HONORABLE STEVEN W. RHODES
CONSUMER BANKRUPTCY SEMINAR

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# Case Law Update

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# Contents

## Tax Claims - Stay and Discharge Issues

*In re Thal,* 2018 WL 2182304 (Bankr. S.D. Fl. 2018) – Unpaid post-petition interest on pre-petition tax claims is discharged as part of Section 1328 "super discharge". Debtor's Plan proposed to pay IRS priority claim in full. IRS filed priority claim for balance due as of petition date and Debtor paid that claim in full during Chapter 13 case. After discharge, IRS levied against Debtor's Social Security to recover unpaid post-petition interest and Debtor sought sanctions for violation of discharge injunction. While taxes themselves would not have been dischargeable, Section 1322(a)(2) requires only that Debtor pay all priority tax debt in full in deferred cash payments. Section 1322 does not require deferred cash payments to include interest or have present value as of date of confirmation equaling total amount of priority claim. Chapter 13 provides unique ability to pay tax liability without penalties and interest normally associated with tax debt. IRS willfully violated discharge injunction. Court ordered IRS to return all funds taken from Debtor post discharge but could not award damages or attorney fees unless Debtor exhausted administrative remedies under 26 USC Sections 7430 and 7433; and Court lacks jurisdiction to award punitive damages as waiver of sovereign immunity under Section 106 specifically excludes punitive damages.

*U.S. v. Hunsaker,* Case No. 16-0386 (D. Ore. 2016), *reversed*, 2018 WL 4122882 (9th Cir. 2018) – IRS violated stay by sending 4 letters to Debtors post-petition threatening collection efforts including garnishment of Social Security benefits. Section 106(a) waives sovereign immunity for violations of Section 362 to extent of damages suffered by Debtor but does not waive sovereign immunity for punitive damages. Damages for emotional distress are actual damages as to which sovereign immunity is waived, acknowledging split with U.S. v. Torres, 432 F.3d 20 (1st Cir. 2005). IRS willfully violated stay by continuing to made demands for payments of back taxes and threats to levy on bank accounts where IRS had actual notice of bankruptcy filing. IRS can be held liable to actual damages but not for "emotional distress" allegedly suffered as result of IRS conduct.

## Contempt

*Lorenzen v. Taggart,* 888 F.3d 438 (9th Cir. 2018*),* cert petition filed, ____ US ___ (2018) – Does good faith belief that action does not violate discharge injunction preclude finding creditor in contempt even if discharge injection did apply and creditor's belief was unreasonable?

*IRS v. Murphy,* 892 F.3d 29 (1st Cir. 2018) – Creditors alleged reasonable belief that that was not discharge is not defense to action for contempt for violation of discharge injunction. Section 524 does not require that violation be "willful", only that actions be taken intentionally and with knowledge of the existence of discharge. IRS violated discharge injunction in attempting to collect debts allegedly excepted from discharge under Section 523(a)(1)(A) based on Debtor's alleged willful invasion of tax liabilities. Debtor brought adversary proceeding in Bankruptcy Court seeking declaration that that had been discharged and the Bankruptcy Judge granted summary judgment in favor of Debtor. Debtor then set sanctions for violation of discharge injunction and IRS alleged that any violation was based on good faith but mistaken belief that taxes have not been discharged. First Circuit concluded that good faith does not allow creditor to escape consequences of intentional violation of discharge injunction.

*Suhar v. Gray-Morgan,* 2018 WL 3956614 (Bankr. N.D. Ohio 2018) – Section 727(d)(3) allows Court to revoke discharge if Debtor refuses to obey lawful Order of Court pursuant to Section 727(a)(6). Standard is one of civil contempt which does not require willful or intentional refusal to obey Court Order. Plaintiff must only prove that Debtor had knowledge of Order; Debtor violated Order; and Order was specific and definite. Evidence established that Debtor had knowledge of Order directing turnover where Debtors response to adversary complaint confirmed that Debtor had knowledge. Debtor admittedly did not turn over funds as ordered and turnover Order was specific and definite as to amount to be turned over. Once moving party establishes prima facie case of contempt, Debtor has obligation to explain non-compliance. Impossibility or inability to comply notwithstanding all reasonable efforts is valid defense to action to revoke discharge but must be supported by evidence to explain noncompliance. Mere assertion of inability to comply without supporting evidence demonstrating efforts taken to comply is not sufficient.

*In re Fisher,* Case No. 18-45089 (Bankr. E.D. Mi. 2018) – Actions taken in violation of stay are invalid and avoidable and shall be voided absent limited equitable circumstances where Debtor unreasonably withholds notice of stay and creditor would be prejudiced if Debtor raises stay as defense or to attempt to use stay unfairly as shield to avoid unfavorable result. Debtor did not list mortgage holder as creditor and mortgage holder, unaware of bankruptcy, continued to foreclose, acquired title at auction, and after expiration of redemption, sold property to third party without notice of bankruptcy filing.

Debtor unreasonably withheld notice of bankruptcy from mortgage holder where Debtor who allegedly was unaware of existence of mortgage would have been able to discover existence of mortgage by either cursory review of title history or review of foreclosure notices. Bank would be prejudiced if Debtor raised stay as defense as both foreclosure and third-party sale would be unwound subjecting creditor to potential claim by purchaser.

**Passive Retention**

*Peterson v. Nu2u Auto World*, 2018 WL 5729907 (D.N.J. 2018) - Second, Seventh, Eighth, and Ninth Circuit Courts of Appeals hold that creditor violates automatic stay by not affirmatively and immediately return qualifying property of debtor seized pre-petition. Tenth and District of Columbia Circuit Court of Appeals find no violation of automatic stay if creditor merely maintains status quo in effect at time of petition. Court adopted minority position that passive retention for purposes of preserving status quo is not violation of stay. Section 362(a)(3) prevents "act to exercise control", not merely exercise of already existing control. Had congress meant to impose affirmative duty to return property, it could have done so. Minority rule still prohibits creditors from taking post-petition action that would give them possession or control over property and allows for bankruptcy court to distribute assets to all claimants in orderly and just manner and allows damages for wrongful post-petition conduct. Debtor may move for turnover of property before a bankruptcy court that can consider creditor's defenses to turnover. Affirmative duty exists to return property where creditor makes demand such as demand for proof of insurance and debtor complies with creditor's request.

