miller (In re Miller)*, 570 F.3d 633 (5th Cir. 2008)**

The issue of surrendering a 910-Vehicle came before the Fifth Circuit. The Court recognized that the once "majority view," has now been rejected by every Circuit to examine this question. The new trend is allowing the 910 creditor a potential unsecured deficiency claim. However, the Court explicitly rejected the "equity of the statute" method applied by the Sixth

Circuit in *Long.* The Court found the reasoning of the *Long* court to be flawed, as the starting point for any interpretation of a statute should be its "plain language." The Court found that "equity of the statute" has been a "dead letter" since the beginning of the Twentieth Century and that it is a deviation from the proper reading of the Bankruptcy Code.

The Court looked closely at and relied on *Wright* and *Butner*. The Court was in agreement with its sister courts that have gone before it and held that a 910 creditor is entitled to pursue a unsecured deficiency claim upon the surrender of a 910-Vehicle.

B. Does "negative equity" that is part of the purchase price of a new vehicle constitute purchase money that is protected by the hanging paragraph of 11 U.S.C. §1325(a)?

<u>Second Circuit</u>

***Reiber v. GMAC, LLC (In re Peaslee)*, 585 F.3d 53 (2d Cir. 2009)**

On a consolidated appeal before the Second Circuit, the Court held that negative equity on a trade-in vehicle should be included in the PMSI accompanying a new car's purchase. Subsequently, the creditor's PMSI is protected from the "cramdown" provision of 11 U.S.C. §1325. Since PMSI was not defined by the Bankruptcy Code, the Court looked to state law for guidance. According to New York law negative equity is considered a purchase-money obligation and included in PMSI. Thus, the debtor's entire claim, which included the portions that may have been attributable to the payoff of negative equity on their trade-in vehicles, must be treated as secured claims. Thus, the creditor is immune from cramdown and bifurcation of their security interest.

***In re Petrocci,* 370 B.R. 489 (Bankr. N.D.N.Y. 2007)**)

How is the Hanging Paragraph implicated on vehicles in which the seller allows the buyer to "roll in" the "negative equity" on a trade-in vehicle?

Under facts identical to those in *In re Peaslee.* and its accompanying cases, the Court differed from the reasoning of the *Peaslee* Court. For example, the Court found the primary purpose of 11 U.S.C. §1325(a)(9) was to take the unsecured negative equity debt that a chapter 13 debtor has when his less then 910 day old vehicle is not worth the outstanding loan balance, and, by refusing it the Code § 506 treatment, to transform it into secured debt not supported by collateral value, and then require it to be paid in full to the detriment of other unsecured creditors. As such, the Court found no distinction between this "ordinary unsecured negative equity debt" and what the *Peaslee* Court referred to as "knowingly refinanced unsecured negative equity debt." In short, the Court found the Hanging Paragraph <u>did</u> apply to negative equity trade in vehicles, precluding 11 U.S.C. §506 cram downs.

In addition, the Court also noted that there should not be any concerns "this case will provide incentive for auto lenders to finance ever larger negative equity balances into their new car loans, confident that in the Chapter 13 environment their entire loan balance will be protected by the purchase money security interest being retained." "This is because a Chapter 13 debtor has the option of surrendering the financed auto, whereupon the lender may be required to accept the car in full satisfaction of the lender's claim, with no unsecured portion of the claim to be paid through the plan." Citing *In re Pinti*, 363 B.R. 369 (Bankr. S.D.N.Y. 2007), the Court, quietly at the end of its decision appears to align with the view that the 910 creditor's claim cannot be bifurcated and a 910 creditor has no statutory basis to assert an unsecured claim after the collateral is surrendered post-petition.

<u>Other Circuits</u>

***Graupner v. Nuvell Credit Corporation (In re Graupner)*, 537 F.3d 1295 (11th Cir. 2008)**

The Court recognized a split among the lower courts when confronting this issue. There are two wide ranging factions: (1) that the PMSI encompasses all components of a new vehicle purchase, including negative equity; and (2) that certain components of a loan, especially negative equity, do not fall under PMSI.

The Court questioned whether negative equity was money required for the purchase, and if so, was a debt created simultaneously with the purchase; or was the negative equity an antecedent debt. The Court found that negative equity should be regarded as money required to make a vehicle purchase. Consequently, if negative equity is considered purchase money, then the entire debt, including negative equity, is protected by the hanging paragraph of 11 U.S.C. §1325(a).

***Wells Fargo Financial Acceptance v. Price (In re Price)*, 562 F.3d 618 (4th Cir. 2009)**

The Court agreed with a great number of courts and held that the meaning of PMSI contained in the hanging paragraph is controlled by state law.

The Court found that “negative equity” financing is integral to the auto industry and the financing of new vehicles. Congressional intent when enacting BAPCPA, and the hanging paragraph in particular, was to protect secured creditors in Chapter 13 bankruptcies.

Citing and finding the courts opinion in *Graupner* persuasive, the Court held that “negative equity” is a part of the PMSI and thus, is protected by the hanging paragraph.

