CONSUMER BANKRUPTCY LAW

Chapters 7 & 13

Second Edition

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Consumer Bankruptcy Law

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Preface

This monograph provides an overview of consumer bankruptcy law and describes the statutory framework for bankruptcy relief under Chapters 7 and 13 of the Bankruptcy Code, Title 11 of the U.S. Code. It is intended primarily as a reference for Article III judges, especially district judges, who may not handle bankruptcy cases frequently; other judges may also find it helpful.

The monograph describes the types of fact and legal issues that arise in the bankruptcy and appellate courts, highlighting the relevant and principal Supreme Court, appellate, and trial court authority. Important circuit conflicts are examined where applicable. This edition updates case law and legislation.

Case law is current through February 28, 2025. Some unpublished decisions are cited. Although they are not precedential, they may have persuasive value.[1] References to the U.S. Code are to the 2022 version unless stated otherwise. References to "the Code" refer to the Bankruptcy Code, which is Title 11. For Official Bankruptcy Forms, please visit https://www.uscourts.gov/forms-rules/forms/bankruptcy-forms. Bankruptcy forms are subject to periodic revision, with several revisions to Official and Director's Bankruptcy Forms and their instructions taking effect on June 22 and December 1, 2024. Restyling of Bankruptcy Rules Parts I through IX took effect December 1, 2024. The restyled Bankruptcy Rules now apply the same general drafting guidelines and principles used in restyling the Appellate, Criminal, Civil, and Evidence Rules. These changes are intended to be stylistic only. Additional substantive amendments to Bankruptcy Rules 1007, 4004, 5009, 7001, and 9006 and new Rule 8023.1 took effect December 1, 2024.

Please check the For Further Reference section, which lists suggested sources for more complete analyses of consumer bankruptcy issues and law.

The author would like to thank Judge Jon P. McCalla (W.D. Tenn.) for his invaluable review of the drafts of the first and second editions of this monograph.

1. *See* Fed. R. App. P. 32.1.

Overview

The statutory framework for consumer bankruptcy relief is contained in Chapters 7 and 13 of the Bankruptcy Code, Title 11 of the U.S. Code. Relief available under Chapters 7 and 13 is distinct from that under Chapters 9, 11, and 12. While non-consumer debtors may file for relief under Chapters 7 and 13, the most common debtors are consumers.

Bankruptcy filings, both business and consumer, will fluctuate as economic and other factors influence debtors. In the twelve months ending December 31, 2024, there were 517,308 bankruptcy filings, 494,201 of which were nonbusiness filings. Of the nonbusiness filings, 298,049 were under Chapter 7, and 195,724 were under Chapter 13.[2] The number of bankruptcy filings, both business and consumer, has fluctuated since the first edition of this monograph, due to economic factors and the effects of Covid-19. In the twelve months ending June 30, 2014, 969,970 nonbusiness bankruptcy filings occurred.[3] Even though the number of consumer bankruptcy filings has dropped over the past decade, the volume of litigation has not diminished. Judges face many challenges in addressing bankruptcy litigation. This monograph serves as an aide for judges navigating the litigation related to consumer bankruptcy cases.

Who Is a Debtor?

Although the term *debtor* has broader meaning in the context of financial transactions, *debtor* in this monograph refers to individuals who file for relief under the Bankruptcy Code.[4] A *consumer debtor* is one whose primary debts are *consumer debts*, a term defined in the Bankruptcy Code as "debt incurred by an individual primarily for a personal, family, or household purpose."[5] As will be seen

2. Report F-5A. U.S. Bankruptcy Courts—Business and Nonbusiness Bankruptcy Cases Commenced, by County and Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2024, https://perma.cc/SC7Y-LPW9.

3. Table F-2—U.S. Bankruptcy Courts Judicial Business (September 30, 2014): U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending September 30, 2014, https://perma.cc/5T7K-AWN9.

4. 11 U.S.C. § 101(13) ("The term 'debtor' means person . . . concerning which a case under this title has been commenced.").

5. 11 U.S.C. § 101(8). Whether a debt is consumer generally focuses on the debtor's purpose for incurring the debt. *See, e.g.*, *In re* Alvarez Velez, 617 B.R. 158 (B.A.P. 1st Cir. 2020).

later in the analysis of eligibility for bankruptcy relief under Chapters 7 or 13, the amount of debt is a factor. Even though a debtor may have a mixture of consumer and nonconsumer debt and still be eligible for relief under these chapters of the Code, the focus of this monograph is on consumer debtors, with the assumption that their debts are primarily consumer in nature.[6] The discussions to follow apply to individuals filing for bankruptcy relief. The monograph does not cover bankruptcy relief for corporations, partnerships, or other entities that may be eligible for Chapter 7 relief but not for Chapter 13 relief.[7]

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) significantly amended the Bankruptcy Code.[8] The 2005 amendments did not change the entire 1978 Bankruptcy Code, but most of its changes were to consumer portions.[9] This examination of the Bankruptcy Code's provisions is based on the Code as amended in 2005, along with relevant subsequent amendments through 2024.[10] However, this monograph does not attempt to distinguish the pre-2005 Code from the amended Code. The For Further Reference section lists resources about the history of the U.S. bankruptcy laws, as well as suggested sources for more complete analysis of bankruptcy issues and law.

What Are Bankruptcy Courts?

The bankruptcy courts are trial courts in the federal judicial system.[11] Where relevant, the monograph examines procedural issues, including case-management

6. There can be disputes on whether debts are consumer in nature. For example, as discussed in part 5, dismissal of a Chapter 7 case may be based upon a finding of abuse when the debtor primarily has consumer debts. *See* 11 U.S.C. § 707(b)(1); *see*, *e.g.*, *In re* Ruff, 639 B.R. 772 (Bankr. N.D. Ga. 2022) (debtor's student loans were not consumer debts for purposes of § 707(b)(1)).

7. Debtors under Chapter 13 must be individuals. 11 U.S.C. § 109(e).

8. Pub. L. 109-8, 119 Stat. 23 (Apr. 20, 2005).

9. For analysis of BAPCPA's amendments and black-lined Code, showing changes made by Act, see Judge William H. Brown & Lawrence R. Ahern III, 2005 Bankruptcy Reform Legislation (2d ed. 2005).

10. Among the amendments to the Bankruptcy Code after 2005, the Bankruptcy Threshold Adjustment and Technical Corrections Act (BTATCA), effective June 21, 2022, increased the Chapter 13 debt-eligibility limit to $2,750,000 and eliminated the distinction between secured and unsecured debt for Chapter 13 eligibility purposes. See *infra* part 6 for discussion of this Act and its changes to Chapter 13 eligibility. Legislation is pending in Congress that would extend the Chapter 13 eligibility amount for two years. However, the legislation was not enacted prior to the June 21, 2024, sunset of BTATCA, resulting in Chapter 13 eligibility reverting to $526,700 for unsecured debt and $1,580,125 for secured debt, restoring the distinction for unsecured and secured debt limits that had been eliminated in BTATCA. These amounts adjusted automatically on April 1, 2025, under 11 U.S.C. § 104.

11. 28 U.S.C. § 151.

tools. Appeals from the bankruptcy courts may go to the district court or, when an appropriate election has been made, to a bankruptcy appellate panel and then to the courts of appeals, with final appeal to the U.S. Supreme Court.[12]

Organization of the Monograph

This monograph is organized as follows:

- Part 1 is an overview of the structure of the bankruptcy courts, their jurisdiction, and their jurisdictional limits. It explains the procedural rules and the fundamentals of the Bankruptcy Code's structure and summarizes the primary terms used in consumer bankruptcy practice.[13] The appellate process, including the potential for direct appeals to the circuit courts, is briefly described. Part 1 concludes with a short explanation of the scope of consumer-related litigation that may occur in the bankruptcy courts.
- Part 2 discusses the commencement of a bankruptcy case by the filing of a petition; the Code's filing requirements and debtor duties; the automatic stay that comes into effect; exceptions from the stay; grounds for moving for stay relief; and issues related to damages for stay violations.
- Part 3 describes how the bankruptcy estate is created and looks at the function of exemptions that may be claimed by debtors under either the Bankruptcy Code or applicable state law. It analyzes recent Supreme Court decisions and other judicial authority about exemptions and their objections.
- Part 4 explains the claim-allowance process, including objections to claims and the different levels of priority for distribution to creditors. It describes the Federal Rules of Bankruptcy Procedure for proofs of claims and provides case analysis of the claims process. Standing to file a proof of claim is an issue that receives substantial attention from the courts, and many issues have arisen from claims filed by home-mortgage creditors and other secured creditors.
- Part 5 examines Chapter 7 relief, including the *means test*, which is an eligibility threshold for relief under Bankruptcy Code § 707. This part covers reaffirmation issues, discharge, objections to discharge, and the

12. *Id.* § 158. A federal court of appeals may grant a direct appeal from a final judgment, order, or decree of the bankruptcy court under § 158(d). *See, e.g.*, *In re* Woolsey, 696 F.3d 1266 (10th Cir. 2012) (discussing certification by the bankruptcy court for a direct appeal).

13. For bankruptcy terms, see the glossary, *infra*.

primary exceptions from discharge, with references to illustrative case authority. The grounds for dismissal of cases and potential conversion of a Chapter 7 case to a Chapter 13 case are also explained.

- Part 6 addresses Chapter 13 relief, beginning with eligibility. It covers the plan proposal and confirmation process, as well as grounds for objection to confirmation and plan modification. Part 6 explains dismissal and conversion of Chapter 13 cases, as well as the discharge issues that arise in Chapter 13 relief.

