STEVEN W. RHODES VETERAN'S DAY CONFERENCE

CASE LAW UPDATE

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Glencove Holdings, LLC v. Bloom, 2022 WL 2679049 (10th Cir. 2022) – Section 523(a)(2) excepts from discharge money, property, services or extension, renewal, or financing of credit to extent obtained by false pretenses, false representation or actual fraud. Creditor must prove 1) debtor made a false representation (2) with intent to deceive (3) creditor relied on representation (4) reliance was reasonable and (5) debtor's representation caused creditor to sustain loss. However, it may not be necessary that Debtor personally obtained money, property or services if Debtor received some benefit from transaction. Court found it unnecessary to determine whether debt would be excepted if Debtor did not receive any indirect benefit. Debtor owned company that acted as Broker in purchase and sale of aircraft. Debtor's company was hired by purchaser to locate suitable aircraft. Debtor found aircraft, had his own company buy it, and then resold it at significantly higher price to Purchaser without disclosing acquisition cost or "spread". Debtor was sole member of Brokerage Company and Brokerage Company received money from sale, providing at least indirect benefit to Debtor sufficient to deny discharge.

In re Simply Essentials, LLC, 2022 WL 1026045 (Bankr. N.D. Iowa 2022), *certificate for direct appeal granted* _ WL _ (2022) – Section 363(f) allows Trustee to sell "property of estate". Noting significant split of authority on whether avoidance actions are "property of estate" capable of being sold, Court concluded that Chapter 5 actions are property that can be sold, adopting holding in *In re Murray Metallurgical Coal Holdings, LLC*, 623 BR 444 (Bankr. S.D. Ohio 2021). Plain language of Section 541 provides that property of estate includes any interest in property that estate

acquires after commencement of case and broadly and includes property of all descriptions, tangible and intangible, as well as causes of action. Power to bring Section 5 claims is not exclusive to Trustee as Court, where Trustee declines or is unable to bring action for benefit of estate, may afford Creditor derivative standing where necessary and beneficial to fair and efficient resolution of case. Conclusion that Trustee's causes of action are property of estate makes further sense for practical reasons as Trustees often are unable to pursue potential causes of action because estate does not have funds on hand to do so which would allow parties to escape claims if claims cannot be sold or transferred.

Coughlin v. Lac du Flambeau Band of Lake Superior Chippewa Indians, 2022 WL 1438867 (1st Cir. 2022) – Congress may abrogate tribal sovereign immunity if it unequivocally expresses purpose. Courts will not lightly assume Congress intended to undermine Indian self-government. Congress need not state its intent in any particular way and Congress is not required to use "magic words" to make intent to abrogate clear. Section 106, adopted in response to two Supreme Court cases that held that prior section was insufficiently clear to abrogate state and federal sovereign immunity, unequivocally abrogates immunity as to any "governmental unit" to extent set forth. "Governmental unit" defined as United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of United States, a State, a Commonwealth, a District, a Territory, a municipality, or foreign state; or other foreign or domestic government, covers essentially all forms of government and is not limited to units that trace origins to Constitutional system of government. Native American Tribe is "government" because it acts as governing authority of members and territories. Tribe is domestic, not foreign, as Tribe belongs or exists within boundaries of United States. Court rejected Sixth Circuit holding in *In re Greektown Holdings, LLC,* 917 F.3d 451, 460-61 (6th Cir. 2019).

III. Lease v. Security Interest

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IV. Discharge

In re City of Detroit, 642 BR 807 (Bankr. E.D. Mi. 2022) – Discharge is non-waivable affirmative defense Party does not waive defense and is not precluded from raising defense merely because party does not present defense in earlier filed pleadings. Debtor's delaying raising issue until after Debtor suffered adverse judgment did not preclude assertion of defense.

Berry v. Fay Servicing, LLC, 2022 WL 4115752 (6th Cir. BAP 2022) – Lender violated discharge injunction when lender attempt to collect debt from Debtor personally. Debtor filed Chapter 7 and obtained discharge. Bank of New York Mellon held mortgage serviced by Wells Fargo. After entry of discharge, Lender proceeded with foreclosure and was successful bidder at sale. Lender then obtained State Court Order removing Debtor from possession and quieting title in favor of Lender. Debtor ultimately voluntarily vacated after "cash for keys" deal. Shortly thereafter, Wells Fargo advised Debtor that servicing had been transferred to Fay, and included "prominent" notice that information was provided solely for information and was not effort to collect debt. Wells Fargo sent second letter with "Final Escrow Review" that again stated letter was not effort to enforce or collect debt. Fay then sent Debtor multiple letters with instructions on how to make mortgage payments; requests for Debtor's Taxpayer ID Number; Form W-9 stating that if Debtor did not

provide requested information Debtor faced $50 penalty; bankruptcy options; "Fair Debt Collection Practices Act Validation Notice"; letter stating that the property was vacant or abandoned; letter asking for information on homeowners insurance and demanding that Debtor pay for force placed insurance; advising that the mortgage payment is being increased to account for an insurance escrow; another mortgage statement; Fay called Debtor to advise of Fay's intent to file suit and followed up with written notice of default and intent to accelerate, foreclose and sell property; and additional letters regarding insurance and mortgage statements. Actions constituted violates of discharge injunction as intended to induce payment; and because Debtor no longer held interest in property and neither Fay nor BNY were secured creditors, provision of Section 524(j) did not apply. There was no fair grounds for debate that Fay's actions were violations of injunction and were not objectively reasonable where discharge had been entered more than 5 years earlier and Debtor vacated the property 2 years earlier. Fay repeatedly sent letters even after Debtor advised Fay in writing of discharge and included copy of discharge order. Sanctions warranted under Court's civil contempt power, including actual damages intended to compensation Debtor for loss totaling $449.72. Punitive damages warranted where conduct was clearly contemptuous as long as amount awarded is not excessive. Award of $10,200 in punitive damages warranted given nature and degree of conduct and was not excessive given Fay's financial ability and resources. However, Court would not award damages for "mental anguish" or emotional distress where entitlement to damages for emotional distress is unsettled and Debtor did not present corroborating evidence of any emotion harm. As to Wells Fargo, Court found not discharge violation. Transfer of servicing is not violation of discharge injunction as transfer is not action to collect debt. Servicer is not liable for Lender's independent violations of discharge injunction. Correspondence that is informational in nature even if it includes payoff amount is not actionable as long as it does not demand payment.