*In re Shannon,* 2018 WL 4293239 (Bankr. N.D. Ill. 2018) – Passive retention of impounded automobile for unpaid parking tickets violates automatic stay. City which holds possessory lien does not qualify for Section 362(b(3) exception to allow party to preserve lien rights as preservation of lien rights does not amount to retention of possession of Debtor's property or give possessory lien holder right to better treatment in bankruptcy than other lienholders. City's refusal to return car on request violated at least three provisions of automatic stay, Sections 362(a)(3); 362(a)(4); and 362(a)(6).

*In re Peake,* 2018 WL 3946169 (Bankr. N.D. Ill. 2018), *Notice of Appeal Filed,* ___ WL _____ (N.D. Ill. 2018) - Passive retention of impounded automobile for unpaid parking tickets violates Section 362(a)(3). Section

362(b)(3) allows creditor to take act to continue or maintain perfection of security interest and City had possessory security interest by virtue of impoundment. City's interest in the vehicle arises when the vehicle is immobilized or impounded and remains perfected by continued retention of vehicle. "Act" to maintain security interest must be single, positive, definite act such as filing financing statement. Passive possession without more is not "act" to continue or maintain pre-existing security interest. Court followed Seventh Circuit precedent of *Thompson v. GMAC,* 566 F.3d 699 (7th Cir. 2009) that creditor must return collateral on request of Debtor, and declined to adopt Tenth Circuit holding in *WD Equipment, LLC v. Cowen,* 849 F.3d 943 (10th Cir. 2017).

*Davis v. Tyson Prepared Foods, Inc.,* 2018 WL 5045613 (10th Cir. 2018) - Based on prior 10th Circuit holding in *WD Equipment, LLC v. Cowen*, 849 F.3d 943 (10th Cir. 2018), passive retention does not violate Section 362(a)(3) or (4). "Act" as used in statute encompasses only affirmative conduct on part of lien holder. Lien that arose postpetition by operation of law and without any affirmative act by creditor to obtain or perfect lien is valid and enforceable and does not violate automatic stay.

**Exemptions – Section 522(g)**

*In re Mickens,* 2017 WL 4767771 (Bankr. W.D. Mi. 2017) – Section 522(g) allows Debtor to exempt property that is recovered by Trustee if initial transfer by debtor was not voluntary or involve concealment of property. Transfer of property from debtor- spouses as joint tenants to tenants by entireties was avoidable fraudulent transfer as transfer adversely affected rights of individual creditors. However, property as a whole was already property of estate and avoidance of entireties status did not amount to "recovery" of property. Recovery requires bringing into estate property that was not property of estate as of commencement of case, either by avoiding transfer of title held by third party or by avoiding lien and preserving lien for benefit of estate, effectively bringing into estate the lien itself. Accordingly, debtors could exempt property even after entireties was avoided as there was no "recovery" of property and as such Section 522(g) did not apply.

*In re Sharp,* Case No. 16-54917 (Bankr. E.D. Mi. 2017) – In general, property of estate and Debtor's exemptions are both determined on petition date. Debtor cannot exempt property transferred by Debtor pre-petition as Debtor did not have any interest in that property as of the petition date and so the property did not become property estate. Debtor could not exempt property once recovered by Trustee as fraudulent transfer as Section 522(g) limits

Debtor's ability to exempt recovered property to property that was not initially voluntarily transferred. Evidence indicated that pre-petition, Debtor voluntarily conveyed property to Debtor's mother, ostensibly to assist in obtaining homeowners insurance.

*In re Hill,* 2017 WL 1458860 (Bankr. W.D. Mi. 2017) – Section 522(g) allows a Debtor to claim an exemption in property which is recovered by the Trustee if the Debtor could have exempted the property had the property might not been transferred and the transfer was not a voluntary transfer by Debtor. If the Trustee avoids a voluntary transfer by the Debtor, Debtor is not entitled to claim to exemption in the recovered property. Transfer is "voluntary" if it is unconstrained by interference, not compelled by another's influence, done by design, intention or purpose, and with knowledge of essential facts. Involuntary transfers include transfers by operation of law such as execution of judgment, repossession or garnishment. Debtor's payment to Court Officer to avoid execution is not voluntary where Court Officer was acting pursuant to Seizure Order entered by State Court; Court Officer arrived at Debtor's residence with intent to seize personal property; and Court Officer afforded Debtor opportunity to pay $4000 cash in lieu of having property seized. Fact that Debtor paid cash to Court Officer to avoid seizure does not make transfer voluntary. Court Officer waited at Debtor's residence while funds in amount necessary to satisfy payment demand were obtained; Court Officer followed Debtor to bank and waited in parking lot while Debtor cashed check to make payment; and Court Officer intended to carry out Seizure Order and was not going to depart empty-handed.

**Exemptions – Amendments**

*In re Mendoza,* 2018 WL 889346 (Bankr. D.N. Mex. 2018) – Rule 1009 allows Debtor to amend exemptions at any time until the case is closed. If case is reopened after closing, courts have adopted three different interpretations of Rule 1009. One interpretation is that Rule 1009 prohibits amending exemptions in reopened cases. A second interpretation allows amendments freely as a matter of course in both open and reopened cases. The third line conditions right to amend after reopening on showing that failure to amend before case closed is due to excusable neglect. Court adopted third interpretation, finding that second interpretation renders rule's limitation on closing case illusory. Rule 9006 allows court to extend deadline to take any act if failure to act within time permitted is result of excusable neglect. Debtor did not offer any evidence to show excusable neglect to allow Debtor to

exempt proceeds of pre-petition personal injury action where Debtor did not disclose cause of action at any time before Trustee filed report of no distribution and Court closed case. Debtor offered no justification why Debtor did not properly disclose cause of action when required or any attempt to amend Schedules or disclose and exempt cause of action until after cause of action was discovered by US Trustee and Court reopened case to allow Trustee to administer cause of action.

*In re Palmer,* Case No. 12-33124 (Bankr. E.D. Mi. 2018) – Rule 1009 allows Debtor to amend exemptions at any time until case is closed. Rule 9006 allows Court to extend any time in court's discretion where failure to act was result of excusable neglect. Rule 1009 does not require automatic rejection of amendment in re-opened case, nor do rules allow amendments freely to be made in re-opened case. Result allows Court to avoid harsh result of prohibiting amendment outright while requiring Debtor to justify late filing.