***Ford v. Ford Motor Credit Corporation (In re Ford)*, 574 F.3d 1279 (10th Cir. 2009)**

The Court stated that when Congress enacts a statute with settled judicial interpretation, it is presumed that Congress was aware of that interpretation. That said, Congress used the term “purchase money security interest” without a definition when enacting BAPCPA. Therefore, the Court presumed that Congress intended for “purchase money security interest” to be interpreted according to state law.

The Court concluded that the “trade-in” exchange of vehicles was a single transaction. As such, there was a “close nexus” between the debtor’s acquisition of the vehicle and the secured obligation to the creditor. It follows that the creditor held a PMSI in the vehicle, for the full amount of the debt (including the “negative equity”), which is protected from “cramdown” by the hanging paragraph of 11 U.S.C. §1325(a), thereby preventing the debtors from bifurcating the debt under 11 U.S.C. §506(a).

***Ford Motor Credit Co., LLC v. Dale (In re Dale)*, 582 F.3d 568 (5th Cir. 2009)**

The Court held that under Texas law, negative equity, gap insurance, and extended warranties constituted purchase money obligations. Thus, the debtor’s purchase of a vehicle which had a purchase money security interest in the debt was not subject to bifurcation of the debt into secured and unsecured portions and the cramdown provisions of the creditor's secured claim.

***Ford Motor Credit Company v. Mierkowski (In re Mierkowski)*, 580 F.3d 740 (8th Cir. 2009)**

The Court prohibited the debtor from bifurcating the creditor's secured claim. The creditor's PMSI in a vehicle acquired by a debtor was applied to the entire debt incurred in financing the vehicle purchase. This included the part of the debt that was associated with the debtor's negative equity in the trade-in vehicle.

***Nuvell Credit Company, LLC v. Callicott (In re Callicott)*, 580 F.3d 753 (8th Cir. 2009)**

Prior to filing bankruptcy, the debtor purchased a new vehicle with financing for the total sale price, which included the negative equity from the trade-in-vehicle. The Court followed *Mierkowski*. The Eighth Circuit found that since the negative equity was an integral part of the entire sales transaction for the new vehicle, the Court held that the creditor had a PMSI securing its entire claim, including the negative equity.

VI. PROJECTED DISPOSABLE INCOME

A. Defining "Disposable Income" and "Projected Disposable Income" in Chapter 13 Cases.

Now in the forefront of bankruptcy issues is the clarification of the term "projected disposable income." The BAPCPA Amendments of 2005 integrated the "means test," which has altered the method in determining the debtor's income and expenses, and further testing the debtor's ability to pay back its unsecured creditors. Application of the "means test," in particular how "disposable income" and "projected disposable income" are applied to a debtor's ability to repay unsecured creditors, has not proved to be straightforward when being applied to the above-median income debtor. The resulting Circuit Courts of Appeals' cases discuss some of the varying concerns with "disposable income" and "projected disposable income", none of which streamline the conflicts. Ultimately, what has resulted is a divide between the courts application of the methodology used to interpret the statute. Some courts look at the statute mechanically, where other courts are using an equitable methodology to ensure that the parties receive a just result.

***Hamilton v. Lanning (In re Lanning)*, 545 F.3d 1269 (10th Cir. 2008), *aff'd,* 130 S.Ct. 2464 (2010)**

How to compute the plan payment for an above-median income debtor?

In contrast to the Ninth Circuit's decision in *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868 (9th Cir. 2008), the Tenth Circuit held that the bankruptcy court can look projected future circumstances when deciding whether the debtor is paying its projected disposable income into the plan, rather than the mechanical approach taken by the Ninth Circuit, which does not look beyond the debtor's pre-filing economic status or circumstances.

In this case, the debtor was an above-median income individual, because the debtor received a one-time buyout from a former employer that greatly increased her average monthly income during the six month look-back period. Her new employer however, decreased her average monthly income below the median income level for the state in which she resided.

Using the mechanical approach applied by the Ninth Circuit, this debtor would not have been able to make the required plan payments. The Tenth Circuit decided to take a different approach, looking for a just result for the parties. This approach resulted in a confirmed the plan despite the plan payments being lower than they would have been if this case were decided by the *In re Kagenveama* Court.

The Supreme Court, granted *certiorari* to this case and limited the question on appeal to whether in calculating the debtor's "projected disposable income" during the plan period, the bankruptcy court may consider evidence suggesting that the debtor's income or expenses during that period are likely to be different from her income or expenses during the pre-filing period.

In June 2010, the Supreme Court affirmed the Tenth Circuit and abrogated the Nith Circuit's holding in *In re Kagenveama*. *See* 130 S. Ct. 2464 (2010)

The Supreme Court held that when a bankruptcy court calculates a debtor's projected disposable income that court may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation of a plan. In so holding, the Supreme Court noted that because the change was already known at the time of plan confirmation, it can be taken into account when calculating the debtor's disposable income.

Maney v. Kagenveama (In re Kagenveama), **541 F.3d 868 (9th Cir. 2008), abrogated by Lanning.**

Coop v. Frederickson (In re Frederickson)**, 545 F.3d 652 (8th Cir. 2008),** ***cert. denied*****, 129 S. Ct. 1630 (2009)**

The chapter 13 debtor, classified as an "above-median income debtor," proposed to pay unsecured creditors $600 per month for 48 months despite the fact that the debtor had negative disposable income. The trustee opposed arguing that the chapter 13 debtor's plan must extend for 60 months, the "applicable commitment period" under 11 U.S.C. §1325(b). The question before the Eighth Circuit was whether an above-median income chapter 13 debtor must extend for the full 60 months of a plan repayment when the debtor has negative "disposable income" as defined by 11 U.S.C. §1325(b)(2) and calculated using the means test.

