CASE LAW UPDATE

HONORABLE STEVEN RHODES VETERANS DAY CONFERENCE

NOVEMBER 11, 2024

Honorable James Boyd
United States Bankruptcy Judge
Western District of Michigan

Laura Genovich, Esq.
Foster, Swift, Collins & Smith, PC
Grand Rapids. Michigan

Thomas D. DeCarlo, Esq.
John Steinberger & Associates, PC
Southfield, Michigan

Materials by Honorable John P. Gustafson and Thomas DeCarlo, Esq.
© 2024

Contents

I. Supreme Court Quick Hitters: 3
II. Notice And The Consequences Of Inadequacy 5
III. Reopening Chapter 7 – When Is There Cause? 7
IV. Statement of Intentions 9
V. Equal Access to Justice Act 10
VI. Chapter 13 – Absolute Right to Dismiss 10
VII. Chapter 13 – Bad Faith 10
VIII. Dischargeability and Default Judgments 11
IX. It is Important to Know the Deference. 11
X. Chapter 13 – Payroll Deduction Order Enforcement 11
XI. Motion To Dismiss A Chapter 7 – Denial Is Not A Final Appealable Order 12
XII. SubChapter V – Silence is not Acceptance? 12
XIII. SubChapter V - Asking for True Up May be a Screw Up 12
XIV. Student Loans – When is §523(a)(8) "Self-Executing"? 12
XV. Lien Stripping – Inherited Property 13
XVI. Means Test – Mortgage Deduction Interpretation 13
XVII. Effect of Discharge 14
XVIII. Discharge Violation and Sanctions 14
XIX. Probate Exception to Bankruptcy Jurisdiction 15
XX. Involuntary Petitions – Now an Even Worse Idea! 15
XXI. Collateral Estoppel 16
XXII. Judicial Estoppel 16
XXIII. Discovery Issues 18
XXIV. Reaffirmation Agreements 18
XXV. Standing to Commence Case 18
XXVI. Sovereign Immunity 18
XXVII. Attorney Disqualification 19
XXVIII. Chapter 13 – Absolute Right to Dismiss 19
XXIX. Voluntary Retirement Contributions 20
XXX. Appeals 21

I. Supreme Court Quick Hitters:

Harrington v. Purdue Pharma, LP, 603 US ___, 144 S.Ct. 2071, 219 L.Ed.2d 721 (2024) – Bankruptcy Code does not authorize bankruptcy court's to approve non-consensual release of non-debtors. Section 1123(b) contains provisions which "may" be included in reorganization plan. Catchall phrase of Subsection 6 relates to prior 5 subsections that concern Debtor's rights and responsibilities and relationship with creditors and cannot be fairly read to provide bankruptcy courts with the power to discharge the debts of non-debtor without consent of affected non-debtor's claimants. Court retains authority to resolve "derivative" claims as those claims belong to Debtor's estate and are asserted by third party on behalf of the estate. Third party release would substantively extinguish all claims against the released party including claims that belong to the victims. The Code expressly allows third party injunctions in asbestos cases only, making it unlikely that Congress intended for broad power to include non-consensual releases in Chapter 11 reorganization plans

Truck Insurance Exchange v. Kaiser Gypsum Company, Inc., 602 US 268, 144 S.Ct. 1414, 219 L.Ed.2d 41 (2024) - Section 1109 allows a "party in interest" to raise and be heard on any issue in a Chapter 11 case including ability to file a Chapter 11 plan when the trustee has been appointed, request appointment or removal of the trustee, challenge good faith of persons voting to approve the plan, and object to confirmation. Whether the prospective party has sufficient stake to be a "party in interest" is determined on a case-by-case basis. An insurer with financial responsibility for a bankruptcy claim is a "party in interest" that may raise and be heard on any issue in a Chapter 11 case, including an objection to a proposed plan of reorganization. The Chapter 11 Plan substantially impaired insurer's interests where the Plan would channel all asbestos claims to asbestos insurers leaving the insurer exposed for millions of dollars and potentially fraudulent tort claims.

Office of the United States Trustee v. John Q. Hammons Fall 2006, LLC, ___U.S. ___, 144 S.Ct. 1588, 219 L.Ed.2d 210 (2024) - Appropriate remedy for short-lived and small disparity created by unconstitutional bankruptcy fee statute was prospective only, and did not require refund or retrospective raising of fees.

II. Post-Petition Increase In Equity in Chapter 13

A. Sale Of Residence During The Chapter 13

In re Elassal, 654 BR 434 (Bankr. E.D. Mi. 2023) – Proceeds from the sale of Debtor's residence after confirmation of a Chapter 13 Plan are not property of the Chapter 13 estate. On confirmation, residence vested in Debtor free of any claims of pre-petition creditors. The proceeds were not "disposable income" as the proceeds represented the sale of capital asset, not recurring stream of payments, and the proceeds were not "known or virtually certain" at the time of confirmation. Disposable income does not include pre-petition property or proceeds of a sale. Under the "estate replenishment" theory, the estate is replenished only with new assets acquired by Debtor post-petition. The proceeds could not be separated from the underlying property and so did not constitute a "new" asset under Section 1306. Judge Randon noted in footnote 3 that the Plan or Order Confirming the

Plan could have left the property vested in the estate which would result in proceeds remaining property of the estate.

In re Baker, 620 B.R. 655 (Bankr. D. Colo. 2020). Debtor gets the non-exempt surplus upon the sale of a residence during the Chapter 13.

In re Marsh, 647 B.R. 725 (Bankr. W.D. Mo. 2023). Proceeds from the post-confirmation sale of debtors' residence, but before the end of the case, were property of the estate under an estate replenishment approach.

In re Adams, 654 B.R. 703 (Bankr. M.D.N.C. 2023). Proceeds from the post-confirmation sale of Debtors residence in Chapter 13 warranted modification requiring turnover of the non-exempt proceeds of the sale, because the property did not vest until Plan completion based on a local rule in the district.

Chapter 11 Variation – 100% FMV Exemption Claim – 9th Circuit Reverses!

In re Masingale, 644 B.R. 530 (9th Cir. BAP 2022) – Affirming the bankruptcy court, the BAP held that in a case converted from Chapter 11 to Chapter 7, Debtors' claim of a homestead exemption equal to "100% of FMV" included post-Petition appreciation - where there was no timely objection to the exemption in the Chapter 11 – despite the "snapshot rule". It's a straight *Taylor v. Freeland & Kronz* analysis - no timely objection to exemption so blah blah blah.. A bit too slick by the Debtors, but not all that controversial. Until. . . . Boom! from the Ninth Circuit: ***In re Masingale***, 108 F.4 th 1195 (9 th Cir. 2024). There is a lot in this Opinion, on lower courts reading *Taylor* and *Schwab* too broadly, the exemption claim form changing (but not at the time this case was pending, and the effect of essentially disclaiming the benefits of the exemption in the Chapter 11 Plan. Perhaps the bottom line is, Chapter 11 debtors have statutory fiduciary obligations to creditors which was inconsistent with claiming an exemption in excess of the statutory limit. Accordingly, in the Chapter 7 case "Masingale's homestead exemption is thus limited to the amount of the statutory cap. The remaining proceeds of the sale of the Greenacres residence are property of the estate." *Masingale*, 108 F.4th at 1208. Are other courts going to follow the Ninth Circuit's lead and use a different rule for Chapter 11 debtors claims of exemption? And how "controversial" or "cutting edge" or "dishonest" does the claimed exemption have to be to warrant disallowance upon conversion to a Chapter 7 (or even during the Chapter 11, raised late?).