V. Fraudulent Transfers – Tax Sales

Hall v. Meisner, 51 F.4th 185 (6th Cir. 2022) – County's taking of title as payment for property tax delinquencies that amount to mere fraction of value of property violates Takings Clause of Fifth Amendment. Allowing County to take property deprived Plaintiff of property including equitable title without public auction and without payment. Property owner's interest in property is not limited to surplus proceeds after foreclosure sale, as owner's rights exist in property prior to and at time of foreclosure sale and do not materialize only after property sold. While decision may have serious fiscal impact, County forcibly took property worth vastly more than debt and did not refund any of the excess.

Lowry v. Southfield Neighborhood Revitalization Initiative, 2021 WL 6112972 (6th Cir. 2021) – Debtor may contest otherwise property concluded property tax sale as fraudulent transfer. *Rooker-Feldman does* not preclude Federal Court review of prior state court judgment confirming foreclosure sale as State Court Judgment is independent from cause of action under Section 548. Amount paid bore no relationship to value of property precluding application of *BFP v. Resolution trust Corp.* Treasurer sold property to City of Southfield for amount of taxes owed, which was roughly 10% of value of property. Tax foreclosure process allows local government to purchase property by paying amount of outstanding taxes due, with no relationship to value of property and no opportunity for competitive bidding by other interested parties.

VI. Attorney Fees

In re Village Apothecary, Inc., 2022 WL 3365131 (6th Cir. 2022) – Bankruptcy Court can reduce fees based on results obtained when determining reasonableness of fee. Court's decision to limit fees to 50% of recovery based on results obtained not abuse of discretion. While fees are determined in first instance using lodestar factors, Court may balance fees based on balancing amount in controversy sand result s obtained. Fees calculated by lodestar would have consumed 99% of assets estate which did not comport with fees in non-bankruptcy matters where counsel routinely negotiate fee reductions with clients. Court not limited to consideration of factors at time services performed. Consideration of services at time performed not inconsistent with consideration of fees at end of matter. Services that appeared beneficial at time are not automatically denied compensation to counsel where matter is ultimately unsuccessful. Reduction in fees based on minimal recovery of $38,000 versus $1.6 million estimated by counsel as potential claim, and counsel sought $37,000 for recovery of $38,000 producing no benefit to anyone other than counsel. While circumstances of each case will vary, decision to reduce fees where results obtained were minimal not abuse of discretion.

VII. Judicial Estoppel

Stanley v. FCA US, LLC, 51 F.4th 215 (6th Cir. 2022) - Judicial estoppel bars an undisclosed suit when: (1) debtor assumed position contrary to one asserted under oath in bankruptcy; (2) bankruptcy court adopted contrary position either as preliminary matter or as part of final disposition; and (3) debtor's omission did not result from mistake or inadvertence. Debtor's action for alleged violation of Family Medical Leave Act barred where Debtor did not disclose action in bankruptcy schedules. Debtor was fully aware of claim where Debtor had filed grievance before bankruptcy filing yet did not disclose claim in either Schedules or Statement of Financial Affairs. Bankruptcy Court relied on representation that Debtor did not have cause of action in confirming Chapter 13 Plan. Estoppel will not preclude claim where non-disclosure was inadvertent, taking into account whether: (1) debtor had knowledge of facts underlying undisclosed claims; (2) debtor had motive to conceal undisclosed claims; and (3) omission was made in bad faith. Debtor had knowledge of facts underlying the undisclosed claims as Debtor had already invoked Union's grievance process. Debtor had material interest in non-disclosure even where Debtor's Plan required 100% repayment to creditors where Chapter 13 filed to consolidate debts, place debts "on hold" and avoid foreclosure. Process requires Debtor to proceed in good faith. Court, Trustee and Creditors can make informed decision only if Debtor accurately discloses assets or makes amendments as needed to disclose potential causes of action. Had Debtor disclosed cause of action, Court and creditors may have taken less favorable approach to Chapter 13 and Debtor stood to benefit from omitted claims. Omission is in bad faith where Debtor submitted amended schedules to disclose cause of action only after Defendant's counsel questioned Debtor about omission and sent demand letter raising judicial estoppel argument. Late disclosure omitted any estimate of value of suit although Debtor had made demand on Defendant for more than $600,000 in damages. Late, perfunctory disclosure does not overcome appearance of bad faith. While judicial estoppel may allow wrongdoer to "get away with it" Debtor cannot be excused from duty of truthfulness and candor.

VIII. Collateral Estoppel and Res Judicata

US v. Schafer & Weiner, PLLC, 2022 WL 3151809 (6th Cir. 2022) – IRS collaterally estopped from seeking disgorgement of fees from Debtor's Counsel where IRS raised issue of disgorgement,

Bankruptcy Court held that following dismissal Court could not order disgorgement to IRS, IRS appealed and then voluntarily dismissed appeal. IRS then filed separate action against Attorneys seeking turnover and return of funds paid to Attorneys by Debtor. Court held that IRS could have litigated claims in Bankruptcy process and IRS decision to dismiss appeals precluded later action.