**Exemptions – Objections**

*Moyer v. Rosich,* 2018 WL 1614214 (Bankr. W.D. Mi. 2018) – Rule 4003(b)(1) imposes short and unforgiving 30-day deadline for "garden variety" objection to exemptions. Rule 4003(b)(2) allows objection at any time prior to one year after closing of case if Debtor fraudulently asserted claim of exemption. Rule 4003(b)(2) does not create independent grounds for objecting to exemption and objection must be based on some other provision of the Bankruptcy Code or State Law that limits exemptions. Objecting party must show that facts do not support the claim of exemption and that the Debtor knew, *at the time Debtor claimed exemption*, that facts did not support that claim, and that Debtor subjectively intended to deceive trustee and creditors. Although Debtor's ability to claim exemption resulted from fraudulent transfer of asset in first instance, Debtor did not "fraudulently" assert exemption where Debtor accurately described interest in Bankruptcy Schedules as Debtor's principal residence; accurately listed interest as of petition date as tenants in entireties; and claimed exemption under applicable state law. While creation of exemption itself may have been fraudulent transfer, there was no indication that claimed exemption itself was fraudulent. Further, Court had previously entered Order disallowing exemption to extent of joint claims and Debtor paid joint claims consistent with that Order. Prior Order had preclusive effect where it had not been set aside, preventing Trustee from now arguing that property was not entireties property entitled to exemption.

**Exemptions – Liens Impairing**

*William F. Sandoval Irrevocable Trust v. Taylor,* 899 F.3d 1126 (10th Cir. 2018) – In evaluating potential lien avoidance of jointly owned property where only one owner files bankruptcy, impairment calculation uses value of other liens on property corresponding to Debtor's percentage of ownership rather than full amount of lien. Calculation begins with value of Debtor's interest in property and subtracts percentage of other liens, not total lien amount, joining First, Third and Ninth Circuits.

**Exemptions – Administrative Expenses**

*Corcoran v. Holley*, 2018 WL 5318223 (E.D. Mi. 2018) (appeal after remand) – Trustee cannot offset exemptions to pay administrative expenses. Debtor properly asserted tenants in the entireties exemption as to residence. If trustee liquidates asset, trustee must turnover to debtors 100% of the proceeds remaining after payment of valid liens. Trustee, with Debtors' consent, sold property and remitted to debtors all proceeds remaining after payment of liens and costs of sale including trustee administrative fee. Trustee required to turn over all proceeds after payment of liens including amounts paid to broker for commission and amount paid for closing costs of sale plus any commission retained by trustee. Fact that estate is administratively insolvent does not excuse trustee's obligation to turn over all proceeds after payment of liens.

**Chapter 7 Trustee Fees**

*In re Bartlett,* 2018 WL 4521227 (Bankr. D. Mass. 2018) – Section 326 does not preclude award of compensation to Chapter 7 Trustee where case converts to Chapter 13 before Trustee collects assets or makes distributions. Section 326 limits Trustee compensation in case under Chapter 7. Once case is converted, Case is no longer "under Chapter 7" and is not subject to limitation under Section 326. Trustee and counsel for Trustee entitled to compensation under Section 330. Court awarded Trustee and counsel $12,000 for time expended investigating Debtor's potentially nonexempt assets before Debtor convert case to Chapter 13.

*Sharkey v. Stevenson & Bullock, PLC*, 2017 WL 5476486 (E.D. Mi. 2017) – Creditor who makes substantial contribution to Chapter 13 case by objecting to exemptions in case initially filed Chapter 7 that ultimately forced Debtor to convert and pay 100% to creditors entitled to administrative expense claim. Debtors originally filed Chapter 7. Attorney for Chapter 7 Trustee objected to exemptions and Debtor converted to Chapter 13. On conversion, Attorney for Chapter 7 Trustee became creditor in Chapter 13 case. Attorney for Chapter 7 Trustee substantially contributed as Chapter 7 would have provided no

distribution to creditors but for Attorney's efforts in having exemption disallowed and disallowance resulted in 100% repayment plan. Section 503(b)(3)(D) is not explicitly limited to Chapter 9 and 11 and does not prevent administrative awards for substantial contributions in Chapter 7 or 13.

**Utilities**

*In re Garigan,* 2017 WL 3669509 (Bankr. E.D. Mi. 2017) – Section 366 prevents utility from refusing or discontinuing service based on debt owed to utility for services rendered pre-petition. However, utility can refuse or disconnect service if Debtor does not, within 20 days of commencement of the case, furnish a deposit or other security for service post-petition. Debtor has obligation to pay deposit within 20 days and fact that utility does not contact Debtor to obtain deposit does not prevent utility from disconnecting service after 20 days if no deposit is paid. Debtor's Motion to prevent utility from disconnecting services acknowledged that Debtor did not pay deposit or even attempt to pay deposit or have any other contact with utility for more than 3 months, and then only after Debtor received shutoff notice. Utility acted within statutory right to shut off utilities without violating Stay or Section 366.

**Voluntary Retirement Contributions**

*In re Penfound,* Case No. 18-48940 (Bankr. E.D. Mi. 2018) – Section 1325(b) prohibits Debtors from excluding post-petition voluntary retirement contributions in calculating disposable income.

*In re Reyes*, Case no. 15-45618 (Bankr. E.D. Mi. 2015) – Debtor is not permitted to deduct voluntary retirement contributions in calculating disposable income over objection of creditor or Trustee.

*In re Rogers*, Case No. 12-32558 (Bankr. E.D. Mi. 2012) – Debtors cannot exclude post-petition voluntary retirement contributions in calculating disposable income.

**Rule 7004**

*In re Drobney,* 583 BR 700 (Bankr. W.D. Mi. 2018) – "Federally Insured Depository Institution" must be served as specified in Rule 7004(h). The term "insured depository institution" includes FDIC insured institutions as defined in section 3(c)(2) of the Federal Deposit Insurance Act; and credit union insured by FCUA. Rule 7004 requires service by certified mail directed to named officer of institution; or to attorney who has already appeared in Bankruptcy case. First class mail is not sufficient. Plan that proposed to cram

down lien held by Federally Insured Depository Institution could not be confirmed where Certificate of Service indicated service by first class mail only.

*In re Nicholaus,* 2018 WL 799152 (Bankr. N.D. Iowa 2018) - Rule 7004 requires service on the Internal Revenue Service by mail to the United States Attorney for the district in which the matter is pending and by mail on the Attorney General of the United States. Debtor served IRS at the address listed in the Proof of Claim. Service was not sufficient for the Court to acquire personal jurisdiction over the IRS, even though the IRS admitted that it actually received the Objection.