B. Upon Conversion From Chapter 13 To Chapter 7

Goetz v. Weber (In re Goetz), 95 F.4th 584 (8th Cir. 2024) – Post-petition appreciation in the value of property inures to the benefit of the Chapter 7 estate on conversion under Section 348. Court rejected Debtor's argument that the entire property had been claimed as exempt, noting that the exemption was not "in-kind" but was limited to the statutory amount. The Court also rejected Debtor's "vesting" argument, noting that no provision of Chapter 13, including "vesting", applies once a case is converted. The Court recognized the policy implications of the ruling and noted that allowing the Trustee to sell the house would produce a hardship, but stated that policy arguments cannot overcome the plain language of the statute.

***In re Castleman**,* 75 F.4th 1052 (9th Cir. 2023) - In a case converted from Chapter 13 to Chapter 7, a postpetition, pre-conversion increase in the equity of an asset belongs to the Chapter 7 estate, not to the Debtor, even if the Debtor has converted the case in good faith

***In re Barrera**,* 22 F.4th 1217 (10th Cir. 2022) – The property was sold during the Chapter 13 and Debtor remained in possession of proceeds when Debtor converted their case to a Chapter 7. Tenth Circuit held that proceeds were not property of the estate because the proceeds of sale are separate from the underlying property. When Debtor sold their house, Debtor no longer has possession of "property of the estate" that Debtor had as of the petition date. Instead,, Debtor had a separate, entirely new asset (the proceeds) acquired post-petition which are not brought into a Chapter 7 estate absent bad faith.

C. Messin' With Vesting To Keep Property In The Chapter 13 Estate

***In re Pugh**,* 2024 WL 1161439 (Bankr. E.D. Mi. 2024) – Attempting to seize on the footnote in *Elassel*, the Trustee objected to confirmation where the Pan proposed to vest property in Debtor. Court rejected the Trustee's argument, noting that the Trustee cannot unilaterally impose a change in the vesting provision – only the Debtor may propose a Plan or modify the Plan before confirmation. Trustee may object but any objection must be based on some provision of the Code including Sections 1322 and 1325. Court concluded that it could override Debtor's vesting election for "good cause" such as bad faith or material undervaluation of the property, neither of which were present here.

D. More Fallout From Messin' With Vesting – The Limits Of Local Rules

Trantham v. Tate, 112 F.4th 223 (4th Cir. 2024). Chapter 13 trustee objected to confirmation of a proposed Plan which altered the standard default language as to the vesting of property of the estate found in local model plan approved for use in all cases filed in district. Reversing both the bankruptcy court and the district court, the Court of Appeals held that the debtor suffered an injury in fact being prohibited from having property vest upon confirmation, and thus had constitutional standing to appeal the Bankruptcy Court's ruling. As to the merits, the bankruptcy court's use of a default vesting provision in its local form was permissible, but by making the local form's default vesting provision mandatory, the bankruptcy court abridged debtor's right to propose a plan with her preferred vesting provision and to have her plan confirmed. Finally, in the absence of a substantive objection, the bankruptcy court also erred in rejecting debtor's proposed vesting provision (upon confirmation) simply because she did not explain why she diverged from the local form. Notably, the bankruptcy court (the proposer of local rules and forms) and the district court (which approves local rules and forms) both upheld the local form being mandatory. It was only when the case got to the appellate court level that the contradictions between the Code and the required local form gained traction.

II. Notice And The Consequences Of Inadequacy

In re Arias, 2024 WL 1710899, 2024 Bankr. LEXIS 938 (Bankr. D. Puerto Rico April 19, 2024). While this case is a Chapter 13, it is a decision with lessons applicable to cases under other Chapters. Debtor served "Franklin Credit Management" with notice of the

Chapter 13 filing at a P.O. Box address. The Plan was served at the same address, and was subsequently confirmed. More than two years later, "Bosco" – which was not included in the matrix or schedules – filed a Motion for Relief from Confirmation Order. The argument was that Bosco was not served, and its servicer – Franklin Credit Management – was "registered with the National Creditor Registration Service Bankruptcy Noticing Center" with a designated preferred address in New Jersey pursuant to 11 U.S.C. §342(f). The Debtor did not use that designated national address for service, as the Code requires. *See*, §342(g); F.R.Bankr.P. 2002(g)(5). Section 342(g)(1) states that: "Notice provided to a creditor by the debtor or the court other than in accordance with this section (excluding this subsection) shall not be effective notice until such notice is brought to the attention of such creditor." Because notice was not effective, confirmation of the Chapter 13 Plan was not effective to bind Bosco, and its debt cannot be discharged. Bankruptcy court websites assert that: "So long as the creditor has provided the National Creditor Registration Service (NCRS) with all of the names and addresses used by them and the debtor has provided the Court the full name and address on their matrix, attorneys with access to CMECF will be able to determine if a creditor has requested a Preferred Address." So, this may impact attorney malpractice liability.

In re Thurman-Pryor*,* 2023 WL 7794678 (Bankr. W.D. Mi. 2023) - Inadequate notice of the bankruptcy case may result in a debt being excepted from discharge under section 523(a)(3) if the creditor did not receive notice in time to file an objection to dischargeability, unless the creditor had notice or actual knowledge of the case in time to file an adversary complaint. Adversary proceeding under section 523(a)(3) based on a lack of notice may be filed at any time. Notice to Michigan Department of Health and Human Services insufficient where the address listed was not the correct address for the creditor. Listing the creditor at an incorrect address amounts to "neither listed nor scheduled" for purposes of Section 523. The question is whether scheduling of the debt fulfills the purpose of the noticing requirement - which is to enable creditors to receive timely notice of proceedings and, at a minimum, must comport with established standards of due process amounting to notice that is reasonably calculated to apprise interested parties of the pendency of the case. Minor errors in scheduling addresses will not necessarily render notice insufficient as long as the error does not deprive a creditor of reasonable notice. The burden of providing adequate notice falls on the Debtor. A creditor may file with the Bankruptcy Court and serve on Debtor notice of the address to be used in the case; or may provide notice of an address to be used by all bankruptcy courts or a particular bankruptcy court in all cases. 11 U.S.C. §342(f). When a creditor is a federal or state government unit or taxing authority, the creditor may also file a designation of mailing address with the Clerk of Court. While the Debtor's designation of mailing addresses for State of Michigan did not include the address for MDHHS and only identified the creditor generically as "State of Michigan" (without listing MDHHS) notice was insufficient where debtor knew that the actual creditor was MDHHS. Debtor compounded this error by using an address shown on a demand letter which tied to the Department of Treasury causing BNC to mail notice to the Department of Treasury, which would not be imputed to MDHHS. Debtor could have avoided the issue by scheduling MDHHS' additional or alternative readily available addresses, including the name and address on the letterhead; or it could have listed MDHHS' Director at an easily ascertainable address which would have constituted appropriate notice. Debtor's choice to list the debt as being owed to the "State of

Michigan" and utilizing an incorrect address resulted in the lack of appropriate notice such that MDHHS did not have notice in time to file a nondischargeability complaint allowing MDHH to pursue nondischargeability under §523(a)(3).

In re Mine Hill Anesthesia, LLC, 658 B.R. 214 (Bankr. S.D. Fla. 2024). Chapter 11 debtor listed and provided notice to the accounts receivable creditor that obtained a judgment lien. It did not provide notice to a second major creditor. The second creditor made its first appearance in the case 143 days after confirmation. While the Plan could not be vacated under §1144, because more than 180 days had passed since confirmation (and confirmation was not obtained by fraud) the Chapter 11 Plan and related orders are not binding on the second creditor, and the creditor may pursue all of its claims and rights unaffected by the Chapter 11 case.

Licup v. Jefferson Avenue Temecula, LLC, 95 F.4th 1234 (9th Cir. 2024) – Chapter 7 Debtor's failure to list a creditor in an "asset" Chapter 7 case renders the entirety of the debt non-dischargeable. The matrix included an incorrect address for creditor's attorney and the parties did not dispute that the creditor lacked actual notice of the case. In a no-asset case, Section 523(a)(3) is irrelevant as creditors need not be notified if filing a claim would be meaningless and worthless. But where the case is an "asset" Chapter 7, due process requires proper notice to creditors. The plain language of §523(a)(3) specifies that the discharge does not affect a debt if a creditor was not notified. The court would not infer a limitation not expressly stated in the statute itself.