1

Introduction: Bankruptcy Courts and the Code

1.1 The Structure of Bankruptcy Courts

Bankruptcy relief is under Title 11 of the U.S. Code through petitions filed in the bankruptcy courts, which are units of the district courts under 28 U.S.C. § 151. The constitutional basis for bankruptcy relief is Article I, Section 8 of the U.S. Constitution, which authorizes congressional creation of "uniform laws on the subject of Bankruptcies throughout the United States." *Uniformity* does not necessarily mean that each aspect of the application of bankruptcy relief is the same for every debtor, wherever located.[14] For example, although the Bankruptcy Code governs bankruptcy relief, state-law exemptions may apply to debtors in bankruptcy; and state law may be applicable in many determinations that are made in bankruptcy cases, such as when the Uniform Commercial Code controls the validity of a security interest, which may influence determination of the allowance of a secured claim. The Uniformity Clause does limit bankruptcy relief to legislation on the federal level.

There have been numerous bankruptcy acts, beginning with the Bankruptcy Act of 1800.[15] The current Bankruptcy Code is based on the 1978 enactment, as it has been amended several times.[16] A substantial amendment, especially

14. Uniformity in the context of exemption choices is discussed *infra* part 3.6. For the conclusion that quarterly United States Trustee fees in Chapter 11 cases violated the Uniformity Clause when not applied in every district, see *Siegel v. Fitzgerald*, 596 U.S. 464 (2022). *See also* Office of U.S. Trustee v. John Q. Hammons Fall 2006, LLC, 144 S. Ct. 1588 (2024) (remedy for *Siegel*'s unconstitutional fee disparity was prospective parity and not refund of fees).

15. 2 Stat. 19 (1800). *See, e.g.*, Charles J. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am. Bankr. Inst. L. Rev. 5 (Spring 1995); Judge Joan N. Feeney & Michael J. Stepan, Bankruptcy Law Manual § 1:2 (5th ed. 2023).

16. Substantial amendments to the 1978 Code include the Bankruptcy Amendments Act of 1984 and the Bankruptcy Reform Act of 1994.

impacting consumer issues, was the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[17] BAPCPA frames much of the focus of the following discussion, since it created legal issues for the bankruptcy and appellate courts. This monograph highlights the principal appellate decisions addressing consumer issues raised by BAPCPA, as well as by pre-BAPCPA portions of the Bankruptcy Code still relevant, and suggests examples of judicial decisions that may form the basis for further research.

Each federal judicial district has a bankruptcy court composed of one or more bankruptcy judges, and each state has one or more judicial districts. There are ninety bankruptcy districts across the country. Each bankruptcy court generally has its own clerk's office, although the services provided by a clerk's office may be shared with the clerk's office of the district court. Each bankruptcy judge is an Article I judge: a judicial officer of the district court appointed by the applicable court of appeals under the procedure outlined in 28 U.S.C. § 152, who serves for a fourteen-year term and is subject to reappointment.

In 1982, the Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipeline*[18] held that the broad, independent authority given to bankruptcy judges under the 1978 Code was an unconstitutional grant to non-Article III courts. In response, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA),[19] under which a bankruptcy court became "a unit of the district court to be known as the bankruptcy court for that district."[20] "[O]riginal and exclusive jurisdiction of all cases under [the Bankruptcy Code]" is vested in the Article III district court.[21] The district court also has "exclusive jurisdiction" over the property of a bankruptcy debtor and of the bankruptcy estate created by the filing of a bankruptcy petition,[22] as well as "original but not exclusive jurisdiction over all civil proceedings arising under title 11, or arising in or related to cases under title 11."[23]

17. Pub. L. 109-8, 119 Stat. 23 (Apr. 20, 2005). Amendments to the Bankruptcy Code after the BAPCPA include the HAVEN Act of 2019, Pub. L. 116-52, 133 Stat. 1076 (Aug. 23, 2019); the Family Farmers Relief Act of 2019, Pub. L. 116-51, 133 Stat. 1075 (Aug. 23, 2019); and the addition of Subchapter V to Chapter 11 for small business debtors, Pub. L. 116-54, 133 Stat. 1079 (Aug. 23, 2019).

18. 458 U.S. 50 (1982). For a discussion of *Northern Pipeline* and the jurisdictional history of the bankruptcy courts, see, e.g., Norton Bankruptcy Law and Practice, ch. 4 (3d ed. 2023), and Judge David S. Kennedy & Spencer Clift, *An Historical Analysis of Insolvency Laws and Their Impact on the Role, Power, and Jurisdiction of Today's United States Bankruptcy Court and Its Judicial Officers*, 9 J. Bankr. L. & Prac. 165 (Feb. 2000).

19. Pub. L. No. 98-353, 98 Stat. 333 (1984).

20. 28 U.S.C. § 151.

21. *Id.* § 1334(a).

22. *Id.* § 1334(e). See *infra* part 3 for a discussion of bankruptcy estates.

23. *Id.* § 1334(b).

The district court is rarely the first court to hear matters in a bankruptcy case. BAFJA created a referral process under which the district court may provide that "any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."[24] In each district, there is a standing order of reference entered by the district court: bankruptcy cases and proceedings are filed initially with the bankruptcy-court clerk, so the bankruptcy court acts as the court of first impression for disputed motions or proceedings in or related to bankruptcy cases. In a typical consumer case, absent some contested matter or proceeding, the debtor may not come before the bankruptcy judge, and the case may be administered by the designated trustee.

Section 157(b) of Title 28 describes what a bankruptcy judge may hear and determine. It describes the bankruptcy court's authority to hear and determine cases under Title 11 and core proceedings arising under Title 11 or arising in a case under Title 11. Core proceedings are defined by a nonexclusive list in § 157(b)(2). The language of § 157(b) describes several core proceedings, separating them from "noncore" proceedings, in which the bankruptcy judge may conduct hearings and enter proposed findings and conclusions. The term *proceeding* is broad, including motions and complaints that may be filed in a bankruptcy case.

As evidenced by the Supreme Court's decision in *Stern v. Marshall*,[25] however, the statutory description of a bankruptcy court's authority is not necessarily constitutional. *Stern* arose out of a Chapter 11 case in which the bankruptcy court had entered a final order in a counterclaim for tortious interference filed by the debtor-in-possession against an individual filing a claim in the case. Section 157(b)(2)(C) of Title 28 specifically includes such a counterclaim as a "core proceeding" over which the bankruptcy court may enter a final order. The problem was that the counterclaim was not based on any Bankruptcy Code provision, but on state common law, and the Court ruled that the statutory grant of authority violates Article III, Section 1 of the Constitution when the counterclaim "is not resolved in the process of ruling on the creditor's proof of claim."[26]

Because of *Stern*, bankruptcy and appellate courts have had to analyze anew whether the bankruptcy court has constitutional authority to enter final orders in some contested matters or proceedings. If the authority is lacking, the bankruptcy judge may still hear a core proceeding and—just as in a noncore proceeding—may enter proposed finding of facts and conclusions of law that would be

24. *Id.* § 157(a).

25. 564 U.S. 462 (2011).

26. *Id.* at 503.

submitted to the district court for consideration in its de novo review and entry of a final decision.[27]

The Supreme Court stressed the importance of de novo review in *Executive Benefits Insurance Agency v. Arkison* (*In re Bellingham Insurance Agency Inc.*),[28] decided after *Stern*. In *Bellingham*, the defendant challenged the bankruptcy court's authority to enter final judgment in a noncore fraudulent conveyance proceeding, and an issue was raised as to whether the defendant had consented to the bankruptcy court's authority. The Ninth Circuit held that the constitutional right to final judgment before an Article III judge was waivable by litigants.[29] Without deciding the consent question, the Supreme Court found that the district court had conducted a de novo review and that even if the bankruptcy court's entry of a judgment was invalid, the district court's review cured any error.

When a bankruptcy court's constitutional authority is questioned, the parties may consent to the entry of a final order by the bankruptcy court as a savings provision in both core and noncore proceedings.[30] In *Wellness International Network, Ltd. v. Sharif*,[31] the Supreme Court held that a bankruptcy court may enter a final order in a *Stern*-type claim if the parties consented, and the consent may be express or implied, provided it was voluntary and knowing. Factual questions may exist when a party subsequently disputes that it consented, but a party's pleading that a proceeding was core may amount to consent to the bankruptcy court's entry of final orders.[32]

Fortunately, the issue of the bankruptcy court's authority doesn't typically arise in the everyday administration of consumer cases. In most consumer cases and proceedings, the bankruptcy court's authority to enter final orders is clear and undisputed.[33] *Stern* did not address the bankruptcy court's subject-matter

27. 28 U.S.C. § 157(c). *See, e.g.*, Ortiz v. Aurora Health Care, Inc. (*In re* Ortiz), 477 B.R. 714 (E.D. Wis. 2012) (although Title 28 doesn't specify that the bankruptcy court can propose findings and conclusions, the bankruptcy court's authority to do so is clear in light of *Stern*); Safanda v. Castellano (*In re* Castellano), 514 B.R. 555 (Bankr. N.D. Ill. 2014) (treating fraudulent conveyance action as noncore, entering proposed findings and conclusions for district court).

28. 573 U.S. 25 (2014). For a review of more than 200 decisions after *Stern* and before *Executive Benefits*, see Judge John E. Hoffman Jr. & Brian L. Gifford, Decisions Interpreting *Stern v. Marshall* (Federal Judicial Center 2012).

29. Exec. Benefits Ins. Agency v. Arkison (*In re* Bellingham Ins. Agency Inc.), 702 F.3d 553 (9th Cir. 2012).

30. 28 U.S.C. § 157(c)(2). *See also* Fed. R. Bankr. P. 7012(b) (responsive pleading in an adversary proceeding " whether the party does or does not consent to the entry of final orders or judgment by the bankruptcy court.").

31. 575 U.S. 665 (2015).

32. *See, e.g.*, *In re* Richards, 655 B.R. 782 (B.A.P. 9th Cir. 2023).