The Court sought to define both "applicable commitment period" and "projected disposable income." In defining "projected disposable income," the court determined that disposable income as calculated is merely the starting point for projected disposable income, since the final calculation takes into account the changes in the debtor's financial circumstances as well as the debtor's actual income and expenses. The Court noted, "that the object is not to select the right form, but to reach a reality-based determination of a debtor's capabilities to repay creditors."

Ultimately, the Court evades the issue of applicable commitment period and finds that the debtor, based its definition of projected disposable income, in fact had a positive disposable income and therefore was required to extend for the entire 60 month commitment period.

***McCarty v. Lasowski (In re Lasowski)*, 575 F.3d 815 (8th Cir. 2009)**

The Eighth Circuit again considers disposable income versus projected disposable income and follows precedent, taking a forward looking approach rather than a backward looking approach. In considering a forward looking approach the Court considers factors that change the circumstances from the initial filing.

Here, the debtor was an above-median income chapter 13 debtor who calculated negative disposable income because her 401(k) loan repayments and contributions reduced her disposable income below zero. This provided for a calculation of a negative monthly disposable income and permitted for minimal payments to unsecured creditors. The Court concluded that the bankruptcy court should have considered that the debtor's loan repayments would cease during the term of the debtor's proposed plan.

The Court agreed with *Fredrickson* and held that the disposable income calculation is only a starting point for determining projected disposable income, and that the determination of projected disposable income includes "changes…that are reasonably certain to occur during the term of the debtor's proposed plan."

***Ransom v. MBNA American Bank (In re Ransom)*, 577 F.3d 1026 (9th Cir. 2009), *aff'd,* 131 S.Ct. 716 (2011).**

The Court held that the debtor could not deduct an ownership cost for cars owned free of debt. This Court followed the plain language approach in defining the applicable monthly expense amounts. The Court notes that to allow for the deduction would read "applicable" out of the statue. Here, the Court focused on the debtor's actual financial situation which is at odds with the mechanical approach followed by the *Kagenveama* court. This Court's findings were more in line with the forward looking courts and focuses on the congressional intent to ensure that debtors pay as much as possible to repay creditors.

To further illustrate the inconsistencies in this Circuit, the BAP overruled the bankruptcy court, establishing a two part approach to 11 U.S.C. §1325. In this case, the debtors deducted payments for two houses and a vehicle which they were surrendering under their plan of reorganization. The chapter 13 trustee objected on grounds that the debtors did not offer as much as possible to creditors and that the plan was not in good faith. The bankruptcy court following the mechanical approach, allowed the deductions, holding that the debtors were contractually obligated to make as of the petition date, regardless of their intent to surrender the catalog. Thus, the Court did not apply a forward looking approach to expenses and in line with *Kagenveama*.

The BAP reversed the bankruptcy court and held that 11 U.S.C. §1325(b)(2) determines if the expense is deductible and 11 U.S.C. §1325(b)(3) determines the amount of the expense that is deductible. In order to consider §1325(b)(3), it must first be determined that the expense is reasonably necessary for the maintenance or support to the debtor.

***Yarnall v. Martinez (In re Martinez)*, 418 B.R. 347 (9th Cir. BAP 2009)**

The issue before the Court was whether debtors can deduct, as secured debt, scheduled contractually due payments on collateral that they surrendered after the filing of the bankruptcy petition?

The Court reversed the bankruptcy court, adopting the forward looking approach similar to *Ransom*, and held that the debtors considered the collateral unnecessary, as they had obtained court orders stripping the liens.

VII. STUDENT LOANS

***Davis v. Educational Credit Management Corp.,* 373 B.R. 241 (W.D.N.Y. 2007)**

What elements must a Debtor prove to show an undue hardship in order to discharge student loans?

In reversing the Bankruptcy Court's partial discharge of the Debtor's student loans, Judge Elfvin began with the Second Circuit's "three-prong test" to determine if a debtor is eligible for an under hardship discharge:

> (1) that she cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans;
>
> (2) that additional circumstances exist indicating that this current state of affairs is likely to persist for a significant portion of the repayment period; and
>
> (3) that she has made good faith efforts to repay the loans.

Citing Brunner v. New York State Higher Education Services Corp., 831 F.2d 395 (2d Cir. 1987)**.**

The District Court's main issue in its reversal was the Bankruptcy Court's failure to look at the household income in addition to just the debtor's income. While the Debtor's income was $8,000, her husband earned an additional $21,000 a year. Thus, while the Debtor's income put her below the self-sufficiency standards for a single individual living in her county ($14,580), the couple's income was above that standard for two adults ($22,788). In addition, the underlying Court, while acknowledging the couple's income was above the self-sufficiency standards, found that income "modest." The District Court found "modesty" irrelevant, and the question was simply whether the couple could maintain the "minimal" standard of living; *i.e*., whether they met the self-sufficiency standards - which they did. In addition, the Western District emphasized that the total household income is applied not just to the first prong, "but with respect to the entire undue hardship analysis." As such, the underlying Court should have also examined the Debtor's husband's assets, career, income or potential for increased career or financial opportunities when considering the second prong.