But . . . There Are Limits As To What A Debtor Is Required To Do Re: Notice

In re Evans, 656 B.R. 776 (Bankr. N.D. Ill. 2024). Chapter 13 Debtor had no duty to discover and provide notice of the bankruptcy case (and the Chapter 13 Plan) to an unknown post-petition assignee ("LaSalle") from another assignee ("Pine Valley") who got the tax claim from the county. The county received notice at its preferred electronic address, and Pine Valley received notice by mail. LaSalle/Tax claim assignee's Motion to vacate the order confirming the Chapter 13 Plan was denied. In addition to rejecting the arguments based on notice, and the attempt to claim that Pine Valley did not get good Rule 7004 service of the Plan (as opposed to "Notice" of the bankruptcy), the bankruptcy court noted that the tax claim assignee (LaSalle) had not filed a proof of claim. Moreover, a Chapter 13 Plan may - but did not have to - treat unfiled claims, and neither LaSalle nor Pine Valley were treated in the Plan. Further, the court held that a Chapter 13 Plan is not a contested matter until someone files an objection to the Chapter 13 Plan. Under *Espinosa*, the confirmed Chapter 13 Plan was binding on LaSalle

In re Wieder, 659 B.R. 21 (Bankr. M.D. Fla. 2024). Objecting to a claim filed by a credit union does not require service by certified mail. Rule 3007(a)(2)(A)(ii) does not require service of a claim objection on a credit union by certified mail under Rule 7004(h), because a credit union is not a defined insured depository institution. Thus, service of the objection by first class mail was sufficient.

III. Reopening Chapter 7 – When Is There Cause?

Not allowing the reopening of a Chapter 7 case to allow the filing of Debtor Education Certificate and all the Debtor to get a discharge:

Most of these cases are from Detroit, and employ a tough standard:

In re Williams, 636 B.R. 484 (Bankr. E.D. Mich. 2022). 20 month was too long – debtor was required to make a showing of "cause" under Rule 1007(b): "This Court has denied motions to reopen in numerous cases, where the delay ranged from 10 months to more than 11 and a half years. *See In re Lewis*, No. 16-54136, 635 B.R. 157 (Bankr. E.D. Mich. Jan. 20, 2022) (Chapter 13 case) (delay of more than two years); *In re Motley*, No. 18-53216, 635 B.R. 150 (Bankr. E.D. Mich. Jan. 14, 2022) (delay of almost 3 years); *In re Brown*, 634 B.R. 748 (Bankr. E.D. Mich. 2022) (delay of 15 months); *In re Rivera*, 628 B.R. 309 (Bankr. E.D. Mich. 2021) (delay of 2 years and 9 months); *In re Szymanski*, 625 B.R. 875 (Bankr. E.D. Mich. 2021) (delay of more than 18 months); *In re Hendricks*, 625 B.R. 694 (Bankr. E.D. Mich. 2021) (delay of more than 14 months); *In re Smith*, 625 B.R. 41 (Bankr. E.D. Mich. 2021) (delay of almost 17 months); *In re Lemon*, 625 B.R. 47 (Bankruptcy E.D. Mich. 2021) (delay of 15 months); *In re Aziz*, 622 B.R. 694 (Bankr. E.D. Mich. 2020) (delay of four years and eight months); *In re Smith*, 620 B.R. 888 (Bankr. E.D. Mich. 2020)(delay of two and a half years); *In re Suell*, 619 B.R. 642 (Bankr. E.D. Mich. 2020) (delay of almost two years); *In re Raza*, 617 B.R. 290 (Bankr. E.D. Mich. 2020) (delay of 11 and a half years); *In re Locklear*, 613 B.R. 108 (Bankr. E.D. Mich. 2020) (delay of nearly 12 months); *In re Jackson*, 613 B.R. 113 (Bankr. E.D. Mich. 2020) (delay of 13 months); *In re Szczepanski*, 596 B.R. 859 (Bankr. E.D. Mich. 2019) (delay of more than 15 months); *In re Lockhart*, 582 B.R. 1 (Bankr. E.D. Mich. 2018) (delay of more than 1 year); Barrett, 569 B.R. at 688 (delay of more than 8 years); *In re Kessler*, 588 B.R. 191 (Bankr. E.D. Mich. 2018) (delay of 5 years); *In re Moore*, 591 B.R. 680 (Bankr. E.D. Mich. 2018) (delay of 10 months)(string cite continues. . .). While this approach is not actually the majority view (although it is the view in the majority of published cases – they are mostly from one judge). This is not to say that judges are not concerned about the delay in filing motions to reopen to file debtor education certificates – the concern is: are creditors going to get actual notice of the Chapter 7 discharge after this long passage of time? And, that has to be weighed against putting the burden on the debtor – who caused the problem by failing to complete the required debtor education/or by not filing the certificate – to simply file another bankruptcy case (which they can do because they have not received a discharge within 8 years, because they still have not received a discharge.)

To Allow Lien Avoidance

Smith v. Kleynerman, 647 B.R. 196 (E.D. Wis. 2022). The bankruptcy court did not abuse its discretion in granting a motion to reopen the case to allow the avoidance of a judicial lien on exemption-impairment grounds.

There are cases (including the ones cited below from the 6th Cir. BAP) that hold that it is reversible error to DENY a motion to reopen to allow lien avoidance. *In re McCoy*, 560 B.R. 684 (6th Cir. BAP 2016)(denial of reopening reversed where case had been closed nearly 4 years); *In re Yonish*, 2016 WL 832587, 2016 Bankr. LEXIS 650 (6th Cir. BAP March 3, 2016)(denial based on laches without analysis was reversed where motion to reopen was filed after case had been closed two years).

Reopen to seek to litigate dischargeability of Student Loans

In re Walker, 427 B.R. 471, 478 (B.A.P. 8th Cir. 2010), *aff'd*, 650 F.3d 1227 (8th Cir. 2011)(finding "no Rule or Code-based time limitation at all as to when a bankruptcy court may adjudicate the dischargeability of student loans").

In re Kapsin, 265 B.R. 778, 781 (Bankr. N.D. Ohio 2001) (denying motion to reopen case to determine dischargeability of student loan because "if a change of circumstances were, standing alone, sufficient to reopen a case for the sole purpose of discharging a student loan obligation, then any debtor who filed for bankruptcy relief could at any time—say even ten or twenty years later—invoke the jurisdiction of this Court for solely that purpose. This, of course, would create the anomalous situation of a perpetual Chapter 7 case, and thus would render superfluous, for purposes of a student loan obligation, paragraph (a) of § 350").

But . . . Post-Closing Changes Are Not Always Good

In re Tolbert, 2022 WL 2126970 (Bankr. N.D. Ill. June 13, 2022). Student loan was refinanced post-Petition. Debtor moved to reopen their case 8 years later, to litigate the dischargeability of their student loans. "*Hiatt* has been repeatedly interpreted by courts within and beyond the Seventh Circuit as providing that when a Debtor, after filing a bankruptcy petition, consolidates pre-petition student loans, those pre-petition loans are expunged and the consolidated loan is a new, post-petition debt not impacted by a discharge order."

Reopening – to avoid criminal conviction (how?).

In re Reichel, 645 B.R. 620 (8th Cir. BAP 2022). Obtaining relief from his criminal conviction for bankruptcy fraud was an improper purpose that could not constitute cause to reopen Debtor's Chapter 7 case.

Reopening to list an omitted asset (like a PI claim).

In re Maldonado, 646 B.R. 917 (Bankr. D. Utah 2022). Debtors could not reopen their bankruptcy case more than five years after the first Chapter 13 Plan payment, and after completing their Plan. Debtors failed to list a personal injury claim, but the case should not be reopened to relieve a party of the consequences of his own mistake or ignorance, nor is good cause to reopen established by mere inattention or neglect.