33. *See, e.g.*, *In re* Salander O'Reilly Galleries, 453 B.R. 106 (Bankr. S.D.N.Y. 2011) (matters such as automatic stay, bankruptcy estate, and discharge are clearly within Article I power).

jurisdiction, but rather its authority over certain types of proceedings.[34] The decision does not restrict the bankruptcy court's authority to enter final orders, subject to appeal, in the basic issues involved in the administration of the typical consumer case[35]—matters such as determining an individual's eligibility to file bankruptcy, determining whether the automatic stay applies or has been violated, confirming Chapter 13 plans, determining the discharge of particular debts or objections to the general discharge,[36] allowing claims,[37] determining what is property of the bankruptcy estate, allowing exemptions, and other clearly "core" matters involved in a consumer case.[38] The bankruptcy court's authority to enter final, rather than proposed, orders becomes more questionable as the issues involved become more controlled purely by nonbankruptcy state law[39] or when the determination will have no direct impact on the bankruptcy estate.

The mere fact that state law will be applied does not necessarily mean that an issue before the bankruptcy court is lacking a subject-matter jurisdictional foundation.[40] As the Supreme Court recognized, what constitutes property of the bankruptcy estate may be, and often is, determined by state law.[41] Congress has given the states an option to require debtors in a particular state to use state law, rather than Bankruptcy Code, exemptions.[42] But *Stern* and *Bellingham* emphasize that when the bankruptcy court's authority is questioned, each of the courts involved may be required to analyze whether the bankruptcy or district court should enter the final order.[43]

Not limited to the concerns about the bankruptcy court's constitutional authority, the district court may at any time, and on its own or a party's motion,

34. *See, e.g.*, CirTran Corp. v. Advanced Beauty Solutions, LLC (*In re* Advanced Beauty Solutions, LLC), No. 11-1183-PAHPE, 2012 WL 603692 (B.A.P. 9th Cir. Feb. 8, 2012).

35. *See* 28 U.S.C. § 157(b)(2)(A).

36. *See id.* § 157(b)(2)(J).

37. *See, e.g.*, *In re* Johnson, 649 B.R. 735 (Bankr. N.D. Ill. 2023).

38. 28 U.S.C. § 157(b)(2). *See, e.g.*, Sheehan v. Dobin, No. 10-6288 (FLW), 2012 WL 426285 (D.N.J. Feb. 9, 2012) (adversary proceeding to determine debtor's interest in property was core).

39. *See, e.g.*, Shaia v. Taylor (*In re* Connelly), 476 B.R. 223 (Bankr. E.D. Va. 2012) (*Stern* affects bankruptcy court's constitutional authority over purely state-law matters).

40. *See* 28 U.S.C. § 157(b)(3) ("A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.").

41. Butner v. United States, 440 U.S. 48 (1979).

42. See discussion *infra* part 3.6.

43. *See* 28 U.S.C. § 157(b)(3) ("The bankruptcy judge shall determine . . . whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11 . . . .").

withdraw the reference of a bankruptcy case or proceeding from the bankruptcy court.[44] But withdrawal is rare, especially in consumer cases.

Assuming that the bankruptcy court enters a final order, the first level of appeal is to either the district court or the bankruptcy appellate panel (BAP), if a BAP has been created by the court of appeals and if the particular district court has authorized appeals to the BAP.[45] Those appellate courts may also, when appropriate, entertain interlocutory appeals.[46] The next level of appeal from the district court or BAP is to the court of appeals.[47] BAPCPA created an option for the bankruptcy, district, or BAP courts to certify a particular matter of public importance (involving conflicting decisions or need for immediate appeal) directly to the applicable court of appeals, which may, in its discretion, take such an appeal.[48] Federal appellate courts have accepted direct appeals on some unique issues presented by BAPCPA's amendments to the Code.[49]

1.2

Procedures and Rules in Bankruptcy Courts

As units of the district courts, the bankruptcy courts apply the Federal Rules of Evidence[50] and most of the Federal Rules of Civil Procedure, as those rules are incorporated into Part VII of the Federal Rules of Bankruptcy Procedure. Part VII of the Bankruptcy Rules governs adversary proceedings, or complaints, filed in the bankruptcy court. Bankruptcy Rule 9014(c) applies many of the Part VII Rules to contested matters, or motions, and the bankruptcy judge may order other parts of the Part VII Rules applicable to motion practice. The bulk of the Federal Rules of Bankruptcy Procedure address procedural issues that are unique to bankruptcy cases and their administration.[51] The bankruptcy courts are trial courts that are

44. 28 U.S.C. § 157(d). *See also, e.g.*, Ortiz v. Aurora Health Care, Inc. (*In re* Ortiz), 477 B.R. 714 (E.D. Wis. 2012) (reference of core proceeding withdrawn). The Seventh Circuit had previously decided in *Ortiz v. Aurora Health Care, Inc.* (*In re Ortiz*), 665 F.3d 906 (7th Cir. 2011), that the bankruptcy court lacked constitutional authority to enter final judgment on debtors' claims that were grounded in Wisconsin law.

45. 28 U.S.C. §§ 158(a), (b).

46. *Id.* §§ 158(a)(3) and (b)(4).

47. *Id.* § 158(d)(1).

48. *Id.* § 158(d)(2).

49. *See, e.g.*, Bledsoe v. Cook, 70 F.4th 546 (4th Cir. 2023) (on direct appeal, Chapter 13 debtor could deduct actual mortgage cost in calculating disposable income). *See* discussion *infra* part 6.

50. For analysis of the Federal Rules of Evidence as applied in bankruptcy cases, see Judge Barry Russell, Bankruptcy Evidence Manual (2023–2024).

51. For analysis of the Federal Rules of Bankruptcy Procedure, see Lawrence R. Ahern III & Nancy MacLean, Bankruptcy Procedure Manual (2024) (annual editions).

not typically involved in the day-to-day administration of a consumer case, but rather conduct hearings on the contested matters and adversary proceedings that are presented by the parties. Normal administrative functions are handled by the clerk's office or by the trustee appointed in a particular case.[52]

In addition to the Federal Rules of Bankruptcy Procedure, each bankruptcy court in a district has local rules addressing procedural issues that are either unique to its district's practice or that supplement the Federal Rules.[53] Consumer practice varies on some issues district by district, even though it operates under the same Code and federal rules.[54] For example, in Chapter 13 practice, although there is an official plan form to be submitted by debtors, Federal Rule of Bankruptcy Procedure 3015.1 permits a district to require a "local plan" form instead of the official form, as long as the plan form meets the requirements found in the rule. Most bankruptcy courts opted out of the official plan form, resulting in a variety of plan forms around the country.[55]

For appeals from bankruptcy court orders, Part VIII of the Federal Rules of Bankruptcy Procedure applies; bankruptcy appellate panels, district courts, or courts of appeals may also have their own rules for bankruptcy appeals.

To help judges with the detailed financial and other disclosures in bankruptcy practice, the Administrative Office of the U.S. Courts (Administrative Office), in conjunction with the rules committees of the Judicial Conference of the United States, publishes the official and suggested procedural forms.[56] Each bankruptcy district may also have local forms that are either required by local rule or recommended for more efficient practice.[57]

The bankruptcy courts accept filings of cases and pleadings within a case by electronic means, and most of the pleading practice before these courts is electronically driven.

52. The roles of trustees in Chapter 7 and 13 cases are discussed *infra* parts 5 and 6.

53. *See* Fed. R. Bankr. P. 9029(a). The local rules of each court are available on that court's website; the Administrative Office provides a search tool to find the contact information and website of any federal court, https://www.uscourts.gov/federal-court-finder/find.

54. *See, e.g.*, Scott F. Norberg & Nadja S. Compo, *Report on an Empirical Study of District Variations, and the Roles of Judges, Trustees and Debtors' Attorneys in Chapter 13 Bankruptcy Cases*, 81 Am. Bankr. L.J. 431 (2007).

55. *See, e.g.*, local Chapter 13 plan form for Eastern District of Virginia Bankruptcy Court, https://perma.cc/2HYN-8QM6.

56. *See* the Official and Director's Forms, https://www.uscourts.gov/forms-rules/forms/bankruptcy-forms.

57. *See, e.g.*, *In re* Armistead, No. 11-36535, 2012 WL 3202964 (Bankr. S.D. Tex. Aug. 3, 2012) (discussing its local rule and form requirement for home-mortgage creditors).

1.3

The Structure of the Bankruptcy Code

The Bankruptcy Code is divided by chapters, using odd numbers (except for Chapter 12). Some chapters refer to a particular form of relief, and others contain portions of the Code that apply generally to any form of relief.

- Chapter 1 (discussed below in parts 1 and 2) contains general provisions and definitions of many terms that appear throughout the Code. Section 103 states that Chapters 1, 3, and 5 apply to the relief sought under Chapter 7, 12, or 13.
- Chapter 3 (discussed below in part 2) deals with commencement of the case, its administrative aspects, the automatic stay, and the various officers, including trustees. It is applicable in Chapter 7 and Chapter 13 cases.
- Chapter 5 (discussed below in parts 3 and 4) contains provisions for creditors and their claims, duties and benefits for the debtor, and the bankruptcy estate, including its exclusions and exemptions. It is applicable in Chapter 7 and Chapter 13 cases.
- Chapter 7 provides for liquidation cases, including for consumer debtors and certain nonconsumer debtors. Subchapters I and II of Chapter 7 are discussed below in part 5.
- Chapter 9 (outside the scope of this monograph) deals with debt adjustment for a municipality.
- Chapter 11 (outside the scope of this monograph) addresses reorganization and liquidation relief, which is typically used by corporations or other entities, but may be available to individual debtors.
- Chapter 12 (outside the scope of this monograph) provides for reorganization by a "family farmer" or "family fisherman."
- Chapter 13 (discussed below in part 6) describes readjustment of debts by individuals with regular income.
- Chapter 15 (outside the scope of this monograph) covers ancillary and crossborder cases.[58]

The glossary at the end of this monograph contains definitions of bankruptcy terms.