*In re Clevinger,* 2018 WL 4223251 (Bankr. N.D. Ohio 2018) - Rule in effect prior to December 1, 2017 required service of Objection on last address designated by creditor, not address listed on Proof of Claim. Rule 3007 as amended effective December 1, 2017, requires service on claimant by first-class mail to person most recently designated on claimant's original or amended proof of claim as the person to receive notice at the address indicated. Objection mailed to incorrect address does not render Order void if notice was reasonably calculated under circumstances to apprise interested parties of pendency of action and afford opportunity to object. Creditor did not deny receipt of Debtor's objection to claim and Court's Notice of Objection to Claim issued by clerk was sent by United States mail addressed to address in proof of claim, address in first notice of change of address and address in second notice of change of address and Court did not receive any of the mail returned as undeliverable. Even if Debtor's Objection was served on incorrect address, Court's notice was served on correct address and afforded ample time for creditor to respond such that service complied with constitutional due process requirements.

**Late Filed Claims – Effect**

*In re Benner,* Case No. 15-31477 (Bankr. N.D. In. 2018) (vacated at request of parties) – Rule 3002 requires claims to be filed within 90 days (now 70 days) from date first set for meeting of creditors. Claim filed on 91st day is untimely. Section 502 which states that a filed claim is deemed allowed applies only to timely filed claims. Claim filed beyond claims bar date is not valid claim and cannot be paid through Chapter 13 Plan as untimely filed proof of claim cannot be allowed. Trustee should not have made distributions

to secured creditor notwithstanding that Chapter 13 Plan provided for such payments.

**Claims – Late Filed – Rule 3001(c)(6)**

*In re Schaller,* Case No. 17-54117 (Bankr. E.D. Mi. 2018) – Prior to December 1, 2017, there was no basis for a Court in Chapter 13 to allow claim filed after claim bar date. Rule 3002(c)(6) added new exception where Debtor does not file a matrix identifying creditors and creditor does not have reasonable opportunity to file claim after learning of case. Debtor's original matrix did not include creditor although Debtor and Creditor were engaged in pre-petition litigation of claims and counterclaims. Creditor first learned of bankruptcy 10 days before bar date when creditor's state court attorney received e-mail from Debtor's state court attorney advising that counsel had just learned of bankruptcy case and that scheduled hearing needed to be adjourned. Creditor's state court counsel advised Creditor who hired Bankruptcy Attorney to investigate and file claim. Creditor filed claim 30 days later, 20 days after bar date. Creditor was not included on matrix preventing creditor from receiving timely notice, and credit did not have reasonable opportunity to file claim before expiration of bar date. Although case pre-dated December 1, 2017, and Rule revision normally applies only to cases filed after effective date of rule, Advisory Committee notes indicated that Court had discretion to apply rule even in cases filed before December 1. Claim allowed as timely filed under Rule 3002(c)(6).

*In re Lovo,* 2018 WL 1568692 (Bankr. S.D. Fl. 2018) – Insufficient notice of filing is not cause to extend time to file proof of claim in Chapter 13 case. Authority to extend time in Chapter 13 is limited to exceptions specifically identified in Rule 3002(c). Rule 3002(c)(6) which expands exceptions to bar date for cases in which creditor received insufficient notice does not apply to Chapter 13 cases filed before December 1, 2017.

*In re Norton*, 2017 WL 354320, 2017 Bankr. LEXIS 197 (Bankr. N.D. Tex. 2017) – Court can allow late filed claim where Debtor files claim on behalf of creditor under Rule 3004, and Debtor's failure to file by the deadline is due to excusable neglect. While Courts cannot extend deadline under Rule 3002 which limits Court's ability to extend deadlines to specific situations identified in Rule 3002, Rule 3004 does not have that limitation. Rule 9006 applies and allows Court to extend deadline for excusable neglect which is equitable standard based on all relevant circumstances including danger of prejudice to the Debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within

the reasonable control of the movant, and whether the movant acted in good faith. Debtor listed creditor in original Schedules and treated creditor in Chapter 13 Plan. The Trustee made distributions to creditor for over 18 months consistent with terms of Plan. Debtor made all Plan payments and there was no question of Debtor's good faith. Trustee did not issue Trustee's Recommendation Concerning Claims which fell outside the norms of the District and TRCC which is normally filed by Trustee is intended to serve as reminder to counsel that claim needs to be filed. Oversight by Trustee in not issuing TRCC and by Debtor's counsel in not filing claim at earlier time were of little practical impact as Trustee had been paying mortgage company all along and Credit Union did not oppose Debtor's late-filing of proof of claim.

**Informal Proof of Claim**

*Houston Bluebonnett, LLC v. JPMorgan Case Bank,* Case No. 17-3270 (S.D. Tx. 2018) – To constitute informal proof of claim in Chapter 11 case, document must be in writing, writing must contain demand by creditor on Debtor's estate, writing must express intent to hold Debtor liable, informal proof of claim must be filed with Court, and based on facts of case it would be equitable to allow claim. Creditors and Debtor had been litigating for years prior to commencement of Chapter 11 case. One creditor had obtained judgment and second creditor had obtained a finding of liability, although Court had not yet fixed damages. On filing Chapter 11, Debtor removed State Court actions to Bankruptcy Court. Removal of cases to Bankruptcy Court constituted a written demand on Debtor's estate. Pleadings from State Court provided adequate notice of basis of claim even though pleadings did not assert specific amount of damages. Pleadings showed creditor intended to hold Debtor liable. Notices of removal were sufficient to satisfy requirement of filing with Bankruptcy Court. Allowing informal Proof of Claim would be equitable where to impacted creditors were only non-insider creditors and one of whom had obtained a judgment for the petition, such that disallowing claims would be "extremely harsh".

**Chapter 13 – Confirmation of Plan**

*In re Shelton,* 2018 WL 4404631 (Bankr. N.D. Ill. 2018) – Silence by secured creditor who is not being treated as required by Section 1325(a)(5) is not "Acceptance" of treatment. Section 1325(a)(5) is only provision in Chapter 13 that requires creditor to "accept" treatment which must mean more than

mere failure to object. Plan that proposed lower initial payment to secured creditors to allow counsel to be paid, with payments to secured creditors increasing after counsel's fees have been paid in full, violates requirement of equal monthly installments under Section 1325 (a)(5). Provision of Section 1326 allows for payment of attorney's fees before or at time of payment to creditors does not override equal monthly installment requirement of Section 1325(a)(5). In cases where there are no secured creditors, Section 1326 allows payment to attorney to occur before payment to unsecured creditors; when there are secured creditors, proposing lower initial payments, thereby delaying payments to secured creditors, cannot occur without consent of secured creditors. Plan sought to delay payment to secured creditors without attempt to procure creditor acceptance, heightens risks born by delay creditors solely to reduce risk and accelerate payment to counsel. Proposed Plan prioritizes counsel's desire to be paid over best interest of Debtor as delay in payment leaves secured debt unpaid for longer time, such that if Debtors case is dismissed, Debtor could be in worse position; and delay in confirming Plan to accrue funds to pay counsel's fees increases risk that preconfirmation default may occur. Risks and harms borne by Debtor are for no reason other than to prefer payment to counsel and is inconsistent with obligations to creditors of fundamental fairness