Long v. Piercy, 21 F.4th 909 (6th Cir. 2021) – Principals of res judicata and collateral estoppel apply in dischargeability actions under Section 523. Res Judicata precludes relitigation of issues that were or could have been raised in prior action. Collateral Estoppel precludes relitigation of issues that were actually and necessarily litigated in prior action between same parties or privies. Res judicata will apply to amount of debt but not dischargeability. Collateral estoppel applies to preclude relitigation of facts actually and necessarily determined in prior proceedings. Embezzlement does not require showing of fiduciary capacity but requires proof that debtor entrusted property to third party, party appropriated property for purposes other than for which it was entrusted, and circumstances indicate fraud. Embezzlement differs from larceny as embezzlement involves property legally entrusted while larceny involves property wrongfully obtained. Debtor and Plaintiff were partners in business. Plaintiff sued Debtor alleging that Debtor misappropriated portion of profits of business. State Court judgment between same parties and resulted in final judgment not entitled to preclusive effect where Judgment was unclear whether Judgment was based on wrongful misappropriate or mere breach of contract. Allegations in contract would support finding of both conversion and breach of contract by alleging that Debtor allegedly wrongfully diverted funds for his own purpose. Even if state court judgment predicated on breach of contract, that does not preclude finding that breach also constituted embezzlement or larceny. Because Judgment did not specify basis of remedy, factual findings in judgment could not be "necessary" to legal conclusions.

Gavola v. Asbra, 2022 WL 2541779 (Bankr. S.D. Ohio 2022) – Section 523(a)(19) renders non-dischargeable any debt resulting from violation of State or Federal Securities laws or common law fraud, deceit or manipulation in connection with sale or purchase of security and includes any judgment or consent order; any settlement entered into by debtor; or any court or administrative proceeding. Issue preclusion applies in adversaries to determine dischargeability of facts or legal issues determined in prior litigation are relevant to elements of Section 523 claim. Once question is determined by Court of competent jurisdiction, matter cannot be disputed in later suit between same parties or privies. Preclusion applies to arbitration awards where subsequent proceeding is between same parties. Preclusion applies where later action presents (1) identical issue; (2) actually litigated in former proceeding; (3) necessarily decided in former proceeding; (4) former decision is final and on merits; (5) party against whom preclusion sought is either same, or in privity with party in former proceeding; and (6) issue preclusion in particular setting would be fair and consistent with sound public policy. Arbitration decision held that Debtor committed securities fraud by misleading Plaintiffs and investing funds in properties that were unsuitable and ultimately resulted in total loss. Arbitrator concluded that Debtor owed fiduciary duty to Plaintiffs and breached that duty result in loss. Arbitrator concluded that Debtor violated State law by selling securities using untrue statements of material fact. Arbitration involved same facts and was litigated by same parties who were all represented by counsel; determinations of arbitrator were necessary to ruling; decision was, by consent of the parties, final; and parties to litigation were parties to arbitration. Decision to resolve dispute by binding arbitration was mutual agreement. Issue preclusion principles were fair and consistent with sound public policy.

IX. Voluntary Dismissal

Harang v. U.S., 634 BR 731 (6th Cir. BAP 2021) – Rule 41 provides that action may be dismissed at plaintiff's request on terms Court considers proper. Plaintiff sued IRS seeking determination that tax debt was dischargeable. Plaintiff did not comply with discovery requests and Court entered two separate sanctions orders that effectively precluded Plaintiff from prevailing at trial. Plaintiff sought to voluntarily dismiss which Court indicated would be granted only with prejudice and that included factual findings from prior sanctions order. Plaintiff did not withdraw request to dismiss and Court entered Order Dismissing with prejudice with language that Plaintiff had not abated any of the defects which resulted in prior sanctions order. Dismissal order did not make new factual findings beyond incorporating prior findings. Inclusion of factual findings consistent with both Rule 41 and Rule 37. While additional findings may have been dicta given that Plaintiff agreed to dismissal with prejudice, that does not render Court unable to include findings or make findings abuse of discretion.

In re Minogue, 2021 WL 4453589 (Bankr. D.S.C. 2021) – Debtor has absolute right to voluntarily dismiss Chapter 13 case that was not previously converted from Chapter 7, but Court has authority to condition dismissal under Section 349. Chapter 13 case be dismissed with prejudice as to any voluntary case for two years and Debtor ordered to accept service of process and all notices from Creditors regarding state court matters by mail to a designated address.

In re Rios, 2016 WL 8461532 (Bankr. D. Kan. 2016) - Chapter 13 debtor can voluntarily dismiss at any time and for any reason under Section 1307(b), bankruptcy court retains discretion to condition dismissal including excepting debts that are dischargeable in current case from discharge in future case; or bar debtor from refiling for a period of 180 days. Courts can only exercise powers after notice and hearing and receiving evidence of cause or of other misconduct.

X. Plan Modification – CARES Act

In re Nelson, 2022 WL 6795096 (Bankr. E.D. Wis. 2022) – Debtor who previously modified plan to extend term beyond 60 months cannot later attempt to modify Plan for some other reason. Prior CARES Act extension under now-expired Section 1329(d) forecloses Debtor's ability to later modify the Plan. Section 1329(c) provides "but the court may not approve a period that expires after five years after (the first payment due date)". With the sunset of the CARES Act, there is no statutory basis to approve a modification that extends beyond 60-months. Fact that current modifications did not seek to extend or change the Plan term did not later problem that Section 1329(b) requires that "the Plan modified under Section 1329" comply with Section 1329(c), not merely that "the modification" comply. Congress could have included a provision continuing Section 13125(d) for all cases pending as of the date of the sunset of the CARES Act but presumably chose not to.