58. *See, e.g.*, Judge Louise De Carl Adler, Managing the Chapter 15 Cross-Border Insolvency Case: A Pocket Guide for Judges (Federal Judicial Center, 2d ed. 2014).

1.4

The United States Trustee and the Bankruptcy Administrator

Under 28 U.S.C. § 581, the U.S. attorney general appoints a U.S. trustee for regions composed of judicial districts. The U.S. trustee has a variety of duties in consumer cases, including the establishment and supervision of a panel of private trustees to serve in all Chapter 7 cases,[59] the appointment of standing Chapter 13 trustees,[60] and the supervision "of the administration of cases and trustees in cases under" all chapters of the Code.[61] Under congressional action, the judicial districts in North Carolina and Alabama were excluded from the U.S. trustee program; these districts have bankruptcy administrators, who serve the equivalent function. While the trustee appointment and supervisory role of these administrative officers may be their most prevalent role in consumer cases, bankruptcy administrators enjoy broad statutory authority to "raise and . . . appear and be heard on any issue in any case or proceeding under this title [11]."[62]

1.5

Litigation in Bankruptcy Courts

Bankruptcy courts are courts of first impression with jurisdiction over matters arising in or related to a bankruptcy case. Bankruptcy courts conduct hearings or trials on contested motions, contested plan confirmations, objections to claims, objections to exemptions, complaints about discharge of debts, and other matters that arise in or are related to the bankruptcy case. Bankruptcy Rule 7001 describes different types of adversary proceedings, which generally require the filing and proper service of a complaint.[63] Motion practice or contested matters that do not fall within the requirements for an adversary proceeding are governed by Bankruptcy Rules 9013 and 9014. Like the district courts, bankruptcy courts use alternative dispute resolution. Many bankruptcy courts encourage mediation and have a pool of approved mediators.[64]

59. 28 U.S.C. § 586(a)(1).

60. *Id.* § 586(b).

61. *Id.* § 586(a)(3).

62. 11 U.S.C. § 307.

63. *See* Fed. R. Bankr. P. 7001. Service of process is addressed in Fed. R. Bankr. P. 7004, which incorporates and expands on Fed. R. Civ. P. 4. *See generally* Lawrence R. Ahern III & Nancy MacLean, Bankruptcy Procedure Manual (2024) (annual editions).

64. *See, e.g.*, Register of Mediators, U.S. Bankruptcy Court of the Southern District of New York, https://www.nysb.uscourts.gov/register-mediators.

The scope of consumer bankruptcy litigation is wide-reaching, including subject matter both within and outside of the Bankruptcy Code. Violations of the automatic stay, bankruptcy-estate issues, claims allowance, exemptions, discharge, plan-confirmation objections, and other topics related to the Bankruptcy Code itself are discussed below in parts 2 through 6. Outside of the Code, some of the commonly litigated consumer cases involve home mortgages and debt-collection activity (e.g., Truth in Lending Act, Real Estate Settlement Procedures Act, Fair Debt Collection Practices Act (FDCPA),[65] and other consumer protection acts, both federal and state). Even when based in part on nonbankruptcy law, bankruptcy litigation often revolves around the allowance or disallowance of a claim filed by a creditor or the recovery of assets for the benefit of the bankruptcy estate. The bankruptcy court also rules on a variety of avoidance litigation, often brought by the trustee[66] but on occasion by a debtor seeking to avoid some transfer or lien in order to claim the asset as exempt.[67]

65. *See, e.g.*, Midland Funding, LLC v. Johnson, 581 U.S. 224 (2017) (filing time-barred claim was not false, deceptive, or misleading under FDCPA because claim disclosed age of debt, and debtor had affirmative defense to claim).

66. *See* 11 U.S.C. §§ 544–551, for avoidance powers.

67. *See id.* §§ 522(g) & (h). *See also, e.g.*, Dickson v. Countrywide Home Loans (*In re* Dickson), 655 F.3d 585 (6th Cir. 2011) (recognizing debtor's standing under §§ 522(g)(1) & (h)).

2

The Commencement of a Case and the Automatic Stay

Principles for Commencing a Consumer Bankruptcy Case

A case is commenced with the filing of a basic petition, Official Form B101, along with the additional schedules, statements of financial affairs, and forms required to complete the case-filing process.

The petition and its related schedules and statements are executed under penalty of perjury.

Several Code sections come into play during this initial filing state:

- Title 28 provides for proper venue.
- Title 11, § 109 describes who may be a debtor under each chapter, with requirements for Chapters 7 and 13 (reviewed below in parts 5 and 6).
- Section 301 provides for voluntary cases; these constitute the majority of Chapter 7 filings, while Chapter 13 is exclusively voluntary.
- Section 302 describes joint petitions, frequently filed by spouses under Chapters 7 and 13.
- Section 342 details notices required to be given to creditors of a case filing.
- Section 362 describes the automatic stay, which is triggered upon the commencement of the case.
- Section 521 spells out the debtor's duties to satisfy eligibility and filing requirements.

2.1

Venue

Venue for bankruptcy cases is addressed in 28 U.S.C. § 1408, which provides that a case should be commenced in the district in which the individuals have their domicile, residence, principal place of business, or principal assets for the 180 days,

or greater portion thereof, immediately prior to filing. Official Form 101 asks debtors to indicate that the venue is proper. For individuals in Chapter 7 or Chapter 13, the venue is typically driven by domicile or residence; but venue is waivable, and unless a timely objection to improper venue is made, the case may proceed in the filing district.[68] The bankruptcy court may transfer a case from one venue to another "in the interest of justice or for the convenience of the parties."[69]

It is unsettled whether, over the objection of a party in interest, the court may retain a case filed in the wrong venue. Individuals sometimes file in the wrong venue, not necessarily out of bad faith, but because they live in one district yet are physically closer to another district's court, or because they reside in one district but work in another adjoining state, or perhaps because the attorney who filed the case practices in another district. For example, a Northern Mississippi resident who lives close to the state line and works in Memphis, Tennessee, might more easily file in the Western District of Tennessee with a Tennessee attorney. Absent any objection by creditors or other parties in interest, the court may be unaware of the improper venue. The Sixth Circuit addressed this scenario, holding that venue must be strictly construed, and in the face of a timely objection (there by the U.S. trustee), the bankruptcy court had no discretion to retain an improperly venued case.[70] Under this strict view, the case must be either dismissed or transferred to the court with proper venue. Lacking such appellate authority, some bankruptcy courts have interpreted the combination of the venue statute and Bankruptcy Rule 1014 to permit retention of an improperly venued case, despite a timely objection.[71]

2.2

Individual and Joint Petitions

Individuals who are consumer debtors may file for relief under either Chapter 7 or Chapter 13, as long as they satisfy eligibility requirements (discussed below in parts 5 and 6). Generally, any person residing or domiciled in the United States can be a debtor.[72]

68. *See* 28 U.S.C. § 1412; Fed. R. Bankr. P. 1014.

69. 28 U.S.C. § 1412. *See also* Fed. R. Bankr. P. 1014(a).

70. Thompson v. Greenwood, 507 F.3d 416 (6th Cir. 2007).

71. *See, e.g.*, *In re* Lazaro, 128 B.R. 168 (Bankr. W.D. Tex. 1991).

72. 11 U.S.C. § 109(a). Section 109(b) specifically defines who is and is not eligible as a Chapter 7 debtor, but those requirements are directed primarily toward non-individuals. The threshold test for Chapter 7 eligibility is in § 707(b), the *means test*, discussed *infra* part 5. Section 109(e) defines who is eligible as a Chapter 13 debtor, a topic explored *infra* part 6.

Many Chapter 7 and Chapter 13 cases are joint filings by spouses. Code § 302 provides that a joint petition may be filed by an individual and that "individual's spouse." Issues addressed by some courts include whether this limitation on filings by spouses requires that the debtors be legally married under applicable state law and whether bankruptcy cases may be filed by same-sex couples who may or may not be recognized as legally married by their state of residence or domicile.[73] A flexible interpretation of § 302 ran headlong into the 1996 enactment of the Defense of Marriage Act (DOMA), which defines *marriage* as a legal union between one man and one woman, and *spouse* as a person of the opposite sex who is a husband or wife.[74] The bankruptcy court in the Central District of California concluded that "no legally married couple should be entitled to fewer bankruptcy rights than any other legally married couple," rejecting the U.S. trustee's motion to dismiss a case filed by a same-sex couple, and holding that DOMA's definition violated equal protection rights of legally married persons under the Fifth Amendment's Due Process Clause.[75]

In *United States v. Windsor*,[76] a taxpayer and surviving spouse of a same-sex couple had been denied spousal deduction on her tax return under DOMA's definition of *marriage* and *spouse*. The Supreme Court held that DOMA's definition of *marriage* was unconstitutional, depriving the taxpayer of Fifth Amendment protection. On the same day, in *Hollingsworth v. Perry*,[77] the Court declined to rule on the constitutionality of state-law restrictions on same-sex couples because of lack of standing of the petitioners. Although the *Hollingsworth* ruling allowed a lower court decision to stand, two years later the Supreme Court addressed same-sex marriages again in *Obergefell v. Hodges*,[78] holding that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and to recognize such a marriage that has been lawfully licensed and performed in another state.

73. *See, e.g.*, *In re* Matson, 509 B.R. 860 (Bankr. E.D. Wis. 2014) (applying United States v. Windsor, 570 U.S. 744 (2013), holding that same-sex debtors legally married in Iowa were eligible to jointly file as spouses in Wisconsin, even though Wisconsin law didn't recognize their marriage).

74. 1 U.S.C. § 7.