*Briggs v. Johns*, 2018 WL 4690394 (W.D. La. 2018) – Bankruptcy Court lacks authority to sua sponte deny confirmation of Plan. Espinosa requirement that Court review Plan to ensure compliance with Code applies only as to self-executing provisions of Code but does not require Court to ferret out every possible objection to confirmation. Self-executing provisions are those that apply without judicial involvement such as determination that debt survives discharge under Section 523(a)(8). Section 1325(b) governs Debtor's obligation to remit 100% of disposable income and is prefaced by "if the trustee or the holder of an allowed unsecured claims objects" such that objection is required to trigger Court's duty to review disposable income component of plan. While Court does have duty to sua sponte evaluate Debtor's good faith, that does not allow Court to deny confirmation based solely on Court's calculation of disposable income Good faith requires consideration of all facts of case including reasonableness of proposed plan; whether plan shows intent to abuse spirit of code; whether debtor intends to effectuate plan; whether there is evidence of misrepresentation, unfair manipulation or other inequities; whether case was part of underlying scheme of fraud with intent not to repay; whether plan reflects debtor's ability to pay; and whether creditor has objected.

**Discharge – Completion of Plan Payments**

*Davis v. Holman,* 2018 W: 5633989 (D. Kan. 2018) – Bankruptcy Court lacks discretion to deny Debtor discharge upon completion of Plan payments even though Debtor's misconduct during course of case would have constituted cause for dismissal. Section 1328(a) says Court "shall" grant discharge of Debtor completes Plan payments, while Section 1307(c) says Court "may" dismiss. Court cannot exercise equitable powers to invade Debtor's right to discharge upon completion of Plan payments, even where Debtors demonstrated disregard for bankruptcy process and abused provisions, purposes and spirit of Chapter 13 by withholding information regarding increased income, nondisclosure of bank accounts, and incurring debt without Trustee's consent, all in violation of Plan and confirmation order.

**Discharge – Direct Pay Secured Debt**

*In re Gibson,* 582 B.R. 15 (Bankr. C.D. Ill. 2018) – Adopting minority approach, Debtor entitled to discharge where Debtor made all payments required to be made to Chapter 13 Trustee even if Debtor did not make all direct mortgage payments. Court cited long history of permitting discharges where all payments to Trustee are made even if direct payments on secured debts are not made. Definition of "all payments under the Plan" as including direct payments on secured debts is of "recent vintage" and it is not clear from language of statute whether direct payments are "payments under Plan". Rule 3002.1 was not intended as impetus for dismissal without discharge but was instead intended to benefit Debtors by better ensuring fresh start. Interpreting all payments under Plan to mean all payments to trustee is consistent with Section 1329 which allows modification before completion of payments under the Plan, which is understood to be when Debtor pays to trustee full amount required by confirmed Plan. Section 1322 prohibits Plan from requiring payments over more than 60 months. Long term debt paid direct by Debtor necessarily extends beyond 60 months and so cannot be a payment under Plan. Remedy for secured creditor is not to deny discharge but to seek stay relief.

*Kessler v. Wilson* (*Matter of Kessler)*, 655 Fed. Appx. 242 (5th Cir. 2016) Discharge can be granted only if all payments required by the Plan are made. Post-petition arrears on direct pay mortgage claim means Debtor did not make all payments required by Plan. Debtor not eligible for discharge.

***Rooker-Feldman***

*Isaacs v. DBI-ASG Coinvestor Fund III, LLC,* 2018 WL 3453360 (6th Cir.

2018) - *Rooker-Feldman* doctrine prevents Federal Court from acting as Court of Appeals for state Court judgment. Doctrine is applied on a "claim-by-claim" basis. State Court Judgment of foreclosure precluded later Bankruptcy Court consideration of whether mortgage was enforceable as relief effectively asks Bankruptcy Court to vacate State Court judgment and clearly identifies State Court judgment as source of plaintiff's injury. Bankruptcy Court would be required to reach conclusion precisely opposite from that reached by State Court on issue of whether mortgage lien attached. However, Rooker-Feldman does not preclude bankruptcy courts use of Section 544 "Strong-arm" power to avoid mortgage that was not perfected. Issue of whether mortgage is unperfected and avoidable is separate from issue of whether mortgage was valid in first instance. Determining avoidability under Section 544 does not require Court to review State Court conclusion that mortgage was valid as mortgage can be avoided even assuming that State Court correctly determined that mortgage constituted valid lien on real estate. State Court order made no findings regarding perfection as none were necessary to State Court judgment.

Philadelphia Entertainment. 879 F.3d 492

**"Ride Through"**

*In re McCray,* 2017 WL 5956639 (Bankr. E.D. Mi. 2017) – Code requires Chapter 7 Debtor to either reaffirm, redeem or surrender collateral. Debtor cannot retain collateral without approved reaffirmation agreement or redemption and must "not retain possession". Debtor who proposed to "pay and stay" did not propose to reaffirm or redeem. Debtor's attempt to have collateral ride through left case subject to dismissal under Section 707 and 727.

**Eligibility/Student Loans**

*In re Pratola,* 578 B.R. 414 (Bankr. N.D. Ill. 2017), *reversed,* 2018 WL 4181498 (N.D. Ill. 2018) – Section 109(e) contains eligibility standards and mandates dismissal or conversion if debts exceed limits. Court does not have equitable power or discretion to allow case to continue where Debtor is not eligible. Student loan debt is included in calculation of unsecured debt and resulted in Debtor having debt in excess of Section 109 limits.

*In re Petty,* 2018 WL 1956187 (Bankr. E.D. Tx. 2018) – Section 109(e) limit eligibility under Chapter 13 to Debtors with non-contingent, liquidated

unsecured debts of less than $394,725.00. Although Section 109 is not jurisdictional and may be waived, Court lacked authority ignore provisions when timely raised. Student loan debt is non-contingent and liquidated unsecured debt and cannot be ignored in determining eligibility.