XI. Exemptions

In re Nadeau, 2022 WL 456708 (Bankr. N.D. Ohio 2022) – Debtor cannot exempt portion of property recovered by Trustee under Section 544, 548 or 549. Property owned in a self-settled revocable trust can be exempted as Debtor's homestead. Transfer of property from individual to self-settled trust with Debtor retaining "lifetime beneficiary" conveyed remainder interest which

was avoidable, even where property, but for transfer, would have been completely exempt as Debtor's homestead. Debtor owned her home. 20 months pre-petition, she conveyed property from herself to self-settled, revokable living trust with Debtor as the "lifetime beneficiary". When Debtor filed for Chapter 7, she still resided in the home and there was no dispute that the property was Debtor's "homestead". Before transfer, Debtor was vested with entire property, both ownership and present right to use and occupy. After transfer, Debtor retained present right to use and occupy but the right to possession after Debtor's lifetime beneficial interest expired (the "remainder") now belonged to Trust. Debtor could exempt value of lifetime beneficial interest but separate value of the reminder recovered by the Trustee could not be claimed as exempt under Section 522(g).

In re Richards, 2022 WL 99503 (Bankr. W.D. Ky. 2022) – Debtor cannot exempt proceeds of sale of homestead where house was sold pre-petition. Debtor sold house and placed proceeds in attorney trust account. Debtor filed for bankruptcy and claimed proceeds exempt under Section 522(d)(1) as State law allowed proceeds to remain exempt if proceeds can be traced. Section 52(d)(1) does not include exemption for proceeds of sale of homestead as Section 522(d)(1) references aggregate interest in real estate or personal property used as residence and cash in bank account was not "used as residence". While proceeds may have been exempt under State law, that does not control scope or interpretation of Federal exemptions under Section 522(d). Contrary result would allow Debtor to benefit from both State and Federal Exemptions which is not permitted as exemptions are mutually exclusive. Debtor chose to use federal exemptions in her bankruptcy petition - state exemptions are rendered inapplicable.

In re Weber, 2022 WL 2827474 (Bankr. M.D. Fl. 2022) – 42 USC Section 407 excludes SSI from execution, levy, attachment, garnishment or other legal process and no other law can limit or modify exemption except by express reference to Social Security Act. 26 USC Section 3402 provides that payment of withheld income to IRS is treated as if it was withheld from payment of wages. Funds withheld from Social Security Benefits do not lose protection under Section 407 after being withheld by IRS and alter refunded to Debtor. Social Security recipient may elect to have taxes withheld but election is entirely in control of taxpayer. Election to withhold benefits only IRS and does not operate as waiver of Section 407. Debtor had monthly SSI of $1787 and monthly wages of $378. He received tax refund of $5,536.00. Debtor claimed portion of refund exempt under state law and claimed balance of $3751 as Social security Benefit. Court overruled Trustee's objection as funds were and remained Social Security Benefits.

XII. Automatic Stay

Kelsay v. Kelsay, 2022 WL 973003 (6th Cir. 2022) – Section 362 does not stay action to establish or modify domestic support obligation order. Domestic Support Obligation is debt that is in nature of maintenance or support without regard to whether the State Court specifically designated the award as such. After Debtor filed for bankruptcy, ex-spouse filed Motion in State Court to modify support order to account for past-due support. State Court Order increasing amount of support and order for Debtor's employer to withhold higher amount constituted establishment or modification of support within exception to stay. Contempt hearing based on non-payment would have violated stay but request for State Court to modify support to account for unpaid support is not contempt. Tax intercepts resulting from increased award did not violate stay under Section 362(b)(2)(F). However, non-filing spouse's attempt to recover unreimbursed medical expenses by filing Motion

for Contempt violated stay as expenses were not in nature of support, warranting award of damages and attorney fees to Debtor and against ex-spouse

XIII. Bifurcated Fee Agreements

In re Baldwin, 2021 WL 4592265 (Bankr. W.D. Ky. 2021) – Bifurcation was inherent attempt to avoid Code and Rules by allowing Counsel to "walk away" after filing. Where Counsel filed petition, counsel is obligated to perform all services in ensuing Chapter 7 regardless of what fee agreement may state. Client's failure to sign post-petition fee agreement would not relieve Counsel of duty to prepare and file remaining papers and represent Debtor in Chapter 7 other than in adversary proceedings.

In re Carr, 613 BR 427 (Bankr. E.D. Ky. 2020) – Bifurcated fee agreement approved where attorney and client both signed fee agreement; attorney did not advise Debtor to incur debt on eve of filing for purposes of paying attorney fees; attorney did not take payment for post-petition services until Debtor paid full filing fee; overall fee was reasonable; and client consented after receiving comprehensive written explanation of how fees would be structured and what services were included.

XIV. Violation of Stay – Commencement of Continuation of Foreclosure Proceedings

In re Wright, 2022 WL 2498770 (Bankr. E.D. Mi. 2022) – Creditor did not violate stay by proceeding with foreclosure sale where Property was owned solely by Debtor's non-filing spouse. Although Debtor resided in house, Debtor was not on title and because no proceedings had commenced for dissolution marriage Debtor had not acquired any martial property interest in property. Debtor's alleged contribution to mortgage payments and utility bills does not create a constructive trust in favor of Debtor. Constructive trust may be imposed where necessary to do equity or to prevent unjust enrichment where property has been obtained through fraud, misrepresentation, concealment, undue influence, duress, taking advantage of one's weakness, or necessities, or other similar circumstances which render it unconscionable for holder of legal title to retain and enjoy property. Constructive Trust is equitable remedy that does not exist until Court imposes it. No Court had imposed constructive trust on property as of date of foreclosure sale and Debtor did not allege that her spouse obtained some advantage through fraud, misrepresentation or concealment or that it would be unconscionable for Spouse to retain and enjoy ownership. Even where evidence would support constrictive trust, court will not impose one where there are intervening interests of bona fide purchaser. Court would not retroactively create constructive trust. Purchaser at duly held foreclosure sale is bona fide purchaser whose interest cannot be cut off by imposition of constructive trust. Debtor's "mere possessory interest" did not amount to legal or equitable ownership and possession was incidental to fact that Debtor resided at property with permission of owner. Further, foreclosure sale did not deprive Debtor of possessory right where she remains in possession of the property and Husband retains redemption right.