75. *In re* Balas, 449 B.R. 567, 569 (Bankr. C.D. Cal. 2011) (en banc). *See also* Massachusetts v. U.S. Dep't of Health & Hum. Servs., 682 F.3d 1 (1st Cir. 2012) (DOMA's provisions denying federal benefits to same-sex, legally married couples in Massachusetts violated equal protection rights); *In re* Somers, 448 B.R. 677 (Bankr. S.D.N.Y. 2011) (holding decisions unrelated to bankruptcy and joint filings on constitutionality of DOMA may impact effect of that statute).

76. 570 U.S. 744 (2013).

77. 570 U.S. 693 (2013).

78. 576 U.S. 644 (2015).

2.3

Filing Requirements

Section 521 of the Bankruptcy Code describes the debtor's requirements, or duties, for assuring a bankruptcy petition filing that will survive a motion to dismiss. In addition to a basic petition (Official Form 101), the debtor must file a list of creditors, with appropriate addresses, to enable the clerk's office to provide notice to creditors of the filing.[79] In the typical case, "unless the court orders otherwise," a consumer debtor must file the following schedules and statements, if not with the petition, within forty-five days of initial filing:[80]

- schedules of assets and liabilities[81]
- schedules of current income and liabilities[82]
- a statement of financial affairs[83]
- evidence from the debtor's attorney or petition preparer that the consumer debtor was provided with explanation of choices between the various chapters for bankruptcy relief,[84] or if no attorney or petition preparer was involved, a debtor's certification that the debtor received from the clerk available remedies under each chapter[85]
- copies of "payment advices" or other evidence of payroll information received by the debtor from an employer within sixty days before petition filing[86]
- a statement of monthly net income[87]

79. 11 U.S.C. § 521(a)(1)(A). For notice provisions, see 11 U.S.C. § 342 and Fed. R. Bankr. P. 2002. For notice provided to creditors of case filing and certain deadlines, such as for proofs of claim, see Official Forms 309A, 309C, and 309I.

80. See Fed. R. Bankr. P. 1007-1(c) for time limits for filing required schedules and statements.

81. 11 U.S.C. § 521(a)(1)(B)(i). Official Forms 106–106H contain schedules of real and personal property, property claimed as exempt, secured and unsecured creditors, executory contracts, unexpired leases, and codebtors.

82. *Id.* § 521(a)(1)(B)(ii). Official Forms 106I and J are important for determining eligibility and plan confirmation (discussed *infra* for Chapter 7 and 13 cases).

83. *Id.* § 521(a)(1)(B)(iii). *See* Official Form 107.

84. 11 U.S.C. §§ 342(b) & 521(a)(1)(B)(iii). *See* Official Form 101, Part 7.

85. *See* Director's Form 2010.

86. 11 U.S.C. § 521(a)(1)(B)(iv).

87. *Id.* § 521(a)(1)(B)(v). The monthly income statement is necessary for the means-test calculation for eligibility and other purposes, which are discussed later in regard to Chapters 7 and 13 relief. *See* Official Forms 122A-1 for Chapter 7 and 122C-1 for Chapter 13.

- a statement of "any reasonably anticipated increase in income or expenditures over the twelve-month period following the date of the filing"[88]
- a certificate of completion of the required prebankruptcy budget and credit counseling course[89]

If a debt repayment plan was developed in conjunction with the counseling noted in the last bullet, a copy of the plan must be filed.[90] Failure to obtain the counseling before filing the petition typically results in dismissal for lack of eligibility.[91]

These schedules and statements are executed under penalty of perjury. Failure to complete the required filings within forty-five days results in an automatic case dismissal unless the court finds cause to extend that time.[92]

2.4

A Debtor's Duties After Filing a Petition

In addition to the basic filing requirements, the debtor has postfiling duties (discussed in this section), including the duty to

- state how collateral for secured debt will be treated and comply with that stated intention
- attend a meeting of creditors, conducted by the trustee, and otherwise cooperate with the trustee
- comply with tax return requirements

If the case is filed under Chapter 7, the debtor must file a statement of intention within thirty days of the petition date, or on or before the § 341 meeting of creditors, whichever is earlier. The statement of intention provides the debtor's intentions for retaining, redeeming, or surrendering property that is collateral for

88. 11 U.S.C. § 521(a)(1)(B)(vi). *See* Official Forms 106I & J, 122A-1 & 122C-1.

89. 11 U.S.C. § 521(b)(1). *See* Official Form 101, Part 5. See also Bankruptcy Rule 1007(b)(7), amended December 1, 2024, to require a debtor to submit the prebankruptcy course certificate. Former Official Form 423 (which had been used by the debtor to show completion of the required prebankruptcy course) was abrogated with the amendment of Rule 1007(b)(7).

90. 11 U.S.C. § 521(b)(2).

91. *See, e.g.*, *In re* Ingram, 460 B.R. 904 (B.A.P. 6th Cir. 2011); Gibson v. Dockery (*In re* Gibson), No. CC-10-1399-PAHKI, 2011 WL 7145612 (B.A.P. 9th Cir. Dec. 1, 2011) (affirming sua sponte dismissal).

92. 11 U.S.C. § 521(i). *See, e.g.*, Soto v. Doral Bank (*In re* Soto), 491 B.R. 307 (B.A.P. 1st Cir. 2013) (case automatically dismissed on failure to provide payment advices within forty-five days).

a secured loan.[93] Failure to file this statement of intention will typically result in termination of the automatic stay under § 362(h).[94] Pursuant to § 521(a)(2)(B), the debtor must perform the stated intention for secured property within thirty days after the first date set for the § 341 meeting of creditors, or within such additional time that the court, for cause, fixes. Pursuant to § 521(a)(6), the Chapter 7 debtor may not retain personal property collateral unless, within forty-five days after the meeting of creditors, the debtor either redeems the property under § 722 or enters into a reaffirmation agreement with the creditor under § 524(c). The choices of redemption or reaffirmation are discussed below in part 5, under Chapter 7 relief.

A debtor has a duty to cooperate with the case trustee in performing the trustee's statutory obligations.[95] A debtor is required to attend the meeting of creditors, as provided under Bankruptcy Code § 341, and if the court holds a discharge determination under § 524(d), the debtor is required to attend.[96] Discharge hearings are not held normally, unless a reaffirmation issue is involved or the debtor is acting pro se.

A debtor who has an interest in an educational retirement account or under a qualified state tuition program, as defined in Internal Revenue Service (IRS) Code § 523(b)(1) or § 530(b)(1), must file a record of that account with the court.[97]

No later than seven days before the first date set for the meeting of creditors, Chapter 7 and 13 debtors must provide the case trustee with a copy or transcript of the federal income-tax return for the most recent tax year preceding the petition filing; and if requested, the debtor must furnish a creditor with a copy as well.[98] Failure to provide these tax returns results in dismissal of the case, "unless the debtor demonstrates that the failure . . . is due to circumstances beyond the control of the debtor."[99] In addition, if requested by the court, trustee, or party in interest, the debtor must provide a copy of all federal income-tax returns (or transcripts and their amendments) that are filed during the case, including any pre-petition returns that are filed after the case is commenced.[100] Failure to file

93. 11 U.S.C. § 521(a)(2)(A). See Official Form 108, which also contains in Part 2 a statement of personal property subject to an unexpired lease and the debtor's intention about assumption of a lease.

94. *See, e.g.*, *In re* Blixseth, 684 F.3d 865 (9th Cir. 2012); *In re* Wright, 657 B.R. 26 (Bankr. D.S.C. 2024).

95. 11 U.S.C. §§ 521(a)(3) & (4).

96. *Id.* § 521(a)(5).

97. *Id.* § 521(c).

98. *Id.* § 521(e)(2)(A).

99. *Id.* §§ 521(e)(2)(B) & (C). *See, e.g.*, *In re* Chassie, No. 10-41432-MSH, 2011 WL 133007 (Bankr. D. Mass. Jan. 14, 2011) (dismissal resulting from debtor's failure to provide required tax return).

100. 11 U.S.C. §§ 521(f)(1)–(3).

the post-petition tax returns can also result in case dismissal or conversion, upon motion of the taxing authority.[101] Post-petition tax returns are more commonly relevant in Chapter 13 cases than in Chapter 7 cases, because monitoring a debtor's tax returns may lead to potential modification of confirmed plans over the three- to five-year period of a plan.[102] Until a plan is confirmed, and annually thereafter until the case is closed, the debtor in a Chapter 13 case is obligated to provide a statement, under penalty of perjury, of the income and expenses for the most recent tax year if the court, trustee, or party in interest requests it.[103]

If requested by the U.S. trustee or case trustee, the debtor shall provide some documentary evidence of identity—typically required at the § 341 meeting of creditors—such as a driver's license or passport.[104]

2.5

Joint Administration and Substantive Consolidation

Although a joint petition of two individuals may be permitted under § 302, it actually creates two bankruptcy estates, one for each debtor. The Code is simply permitting the joint filing for convenience, with only one filing fee required. From a practical standpoint, the joint filing is treated as one case jointly administered by the court and trustee, unless an issue arises, such as the need to determine separate property interests of the two debtors. In the typical joint filing, each debtor may have individual, as well as joint, debts, and there may be instances in which distribution to claimants will vary, depending on whether a claim was against both debtors or only against one individual.[105] Although not expressly authorized in the Code, there are rare instances in which the court may be required to substantively consolidate the two bankruptcy estates, in which event the assets and liabilities of the two individuals are literally combined.[106] Bankruptcy Rule 1015 addresses consolidation and joint administration.

An issue arises occasionally when only one spouse files, and later the other spouse tries to join in that petition without filing a separate bankruptcy. The majority rule is that such joinder is not permitted, since § 302 refers to an initial

101. *Id.* § 521(j).

102. See *infra* part 6 for discussion of plan modification.

103. 11 U.S.C. §§ 521(f)(4) & (g).

104. *Id.* § 521(h).