In addition, the Court found the individual Debtor's claim that she has been unsuccessful in securing employment in her field of study and suffered from depression not enough to satisfy the second prong of *Brunner*. The second prong, according to the District Court, is a "very demanding standard" that requires a "certainty of hopelessness." Here, there was no medical corroboration to support the Debtor's claim that her depression caused her to lose a job opportunity. She was not disabled or a victim of a serious illness as normally associated with these type of requests of undue hardship. Moreover, "the mere inability to find a better-paying job is insufficient for a finding of an additional circumstances." The Court concluded the Debtor's circumstances "were of mere inconvenience, austere budget, financial difficulty and inadequate present employment and are not grounds for discharging educational debts."

Finally, the District Court found that since there was no finding of under hardship, the Bankruptcy Court could not consider a partial discharge of the student loans under either 11 U.S.C. §523(a)(8) or it equitable power under 11 U.S.C. §105(a). "Had the Bankruptcy Order found that Mrs. Davis demonstrated under *Brunner* that undue hardship would result if she were required to pay the entire obligation, only then could it consider what part of the obligation could be maintained without resulting in undue hardship and discharge the rest."

Wells v. Sallie Mae (In re Wells), **380 B.R. 652 (Bankr. N.D.N.Y. 2007)**

Does the non dischargeabilty of student loans apply to non-student borrowers? Can a Court offer partial relief to a Debtor regarding student loans?

The Debtors, parents to a current student, attempted to discharge various student loans as a hardship. First they alleged that because the loans were taken out on behalf of another person *Brunner*'s three-prong test should be bypassed for a "totality of circumstances" approach adopted in other Circuits. Judge Gerling rejected that argument, citing previous cases that have concluded "student loans obtained by a parent for the educational benefit of a child are non-dischargeable." In short, Congress did not intend on limiting 11 U.S.C. §523(a)(8) strictly to student borrowers and not non-student borrowers and co-makers.

In applying the three-prongs of *Brunner* to the facts at hand, the Northern District concluded that there simply was not the type of "exceptional circumstances" to suggest a continuing inability to repay the loans over an extended period of time that would constitute an undue hardship. However, the Court did not end there. The Debtors also requested in the alternative, that the Court consider a partial discharge of their student loans provided they are able to establish undue hardship as to that portion of the debt sought discharged. Citing various cases, the Court noted that "not all courts have agreed to consider a partial discharge of a student loan obligation." Under the facts at hand Judge Gerling, citing the precedent set in *In re Kenny*, 313 B.R. 100**.** (Bankr. N.D.N.Y. 2004), declined to grant a partial discharge, but deemed it appropriate to allow the debtors a deferment of the loans for one year without further accumulation of interest for that year.

Jackson v. Educ. Rec. Inst. (In re Jackson), **2007 Bankr. LEXIS 2713 (Bankr. S.D.N.Y. 2007)**

Does the debtor's various physical and emotional ailments warrant an undue hardship exemption and the discharge of $120,000 in student loans?

In contrast to the Debtors in *Davis v. Educational Credit Management****.*** and *In re****.*** *Wells****.***, the Debtor here had a variety of conditions demonstrating an undue hardship. For example, the Debtor suffered from a bipolar disorder that resulted in "manic episodes" at previous employment (resulting in his direct termination), along with glaucoma, high blood pressure, sleep apnea and a partially paralyzed right hand. At the time of the Bankruptcy, he was following a daily treatment plan that included six mediations and three consultations with psychiatrists per week. In addition, the Debtor had attempted suicide fourteen different times, one of which resulted in his paralyzed right hand. Although the Debtor, appearing pro-se offered no expert testimony or corroborative evidence in support of these ailments, the Court noted that "requiring that a debtor provide corroborative medical evidence beyond their own testimony in order to sustain the evidentiary burden for a hardship discharge of a student loan on medical grounds is likely to prevent pro se debtors form receiving the relief to which they are entitled because they cannot afford to hire medical experts to testify to the effect of their diseases on their earning capacity."

Based on the foregoing, along with the fact the Debtor's monthly expenses were reasonable and that he met the other prongs of *Brunner v. New York State Higher Education Services Corp*., 831 F.2d 395 (2nd Cir. 1987), the Court discharged the Debtor's student loans pursuant to the "undue hardship" exception of 11 U.S.C. §523(a)(8).

***Rogers v. Key Bank (In re Rogers),* 374 B.R. 510 (Bankr. E.D.N.Y. 2007)**

What constitutes a student loan?

An interesting case that details what loans constitute the protection afforded qualified educational loans in Bankruptcy. Specifically, the Debtor argued that the lender forwarded the entire loan amount of $115,000 directly to her and that only $15,000 was used for tuition. The lender claimed the Debtor's admission that he used the remaining funds as "living expenses" fits squarely within the 20 U.S.C. §1087 definition of "costs of attendance" that is statutorily included within an "educational loan.