Bayview Loan Servicing, LLC v. Fogarty, 2022 WL 2443388 (2d Cir. 2022) – Naming Debtor as defendant in foreclosure action violates stay even where Debtor has no interest in property. Property was owned by LLC in which Debtor owned 99% membership interest. After LLC stopped paying mortgage, Lender commenced foreclosure proceedings naming LLC and Debtor as defendants. After Lender completed foreclosure and days before sale, Debtor file Chapter 7.

Lender contended that there was no stay as Debtor did not own property. Curt held that Lender willfully violated stay. Debtor's possessory interest was property estate protected by stay. Sale was continuation of pre-petition action against debtor and was attempt to enforce judgment entered pre-petition. Creditor's actions can violate two separate provisions of Section 362 simultaneously, nothing in Section 362 make one violation exclusive as to others. Whether or not sale impacted Estate, action against Debtor personally was violation. Lender had no reasonably objective basis to believe that actions were lawful subjecting lender to damages including punitive damages for willful violation.

Connor v. Property Fund 629, LLC, 2022 WL 2062214 (Bankr. M.D. Tn. 2022) – Automatic stay applies to stop eviction where property has previously been foreclosed and Debtor as of petition date had no interest in property but remained in possession. Retention of property alone is possessory interest which is property of estate and protected by Section 362. Party has affirmative duty to act where failure to do so would violate stay such as when party places into motion collection efforts pre-petition that will continue post-petition unless party takes action to stop further collections. Creditor must take necessary steps to halt or reverse pending State Court actions or other collection efforts commenced prior to the filing of petition, including garnishment of wages, repossession of automobile, foreclosure of mortgage or judgment lien and maintain or restore status quo as it existed at time of filing of petition. Post-petition eviction does not maintain status quo as discussed in *Fulton*. However, affirmative duty of attorney does not arise instantaneously upon being informed of bankruptcy filing where attorney had not been able to contact clients even after prompt and diligent inquiry and eviction occurred less than 30 minutes after attorney first learned of bankruptcy filing.

XV. Post-Petition Appreciation

In re Castleman, 2022 WL 2392058 (W.D. Wa. 2022) – Post-petition pre-conversion equity in Chapter 13 become property of estate in Chapter 7. Section 348 unambiguously sweeps into Chapter 7 estate any property acquired after commencement of Chapter 13 and before conversion. Section 541 sweeps in all property owned by Debtor as of commencement including proceeds, profits and rents except to extent resulting from earnings from services performed by individual debtor post-petition. Post-petition appreciation is not separate, after-acquired property interest but is part of property itself. Property becomes property of Chapter 7 estate at conversion, including appreciation in value from commencement of case. If Debtors made mortgage payments post-petition Debtor may apply for administrative claim status under Section 503(b).

In re Parker, Case No. 19-50811 (Bankr. E.D. Mi. 2022) – Post-petition equity in property becomes property of Chapter 7 Estate upon conversion. When Debtor filed case, Debtor able to exempt all of the equity in home. Debtor covered 2 years later by which point value had increased beyond amount Debtor could exempt. Post-petition appreciation is incidental to property itself. Upon conversion, property became property of Chapter 7 estate including appreciated value.

In re Adams, 2022 WL 2079725 (Bankr. W.D. Mi. 2022) – Section 348 sweeps into Chapter 7 estate all property of estate that remained in possession of Debtor as of date of conversion. Section 541 sweeps in all legal or equitable interests as of commencement of case with intent to sweep in every piece of property to pay claims. Value is not separate asset apart from pre-petition property but is attribute or incident of property itself. As stated by Sixth circuit in *Coslow*, post-petition

increase in equity becomes part of bankruptcy estate as long as equity does not result from payment for post-petition services. Valuation in Chapter 13 is not binding on Chapter 7 estate. Trustee may sell property and account to Debtor for exemption with Trustee being able to require Debtor to relinquish possession. Court could not determine whether property was of inconsequential value as parties did not present evidence of value and court inclined to wait for Trustee to receive purchase offer to set valuation. Debtors not permitted to surcharge collateral for costs incurred to protect property or to receive administrative expense as any increase in value attributable to post-petition mortgage payments did not arise from transactions with Estate and did not directly and substantially benefit Estate. Transactions were between Debtors and third parties (mortgage company and taxing authorities) and in general parties not entitled to priority claims for expenses parties would have incurred regardless of possible priority treatment as expenditures were to benefit Debtor's own interests.

XVI. PPP Loans

Brady v. US Small Business Administration, 639 BR 548 (Bankr. N.D. Ca. 2022) – Funds received by Debtor for PPP loan that were not disbursed and were returned to SBA were not property of estate and payment to SBA was not avoidable. Borrower received funds in trust because after receipt of loan Borrower decided to return fund to SBA. Fund were held in trust to facilitate intention of parties to return loan to lender as lender was rightful owner of funds. Transfer also not made on account of antecedent debt where Borrower elected to terminate loan within contractual safe harbor period so funds remained property of lender when returned. Transfer also in ordinary course of business as contract provided for safe harbor period within which Borrower could return funds to SBA with no further liability and Borrower complied with safe harbor provisions. While ordinary course of business normally involves payment history between Debtor and Creditor, where case involves one-time transaction Court looks to similarly situated transfers between parties not headed into bankruptcy.