105. The claims allowance and distribution processes are discussed *infra* part 4.

106. *See, e.g.*, *In re* Bonham, 229 F.3d 750 (9th Cir. 2000) (explaining concept and history of substantive consolidation that combines the assets and liabilities of separate but related entities).

joint filing.[107] If the spouse who did not file originally needs bankruptcy relief, that spouse may file a separate petition and then ask the court to jointly administer the two cases or, if appropriate, substantively consolidate them.[108]

2.6

Prebankruptcy Credit Counseling

Before filing a petition, individuals seeking relief under any chapter of the Bankruptcy Code must complete counseling from an approved, nonprofit budget and credit counseling agency.[109] Although there are exceptions in the statute, they are rarely applied.[110] The need to meet this threshold eligibility requirement is strictly enforced; debtors who do not file the required certificate of completion are ineligible for relief.[111] Early case law after enactment of BAPCPA questioned whether a case filed by an ineligible debtor should be dismissed or stricken,[112] but the general result of failure to complete the counseling pre-petition is dismissal. Completing it after the petition filing has not been the answer, since § 109(h) requires the counseling "during the 180-day period ending on the date of filing the petition."[113] There was also disagreement among courts as to whether completion on the same date as the petition filing was sufficient, and most courts have adopted the view that so long as the counseling is actually completed before the time

107. *See In re* Clinton, 166 B.R. 195 (Bankr. N.D. Ga. 1994) (finding no reported decision allowed single filer to later amend petition to add spouse).

108. *See* Fed. R. Bankr. P. 1015(b).

109. 11 U.S.C. § 109(h).

110. *See id.* §§ 109(h)(2)–(4) for potential exceptions from the requirement.

111. *See, e.g.*, *In re* Mitrano, 409 B.R. 812 (E.D. Va. 2009) (absent circumstances described in statute, bankruptcy court has no discretion to waive § 109(h) requirement, with debtor ineligible and case dismissed). Courts may be faced with a debtor moving to reopen a case that was dismissed and closed, due to the debtor's failure to obtain the required prebankruptcy credit counseling. Under § 350(b), reopening a closed case generally requires a showing of "cause." *See, e.g.*, *In re* Williams, 636 B.R. 484 (Bankr. E.D. Mich. 2022).

112. *See, e.g.*, Adams v. Zarnel (*In re* Zarnel), 619 F.3d 156 (2d Cir. 2010) (remanding to determine if striking petition or dismissal was appropriate).

113. *See, e.g.*, Gibson v. Dockery (*In re* Gibson), No. CC-10-1399-PAHKI, 2011 WL 7145612 (B.A.P. 9th Cir. Dec. 1, 2011); *In re* Ingram, 460 B.R. 904 (B.A.P. 6th Cir. 2011). *See also* Hayes v. Fay Servicing LLC, No. 6:22-cv-00063, 2023 WL 2541129 (W.D. Va. Mar. 16, 2023) (completion of credit counseling day after petition filed did not satisfy § 109(h)); *In re* Ravenscroft, No. 23-00021-GS, 2023 WL 8531379 (Bankr. D. Alaska Mar. 7, 2023) (use of certificate of completion dated 198 days prior to the petition filing did not satisfy § 109(h), and case was dismissed).

of the petition filing, completion on the same date is compliance.[114] Section 111 of the Code describes the list of nonprofit budget and credit counseling agencies, as selected by the U.S. trustee or bankruptcy administrator.

2.7

The Automatic Stay

The automatic stay is one of the critical components of any bankruptcy case: it stops creditors from pursuing collection actions against a debtor who has declared bankruptcy. There are certain exceptions. Here is an outline of how § 362's automatic stay functions:

- The stay is automatically triggered by the commencement of a bankruptcy case without the need for a court order. (§ 362(a))
- The stay stops or delays a broad range of creditor actions, subject to statutory exceptions. (§§ 362(a) & (b))
- A creditor can seek relief by filing a motion to have the stay lifted. Any objections to the motion will trigger a contested proceeding. (§ 362(d))
- Violations of the stay may result in monetary damages and potential punitive damages. (§ 362(k))
- The stay's effect on property ends once the property no longer belongs to the bankruptcy estate and generally when the case is closed or dismissed. Its effect on the individual debtor ends when discharge is granted. (§ 362(c))
- In cases involving repeat filers, the stay may be limited in time or may not go into effect. (§§ 362(c)(3) & (c)(4))

The commencement of a bankruptcy case by the filing of a petition acts as an order for relief under the chapter designated on the petition.[115] An automatic stay goes into effect without the need for any court action,[116] and a bankruptcy estate is immediately created.[117] The stay stops almost all creditor actions, unless an exception

114. *See In re* Francisco, 390 B.R. 700 (B.A.P. 10th Cir. 2008) (discussing various views and adopting position that completion on same day, but before petition, satisfied § 109(h)); *In re* Arkuszewski, 507 B.R. 242 (Bankr. N.D. Ill. 2014) (discussing split of authority on meaning of "date of filing" in § 109(h)(1) and holding debtor not eligible when credit briefing was completed on same day but after filing of petition).

115. 11 U.S.C. § 301(b).

116. *Id.* § 362(a).

117. *Id.* § 541(a). See discussion *infra* part 3.

to the stay (found in § 362(b)) applies or until the creditor moves the court for relief from the stay under § 362(d). The automatic stay and its exceptions are sources of frequent litigation in the bankruptcy courts, often resulting in appeals.

Courts are called on to decide whether a particular creditor action violated the stay; whether a § 362(b) exception protects the actions; or if a violation occurred, whether damages are appropriate under § 362(k). Legislative history states the purpose of the § 362(a) automatic stay:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.[118]

Whether a creditor is secured or unsecured, the stay broadly stops the following actions, at least temporarily:[119] (1) continuation or commencement of judicial and administrative actions against the debtor;[120] (2) enforcement of any judgment against the debtor or property of the bankruptcy estate;[121] (3) actions to obtain possession of or exercise control over property of the estate;[122] (4) actions to create or perfect a lien against property of the estate or of the debtor;[123] (5) acts to collect, assess, or recover claims against the debtor that arose pre-petition or to set off against a pre-petition debt, although there are exceptions for certain setoff actions;[124] and (6) commencement or continuation of U.S. Tax Court proceedings concerning the tax liability of an individual "for a taxable period ending before the date of the order for relief."[125]

118. H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977).

119. This discussion of the automatic stay focuses on actions against individual consumer debtors. There are other aspects of the stay that apply in nonconsumer business cases.

120. 11 U.S.C. § 362(a)(1); *see, e.g.*, *In re* Byrd, 357 F.3d 433 (4th Cir. 2004).

121. 11 U.S.C. § 362(a)(2); *see, e.g.*, *In re* Fogarty, 39 F.4th 62 (2d Cir. 2022).

122. 11 U.S.C. § 362(a)(3). *But see* City of Chicago v. Fulton, 141 S. Ct. 585 (2021) (city's retention of vehicle impounded prior to Chapter 13 filing did not violate § 362(a)(3)). *Fulton* is discussed *infra* text accompanying notes 126, 197, and 223.

123. 11 U.S.C. §§ 362(a)(4) & (5). However, § 362(b)(3)'s exception from the stay permits certain acts to maintain or continue to maintain a perfected security interest.

124. 11 U.S.C. §§ 362(a)(6), (7). *See* 11 U.S.C. §§ 362(b)(6), (17), (26), and (27) for stay exceptions allowing setoff, with only § 362(b)(26) applying to individuals. *See also* § 553 (for setoff); *and see, e.g.*, *In re* Wood, 993 F.3d 245 (4th Cir. 2021) (debtor's claim of exemption in tax refund did not overcome government's right to set off refund against debt to Department of Housing and Urban Development).

125. 11 U.S.C. § 362(a)(8). *But see* Schoppe v. Comm'r of Internal Revenue, 711 F.3d 1190 (10th Cir. 2013) (bankruptcy filing did not stay taxpayer's appeal of tax court's adverse decision; discussing split of authority between Fifth and Ninth Circuits, holding that tax-court petition initiated by taxpayer was not continuation of administrative proceeding against debtor).

Creditors are often advised that if there is any doubt about the reach of the stay, they should move for stay relief under § 362(d) rather than run the risk of violation and potential monetary damages. Section 362(d) stay relief is initiated by practice under Bankruptcy Rule 4001. The volume of litigation over stay violations and the number of reported decisions are too extensive to cover in this brief overview of the subject. The following examples illustrate a few of the many issues raised in consumer-debtor cases.

- Under Supreme Court authority in *City of Chicago v. Fulton*,[126] the city's mere retention of vehicles impounded for pre-Chapter 13 traffic violations did not violate § 362(a)(3), with a stay violation requiring more than maintaining the status quo as to property of the bankruptcy estate. Steps by a creditor beyond mere retention, without stay relief, present other stay violation issues, and a creditor's retention is subject to the debtor seeking turnover under § 542, which is discussed later in this section.
- Under Supreme Court authority in *Citizens Bank of Maryland v. Strumpf*,[127] a bank's temporary, administrative freeze of an account is not a stay violation. But the better course of action by a bank is to promptly move for stay relief if it intends to set off the account against a pre-petition debt.[128]
- An internal recording of post-petition fees by a mortgage creditor did not violate §§ 362(a)(3), (5), or (6), provided there was no collection activity in the Chapter 13 case against the debtor or bankruptcy estate.[129]
- A notice of annual tax statement to the debtor, or a notice of a mortgage payment increase (for example, when property taxes increased or an adjustable rate increase occurred in a mortgage), was not a stay violation, provided there was no threatening or coercive action;[130] but such notices raise issues in Chapter 13 cases, in which a mortgage likely is being paid

126. 141 S. Ct. 585 (2021).

127. 516 U.S. 16 (1995). *See also* Mwangi v. Wells Fargo Bank, N.A. (*In re* Mwangi), 764 F.3d 1168 (9th Cir. 2014).