IV. Statement of Intentions

In re Lee, 2024 WL 1202481, 2024 Bankr. LEXIS 704 (Bankr. W.D. Mich. March 20, 2024) - 11 USC Section 362(h) requires Debtor to file their Statement of Intention indicating whether debtor must surrender or retain property and, if retained, either redeem or enter into a reaffirmation agreement or assume unexpired lease. If debtor does not take timely action to complete their stated intention, the automatic stay terminates and property is no longer property of the estate (if the trustee takes no action). Where Debtor did not comply with Section 362(h), Debtor's vehicle was automatically removed from the bankruptcy estate ending the Court's *in rem* jurisdiction over the motor vehicle. Competing interest of Debtor and Creditor in vehicle is then governed by applicable non-bankruptcy law and state courts. [The Creditor went on to screw up by violating the

discharge injunction, but was not sanctioned. *In re Lee*, 2024 WL 3092581, 2024 Bankr. LEXIS 1472 (Bankr. W.D. Mich. June 21, 2024).]

V. Equal Access to Justice Act

In Re Teter, 90 F.4th 493 (6th Cir. 2024), Debtor could not recover attorney fees against UST through Equal Access to Justice Act (EAJA) after United States Trustee withdrew motion to dismiss case.

VI. Chapter 13 – Absolute Right to Dismiss

TICO Constr. Co. v. Van Meter (In re Powell), __ F.4th ___, 2024 WL 435615, 2024 U.S. App. LEXIS 24742 (9th Cir. Oct. 1, 2024). A new Court of Appeals decision upholding a Debtor's "absolute" right to dismiss a case filed as a Chapter 13 (and unconverted). Creditor sought conversion. The Ninth Circuit held that even assuming the term "debtor" refers only to someone who meets Chapter-specific eligibility requirements, a court does not need to determine that a debtor meets those requirements before allowing voluntary dismissal. And, under the circumstances, upon debtor's motion to dismiss, the bankruptcy court was required to dismiss Debtor's case without further inquiry. There was a Dissent, that would have ruled that Chapter-based eligibility requirements have jurisdictional significance, and the right to dismiss under Section1307(b) would only apply if the debtor were properly a debtor in Chapter 13. The majority holding is in line with the Sixth Circuit's position set forth in *In re Smith*, 999 F.3d 452 (6th Cir. 2021). Unless a circuit court latches on to the rationale of the dissent (or an older circuit court holding gets upheld) it appears unlikely this issue will be the subject of a Supreme Court decision.

VII. Chapter 13 – Bad Faith

In re Cupples, 2024 WL 1143957, 2024 Bankr. LEXIS 642 (Bankr. Del. March 15, 2024) - How bad to the fact have to be before you can't file a Chapter 13 to repay the debt? In this case, the Debtors had been found guilty by a jury in federal court of stealing $275,000 from a dead woman's home. The Bankruptcy Judge dismissed the Chapter 13, finding it had been filed in bad faith. The Debtors' motive for filing the Chapter 13 was to avoid paying the judgment, not a desire to reorganize. Notably, the creditor-probate estate filed their complaint to determine dischargeability late – and the complaint was dismissed with prejudice. Section 1307(c) allows cases to be dismissed "for cause." "While Section 1307 does not explicitly list a good-faith requirement, the 3rd Circuit Court of Appeals has consistently held that a bankruptcy filing may be dismissed 'for cause' under § 1307(c) if it is not made in good faith," citing e.g.,. *In In re Myers*, 491 F.3d 120 (3d Cir. 2007). The appeals court added that bankruptcy courts can "reasonably find bad faith" if the purpose of the bankruptcy filing was to defeat litigation without a reorganization purpose. The Cuppleses retained their bankruptcy attorney 20 days after the judgment was entered and filed their bankruptcy petition less than 90 days after the judgment was recorded in Delaware.

In re Page, 658 B.R. 178 (Bankr. E.D. Wash. 2024). Debtor's Chapter 13 Plan proposed to re-amortize 910 car loans, which resulted in monthly loan payments being higher than the contractual auto payments, thereby reducing the Debtors' disposable income. The

court found the Plan could not be confirmed because it was harmful to unsecured creditors, and under the totality of the circumstances the plan was not proposed in good faith. The court also found cause to dismiss the case. Pigs. Hogs. Fed. Slaughtered.

VIII. Dischargeability and Default Judgments

In re Savinelli, 661 B.R. 829 (Bankr. S.D. Ohio 2014). A default judgment established the amount of the debt, but on Summary Judgment, there was insufficient evidence to determine whether the default judgment had collateral estoppel effect as to the debt's dischargeability. Every aspect of the Complaint, other than the amount of the debt, was denied summary judgment. Bankruptcy courts deal with overly optimistic non-dischargeability summary judgment filers a lot. Some would say, too much.

IX. It is Important to Know the Deference.

In re Wagner, ___ F.4th ___, 2024 WL 4142990, 2024 U.S. App. LEXIS 23139 (11th Cir. Sept. 11, 2024). The bankruptcy court determined, after a hearing, that debtor was entitled to a discharge, despite failing to list an ownership interest in a show horse. The district court reversed, holding that the bankruptcy court's decision was "clearly erroneous", and instead found that debtor knowingly and fraudulently made a false oath in omitting his ownership interest. The 11th Circuit reversed the district court and upheld the bankruptcy court because the district court misapplied the "clearly erroneous" standard in its review. Thus, the bankruptcy court did not clearly err in determining that the debtor was entitled to a discharge.

X. Chapter 13 – Payroll Deduction Order Enforcement

In re Lauber, 2024 WL 1775257 (Bankr. W.D. Mich. 2024) – The bankruptcy court has the authority to enforce Payroll Order through contempt power. The Employer failed to comply with the Payroll Order when the Employer withheld funds from Debtor's pay but did not remit payments to Chapter 13 Trustee. The Employer had knowledge of the Order as Employer partially complied by withholding payments from Debtor's pay. Employer had notice of the obligation to withhold and remit, and continued to withhold the funds even after the entry of an Order to Show Cause. Contempt powers are limited to remedies designed to compel or coerce compliance and compensate a person who suffers injury from non-compliance. The bankruptcy court entered an Order requiring the Employer to turn over the funds that were withheld, and entered judgment against the Employer for the amount of withheld funds, which Debtor was permitted to enforce immediately after entry of the Order. The court also found that Employer's actions constituted a willful violation of automatic stay for which award of attorney's fees was warranted. Employer's actions in withholding funds triggered the requirement of Debtor to seek counsel who took repeated and costly steps in effort to convince the Employer to remit payments. This is the easiest case for enforcement – monies are withheld, but not turned over. More difficult, is situations where employers just ignore the payroll deduction order. The first level problem is that almost all such orders are entered without notice or the opportunity for a hearing. . . .

XI. Motion To Dismiss A Chapter 7 – Denial Is Not A Final Appealable Order

In re Delaney, 110 F.4th 565 (2nd Cir. 2024). Pro se debtor moved to dismiss the Chapter 7 case. The bankruptcy court denied the Motion, finding dismissal was not in the best interest of all parties. On appeal, the Circuit Court held that denial of dismissal was not a final appealable order.

XII. SubChapter V – Silence is not Acceptance?

In re M.V.J. Auto World, Inc., 661 B.R. 186 (Bankr. S.D. Fla. 2024). The proposed Subchapter V Chapter 11 plan could not be consensually confirmed, since an impaired class of creditors did not accept the plan, but the Plan could be confirmed as a nonconsensual plan because the only other impaired class did vote to accept the plan. *See also*, ***In re Thomas Orthodontics***, 2024 WL 4297032 at *7, 2024 Bankr. LEXIS 2334 at *18 (Bankr. E.D. Wisc. Sept. 25, 2024)("a clear majority of courts have held that an impaired class cannot accept a chapter 11 plan by silence."); ***In re Florist Atlanta, Inc.***, 2024 WL 3714512 at *2 n.5, 2024 Bankr. LEXIS 1842 *3 n.5 (Bankr. N.D. Ga. Aug. 7, 2024); ***In re Creason***, 2023 WL 2190623 (Bankr. W.D. Mich. 2023); ***In re Lupton Consulting LLC***, 633 B.R. 844, 862, n.20 (Bankr. E.D. Wis. 2021)("a failure to cast a ballot is not consent"); COLLIER ON BANKRUPTCY ¶¶ 1126.04, 1129.02[8], 1191.02.