The Court identified all of the pertinent statutes that set forth a qualified educational loan, beginning with 11 U.S.C. §523, then 26 U.S.C. §221(d)(1), and finally the definition of "costs of attendance" in 20 U.S.C. §1087. Since the majority of the loan fell under the vague "costs of attendance" the court focused on that definition, which includes "an allowance for books, supplies, transportation, and miscellaneous personal expenses for a student attending the institution on at least a half-time basis." The Court denied the Debtor's motion for summary judgment, finding a genuine issue of material fact exists as to the Institute's determination of which, if any, of the loan proceeds which the Institute advanced to [the Debtor] constitute a "cost of attendance" which qualified as a "higher education expense." Since a "qualified educational loan" is defined under 26 U.S.C. §221(d)(1) as an "indebtedness incurred by the taxpayer solely to pay qualified higher education expenses" if some of the loan was not intended for "costs of attendance" the entire loan was then not "solely" to pay qualified higher education expenses and presumably dischargeable.

VIII. FRAUDULENT CONVEYANCES AND FAIR CONSIDERATION

***Arnold v. Barberi (In re Walsh),* 2007 Bankr. LEXIS 3964 (Bankr. W.D.N.Y. 2007)**

What constitutes "fair consideration" or "reasonably equivalent value" to survive attack as a fraudulent conveyance?

The Debtor sold real property to a third party for investment purposes for $115,000, to which the Debtor also received a lease back at the rental value of $650 per month). The Trustee submitted an appraisal indicating the property could have sold for $135,000 (to a buyer looking to live in the residence), and argued the Debtor's transaction was not for fair consideration, and therefore avoidable fraudulent conveyances.

Judge Kaplan dismissed the Trustee's fraudulent conveyance action on summary judgment, holding that "the consideration paid here did not fall below the lowest point in the range of reasonableness." There is nothing inherently wrong with a buyer paying less that what an appraiser says would be fair market value, and the "price paid here and what a prospective 'homeowner' was likely to have paid is not a shocking disparity." In a footnote in the decision, Judge Kaplan explains that courts should first look to price paid and determine whether it was reasonable fair. "If it was, the inquiry ends, <u>unless</u> the finder of fact concludes the buyer confederated in a fraud upon the seller's creditors" (*emphasis in the original*). In this case the Trustee provided no evidence to the Court, after it determined the sale price reasonable, that the buyer had reason to believe that the seller was engaged in a scheme to defraud creditors. The Court found the sale and lease back of the property to the Debtor alone did not constitute sufficient evidence of a fraud on the Debtor's creditors.

***Arnold v. Walsh (In re Walsh),* 2007 Bankr. LEXIS 2619 (Bankr. W.D.N.Y. 2007)**

What restraints must be imposed on a third-party to qualify as a "mere conduit" under 11 U.S.C. §550?

The Trustee moved to recover alleged fraudulent transfers made from the Debtor to his wife. In response, the Debtor contended she was a "mere conduit" and not an "initial transferee" from whom the Trustee could recover under 11 U.S.C. §550.

The court disagreed with the Debtor's wife, writing that "contrary to her arguments, she has established only that she <u>would</u> not have unilaterally decided how to spend the $48,000, not that she <u>could</u> not do so (*emphasis in original*)." Simply put, there was nothing preventing the Debtor's wife from doing anything she wished with the transferred funds. "This fact is dispositive, in that no case can be found in which a transferee who is a 'mere conduit' would not have been in breach of some duty under trust doctrine, agency, other fiduciary doctrine, or at least under contract, had the transferee not acted for benefit of the transferor/debtor's creditors." Moreover, the Court held that "the defendant's sense of moral obligation to her marriage and to her husband was not a legal obligation to refrain from exercising the full dominion and control that she unequivocally possessed by virtue of the funds being in her bank account, to which her husband had no access."

In addition, the Court rejected the Trustee's argument that Debtor's wife should have known of her husband's financial condition at the time and the fact the transfer was fraudulent. In summary the Court held:

> The Trustee's argument that her denial of knowledge of her husband's financial situation is "incredible," can rest only in a supposition that both parties to every marriage are completely forthright and forthcoming with each other about how well or how poorly each is doing at work. For such argument to be premised in some kind of notion of "inquiry notice" by virtue of marriage alone would be lacking both in legal authority and in empirical evidence: in this Court's experience, many spouses are the last to know the other spouse's financial situation despite a high degree of watchfulness. Even marriages that do not involve one spouse's conducting a business often come before this Court because of hidden bank accounts, brokerage accounts or credit card statements that do not come to the home address, concealing a spouse's problem with gambling or other addictions, or unwise investment choices. Indeed, the absence of legal authorities and empirical evidence aside, public policy would seem to mandate against imputations of knowledge between spouses that would require audited reciprocal financial statements between spouses when any significant inter-spousal transaction is to occur.

IX. REPEAT FILERS AND THE AUTOMATIC STAY

***In re Paley*, 390 B.R. 53 (Bankr. N.D.N.Y. 2008)**

Can a debtor avoid the prohibition of filing a second Chapter 7 by filing a Chapter 13 with no real payments to creditors?