128. *See* Harchar v. United States (*In re* Harchar), 694 F.3d 639 (6th Cir. 2012) (IRS's temporary delay in processing tax refund while deciding whether to seek setoff was not violation of §§ 362(a)(3) or (6), and IRS promptly filed motion for stay relief). *See also* Gregory P. Johnson, *Following* Strumpf: *Will Allowance of an Administrative Freeze Begin the Erosion of the Automatic Stay?*, 5 J. Bankr. L. & Prac. 193 (1996).

129. Jacks v. Wells Fargo Bank, N.A. (*In re* Jacks), 642 F.3d 1323 (11th Cir. 2011).

130. *See, e.g.*, Knowles v. Bayview Loan Servicing, LLC (*In re* Knowles), 442 B.R. 150 (B.A.P. 1st Cir. 2011).

through a plan.[131] Factual questions are often presented as to when a notice crosses the line into demand or threat.[132]

- Although a state child-support creditor did not violate the stay by sending collection letters, because of § 362(b)(2)'s exception, it violated the terms of the confirmed Chapter 13 plan, which provided for payment of the allowed claim.[133]
- Post-petition repossessions of property without stay relief are stay violations, and they become willful violations if the creditor had any notice of the bankruptcy filing.[134]
- Asking the Chapter 7 debtor to consider reaffirmation of secured debt was not a stay violation, again assuming no threatening or coercive action.[135]
- Filing a proof of claim, even though ultimately disallowed, and filing other pleadings in the bankruptcy case, were not stay violations.[136]
- Prosecuting a state-court civil action after a Chapter 13 filing violated the stay.[137]
- Post-petition eviction from a home or apartment typically violates the stay, as does continuing with foreclosure without stay relief.[138]

131. *See* Campbell v. Countrywide Home Loans, Inc., No. 07-20499, 2008 WL 3906382 (5th Cir. Aug. 26, 2008) (sending escrow statement and notice of payment increase was not stay violation), *opinion withdrawn & superseded by* Campbell v. Countrywide Home Loans, Inc., 545 F.3d 348 (5th Cir. 2008). *Accord In re* Zotow, 432 B.R. 252 (B.A.P. 9th Cir. 2010). *But see, e.g.*, Patterson v. Homecomings Fin. LLC, 425 B.R. 499 (E.D. Wis. 2010) (debtors had plausible cause of action for stay violation when lender collected post-petition charges that were not disclosed). See discussion *infra* part 6, including Official Form 410S2 for disclosure of post-petition mortgage charges.

132. *See, e.g.*, *In re* Ocasio, 272 B.R. 815 (B.A.P. 1st Cir. 2002) (threat to "get [the money] from your face" easily violated stay).

133. *See* Fla. Dep't of Revenue v. Rodriguez (*In re* Rodriguez), 367 F. App'x 25 (11th Cir. 2010). *See also In re* Paris, 656 B.R. 225 (Bankr. N.D. Ill. 2024) (discussing exception from stay for collection of domestic support).

134. *See, e.g.*, *In re* Carlton, No. 10-00079-8-RDD, 2013 WL 2297082 (Bankr. E.D.N.C. May 24, 2013); *In re* Suggs, 377 B.R. 198 (B.A.P. 8th Cir. 2007). *But see* City of Chicago v. Fulton, 141 S. Ct. 585 (2021), discussed *supra* note 122 and *infra* text accompanying notes 126, 197, and 223.

135. *See, e.g.*, *In re* Jefferson, 144 B.R. 620 (Bankr. D.R.I. 1992) (citing numerous opinions on issue).

136. *See, e.g.*, Knowles v. Bayview Loan Servicing, LLC (*In re* Knowles), 442 B.R. 150 (B.A.P. 1st Cir. 2011); *In re* Briggs, 143 B.R. 438 (Bankr. E.D. Mich. 1992).

137. Wesley v. Oh (*In re* Oh), No. NC-07-1325-MDKB, 2008 WL 8448837 (B.A.P. 9th Cir. Apr. 16, 2008). *But see In re* Mason, 527 F. App'x 118 (3d Cir. 2013) (per curiam) (stay not violated by eviction when debtor had no possessory interest in leased property, which did not become property of bankruptcy estate).

138. *See, e.g.*, *In re* Perl, 513 B.R. 566 (B.A.P. 9th Cir. 2014); *In re* Derringer, 375 B.R. 903 (B.A.P. 10th Cir. 2007).

- Failure to release garnishment may be a stay violation.[139]
- The IRS's temporary freeze of tax-refund processing did not violate the stay, since the debtor had no due process right to prompt payment, and the IRS was investigating whom to pay and whether it had the right of setoff.[140]
- Credit union's notice to debtor that account would be closed did not violate the stay, when no coercion to pay was involved.[141]
- Mortgage creditor did not violate the stay by refusing to foreclose after the Chapter 13 debtor's plan surrendered the home. The court concluded that it lacked authority to force state remedy of foreclosure.[142]

2.7.1

Exceptions from the Automatic Stay

Despite its breadth, the automatic stay has twenty-seven statutory exceptions,[143] set forth in § 362(b), many of which do not come into play in consumer cases. Again, the volume of decisional and other authority on the exceptions is too vast to cover in this monograph, but a brief review of the most common exceptions in consumer cases is illustrative.

Section 362(b)(1) provides an exception from the automatic stay for "the commencement or continuation of a criminal action" against the debtor.[144] Typically easy to apply, § 362(b)(1) is often relevant in state actions such as enforcement of delinquent child support or insufficient funds checks. But questions may exist as to whether the purported criminal action is instead a civil debt-collection

139. *See, e.g.*, *In re* Scroggin, 364 B.R. 772 (B.A.P. 10th Cir. 2007). *See also In re* McIntosh, 657 B.R. 279 (Bankr. S.D. Fla. 2024) (garnishment twenty years after Chapter 7 discharge violated discharge injunction).

140. Harchar v. United States (*In re* Harchar), 694 F.3d 639 (6th Cir. 2012).

141. *See* Messick v. Ascend Fed. Credit Union, 424 B.R. 344 (E.D. Tenn. 2010).

142. *See, e.g.*, *In re* Arsenault, 456 B.R. 627 (Bankr. S.D. Ga. 2011). *See also In re* Rose, 512 B.R. 790 (Bankr. W.D.N.C. 2014) (majority of courts find nothing in Bankruptcy Code's "surrender" to compel creditor to take possession of property).

143. Section 362(b) has twenty-eight subsections, but only twenty-seven exceptions because § 362(b)(5) was repealed in 1998.

144. *See, e.g.*, United States v. Robinson (*In re* Robinson), 764 F.3d 554 (6th Cir. 2014) (although Bankruptcy Code § 362(b)(1) addresses only action against debtors, 18 U.S.C. § 3613(a) permits enforcement of criminal restitution judgment against property of a Chapter 13 estate).

action.[145] The bankruptcy court may need to determine whether the attempted action is civil or criminal contempt, especially when a state-court action involves the potential incarceration of the debtor.[146]

Section 362(b)(2)'s exceptions to the automatic stay permit a range of actions concerning marital dissolution, child custody, and domestic support obligations (DSOs)—including collection actions—that may reach post-petition income. Thus, § 362(b)(2) is widely applicable in consumer cases. As one of the exceptions that was broadened by BAPCPA, § 362(b)(2) incorporates the term *domestic support obligation*, which is defined in § 101(14A). Domestic support obligation includes the normal alimony, maintenance, and support obligations. It also includes obligations that are owed to or recoverable by the spouse or child, as well as to governmental units, such as state child-support agencies.[147] The term *domestic support obligation* appears in other parts of the Code, including the § 523(a)(5) exception from discharge (discussed below in parts 5 and 6), and the § 507(a)(1) priority claim provision (discussed below in parts 4 and 6).

Many factual and statutory interpretive issues arise in consumer cases under the § 362(b)(2) exception, as well as under the application of the "domestic support obligation" concept in other Code sections.[148] For example, courts have had to determine the extent to which the exception permits a state court—although authorized by § 362(b)(2)(A)(iv) to proceed with dissolution of the marriage—to divide marital property. Since such a property division is likely to impact the debtor's property interest that has come into the bankruptcy estate, it is not surprising that some limitations on the exception come into play.[149] There

145. *See, e.g.*, McMaster v. Small (*In re* Small), 486 F. App'x 436 (5th Cir. 2012) (bankruptcy court didn't err in finding enforcement of spousal support not protected by §§ 362(b)(1) & (2)); *In re* Fussell, 928 F.2d 712 (5th Cir. 1991) (discussing test for creditor's criminal or civil motivation in pursuing action).

146. *See, e.g.*, Guariglia v. Cmty. Nat'l Bank & Trust Co., 382 F. Supp. 758 (E.D.N.Y. 1974), *aff'd*, 516 F.2d 896 (2d Cir. 1975) (discussing difference in civil and criminal contempt actions and whether stay applies); *In re* Paris, 656 B.R. 225 (Bankr. N.D. Ill. 2024) (§ 362(b)(2) allowed enforcement of support obligation through civil contempt action, which may include incarceration).

147. *See, e.g.*, Rivera v. Orange Cnty. Prob. Dep't (*In re* Rivera), 832 F.3d 1103 (9th Cir. 2016) (parent's debt to county for support of incarcerated child was not in nature of support under § 101(14A)).

148. For examination of multiple issues related to domestic support obligations, see Judge William H. Brown, Bankruptcy and Domestic Relations Manual (2024) (annual editions).