*In re Fishel,* 2018 WL 1870368 (Bankr. W.D. Wis. 2018) – Section 109(e) is not jurisdictional but sets in motion series of events that allows court to dismiss case at later date. Section 1307 is discretionary and provides that court may dismiss or may convert but does not require dismissal or conversion. While lack of eligibility may constitute cause for dismissal Court is not required to dismiss where dismissal would be absurd or would produce result beyond scope of abuse which Congress was attempting to address. Debtor could make payments proposed in Plan and while Debtor has significant student loan debt, that debt would survive discharge. Allowing case to proceed is consistent with Congressional intention that Debtors who can pay portion of debt in Chapter 13 should be required to do so. Best interests of Debtor, estate, and creditors best served if Debtor permitted to pursue confirmation of her Chapter 13 Plan. Literal interpretation of statute would lead to absurd result where Debtor had no option. Debtor was above-median income with disposable income available to pay creditors and would not be able to rebut presumption of abuse leading to dismissal; but Chapter 13 attempt to repay some amounts raises argument that Debtor is ineligible for Chapter 13 relief. Only remaining option would be Chapter 11 which is inordinately expensive and cumbersome for consumer Debtor; would likely result in significant portions of funds that would otherwise be available to creditors being paid in administrative expenses and U.S. Trustee quarterly fees; additional formalities of Chapter 11, including disclosure statement and balloting, and attorney's fees, would eat up substantial amounts that would otherwise be available to creditors; which is neither in best interests of Debtor nor creditors.

**Private Student Loans**

*McDaniel v. Navient Solutions, LLC,* 2018 WL 4620632 (Bankr. D. Colo. 2018) – Private "Tuition Assistance" loans were not excepted from discharge under Section 523(a)(8)(A)(i) as loans were not made or guaranteed by governmental unit or non-profit; private loans did not constitute "educational benefit, scholarship or stipend" under Section 523(a)(8)(ii); and loans did not constitute "qualified education loans" under Section 523(B) as loans were not "qualified education loans". Obligation is not "education loan" or "student loan" merely because obligation is labeled as such unless loan meets one or

more criteria set forth in Section 523(a)(8). Word "loan" is not used in Section 523(a)(8)(A)(ii) but is used in both sections 523(a)(8)(A)(i) which encompasses educational benefit overpayment or loan made, insured or guaranteed by governmental unit or nonprofit institution; and Section 523(a)(8)(B) which encompasses "qualified education loans". Court would not stretch phrase of Section 523(a)(8)(A)(ii) regarding "obligation to repay funds received" to include loans where Section 523(a)(8)(A)(ii) references only educational benefits, scholarships or stipends. Student loan creditor violated discharge injunction by attempting to collect student loans which were correctly scheduled in Debtor's Chapter 13 case and treated as general unsecured claims in Debtor's Chapter 13 Plan. Student loan creditor violated discharge injunction by attempting to collect student loans which were correctly scheduled in Debtor's Chapter 13 case and treated as general unsecured claims in Debtor's Chapter 13 Plan.

**Student Loans – Treatment**

*In re Quinn,* 2018 WL 3012900 (Bankr. E.D. Mi. 2018) – Allowing separate classification of student loans coupled with favorable treatment helps Debtors and is also consistent with congressional intent to protect fiscal health of student loan programs. However, favorable treatment of student loans, even as long-term debt under Section 1322(b)(5) cannot unfairly discriminate. Whether treatment unfairly discriminates is based on totality of circumstances. One consideration that supports favorable treatment is to not force Debtor into default during term of Plan. Debtors' Plan would result in continuing default student loan creditor would be paid as long-term debt and would receive between $850 per month and $1112 per month, but would remain in default on student loans because contractual obligation was $1894 per month. If Debtors' Plan is approved, student loan creditors would receive all available funds with general unsecured creditors receiving no distribution. Over the term of Debtor's Chapter 13 Plan, Debtors would reduce the principal balance on the student loan by only $215. If student loans are not separately classified, Debtors would owe $6006 more than the petition date. Slight benefit to Debtors does not offset discriminatory impact on unsecured creditors, particularly where Debtor would remain in default of student loans yet remaining unsecured creditors would receive nothing. Chapter 13 Plan that diverted 100% of Plan funding to student loan creditors with no meaningful payment to remaining unsecured creditors unfairly discriminated. **Note: After Court issued opinion, Debtor modified Plan to pay minimum dividend to unsecured creditors of 10% of allowed claims (for a total**

**distribution of approximately $3000) following which Court confirmed Chapter 13 Plan.**

**Undue Hardship**

*Pierson v. Navient,* 2018 WL 4849658 (Bankr. N.D. Ohio 2018) – *Brunner* requires that Debtor be unable to maintain, based on current income and expenses, minimal standard of living if forced to repay loans; additional circumstances exist such that state of affairs is likely to persist for significant portion of repayment period; and Debtor has made good faith efforts. Debtor demonstrated inability to pay or total household income was $1161 per month for a household of 3; plaintiff's home lacked basic amenities such as functioning furnace and stove; Debtor had medical problems and no health insurance; and Debtor "wore his only nice shirt to Court". Fact that Debtor was engaged in Income Contingent Repayment Plan which had a zero-dollar payment did not preclude finding of financial hardship where participation in IBR is neither automatic nor permanent and loan extends over substantial period of time. Given plaintiff's tenuous living conditions and medical circumstances, annual administrative compliance cannot be shrugged off or taken for granted. Further, plaintiff had been told that participation in IBR had been terminated and Debtor was told he could not reapply. Further, at end of IBR, Debtor would be faced with large taxable income for forgiveness of debt which Debtor would have no ability to pay. Debtor's financial circumstances were likely to be permanent where Debtor had limited earning potential; and was only able to obtain employment doing yardwork and lawn care, auto-parts and grocery store stocking, cashier and sales associate at 7-Eleven; Debtor failed reading class preventing him from completing post-secondary education; Debtor struggled with learning disabilities and bipolar manic depressive disorder but has attempted to work whatever jobs he could obtain. Debtor could not be forced to move to a new location which would force Debtor to abandon his wife and his home; and last time Debtor attempted to do so, he ended up living out of his car. Even if Debtor was able to obtain additional employment, his monthly income would barely exceed $2000 which is not sufficient to maintain a family of 3 particularly where additional income would likely reduce food assistance benefit that Debtor currently receives. Whether Debtor made good faith efforts to repay loan determined by whether Debtor's failure to repay loan is from factors beyond Debtor's reasonable control; whether Debtor has realistically used all available financial resources to repay loan; whether Debtor is using best efforts to maximize earning potential; length of time after loan first becomes due before

Debtor seeks to discharge debt; and percentage of student loan debt in relation to Debtor's total indebtedness. Plaintiff's inability to repay loans was not result of any fact or within his control. Notwithstanding dire financial circumstances, Debtor began making monthly $5 payments to prevent wages being garnished and income tax refunds being seized. Plaintiff had attended college 20 years earlier leaving no opportunity for Debtor to read benefit of education. Debtor filed bankruptcy to address judgment against him by former landlord and resulting wage garnishments and while discharges to the loan would improve financial condition, that was not motivating factor in filing bankruptcy in first instance.