Going The Other Way – Houston Does Not See a Problem

In re Franco's Paving LLC, 654 B.R. 107 (Bankr. S.D. Tex. 2023)(Jones, J.) and ***In re Hot'z Power Wash, Inc.***, 655 B.R. 107 (Bankr. S.D. Tex. 2023)(Rodriguez, J.).

XIII. SubChapter V - Asking for True Up May be a Screw Up

In re Packet Constr., LLC, 2024 WL 1926345, 2024 Bankr. LEXIS 1053 (Bankr. W.D. Tex. April 30, 2024). There was no general requirement for a subchapter V debtor to "true up" its payments to its creditors when its actual income exceeded its projected disposable income, §1191(b), and there were no circumstances presented that could warrant consideration of a departure from the general rule. Thus, no "true up" would be required or imposed. *See also*, *In re Nelkin & Nelkin, P.C.*, ___ B.R. ___, 2024 WL 4249836 at **9-11, 2024 Bankr. LEXIS 2324 at **24-29 (Bankr. S.D. Tex. Sept. 20, 2024).

XIV. Student Loans – When is §523(a)(8) "Self-Executing"?

In re Irigoyen, 659 B.R. 1 (9th Cir. BAP 2024). The issue in this appeal was whether the debt in issue was within the scope of §523(a)(8). The Panel held: "a more prudent interpretation is that § 523(a)(8) is 'self-executing' in the sense that neither party is required to file a lawsuit to determine the dischargeability of the debt. However, the lack of a determination does not change the nature of the debt. The debt is excepted from the general discharge order only if it actually qualifies as the type of educational loan covered by § 523(a)(8). Otherwise, the debt is discharged with every other dischargeable debt. This interpretation harmonizes §§523, 524, and 727, such that only the specific debts enumerated by Congress are excepted from the general discharge." *Irigoyen*, 6459 at 12. The bankruptcy court had held that the debt was not discharged until an order was entered discharging it. Because the bankruptcy court was held to be wrong on that, the case was

remanded for a determination was to whether or not there was a "fair ground of doubt" regarding the discharge of the debt under *Taggert*.

XV. Lien Stripping – Inherited Property

In re Keels, 661 B.R. 929 (Bankr. D. Md. 2024). Debtor inherited property with a home equity lien (a second mortgage) attached. In her Chapter 13 case, the bankruptcy court held that she could avoid the home equity lien even though the lien was in existence prior to her ownership of the property. The amount of the Creditor's claim was determined under Section 1322 and 1325 of the Code. The language of those sections is focused on the amount of the Creditor's claim, not on the Debtor's interest or ability to claim an exemption. Thus, Debtor could strip off the Creditor's lien, provided that Creditor's claim was wholly unsecured.

XVI. Means Test – Mortgage Deduction Interpretation

In re Moreno, 2023 WL 8519682 (Bankr. D.N.M. Dec. 7, 2023). In this Means Test case, the court followed *In re Currie*, 537 B.R. 884 (Bankr. C.D. Ill. 2015) and held that the full mortgage deduction was allowed – even though the Debtor was not obligated on the home mortgage and did not pay on it. What the Debtor did pay on was utilities (cell phone and fuel expenses, which the IRS defines as "utilities") and under *Currie* (taking a plain language view of § 707(b)(2)(A)(ii)(I)) the mortgage and utilities deduction are not split from each other – even though the U.S. Trustee asserted that they should be. Rejecting the U.S. Trustee's arguments, the court followed the IRS standards – as the Code requires – which do not split mortgage and utility expenses.

The decision in *Ransom v. FIA Card Services, N.A.*, 562 U.S. 61, 131 S. Ct. 76, 178 L. Ed. 2d 603 (2011), which found the ownership expense inapplicable when there was no debt, was distinguishable because in that case the IRS does split the ownership expense from the operating expense. But because the IRS lumps mortgage and utilities, the Debtor get the full deduction, even though the Debtor only pays "utilities".

[E]ven though dividing the Housing and Utilities Standard into 'Mortgage or Rent Expenses' and 'Insurance and Operating Expenses' with separate deductible limits for each category may further an overarching policy underlying BAPCPA . . . it conflicts with § 707(b)(2)(A)(ii)(I) of the Bankruptcy Code, which requires above-median-income Debtors to use the applicable monthly expense amounts specified under the IRS National and Local Standards. The IRS Local Standard for Housing and Utilities specifies 'a single amount that is inclusive of all housing expenses,' . . . without breaking the amount down into any categories. . . . The division of the IRS Local Standard for Housing and Utilities into two categories with separate deductible limits . . . would impermissibly and materially affect substantive rights. . . . [T]he Court does not have discretion to deny the full deduction based solely on bankruptcy policy."

Another example that shows *Law v. Siegel*'s focus on "plain meaning" - and not "equity" – is not always creditor friendly.

XVII. Effect of Discharge

***In re Talley**,* 652 BR 422 (Bankr. E.D. Mich. 2024) – A discharge in bankruptcy does not extinguish debt, but merely releases a debtor from personal liability. The discharge does not affect liability of any other entity on or property of any other entity for debts and does not eradicate liability of third parties such as contractually responsible insurance companies. Chapter 7 discharge does not extinguish liability and personal injury action but renders collection of debtor's personal liability unenforceable. A creditor does not violate the discharge injunction by proceeding and the lawsuit against a Debtor in order to determine liability for purposes of collection from a 3rd party. The Bankruptcy Code is not intended to provide a method by which an insurer can escape its obligations based on the financial misfortune of an insured.

In re Cmelka, 661 B.R. 626 (Bankr. N.D. Ill. 2024). In Debtor's third Chapter 13 case, Creditor was not scheduled and did not receive notice. The confirmed Plan paid out 100%, with Debtor receiving back $163,000 – which would have satisfied Creditor's unscheduled claim in full. Under §523(a)(3)(A), made applicable in Chapter 13 under §1328(a)(2), the unscheduled debt was not discharged.

XVIII. Discharge Violation and Sanctions

In re Walker, 2024 WL 3447935 (Bankr. E.D. Mi. 2024) - Discharge is enforced using Court's Civil Contempt power where the creditor violates a definite and specific order of court with knowledge of the order and where there was no fair ground of doubt as to whether the order part of the creditor's conduct or any objectivity reasonable basis for concluding that the creditor's conduct might be lawful. Creditor and Creditor's Counsel violated the discharge by filing a collection action within one year after entry of the discharge, obtaining a default judgment, and then issuing a writ of garnishment to debtor's employer. After learning of the garnishment, Debtor called Creditor's Counsel to advise that Debtor had been discharged which constitutes sufficient notice to cause a reasonably prudent person to make further inquiry. However, neither creditor nor Creditors Counsel return funds requiring Debtor to hire counsel who mailed a copy of the discharge to Creditor's Counsel within promptly refunded to Debtor the amount of the post-discharge garnishment. Debtor entitled to recover reasonable attorney's fees including informal efforts to address the issues and costs and fees incurred in bringing and litigating a motion for contempt. Debtor entitled to recover damages for emotional distress where Debtor testified that he was extremely distressed when he learned wages were going to be garnished; Debtor became concerned that he had done something wrong and would have to be paid the debt; Debtor was concerned that there was a court document instructing his employer to garnish wages; Debtor was stressed and embarrassed and debtor's legitimate concerns are exacerbated when Creditor's Counsel was allegedly dismissive en route; and the loss of a significant portion of his wages because Debtor distress as funds were needed to provide for his family. Creditors and Creditor's Counsel's actions were sufficiently willful to warrant an award of punitive damages of $1000.