In both cases, the Debtors had received a Chapter 7 discharge within 8 years and were therefore, prohibited pursuant to 11 U.S.C. §727(a)(8) from filing another Chapter 7 Bankruptcy. However, both incurred significant debt since those discharges, were below median income Debtors, and legitimately demonstrated non-exempt net income of $117 and negative $88 respectively. Both Debtors filed Chapter 13, and proposed plans that would pay their attorneys' fees any trustee commissions, and secured creditors. Neither plan allowed for any distribution to unsecured creditors. Each case, observed the Court, "is a disguised Chapter 7 case designed to satisfy attorney's fees and nothing else." As such, the Chapter 13 Trustee objected, claiming both were not proposed in good faith, claiming the filings frustrated the will of Congress and renders 11 U.S.C. §727(a)(8) meaningless. The Debtors both argued that they are living with little to no disposable income, have no non-exempt property, and filed Chapter 13 simply to deal with zealous creditors.

The Court first dismissed the Debtors' notion that BAPCPA had rendered the requirement of good faith under 11 U.S.C. §1325(a)(3) moot by a Debtor's narrow compliance with the provisions of 11 U.S.C. §1325(b). Prior to BAPCPA, courts relied on §1325(a)(3) and its good faith mandate to monitor the merits of the filing and proposed plan. The Debtors argued that they met the narrowed §1325(b) "ability to pay" criteria, and that somehow BAPCPA asks nothing more of a Chapter 13 Debtor. Citing *In re Lasota*, 351 B.R. 56 (Bankr. W.D.N.Y. 2006), Judge Littlefield found "Congress did not intend to abrogate the good faith requirement of §1325(a)(3) with the passage of BAPCPA. "Plans must still be proposed in good faith to be confirmed." Here, the Court, denied both Plans and concluded:

> These cases, basically Chapter 7 cases hidden within Chapter 13 petitions, blur the distinction between the chapters into a meaningless haze. To allow them to go forward would, in effect, judicially invalidate §727(a)(8)'s requirements of an eight year hiatus between Chapter 7 discharges and replace it with either the four year break required by 11 U.S.C. §1328(f)(1), or the two year gap mandated by 11 U.S.C. §1328(f)(2).

***In re Barrows,* 2008 Bankr. LEXIS 4600 (Bankr. N.D.N.Y. 2008)**

What must a debtor prove to rebut the presumption of abuse for a second Chapter 13 within a year of the dismissal of the first under 11 U.S.C. §362(c)(3)(C)?

The Debtor filed his second Chapter 13 petition within a year of the first and included an application to extend the automatic stay pursuant to 11 U.S.C. §362(c)(3). The Debtor's mortgagee opposed. Chief Judge Gerling used the case as an opportunity to review the factors laid out in *In re Galanis*, 334 B.R. 685 (Bankr. D. Utah 2005) and *In re Carr*, 344 B.R. 776 (Bankr. N.D.W.Va. 2006) in dealing with §362(c)(3) motions to extend the stay ("this Court has embraced the *Galanis* factors 'as somewhat of a beacon in an otherwise turbulent sea.'"). Those factors are as follows:

1. Whether there was a reasonable probability of success of the reorganization

(sufficient net income to fund plan);

2. Reason for the first case's dismissal (manipulation of bankruptcy system or circumstances beyond the debtor's control);

3. Reasonable assurance that whatever caused the dismissal of the prior case will not repeat in the current case;

4. Whether creditors have suffered any untoward prejudice between the dismissal of the prior case the filing of the current case; and

5. Any objection from the trustee or creditor to the Debtor's request for an extension of the automatic stay.

Chief Judge Gerling applied each of these factors to the facts in question, but prefaced the Court's ruling bottomed upon the underlying theme that "the real conclusion a bankruptcy court must reach is whether or not the debtor's subsequent filing is made in good faith..." Here, the Debtor's slaughterhouse business could not maintain the original plan primarily because of a flood/water damage that took ten months for the insurance company to pay, along with the USDA's delay in allowing operations to continue – all of which were no longer issues for the Debtor. Based on the foregoing the Court granted the Debtor's Motion.

In re Marcello, **2008 Bankr. LEXIS 901 (Bankr. N.D.N.Y. 2008)**

What factors must a repeat filing Debtor demonstrate to rebut the presumption of bad faith and extend the automatic stay?

The Debtor previous Chapter 13 was dismissed on January 8, 2008 for failure to timely file a plan. With a foreclosure looming, the Debtor filed another Chapter 13, claiming she had obtained new employment and could now propose a confirmable plan in the case – facts absent under the first Chapter 13 which resulted in her failure to submit a Plan. As a repeat filer under BAPCPA amended §362(c)(3), the Debtor was forced to immediately move for an order extending the automatic stay in her current Chapter 13 to prevent the foreclosure. Specifically the Debtor was required to demonstrate the filing was in good faith and rebut, by clear and convincing evidence, the presumption that the case not filed in good faith.