**Appellate Standing**

*In re Pointe North*, 890 F.3d 1188 (9th Cir. 2018). Failure to object/appear does not affect pecuniary interest and standing for purposes of appeal.

*In re Wrightwood Guest Ranch*, 896 F.3d 1109 (9th Cir. 2018): Agreed with *Pointe North* but also said that the appellants had forfeited their claims.

**Attorney Fees**

*In re Cooper,* 2018 WL 3202996 (Bankr. E.D. Mi. 2018) - Neither Section 330 nor Rule 2016 sets deadline by which the application must be filed. Application filed three days after Debtor voluntarily dismissed Chapter 13 case was timely. Attorney required to seek dismissal promptly upon Debtor's request rendering it impractical for attorney to request attorney fees before seeking dismissal and Attorney must place Debtor's interest above his own pecuniary interest preventing counsel from delaying dismissal merely to obtain payment. Fees requested were reasonable for services rendered constituted appropriate administrative expense of Chapter 13 estate.

*Howard v. Derham-Burk,* Case No. 17-1064 (9th Cir. BAP 2018) - Attorney fees for services incurred during the course of Chapter 13 case that remain unpaid as of entry of discharge are discharged under Section 1328. After Debtor received discharge, attorney filed fee application primarily related to services in connection with Notice of Final Cure, and sought to recover fees directly from Debtor outside bankruptcy. Plan provided for payment of attorney's fees and costs as administrative expenses over life of Plan and included supplemental fees and expenses for services through term of Chapter 13 case. Although services did not relate to ongoing performance under Plan, services were necessary to ensure that lender did not undermine Debtor's

ability to obtain fresh start. Attorney could have modified Plan to arrange for and obtain compensation by alternate means before entry of discharge but did not do so. Although Debtor is not prevented from voluntarily paying approved fees, Counsel cannot require Debtor to make payments on discharged administrative expense claim.

*In re Freeman,* 2018 WL 4362045 (Bankr. E.D. Mi. 2018) – Bankruptcy Court can order disgorgement of previously paid fees under Section 329 where fees awarded exceed reasonable value of services provided. Compensation paid to counsel exceeded reasonable value of services where purpose of filing Chapter 13 proceeding was to cure default in mortgage; attorney solicited Debtor as client specifically to save property from foreclosure; and Debtor hired attorney specifically to take that action. However, attorney did not file proof of claim for mortgage company resulting in funds that should have been paid to mortgage company being paid instead to unsecured creditors. Had counsel timely filed proof of claim, where each company would have received benefit of Plan in counsel would have earned fee paid in connection with Chapter 13 case. However, delay in filing proof of claim resulted in Trustee disbursing funds to unsecured creditors placing Debtors far worse off than Debtors were when case filed in first instance. Case stayed foreclosure sale but Debtors were 11 months more behind on their mortgage, Plan was running beyond 60 month confirm Plan term, and Plan would not succeed in saving property from foreclosure. By not filing protective proof of claim, attorney effectively destroyed any value of case. If Debtors are able to be successful in completing Plan, it will not be as a result of attorney's services. Services had no value such that Court would order disgorgement of entire fee paid to attorney for Chapter 13 case.

**Property of Estate – Product Liability Claims**

*Davis v. Nasuti,* 2018 WL 2223076 (Bankr. N.D. Ga. 2018) – Personal injury claim is property of estate if claim is sufficiently rooted in pre-bankruptcy past. Cause of action for product liability for defective medical device arose when device implanted, even if Debtor was unaware of any issues and had no problems with device pre-petition. Discovery is not relevant to when cause of action arises, but ties only to Statute of Limitations. One year after Debtor filed Chapter 7, device broke, and Debtor made claim against manufacturer which settled for $147,000. Proceeds of settlement were property of estate

which must be turned over to Trustee for distribution. *Compare Mendelsohn v. Ross,* 251 F. Supp. 3d 518 (E.D.N.Y. 2017) reaching contrary conclusion involving same medical device.

*Mendelsohn v. Ross,* 251 F. Supp. 3d 518 (E.D.N.Y. 2017) – Whether cause of action is property of Chapter 7 estate depends on whether cause of action is sufficiently rooted in pre-bankruptcy events. Cause of action based on failed medical device was post-petition even though medical device was implanted and all facts giving rise to cause of action occurred pre-petition. Cause of action does not arise until Debtor knows of cause of action, which occurred when device failed post-petition. Settlement proceeds of claim against manufacturer were not property of estate as settlement was proceed of post-petition asset. *Compare Davis v. Nasuti,* Case No. 10-24836 (Bankr. N.D. Ga. 2018) reaching contrary conclusion involving same medical device.

**Denial of Discharge False Oath – 727(a)(4)**

*Siewe v. Locci,* 2018 WL 2111076 (11th Cir. 2018) – False Oath can include false testimony given under oath in connection with adversary proceeding to except debt from discharge. Creditor filed claim based on promissory note and filed complaint to except debt from discharge. Debtor defended, asserting that he owed creditor only $9000 and that signature on note was forged. Bankruptcy Court found that Debtor lied multiple times in testifying that he did not signed note where 2 other witnesses testified at trial that they saw Debtor signed note; handwriting expert testified that signature was "probably" Debtor's; and bank records show that creditor advanced at least part of loan to Debtor. Bankruptcy Court did not commit error in finding that Debtor "knowingly and fraudulently made false oath in connection with the adversary proceeding" warranting denial of discharge.

**Denial of Discharge – Bad Timing – 727(8)**

*In re Holloway,* Case No. 18-51115 (Bankr. E.D. Mi. 2018) – Debtor is not eligible for discharge in Chapter 7 where Debtor received discharge in prior Chapter 7 in case commenced within 8 years before the date of filing of petition in current case. Debtor not eligible for discharge where prior case filed on August 10, 2010 and current case filed August 10, 2018, 8 years to day after Debtor filed prior Chapter 7. Automatic stay continued with respect to property of estate until property is no longer property of estate; automatic stay as to action other than action against terminates upon entry of Order Denying Discharge.