XIX. Probate Exception to Bankruptcy Jurisdiction

***Williams v. Gold**,* 657 BR 93 (E.D. Mich.), *appeal pending*, ___ WL ___ (6th Cir. 2024) - Federal courts have no jurisdiction to probate a will or administer an estate. The probate exception has a "distinctly limited scope," and federal courts may retain jurisdiction so long as it does not interfere with probate proceedings or assume general jurisdiction over probate or property in state court custody. An exception reserves to state probate courts the probating or the annulment of a will and the administration of decedent's estate; and precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. In 2019, Debtor's wife died intestate. In 2020, Debtor filed for relief under Chapter 7. Trustee argued that under Michigan intestacy law, the Deceased Spouse's property automatically became Debtor's property, and filed an Adversary Proceeding for declaration that Deceased Spouse's interest was now property of the estate. Trustee's complaint falls within the probate exception because it asks the bankruptcy court to administer a probate estate. The complaint invites the bankruptcy court to determine intestate succession issues - whether the decedent died intestate, whether Decedent's estate included the real property at issue, and whether under Michigan law Debtor inherited property by intestate succession. Administration of Michigan's intestacy statutes is within the province of Michigan's state courts.

XX. Involuntary Petitions – Now an Even Worse Idea!

PCC Rokita S.A. v. HH Tech. Corp. (In re HH Tech. Corp.), 659 B.R. 788 (1st Cir. BAP 2024). The two Petitioning Creditors had the burden of proof as to the existence of less than 12 creditors holding unsecured claims. Which is a substantial risk for a single creditor filing an involuntary petition. But *HH Tech* also held that in attempting to meet that burden of proof by eliminating creditors who received preferential transfers, "the bankruptcy court also correctly placed on Rokita and Morimatsu [Petition Creditors] the burden of establishing the unavailability of §547(c) affirmative defenses to claims of preferential transfers." 659 B.R. at 807.

But . . . .

***In re Rillema**,* 2024 WL 1261868 (Bankr. N.D. Ohio 2024) – An involuntary case may be commenced only by the holders of claims that are not contingent as to liability or the subject of a *bona fide* dispute as to liability or amount. The creditor bears the burden of establishing the requirements under Section 303. A debt is subject to *bona fide* dispute if there is any legitimate factual or legal basis for Debtor not paying the debt – either the existence of a genuine issue of material fact(s) that bears upon Debtor's liability, or meritorious contention as to application of the law to the undisputed facts. The court will not resolve disputed issues of fact or law, but only determine whether such issues exist. Federal Rule of Civil Procedure 12 applies to involuntary petitions under Rule 1011 but the court may convert the Motion to one for Summary Judgment where materials beyond the four corners of the Petition are considered. Although the Debtor submitted hundreds of pages in response to the Petition - amounting to a statement that "there is a lot of litigation pending" - Debtor did not deny that Debtor was indebted to Creditor and that proceedings in the other court(s) were largely procedural. Pending litigation may strongly suggest the existence of *bona fide* dispute, but litigation does not necessarily establish the

existence of a *bona fide* dispute, and the court must consider how the litigation relates to the claim, status of litigation, including whether there are affirmative defenses, whether there are counterclaim,(s), whether there is a judgment, and whether there is a pending appeal. The four corners of the Involuntary Petition, taken as true for purposes of Rule 12, contains specific allegations regarding amount of the debt, and the Petition at least infers that Debtor has fewer than 12 creditors. It also contains a statement that the Creditor is eligible to file the Petition, and includes all the elements required to support relief. While the Petition did not contain additional information or attachments to show the nature of the claims and the basis for finding a lack of a *bona fide* dispute, the Creditor used Official Form 105 as required, which assumes legal sufficiency.

XXI. Collateral Estoppel

Alabama Creditors v. Doran, 2024 WL 1100315 (11th Cir. 2024) – The Full Faith and Credit statue requires Courts in United States to provide same effect to state judicial *proceedings as provided by law of state where judgment issued*. A final judgment rendered by a court with adjudicatory authority over the subject matter and persons, qualifies for recognition. The Debtor's litigation in the bankruptcy court regarding the possible exemption of his retirement account was not barred by Full Faith and Credit Act, where the Debtor was not contesting or asking Bankruptcy court to ignore a prior state court judgment that determined that the account was not exempt, but was only asking the bankruptcy court to determine the meaning of the state court judgment. Collateral estoppel did not prevent the bankruptcy court from determining the exemption issue. Collateral estoppel bars re-litigation of issues of fact or law litigated and decided in a prior suit and requires: (1) the issue in the present action must be identical to the issue litigated in the prior action; (2) the issue must have been actually litigated in prior action; (3) resolution of the issue must have been a necessary part of the prior judgment; and (4) the same parties must be involved in the two actions. Debtor's claims in Bankruptcy Court were not barred as it was not clear that the determination of the claimed exemption was necessary to the resolution of the State Court matter. The State Court had denied Debtor's claimed exemption on both "procedural and substantive" grounds, but Court could not determine whether State Court denied the exemption based on procedural reasons or for substantive ones. Where a judgment does not distinguish between which of two (or more) independently adequate grounds is relied on, the bankruptcy court cannot determine what issues were in fact adjudicated, and the judgment has no preclusive effect.

XXII. Judicial Estoppel

McGruder v. Metropolitan Government of Nashville & Davidson County, Tennessee, 99 F.4th 336 (6th Cir. 2024) - Judicial Estoppel does not apply to equitable relief such as the reinstatement of prior employment. Preventing a party from seeking reinstatement would not serve bankruptcy goals as the nondisclosure did not materially affect the bankruptcy proceedings because injunctive relief does not generate funds that can be distributed to creditors. The claim for reinstatement likely would not be relevant to the bankruptcy court's determination of the disposition of the Debtor's assets, and the omission of the reinstatement claims did not minimize Debtor's assets as Debtor's future earnings are not pertinent to Chapter 7 proceedings.

***Moore v. Reliable Home Health Care, LLC**,* 2024 WL 1049895, 2024 U.S. Dist. LEXIS 42237 (S.D. Ohio March 11, 2024) – Judicial Estoppel is an equitable doctrine that bars a party from (1) asserting a position that is contrary to one that party asserted under oath in a prior proceeding, (2) if the prior court adopted a contrary position either as preliminary matter or as part of final disposition; and (3) if the Debtor's failure to disclose was not due to mistake or inadvertence meaning where the Debtor lacked knowledge of the factual basis of the undisclosed claim(s) and 'the Debtor has no motive for concealment or acted in bad faith.' Debtor did not disclose an already pending employment discrimination case in their bankruptcy schedules and the bankruptcy court adopted Debtor's assertion that no causes of action existed in entering an Order of Discharge. Debtor had knowledge of factual basis of her claims and had motive to conceal the action to allow the Debtor, not the Estate, to financially benefit from the judgment. The bankruptcy case was reopened after Defendant filed its motion to dismiss based on judicial estoppel, evidencing the effort to conceal the pending action in bad faith.