To determine whether the Debtor had rebutted the presumption of bad faith by clear and convincing evidence, Judge Gerling relied on the seven part test articulated in *In re Galanis*, 334 B.R. 685 (Bankr. D.Utah 2005) – a decision the Court found "stands as somewhat of a beacon in an otherwise turbulent sea." Those seven factors, and the Court's application to the facts at hand were as follows:

1. *Time lapse between the two cases* (shorter the duration, the greater the likelihood filed in good faith): the lapse here was minimal and there were no additional creditors between filing;

2. *Type of debts listed in Schedules*: the only listings were the mortgagee and two credit cards, so this element too favored the Debtor;

3. *Motivation for filing second case*: the increase in monthly income thought to occur during the first filing did not occur until the second, and with this increase the Debtor believed she could support a Plan and prevent foreclosure;

4. *Current case impacts on the creditors*: this factor did not favor the Debtor, since the mortgagee was currently stayed from foreclosing and the Debtor continued to increase the arrearage ($21,754 total);

5. *Why was the prior case dismissed*: while the Debtor contended she refused to file a Plan in the first case because she never obtained the new employment she expected, the Court noted that she never sought an extension of time to file the Plan or even responded to the Trustee's original motion to dismiss to try and explain the same. Since one exclamation may very well have been that the first case was simply a means to delay foreclosure with no real intention of filing a plan, this element did not favor the Debtor;

6. *Likelihood that the Debtor will be able to comply with monthly payments required in her Plan*: Based on the Schedule I and J, it appeared the Debtor would meet this requirement;

7. *Whether or not any creditor or trustee had objected to the request to extend the stay*: Here the Bank objected, but the other creditors and trustee had not.

Based on the totality of circumstances and utilizing the *Galanis* factors, the Court concluded the Debtor had rebutted the presumption of lack of good faith by clear and convincing evidence. However, the Court found that in extending the stay it had the ability to set certain terms and conditions. Specifically, the Court required the Debtor make her regularly post-petition mortgage payment to the Bank, and if she failed to do so at any point during the next six months the Bank could obtain relief from the stay by a simple affidavit of default without further notice to the Debtor.

***In re Parker*, 336 B.R. 678 (Bankr. S.D.N.Y. 2006)**

How does the automatic stay apply when only one of the debtors in a joint filing previously filed bankruptcy?

The Court held that, in joint Chapter 13 case filed by debtor-husband and debtor-wife, one of whom had been a debtor in two prior Chapter 13 cases which were pending within one year of petition date, and the other of whom had no prior cases pending within one year of the current joint case, automatic stay did not go into effect, pursuant to provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), only as to debtor-husband.

The [BAPCPA] added several provisions to the Bankruptcy Code wherein the automatic stay, which normally arises whenever a bankruptcy case is commenced, is either limited in duration or not triggered. Because this case is the third filed by debtor-husband in the past year, pursuant to 11 U.S.C. §362(c)(4) no stay went into effect, as to him, by the filing of this case. However, for the reasons set forth below, §362(c)(4) does not apply to joint debtor-wife, and the stay remains in effect as to her.

Section 362(c)(4) applies where two or more cases were pending in the year prior to the filing of the instant case and provides that "the stay under [Section 362(a)] shall not go into effect upon the filing of the later case." 11 U.S.C. §362(c)(4)(A)(i). The fact that §362(c)(4) applies to debtor-husband does not mean that the stay did not go into effect as to joint debtor-wife. The Court concluded that in a joint bankruptcy case, the application of 11 U.S.C. §362(c)(3) and (4) to each debtor must be analyzed separately.

***In re Lemma*, 394 B.R. 315 (Bankr. E.D.N.Y. 2008)**

Does a confirmed plan still bind a creditor if the stay was automatically dismissed under 11 U.S.C. §362(c)(3)?

The Court held amongst other things that, the mere fact that debtors' confirmed plan did not provide for immediate payment in full of accelerated mortgage debt did not entitle mortgage lender to relief from co-debtor stay, under bankruptcy statute providing for lifting of co-debtor stay at creditor's request if plan does not provide for payment of creditor's claim.

Because the Bank was served with the Plan and with notice of the hearing on confirmation, the terms of the Plan now govern the rights of the parties. The Bank is now barred by *res judicata* from arguing that Debtors had no right to cure and reinstate the mortgage and note. The results are not altered by the fact that in this case, the stay was terminated by operation of law under 11 U.S.C. §362(c)(3)(A), as opposed to 11 U.S.C. §362(d).

Post BAPCPA, a majority of courts have held that even where the stay has been terminated pre-confirmation by operation of law under §362(c)(3) of the Bankruptcy Code, the debtor still retains the right to bind the creditors under a confirmed plan. *See Kurtzahn v. The Sheriff of Benton County, Minn. (In re Kurtzahn),* 342 B.R. 581 (Bankr. D.Minn. 2006); *In re Fleming,* 349 B.R. 444 (Bankr. D.S.C. 2006). Under these cases, the creditor must preserve its rights after the stay is vacated by objecting to the plan or by completing the liquidation of the collateral pre-confirmation, or else it is bound to accept the treatment afforded under the confirmed plan.

The Court declined to follow the minority opinions, and held that once a plan is confirmed, the plan binds the debtor and its creditors regardless of whether the stay has been vacated prior to confirmation, so long as the debtor remains current under the plan.

X. VOLUNTARY DISMISSAL

***Schwartz v. Geltzer (In re Smith)*, 507 F.3d 64 (2d Cir. 2007)**

Is a debtor's ability to repay creditors cause to allow a voluntary dismissal of her bankruptcy?