**Denial of Discharge – Chapter 11**

*Um v. Spokane Rock I,* 2018 WL 4371030 (9th Cir. 2018) – Section 1141(d)(3) denies discharge to Debtor if Plan provides for liquidation of all or substantially all property of estate; Debtor does not engage in business after consummation of Plan; and Debtor would be denied discharge under Section 727. Section 1141(d)(3) applies equally to individual and corporate Debtors. Debtors not eligible for discharge where Plan was "liquidating Plan" under which Plan Administrator would liquidate all estate assets other than assets which Debtors exempted. Fact that Debtors would retain membership interests in various limited liability companies did not amount to retention of property where membership interests were worthless because Plan required sale of all assets of LLCs leaving LLCs as worthless shells. Debtors would no longer engage in business where Debtors would no longer work for or continue in business which Debtors had operated prepetition but would instead become employees of entirely unrelated businesses owned and operated by other parties. Requirement that Debtor "engage in business" requires that Debtor at least continue to be engaged in business which is owned by Debtor, not merely employment in someone else's business. Debtors conceded that Debtors would not be eligible for discharge under Section 727. As such, Debtors not eligible for discharge under Section 1141.

**Student Loans – Defined**

*Ramani v. Romo,* Case No. 17-2107 (Bankr. E.D. Mi. 2018) – "Student Loan" is defined as educational benefit overpayment alone made, insured or guaranteed by governmental unit or made under program funded in whole or in part by governmental unit or nonprofit institution; or obligation to repay funds received as educational benefit, scholarship or stipend; or any other educational loan that is qualified education loan. 26 USC Section 221 defines "qualified education loan" as any indebtedness incurred by taxpayer solely to pay qualified higher education expenses incurred on behalf of taxpayer, spouse or dependent; paid or incurred within reasonable period of time before or after indebtedness is incurred; and attributable to education furnished during period for which recipient was eligible student. "Qualified education loan" also includes any indebtedness used to refinance qualified education loan other than indebtedness owed to person related to taxpayer. 26 USC Section 267 defines "related" as brothers, sisters, spouse, ancestors and lineal descendants. Collateral estoppel applies in dischargeability proceedings and

bars re-litigation of issue where new action is between same parties or privies; earlier proceeding led to valid final judgment; issue in question was actually and necessarily determined in prior proceeding; and parties had full and fair opportunity to litigate issues. Prior State Court judgment in favor of Plaintiffs and against Defendant conclusively determined that obligation from Defendant to Plaintiffs arose out of Plaintiffs refinancing Defendant's student loan indebtedness; and conclusively determined that Plaintiffs were Defendant's in-laws which are not included in definition of "related". State Court judgment resulted from action between same parties. Complaint in state Court action alleged all facts necessary to establish judgment as well as all elements under Section 523(a)(8) and 26 USC Section 2221(d)(1). Defendant had full and fair opportunity to litigate issues but failed to do so resulting in default judgment.

**Duties of Trustee**

*New Products Corporation v. Tibble,* 2016 WL 245908 (Bankr. W.D. Mi. 2016), *aff'd,* 2017 WL 4216081 (W.D. Mi. 2017), *affd*, 2018 WL 1916216 (6th Cir. 2018) – Trustee has duty to protect assets consistent with ordinarily prudent person in conduct of private affairs under similar circumstances and with a similar object in view. Trustee should not spend money that would otherwise go to unsecured creditors to prop up collateral of particular creditor. Trustee does not have duty to protect asset where liens on asset far exceed value, as any money expended would solely benefit secured creditor while depleting the few assets of estate. Trustee not liable to secured creditor for diminution in value of building where, after Chapter 7 filed, Trustee did not secure building, allowing "scrappers" to remove wires, steel beams, piping, light fixtures, plumbing fixtures, furnaces and support columns. As of petition date, building value was less than half of what was owed on secured claim. Although "scrapping" undoubtedly adversely affected value of property, trustee not liable for failure to secure where only secured creditor would have benefitted at expense of unsecured creditors and secured creditor had other remedies available to it including stay relief and motion to compel abandonment for creditor to protect its rights.

**Pre-Petition Credit Counseling**

*In re Wilson,* 2018 WL 528 88 90 (Bankr. N.D. Ohio 2018) – Debtor "substantially complied" with requirement for credit counseling. Evidence indicated that Debtor completed counseling prior to commencement of case but Debtor was unable to obtain certificate of completion due to record-keeping error by credit counseling provider. Section 521 requires only that

Debtor certify that Debtor has completed course but does not require certificate that that Debtor actually received prepetition counseling. Evidence indicated that Debtor obtained prepetition counseling and filed Section 521 certificate describing services received. Evidence did not warrant dismissal of case where record included no indication that Debtor filed case in bad faith; Debtor filed Section 521 certification asserting that Debtor received prepetition counseling only to later discover that credit counseling agency did not properly record completion of counseling; and that Debtor took all reasonable steps to comply with statutory requirement. Debtor's Section 521 certification confirmed that Debtor received counseling within 180 days prior to commencement of the case and record provided no indication that any party would be prejudiced by allowing case to proceed. Case presented "unique" equitable factors where Debtor had done her best to comply with requirements including actually receiving counseling.

*In re Mackey,* 565 BR 238 (Bankr. E.D.N.Y. 2017) – 28 CFR Section 58.22(o) promulgated by the Office of the United States Trustee permits credit counseling to be obtained by third party acting as Debtor's legal representative as long as the Briefing Certificate sets forth the name of the legal representative and legal capacity of that representative. Briefing Certificate did not meet requirements where Briefing was obtained by incarcerated Debtor's wife who held valid power of attorney, but Certificate indicated that Briefing was completed by Debtor, and did not indicate that Briefing was completed by wife acting under specified legal capacity.

**Bankruptcy Fraud**

*U.S. v. Williams,* 2018 WL 2709457 (7th Cir. 2018) – Serial bankruptcy petitions to avoid foreclosure can constitute bankruptcy fraud. Debtor filed five separate Chapter 13 petitions to stop condominium Association from proceeding with addiction. In each case, Debtor file Chapter 13 petition but did not file completing documents and did not make payments. Debtor also temporarily transferred title of unit to friend for no consideration who then filed his own Chapter 13 petition which was also dismissed. Multiple Chapter 13 bankruptcy filings in bad faith constitute fraud. Debtor's sentenced to 47 months in prison where claims increased from first filing to last filing by $193,000, justifying finding that losses resulting from fraud exceeded $150,000. For purposes of sentencing enhancement, losses not limited to those suffered by condominium Association because fraudulent bankruptcy filings automatically precluded other creditors from collecting debts.