Snyder v, Polymer Mach. Co., 2023 WL 2734687, 2023 U.S. Dist. LEXIS 57563 (N.D. Ohio March 31, 2023) - Judicial estoppel prevents party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. Judicial estoppel preserves the integrity of courts by preventing a party from abusing the judicial process through cynical gamesmanship. When a party has sought bankruptcy protection, judicial estoppel bars undisclosed suit(s) when: (1) Debtor assumed a position contrary to one she asserted under oath in bankruptcy; (2) bankruptcy court adopted a contrary position either as preliminary matter or as part of final disposition; and (3) Debtor's omission did not result from mistake or inadvertence. A debtor has an ongoing duty to amend their schedules to disclose all potential causes of action that arise during a Chapter 13 case. Two years into the Chapter 13 case, Debtor filed suit against Employer for alleged violations of the Fair Labor Standards Act. Debtor did not make effort to notify the bankruptcy court until 3 months after the Debtor filed the case, and one month after the FLSA Defendant moved for dismissal based on judicial estoppel. Allowing the Debtor to simply correct omissions only after opposing party raises the issue would encourage gamesmanship. Plaintiff-Debtor became aware of the claims before Defendant filed the Motion to Dismiss, but made no attempt to amend the Schedules or Plan, or alert bankruptcy court of the claims.

***Todd v. Quin (In re Todd)**,* 2023 WL 8284792, 2023 Bankr. LEXIS 2852 (Bankr. S.D. Miss. Nov. 30, 2023) - Judicial estoppel does not apply to Chapter 13 Debtors' post-petition malpractice action because the cause of action was not concealed; intervention by the Chapter 13 trustee in the lawsuit does not upset the Debtors' rights to all future proceeds. Here, the Chapter 13 Debtors adequately scheduled contingent and unliquidated post-petition medical malpractice claim. At completion of payments and discharge the malpractice claim was "technically" abandoned to the Debtors under §554(c) and no portion of any future recovery belongs to the Chapter 13 estate.

Property of the Estate in a Chapter 7

Bercy v. City of Phoenix, 103 F.4th 591 (9th Cir. 2024). A hostile work environment suit was filed based on conduct that began before the Chapter 7 case was filed, and continued afterward. The Ninth Circuit held that the action accrued prepetition and was property of the Chapter 7 estate under §541(a)(6). The Chapter 7 trustee had reopened the case, and

was the only party with authority to pursue the cause of action. The debtor had no standing based on the failure to list the claim.

XXIII. Discovery Issues

***In re Insight Terminal Solutions, LLC**,* 657 BR 78 (6th Cir. BAP 2024) – Bankruptcy court's decision to not admit deposition testimony was not erroneous where the witness had died before direct examination could be completed, and before opposing parties could conduct any cross-examination.

XXIV. Reaffirmation Agreements

***In re Tarpley**,* 2024 WL 13133315, 2024 Bankr. LEXIS 742 (Bankr. E.D. Mich. March 27, 2024) – Section 521 requires a reaffirmation agreement to be made before the granting of the discharge. Once the discharge order has been entered, there are no grounds to permit reaffirmation. The reaffirmation agreement is "made" when the agreement is signed by both parties. The Debtor timely signed the reaffirmation agreement, but due to system processing error the Creditor did not sign the reaffirmation agreement until after the discharge was granted. Accordingly, the bankruptcy court lacked authority to allow reaffirmation agreement made after discharge to be effective.

XXV. Standing to Commence Case

In re Eton Stret Brewery, LLC, 2024 WL 4394575 (Bankr. E.D. Mi. 2024 – State law determines who has the authority to file a voluntary bankruptcy petition on behalf of a corporation as determined by the Operating Agreement. Provision of Operating Agreement that allowed President to make "Ordinary and Usual Business Decisions" did not amount to power to unilaterally file bankruptcy. Provision alloowing President to "do all things necessary or convenient to carry out the Company's business and affairs, including the power to ... (9) begin ... any proceeding in the Company's name" did not broaden the President's authority where provision did not indicate power to do all things necessary was in addition to or an expansion of general authority to make day to day business decisions. Operating Agreement specifically required unanimous member approval. President's effort to use Bankruptcy to circumvent specific limitation on power to sell by unilaterally filing bankruptcy and then exercising power as debtor-in-possession to sell assets under Section 363 constituted bad faith warranting dismissal of case.

XXVI. Sovereign Immunity

***Department of Agriculture and Rural Development Rural Housing Service v. Kirtz**,* 601 US 42. 144 S.Ct. 457, 217 L.Ed.2d 361 (2024) – The United States, as a sovereign, is generally immune from suit seeking money damages. Congress may choose to waive immunity through a clear statement that unmistakably allows suit against the United States. Congress need not state its intent to waive sovereign immunity in any particular way and need not use magic words but congressional waiver must be unmistakably clear in language of statute with any ambiguity construed in favor of sovereign immunity. Where a statute creates a cause of action and explicitly authorizes suit against the government, but does not discuss sovereign immunity in so many words, dismissing the claim against the government would effectively negate a claim that Congress clearly authorized by effecting

a clear waiver of sovereign immunity. The Fair Credit Reporting Act provides for a clear waiver of sovereign immunity where the Act authorizes suits against any person who willfully or negligently violates Act. The term "person" is defined broadly to include "any" governmental agency. Accordingly, dismissing the suit based on sovereign immunity would effectively negate suits that Congress clearly authorized in the statute.

XXVII. Attorney Disqualification

In re Jones, Case No. 24-00842 (Bankr. W.D. Mi. 2024) – Party may raise allegations of attorney misconduct by filing Motion to Disqualify. Motions are disfavored as they interfere with attorney-client relationship and litigant's choice of counsel. Courts will generally deny disqualification unless complaining party carries high burden of proof. Objective is to balance public interest in upholding integrity of profession against Party's right to chose counsel. While litigation results in stress, that is not excuse for intimidation of opposing party. Court denied Motion to Disqualify where evidence indicated that most of the hostie interactions were between Counsel's wife and opposing party and did not involve Attorney himself. Party testified that she wanted chosen counsel because he was a long-time friend, has bankruptcy experience, he cares about her and outcome, and is familiar with underlying facts and circumstances, as litigation has been pending in State Court for some years. Party's choice of counsel stacked against record of active hostility from Attorney's spouse (but not from Attorney personally) warranted denial of Motion to disqualify. Court expressed expectation that matters will proceed civilly and encouraged parties to conduct any face-to-face interactions in Courthouse where Marshall Service can provide security.

XXVIII. Chapter 13 – Absolute Right to Dismiss

In re O'Hara*,* 2024 WL 2099351 (Bankr. W.D. Mi. 2024) - Debtor has absolute right to dismiss Chapter 13 case. Debtor has no right to dismiss case after conversion to Chapter 7. Court conducted hearing on Trustee's Motion to Convert. At hearing, the Court reminded Debtor of right to dismiss suggesting that prompt voluntary dismissal motion might avoid conversion. Instead, Debtor's counsel filed response to Chapter 13 Trustee's dismissal motion late on the evening before the hearing; showed up 1½ hours late for the hearing; and waited until after entry of the Conversion Order before attempting to invoke Debtor's dismissal rates. When counsel attempted to dismiss case, counsel filed "notice" of dismissal rather than motion required by Rule 9013, although Court found error "harmless". Even then, counsel did not file notice until after conversion order had been entered. Conversion order took effect upon entry at which point all provisions of Chapter 13 including right to dismiss ceased to become operative. Debtor's motion to dismiss denied without prejudice to Debtor's right to seek dismissal in Chapter 7 case "for cause.

In re Pino, 2024 WL 1049074 (10th Cir. BAP March 11, 2024). Order converting case from Chapter 13 to Chapter 7 eliminated the Debtor's right to dismiss the case under Section 1307. It seems pretty clearly to be the correct answer, based on the language of Section 1307(b), which specifically says the right to dismiss exists "if the case has not been converted". Plus You can't use §1307(b) when you are in a Chapter 7, because Section 103(j) says that the provisions of Chapter 13 only apply when you are in a Chapter 13 – and if you have converted to Chapter 7, you are no longer in a Chapter 13.

Skandis v. Moyer, 2023 WL 2520521 (6th Cir. BAP 2023) – Although Debtor has absolute right to dismiss Chapter 13 that was not previously converted from Chapter 7, Debtor has no right to dismiss Chapter 13 after case has been converted to Chapter 7. Record indicated that Debtor first made request to convert after Court had entered order converting case. Debtor's vague statements at hearing on Motion to Convert that Debtor wanted to stay in Chapter 13 but if the Court was not going to allow case to stay in Chapter 13, that Debtor preferred dismissal without bar to refiling was not "request" to convert under Section 1307.