With only roughly $14,000 in debt, the Debtor filed a Chapter 7 Bankruptcy, and included as an asset a personal injury claim. The trustee appointed a special counsel to prosecute the Debtor's claim. After a plethora of errors by the special counsel in that prosecution, the Trustee requested an order of the Court removing the attorney from his appointed position. Despite these errors, the Debtor became enamored with the attorney and objected to his removal. After the Bankruptcy Court granted the Trustee's request, the Debtor petitioned the Court for the voluntary dismissal of her case to allow for the attorney to continue representing her in the personal injury litigation. In support of that request, the Debtor obtained a third-party to front the $14,000 (placing a lien on her possible P.I. damages award) needed to repay her creditors immediately. The underlying court denied the Debtor's application, citing not only the attorney's previous incompetence and an undefined prejudice to her creditors, but also that the Debtor's ability to repay creditors was not adequate cause for dismissal.

On appeal, the Second Circuit citied 11 U.S.C. §707(a) and distinguished earlier case law that found a debtor's ability to repay her debts could not constitute cause for dismissal. Those earlier cases, according to the Second Circuit, were based on a creditor's ability to involuntarily dismiss a bankruptcy based on the debtors' ability to repay – thereby forcing the debtor into "a non-uniform mandatory chapter 13." When it is the debtor seeking the voluntary dismissal of the bankruptcy, the debtor's ability to repay her creditors should be considered by the Court. The Second Circuit went on to caution that a debtor's ability to repay her debts is not *per se* grounds for dismissal, but is simply part of the required inquiry into whether dismissal would be in the best interest of all parties in interest. Under the facts in *Schwartz*, the Second Circuit reversed the earlier court's decision, finding the dismissal would benefit all of the parties in interest to an extent outweighing any concerns of the Trustee.

XI. 45-DAY AUTOMATIC DISMISSAL

A. Does a Bankruptcy Court have discretion to waive the 11 U.S. C. § 521(a)(1) filing requirement after the expiration of the 45-day automatic dismissal deadline set forth in 11 U.S.C. §521(i)(1)?

11 U.S.C. §521 was amended by BAPCPA to expand the financial disclosure duties of debtors. 11 U.S.C. §521(a)(1) requires a debtor to file a list of its creditors and other detailed financial information, "unless the court orders otherwise." Should a debtor fail to file the required financial information within 45-days of the filing of the petition, 11 U.S.C. §521(i)(1) states that the debtor's case will be "automatically dismissed effective on the 46th day after the date of the filing of the petition."

Courts have been split on whether a bankruptcy court has discretion to waive the "automatic dismissal" found in §521(i)(1). There are courts that have held that the bankruptcy courts do have the discretion to waive the filing requirement after the deadline has past and there are courts that have held that the 45-day deadline applies to the courts as well as the debtors. The First Circuit was the first Circuit Court of Appeals to rule on this issue.

***Miranda v. Acosta-Rivera (In re Acosta-Rivera)*, 557 F.3d 8 (1st Cir. 2009)**

The Court stated that they were reluctant to read into BAPCPA's new limits on judicial discretion that would encourage bankruptcy abuse, rather than discourage it. Congress' intent when enacting BAPCPA was to remove as many "weapons" as possible from the possession of abusive debtors. The Court declined to read the statute mechanically, which although "textually plausible…fails to harmonize the letter and purpose of the statute." Instead, the Court decided to take the approach that "recognizes that missing information may or may not be required, in a practical sense, depending upon what is deemed material by the court many months (or even years) after the bankruptcy petition has been filed."

The Court perceived that Congress intended for a bankruptcy court to have the meaningful opportunity to discern whether the missing information is "required" in that specific case. Thus, if information has become irrelevant or extraneous, the court may "order otherwise" and waive the dismissal requirement of a debtors case. The Court was very careful to iterate that it was not deciding whether a bankruptcy court had "unfettered discretion" with which to waive the disclosure requirements "*ex post*." The Court noted that, if there is no continuing need for the information or if waiver of the "automatic dismissal" is necessary so as to not enable a debtor's furtherance of its abuse of the process, a bankruptcy court has discretion to take such action. Lastly, the Court stated that "the great divide in [§521] is between information that is required and information that is not. The Act allows courts to do the sifting suggested by that divide without rigid adherence to the [45-day] deadline."

***Wirum v. Warren (In re Warren)*, 568 F.3d 1113 (9th Cir. 2009)**

The Court agreed with that the approach of the First Circuit in *Acosta-Rivera*, and found that the holding is consistent with Congressional intent in enacting BAPCPA and with the language of 11 U.S.C. §521. The Court examined the statutory language of §521, and recognized that its interpretation of the statute is inconsistent with the majority of the bankruptcy and district courts that address this question. However, the Court noted that although the majority view is appealing and would "all but guarantee" the dismissal of a case upon expiration of the deadline, it also enables abusive debtors to gain the "automatic dismissal" and thus encourage more bankruptcy abuse. Congress specifically enacted BAPCPA to prevent further abuse, and thus, the Court held that the bankruptcy court was within its discretion to waive the filing requirement despite the 45-day deadline's expiration.