XVII. Priority - Other Tax Claims

In re Szczyporski, 2022 WL 1483594 (3d Cir. 2022) – Shared Responsibility Fee under ACA is tax, not penalty, and is afforded priority treatment under Section 507(a)(8). Analysis of tax versus penalty focus on whether obligation is (1) involuntary pecuniary burden laid upon individuals or property; (2) imposed by or under authority of legislature; (3) for public purposes; (4) under police or taxing power; (5) universally applicable to similarly situated entities; and (6) whether granting priority status to government will disadvantage private creditors with like claims; plus any other relevant factors such as whether taxpayer received particularized benefit as payment made for benefit not shared by others is generally not tax. SRP is tax as payment is an involuntary pecuniary burden upon individuals who fail to maintain minimum health insurance coverage; imposed by Congress; levied for public purpose of expanding health insurance coverage; imposed under Congress's taxing power; it is universally applicable to all taxpayers subject to the Individual Mandate who do not maintain minimum health insurance coverage; and granting priority status to IRS will not disadvantage similarly situated private creditors. Payment calculated and administered like tax: (1) paid into Treasury by taxpayers when they file tax returns; (2) does not apply to individuals who do not pay federal income taxes because household income is too low; (3) is calculated using factors familiar to tax context such as "taxable income, number of dependents, and joint filing status"; (4) is found in Internal Revenue Code and enforced by IRS;

(5) is assessed and collected in same manner as taxes; and (6) produces at least some revenue for government. While payment is not traditional tax on income, tax is calculated based on income for purposes of Section 507(a)(8).

IRS v. Juntoff, 636 BR 868 (6th Cir. BAP 2022) – Section 507(a)(8) affords priority treatment for tax on or measured by income or gross receipts and excise taxes on pre-petition transactions. Tax is pecuniary burden laid upon individuals or property for purpose of supporting Government while penalty is exaction imposed as punishment for unlawful act. Court must engage in functional examination of applicable statutory scheme taking into account whether payment is (a) involuntary pecuniary burden; (b) imposed by, or under authority of legislature; (c) for public purpose; (d) under police or taxing power of state; (e) pecuniary obligation is universally applicable to similarly situated entities; and (f) according priority treatment to the government claim not disadvantage private creditors with like claims. "Shared Responsibility Payment" is "tax measured by income". Charge is measured by income as amount is determined in part by Debtor's taxable income. Section 507 does not require that tax be calculated solely or primarily based on income but only that it to some extent be measured by income. Charge is "universally applied" even though Government has discretion to grant hardship exemptions as charge universally applied to all persons who are in position to be subject to payment, not including individuals who are exempt. Charge was not "penalty" where individual mandate clearly aims to induce purchase of health insurance, failure to do so is not unlawful. Neither ACA nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring payment to IRS.

U.S. v. Chesteen, 2020 WL 859688 (5th Cir. 2020) – Section 507(a)(8)(E)(i) creates priority status for excise taxes, defined as tax levied on an activity. Priority claims deviate from the presumption of equal distribution of funds to creditors and are tightly construed. In Chapter 13, priority claims must be paid in full. Shared Responsibility Payment ("SRP") under Affordable Car Act is not priority tax claim. Excise taxes generally refer to tax imposed on manufacture, sale, or use of goods, or on an occupation or activity, or transferring property, or engaging in business in corporate capacity, all of which involve discrete act by person or entity being taxed. SRP is not excise tax. SRP is not levied in connection with any transaction and instead applies when individual does not act to obtain health insurance and is designed to encourage person to act. Taxpayer's choice not to participate is not "act".

XVIII. Section 727(a)(5)

Vara v. McDonald, 29 F.4th 817 (6th Cir. 2022) – Section 727(a)(5) allows Court to deny discharge where Debtor does not satisfactorily explain loss of assets to meet obligations. Intent is not element of action. Section 727(a)(5) has on "lookback" period or imitation. While Courts normally focus on 2 years pre-petition, this is not fixed or limiting period and longer lookback is warranted where unexplained losses made up crucial portions of Debtor's financial history and were not too far-removed from bankruptcy process. Once Trustee establishes loss of assets, Debtor must do more than present vague, indefinite or uncorroborated hodgepodge of information. Debtor's "threadbare" recitation from memory is not sufficient particularly where testimony was often unclear or uncertain and Debtor offered little evidence to back up testimony including no documentation regarding more than $75,000 in personal checks drawn from account, substantial deposits into personal account, or near-total loss of $100,00 which Debtor blamed on gambling

and day-trading. Debtor was sophisticated actor with significant financial experience making explanation even less convincing.

XIX. Chapter 13 - Funds on Hand at Dismissal

In re Leckman, Case No. 16-48671 (Bankr. E.D. Mi. 2022) – Counsel entitled to payment of fees where case dismissed after confirmation. Following *Bekofske v. Marve,* 2020 WL 11622509 (E.D. Mi. 2020), "cause" under Section 349 requires only some "acceptable reason" to reallocate funds and does not require showing that Debtor engaged in bad faith or other misconduct. "Cause" existed to allow the Trustee to pay Counsel's fees for services performed in effort to save case from dismissal as long as services were reasonable at time performed and were performed at time when saving case may have been possible. Motion for Cause under Section 349 must be served on entire creditor matrix and not just ECF participants as other creditors may also want to lay claim to funds should creditor desire to assert independent "acceptable reason" for creditor to be paid from funds on hand at dismissal.

XX. Trustee Fees - Dismissal Before Confirmation

McCallister v. Evans, 637 BR 144 (D. Id. 2022), *appeal* pending, ___ WL ___ (9th Cir. 2022) – Chapter 13 Trustee retains fees paid in case dismissed pre-confirmation. 28 USC Section 586 requires Trustee to collect fee from all payments received. Section 1326 requires Debtor to commence payments 30 days after case filed but further directs that if case is dismissed pre-confirmation, trustee shall return to Debtor any payments not previously paid and not yet due and owing to creditors. Recognizing deep split of authority Court held that trustee retains percentage fee. Plain language of Section 586 requires Trustee to collect fee. Section 1326 mandate that payments be returned differentiates between payments and percentage fee, and explains that Trustee takes fees before payments to creditors. Further, fees have been "previously paid" to Trustee on receipt bringing fees within exception under Section 1326. Court recognized distinction between Trustee fee in Chapter 13 and Chapter 12 (where statute specifically allows Trustee to retain fee) but discounted language in Section 1226 as "surplusage".