In re Smith, 2020 WL 476013 (Bankr. N.D. Ohio 2020) – Debtor does not have absolute right to dismiss Chapter 13 case where record indicates that Debtor is manipulating the system. Even if Debtor has absolute right, Court retains power to sanction bad conduct such as bar to refiling, preventing discharge of debts in future cases, and requirement that Debtor seek court approval before commencing new case. Debtor's conduct in filing and then virtually immediately dismissing multiple Chapter 13 cases solely for purposes of delaying foreclosure warranted sanction of *in rem* relief to Creditor.

XXIX. Voluntary Retirement Contributions

Davis v. Helbling, 2020 WL 2831172 (6th Cir. 2020) – Debtor who is making 401k contributions pre-petition allowed to continue contributions and deduct amount from disposable income. Debtor cannot deduct contributions that were not being made pre-petition and cannot deduct amount by which contribution is increased post-petition. Good faith is not issue unless Debtor commences or sharply increases contribution on eve of filing. Court did not determine how to calculate amount of contribution, whether determined by average of 6 calendar months pre-petition or by amount being contributed as of petition date.

Penfound v. Ruskin, 2021 WL 3508561 (6th Cir. 2021) – Following Davis, party may deduct recurring voluntary contributions to a 401(k) Plan only if Debtor has consistently been making those contributions during the six months prior to commencement of case. Debtor could not deduct contributions where Debtor had not made contributions in the six months preceding filing of the case. Debtor had previously worked for a number of years at an employer that maintained a 401(k) Plan and Debtor steadily contributed to that Plan. Debtor left that employment in 2017 and enjoined new employer that did not offer 401(k) Plan such that Debtor was unable to make further contributions. In 2018, Debtor found yet another new job with a company that offered a 401(k) plan but because of delay in eligibility Debtor could not contribute to that 401(k) plan prior to commencement of Chapter 13, although Debtor did commence those contributions post-petition as soon as Debtor was eligible. Debtor's history of regular contributions and inability to contribute during the six months pre-petition did not overcome the lack of contributions during the six months pre-petition.. Court would not expand six month look back as six months pre-filing was longest look back period supported by Bankruptcy Code. Bankruptcy Code does not permit Chapter 13 Debtor to use history of retirement contributions from years earlier as basis to shield voluntary post-petition contributions from unsecured creditors even if Debtor had no ability to make further contributions in the six months preceding filing.

XXX. Appeals

In re California Palms Addiction Recovery Campus, Inc. v. Vara, 87 F.4th 734 (6th Cir. 2023) - Bankruptcy Court Order granting motion to convert from Chapter 11 to Chapter 7 is final, appealable order. Order is considered "final" for purposes of appeal if it leaves nothing for court to do but execute judgment. "Final" order in bankruptcy case is one entered in a proceeding that terminates proceeding. Motion to Convert to Chapter 7 is "proceeding" as discrete dispute with specific procedural steps and granting of motion terminates proceeding as order eliminates rights and obligations stemming from Chapter 11 and results in significant and irreparable consequences has Debtor loses control of estate and opportunity to reorganize.

In re Baum, 2023 WL 4055338 (Bankr. E.D. Mi. 2023) – 28 USC Section 158(d)(2) allows Court on own motion to certify direct appeal to Court of Appeals. Court would not exercise discretion to certify appeal where there was no "order or decree" that had been appealed. Notice of Appeal must identify judgment, order or decree being appealed and must attach copy of judgment, order or decree being appealed. Notice of Appeal identified "judgment, order, or decree appealed from" as "Opinion Re § 349(b)(3) & § 1326(a)(2)" entered May 5, 2023, and linked Notice of Appeal to May 5 Opinion and attached copy of May 5 Opinion to Notice of Appeal. Deadline to appeal Order of Court passed with no notice of appeal being filed.

Findling v. Terry, 2024 WL 781022 (E.D. Mi. 2024) – *Baum,* part 2. The district Cout saved Debtor's appeal and rejected Trustee's Motion to Dismiss. While Notice of Appeal mistakenly referred to Opinion and not Order, there was no confusion about what was being appealed. Trustee did not object to appeal and filed response to potential direct certification raising correct issues on appeal. 28 USC Section 158 grants to District Court appellate power to review lower court judgments. Federal Rule of Appellate Procedure 3 requires designation of appeal as "mandatory and jurisdictional" However Supreme Court has cautioned that Rule 3 must be applied liberally and imperfections in notice of appeal are not fatal absent genuine doubt about who is appealing, from what judgment and to what court. Absent prejudice, mere technical errors do not deprive court of jurisdiction. Appellant appealed an opinion rather than final order throughout all documents in record. There never existed any genuine doubt or confusion about outcome appealed. Court referred to Order in Opinion. The bankruptcy court filed Opinion and Order on same day. Comparing Opinion to the judgment in the Order, legal outcome is identical. Correct order discernable from Opinion that Appellant included in appeal, intent to appeal correct order is discernable from notice itself. Trustee understood the judgment being appealed because she addressed Order in her response to certification motion. Issue not constitutionally moot where Chapter 13 Trustee filed final report and Bankruptcy Court closed case as case could be reopened to administer funds if underlying decision reversed.

Evans v. McCallister, 69 F.4th 1101 (9th Cir, 2023) – Implicitly overruling *Harmon v. McCallister,* 2021 WL 3087744 (9th Cir. BAP 2021) Ninth Circuit concluded that Trustee not entitled to keep percentage fee when case dismissed prior to confirmation of Plan.

Nardello v. Balboa, 514 BR 105 (D.N.J. 2014) – Chapter 13 Trustee compensation controlled by 28 USC Section 586 which provides for Trustee to take percentage fee from all payments received. Trustee fee not limited to or constrained by funds paid to creditors

and Trustee is entitled to fee on all funds received even if case dismissed as fees are not based on disbursements to creditors. Section 1326 allows fee to be taken before or at time of disbursement to creditors, indicating that Trustee fee is not dependent on payment to creditors.

Soussis v. Macco, 2022 WL 203751 (E.D.N.Y. 2022), *appeal pending* Case No. 22-155 (2d Cir. 2024) - Trustee is entitled to the percentage fee regardless of whether the Plan is confirmed. The parties appealed to the Second Circuit and that matter is pending (the docket reflects that the matter was fully briefed last August but does not reflect an oral argument date).

In re Doll, 57 F.4th 1129, *rehg en banc denied,* ____ F.4th ____, (10th Cir. 2023), *cert denied* 2024 WL 674703 (2024) - the Tenth Circuit concluded that the Chapter 13 Trustee must disgorge the percentage fee received if the Plan is not confirmed. 28 USC Section 586 provides for the Trustee to collect a fee based on a percentage of the payments the Trustee received from the Debtor for disbursement to creditors under a confirmed Plan. However, Section 1326 controls how the payments to the Trustee are disbursed and provides "If a plan is not confirmed, the trustee shall return any such payments … to the Debtor". Tenth Circuit concluded that Section 586 and Section 1326, "read together, unambiguously require a Chapter 13 Standing Trustee to return pre-confirmation payments to the Debtor without deducting the trustee's fee when no plan is confirmed". The Court noted that while Trustees in Chapter 12 and Subchapter V of Chapter 11 are specifically authorized to deduct their fees before returning pre-confirmation payments to the Debtor, that provision is conspicuously absent from Section 1326.

In re Baum, 2023 WL 3284625 (Bankr. E.D. Mi. 2023) – Trustee entitled to retain fees in pre-confirmation dismissal, rejecting *In re Doll* and adopting *Harmon v. McCallister, Nardello v. Balboa and Soussis v. Macco.*