Soussis v. Macco, 2022 WL 203751 (E.D.N.Y. 2022), *appeal pending* ___ WL ___ (2d Cir. 2022) - Trustee is entitled to keep the fee on payments received before confirmation when case dismissed before confirmation. 28 USC Section 586 entitles Chapter 13 Trustee to collect percentage fee regardless of whether the plan is confirmed consistent with 11 USC Section 1326. Although number of cases discussing this produce clear split of authority with a slim majority concluding that the Trustee does not get to keep the money, no cases have made it to the Circuit Court, most likely because the amount involved in any one case is relatively small. Pre-confirmation payments included $1,000 per month plus a lump sum payment of $380,000, resulting in Trustee fee of approximately $20,600.00. Debtor sought disgorgement under Section 105 and Section 326. Court rejected both grounds as Trustee fee is set by statute, 28 USC Section 586(b). The Court also held that any objection to Trustee's retention of the fees must be brought as an objection to Final Report and not as a separate motion

XXI. Equitable Mootness

Biondo v. Gold, Lange, Majoros & Smallarz, PC, 2022 WL 2512789 (E.D. Mi. 2022) – Equitable mootness preserves interests bought and paid for in reliance on juridical decisions and avoids efforts to unscramble egg and is implicated when party does not obtain stay and relief would undo transaction too complex and difficult to unwind. Court must consider whether relief requested would affect either parties not before court or success of plan; whether stay has been obtained; and whether plan has been substantially consummated. Appeal of Order awarding compensation to attorney for Chapter 7 Trustee rendered moot when Trustee filed final report, Court entered text order declaring estate to be fully administered, Court discharged Trustee and Court closed case. Debtor's failure to obtain stay of closing of case. If appeal heard and fee award reversed, court would need to reopen case and reappoint Trustee. Given modest surplus in estate, reopening case would likely push estate from surplus to deficit. Debtor did not seek stay causing Trustee to continue efforts to complete case and make final distributions and file final report, amounting to substantial consummation.

XXII. Re-Imposing Stay After Grant of Stay Relief

In re Cable, 2022 WL 2707691 (Bankr. E.D. Tn. 2022) – Request to re-impose stay after prior stay lift is request for injunctive relief that must be brought by adversary proceeding. Debtor filed Motion to Re-Impose under Rule 60(b)(5) which allows Court to grant relief where applying order prospectively is not longer equitable. Rule 60 did not apply as Debtor was not seeking relief from Order Granting Relief From Stay and did not contend that prior Order was erroneous, but was seeking to impose new injunction. Court *sua sponte* converted Motion into Adversary Proceeding under Section 105 to maintain status quo pending further proceedings preventing foreclosure sale. Debtor filed for relief under Chapter 13 and agreed to file Amended Plan to pay Lender in full within 20 days after confirmation or automatic stay lift would lift following Notice of Default and 20 days to cure. Debtor defaulted and did not cure within 20 days of notice. Debtor asserted that estimate of available funds at confirmation was good faith if over-optimistic, and Debtor and Husband had problems with farm equipment, Debtor and Husband could not obtain credit to purchase seed so had to pay cash, and Debtor and Husband used remaining cash to pay other liens, not Lender. Preliminary injunctive relief available under Section 105 where Debtor faced imminent and irreparable harm if sale proceeded as foreclosure would eliminate future income and end Debtor's livelihood. A drastic end to Chapter 13 was unnecessary given Debtor's proven sources of funds that would allow Debtor to pay off Plan in 30 days and preserve Debtor's farm and home. Balance of equities favored short injunction where Bank acknowledged that delay would not cause harm beyond increase in legal expenses which are covered by property worth twice amount owed.

XXIII. Disqualification of Counsel

In re Baum, 2022 WL 1447379 (Bankr. E.D. Mi. 2022) – Attorney cannot be both attorney for Debtor and creditor of estate. Attorney represented Debtor in significant matters pre-petition and continued to do so post-petition. Pre-petition retention was done under contingency fee agreement with Attorney to receive percentage of funds recovered from third party transferees of Debtor's ex-husband. Second pre-petition fee agreement called for hourly rate in separate but related proceedings. As of petition date, counsel held contingent, unliquidated claim against Debtor for contingency fee; and Counsel had expended significant time giving Counsel unliquidated claim under Hourly Rate Agreement. Further, Counsel asserted an attorney's lien against any funds

recovered by Debtor constituting secured claim. Immediately after filing Counsel and Debtor entered into new fee agreement that purported to replace and supersede prior agreements and replaced 33% contingence fee plus hourly rate with flat 50% contingency. Counsel then filed Proof of Claim for more than $800,000.00. Counsel initially charged $4,000 for Chapter 13 but later waived that fee and agreed that any fees under any of the three retainer agreements would be subordinated to claims of other creditors with Counsel receiving no fees unless and until all other allowed claims paid in full. Third fee agreement made post-petition is not valid unless parties in interest are given notice and opportunity to object, Court has held hearing, and Court approved retention as entry into third agreement is use by debtor other than in ordinary course by purporting to divert 50% of recoveries (which are property of estate) to Counsel. Michigan Rue of Professional Conduct 1.7 prohibits Counsel from representing client where representation conflict with Counsel's own interests unless Counsel reasonably believes representation will not be adversely affected and Client consents after consultation. Court or opposing party can raise potential conflict although use by opposing party but be monitored to make sure it does not become technique of harassment. Even if conflict does not present danger of prejudice to other creditors based on subordination by Counsel, conflict nonetheless created significant conflict with Debtor particularly including Post-Petition Fee Agreement which amounted to settlement of counsel's pre-petition claim which significantly increases or decreases fees compared to Debtor's obligations under two pre-petition agreements. Counsel has duty to advise Debtor whether to object to claims, whether to settle claims, and on what terms to settle claim. Counsel could not shirk duties to advise and represent Debtor regarding Counsel's own pre-petition claim. Debtor needed and attorney has duty to provide, independent, objective advice and representation about Counsel's pre-petition fee claims and Counsel could not reasonably give independent, objective advice and representation to the Debtor. Counsel had conflict of interest that cannot be waived and required disqualification.

XXIV. Derivative Standing

Connor v. Property Fund 629, LLC, 2022 WL 38298 (Bankr. M.D. Tn. 2022) - Debtor in Chapter 13 has co-existent standing with Chapter 13 Trustee to bring adversary proceedings. Debtors in Chapter 13 have different status than Chapter 7 under Section 1326 which provides for possession of property to remain in Debtor. In addition, Confirmation Order specifically reserved right of Trustee and Debtor to pursue causes of action for benefit of Debtor or Estate. Chapter 13 Trustee could abandon interest in litigation and leave the right to pursue it vested in the Debtor, so there is no rationale to conclude that trustee cannot agree to concurrent standing. Confirmation Order also specifically referred to Debtor's continued pursuit of adversary proceedings and included alternative plan provisions based on outcome of "ongoing litigation" including reserving right of Trustee to seek dismissal or conversion if litigation is unreasonably delayed. Generic provision in one part of Confirmation Order gave Debtor standing to pursue this general type of litigation, and specific provision how outcome can affect plan. Order conveying derivative does not need to be entered prior to the complaint being filed as ability to confer derivative standing is straightforward application of equitable powers to craft flexible remedies in situations where Code's causes of action fail to achieve intended purpose.

RS Air, LLC v. Netjet Sales, Inc., 2022 1284012 (9th Cir. BAP 2022) – Creditor seeking derivative standing to pursue claims on behalf of Estate against Debtor's principal and shareholders, must first make demand on Debtor to take action, demand was rejected, creditor must allege colorable claim that would benefit estate if successful based on cost-benefit analysis, and inaction by debtor

is unjustified in light of duties under Chapter 11. Creditor's proposed complaint did not allege sufficient facts to support piercing of corporate veil under Delaware law. Bankruptcy Court Order denying derivative standing reversed and remanded to Bankruptcy Court for further proceedings.

XXV. "Hypothetical" Jurisdiction

Bayview Loan Servicing, LLC v. Fogarty, Case No. 20-2187 (2d Cir. 2022) – Under normal circumstances, District Court Order remanding case to Bankruptcy Court for further proceedings is not "final order" and is not immediately appealable. However, Appellate Court can exercise "hypothetical" jurisdiction and decide matter where there is no doubt that Court would have Article III jurisdiction, statutory jurisdictional issue is novel and not addressed by parties, and merits turn on straightforward textual analysis. Court has authority to decline to rule on jurisdictional questions as long as Court has Article III jurisdiction. After Bankruptcy Court held lender in contempt for violation of stay, Lender appealed. District Court affirming finding of contempt but remanded matter to Bankruptcy Court for determination of damages. Lender appalled to Circuit Court which held that it had hypothetical jurisdiction to consider appeal notwithstanding remand to Bankruptcy Court.

XXVI. Secured Claims - Equal Monthly Installments Generally

In re Hillman, 2022 WL 2195468 (Bankr. N.D. Ohio 2022) – Where confirmed Plan called for creditor to receive equal monthly installments of specified amount, Creditor not entitled to payment of any additional funds beyond EMI payment. Plan called for Creditor to receive EMI payments on car claim, and called for Debtor to sell non-residential property and remit proceeds to Trustee for additional plan funding. After confirmation, Debtor sold property and remitted proceeds. Trustee used portion of proceeds to pay off car in full rather than pay administrative expenses and unsecured creditors as provide in Plan. Trustee ordered to recover funds paid to car creditor in excess of EMI amount and apply payments according to Plan. Trustee's argument that EMI payment would not fully amortize loan over plan term did not change clear plan language that provided for EMI payments only.

XXVII. Effective Date of Plan

In re Batoha, 2022 WL 1310943 (Bankr. E.D. Mi. 2022) – Code requires Debtor to commit all disposable income received during Applicable Commitment Period beginning on the first payment due date under Section 1326. Model Plan requires Debtor to remit all disposable income received for length of applicable commitment period beginning on date of confirmation of Plan. Debtor may elect either option – starting payments (and Plan Length) on first payment due date or at confirmation but may not attempt to begin payments as of first payment due date while deferring effective date of Plan. If Debtor elects first payment due date, plan must pay plan payment times ACP within 60 months of first payment due. If Debtor elects confirmation date, Debtor must remit plan payment times ACP starting from confirmation date, giving Debtor benefit of pre-confirmation payments to apply against future events, but Debtor is not entitled to refund of "overpayment" of pre-confirmation payments if Debtor otherwise completes payments under Plan.

In re Kinne, 2020 WL 5505912 (Bankr. E.D. Mi. 2020) – Bankruptcy Code requires applicable commitment period to run from first payment due date. Debtor cannot be compelled to define effective date of Plan (and to calculate duration of Plan) using confirmation date.

In re Humes, 579 BR 557 (Bankr. D. Colo. 2018) – Plan duration commences with first payment due pursuant to Section 1326. To defer start of plan term to confirmations violates Section 1325(b) and results in plans running longer than statutory maximum 60 months.

In re Dorsett, Case No. 16-40837 (Bankr. E.D. Mi. 2017) – Lanning and other provisions of Code require effective date of plan to be date of confirmation. Plan that proposed to set effective date as date on which first payment came due could not be confirmed.

XXVIII. UST Fees

Office of United States Trustee v. John Q. Hammon Fall 2006, 142 S.Ct. 2810, 2022 WL 2111347 (2022) - Reversed and remanded to 10th Circuit for determination of remedy following holding in *Siegel v. Fitzgerald*, 142 S.Ct. 1770 (2022) that temporary increase in United States Trustee Fee was unconstitutional.