149. *See, e.g.*, *In re* Johnson, 655 B.R. 83 (Bankr. D.S.C. 2023) (§ 362(b)(2) permitted divorce to proceed and stay relief granted to allow state court to divide marital property, with stay remaining in effect as to property of estate); *In re* Secrest, 453 B.R. 623 (Bankr. E.D. Va. 2011) (relief from stay to pursue equitable division of marital property not a matter of right, and bankruptcy court had discretion to determine whether cause existed for stay relief for that purpose or whether bankruptcy court would continue to retain jurisdiction).

is frequent interplay between this exception and the effect of a plan confirmation in Chapter 13. For instance, a plan may provide for payment of all or part of pre-petition support, while § 362(b)(2)'s collection exceptions from the stay may permit an entity to do things like suspend a driver's license,[150] which would adversely affect the debtor's ability to work and fund the confirmed plan. The exception notwithstanding, issues arise as to whether the debtor's post-petition earnings are protected in Chapter 13.[151] Although a creditor may be permitted to take actions under § 362(b)(2), that creditor must be cognizant that it could still violate the terms of a confirmed plan, since § 1327's effect of confirmation binds creditors.[152] Judicial interpretation of the statutory interplay is often required.[153]

Section 362(b)(3) is a limited exception from the stay for post-bankruptcy perfection of a security interest, which comes into play more often in commercial cases than it does in consumer cases. Section 362(b)(4) contains a police- and regulatory-power exception that may be applicable in consumer cases when enforcement of public health and safety laws or regulations are involved.[154] Section 362(b)(9) provides that the automatic stay does not apply to tax audits, notices of tax deficiency, or demands for tax returns or tax assessments. The automatic stay does apply to the collection of the tax, for which stay relief would be required.[155]

Section 362(b)(10) rarely arises in consumer cases, since it deals with non-residential real-property leases, and § 362(b)(11)'s exception from the stay for presentment of a negotiable instrument has been addressed infrequently in con-

150. 11 U.S.C. § 362(b)(2)(D). *See, e.g.*, *In re* Penaran, 424 B.R. 868 (Bankr. D. Kan. 2010).

151. *See, e.g.*, *In re* Omine, 485 F.3d 1305 (11th Cir. 2007), *withdrawn pursuant to settlement*, No. 06-11655-II, 2007 WL 6813797 (11th Cir. June 26, 2007) (holding state child-support agency violated stay by collection against debtor's post-petition earnings). *See also In re* DeSouza, 493 B.R. 669 (B.A.P. 1st Cir. 2013) (interpreting § 362(b)(2)'s specific exceptions, state-court collection of alimony from post-petition wages violated stay).

152. The effect of plan confirmation is discussed *infra* part 6.

153. *See, e.g.*, *In re* McGrahan, 459 B.R. 869 (B.A.P. 1st Cir. 2011). The bankruptcy court found that the confirmed plan bound a state, preventing interception of tax refunds under § 362(b)(2)(F). The appellate court reversed, holding that plan provisions did not sufficiently address the interception power under that exception. For the plan to control over the exception, it must specifically address the interception authority, giving the creditor due-process notice. *See also* Fla. Dep't of Revenue v. Rodriguez (*In re* Rodriguez), 367 F. App'x 25 (11th Cir. 2010) (although no stay violation occurred because of § 362(b)(2)(B)'s exception, state revenue department violated Chapter 13 confirmation order by attempting collection of child support in excess of plan's provisions). *Cf. In re* Fort, 412 B.R. 840 (Bankr. W.D. Va. 2009) (§ 362(b)(2)(C) permitted withholding of income, and state's collection action was permitted).

154. *See* California v. Villalobos, 453 B.R. 404 (D. Nev. 2011) (discussing scope of § 362(b)(4)).

155. *See, e.g.*, *In re* Waugh, 109 F.3d 489 (8th Cir. 1997).

sumer cases.[156] Sections 362(b)(12) through (b)(17) would not apply in consumer Chapter 7 or Chapter 13 cases, while § 362(b)(18)'s exception for creation or perfection of a statutory lien for post-petition ad valorem property taxes could apply.

Section 362(b)(19) permits the continued withholding from a debtor's wages and collection of any loan against a pension, profit-sharing, stock bonus, or other retirement plan established under the IRS Code sections delineated in the exception. This exception works in conjunction with both § 541(b)(7), which excludes such wage withholdings from property of the bankruptcy estate, and § 523(a)(18), which excepts such loan obligations from discharge. Also, in Chapter 13's § 1322(f), such loan repayment withholdings are not included in the disposable income that is considered for eligibility and plan purposes, and the debtor is not permitted, in a plan, to modify the terms of such a loan repayment.

Section 362(b)(20) permits enforcement of liens or security interests when the court had previously entered a stay-relief order in a prior bankruptcy case, called an in rem order, providing that the stay in a future case would not apply as to that specific property. The debtor could move to impose the stay in a future case, "based upon changed circumstances or for other good cause shown, after notice and hearing."[157]

Section 362(b)(21) permits action to enforce a lien or security interest if the debtor was ineligible to file for bankruptcy relief under § 109(g) or because the debtor was in violation of a prior order that prohibited the debtor from filing again for bankruptcy relief. Eligibility for relief under Chapters 7 and 13 are discussed below in parts 5 and 6. Section 109(g)(2)'s impact on a new bankruptcy case is discussed below.

The exceptions in §§ 362(b)(22) and (23) address whether the automatic stay applies to unlawful detainer and eviction proceedings for residential property when the landlord has gotten a prebankruptcy judgment for possession.[158]

Section 362(b)(26) permits setoff by a governmental unit, under nonbankruptcy law (typically the Internal Revenue Code (IRC)), of a prebankruptcy income

156. *See, e.g.*, *In re* Thomas, 428 F.3d 735 (8th Cir. 2005).

157. 11 U.S.C. § 362(b)(20). See also 11 U.S.C. § 362(d)(4) for the in rem relief provision; and see, for example, *In re Alakozai*, 499 B.R. 698 (B.A.P. 9th Cir. 2013), and *In re Muhaimin*, 343 B.R. 159 (Bankr. D. Md. 2006), for application of this in rem relief.

158. For discussion of these exceptions, see Judge Alan Ahart, *The Inefficiency of the New Eviction Exceptions to the Automatic Stay*, 80 Am. Bankr. L.J. 125 (2006). See also 11 U.S.C. §§ 362(*l*) and (m), containing conditions for application of §§ 362(b)(22) and (23).

tax refund against a prebankruptcy tax liability, and this exception certainly may be applicable in consumer cases.[159]

2.7.2
Waivers of the Automatic Stay

Generally, waiver by a debtor (before filing bankruptcy) of any of the protections under Title 11—including the automatic stay—is not enforceable, as against public policy.[160] Yet there are instances in which courts have found that a debtor waived the protection of the stay. For example, in *Roseman v. Roseman*,[161] the debtor had allowed the state court to proceed with a divorce, participating in the contested divorce and child-custody proceedings without telling his spouse or the state court of his bankruptcy filing. The Sixth Circuit held that an equitable exception to the stay was appropriate. Fact-specific analysis is required before applying such a waiver.

2.7.3
The Codebtor Stay

One of the differences between Chapters 13 and 7 is that § 1301, commonly called the *codebtor stay*, provides a stay as to most actions against an individual who cosigned or is obligated with the Chapter 13 debtor on a consumer debt.[162] Section 1301 has the following exceptions: (1) the codebtor became liable on the debt in the ordinary course of the codebtor's business, or (2) the case is closed, dismissed, or converted to another chapter. Also, the party seeking to proceed against the codebtor may move for relief, showing that: the codebtor actually received the consideration underlying the claim; the Chapter 13 plan does not

159. *See, e.g.*, Gould v. United States (*In re* Gould), 603 F.3d 1100 (9th Cir. 2010) (§ 362(b)(26) gives IRS setoff right without seeking stay relief). *See also* Harchar v. United States (*In re* Harchar), 694 F.3d 639 (6th Cir. 2012) (discussed *supra* text accompanying note 140). Section 362(b)(24) rarely applies in consumer cases, and §§ 362(b)(27) and (28) would not apply to consumer debtors.

160. *In re* Huang, 275 F.3d 1173 (9th Cir. 2002). *See generally* Bruce H. White, *The Enforceability of Pre-petition Waivers of the Automatic Stay*, 15 Am. Bankr. L.J. 26 (1997).

161. 14 F.3d 602 (6th Cir. 1993).

162. *See* Dugan v. U.S. Bank (OH) (*In re* Dugan), No. 4:11-AP-1267, 2012 WL 6825328 (Bankr. E.D. Ark. June 20, 2012) (§ 1301 doesn't apply to business obligation); *In re* Sarner, No. 10-17487-JNF, 2011 WL 5240200 (Bankr. D. Mass. Oct. 31, 2011) (§ 1301 applies only to consumer debts). *See also In re* Oppong, 655 B.R. 552 (Bankr. D.N.J. 2023) (although stay did not come into effect as to repeat-filing debtor under § 362(c)(4), codebtor stay was in effect to prevent foreclosure, absent stay relief). The limitations of subsections 362(c)(3) and (4) on the stay for repeat filers are discussed *infra* in this section.

propose to pay the debt in full; or the creditor's interest would be "irreparably harmed by continuation of the stay."[163]

2.7.4

Termination of the Stay

The automatic stay typically terminates when the bankruptcy case is closed or dismissed, or the individual receives a discharge. The property at this point is no longer property of the estate, and the debtor's personal discharge is protected by a discharge injunction.[164] There are exceptions to this general rule. Section 362(c) contains provisions for the stay's early termination or never coming into effect when a debtor has been in prior cases within defined times.[165] For example, § 362(c)(3) provides that when an individual was a debtor in a case pending within the prior year and that case was dismissed, in the subsequent case, the automatic stay shall terminate "with respect to the debtor on the 30th day after the filing of the later case."[166] The statute as amended in 2005 led to disagreement among courts on whether the stay that terminated applied only to the debtor and the debtor's property, as opposed to both the debtor and property of the estate. This issue is not resolved on a circuit level.[167] Sections 362(c)(3)(B) and (C) contain means for a party in interest—which would include the debtor and trustee—to move for the stay to remain in effect beyond the thirty days; but there is a presumption that the current case was not filed in good faith, and the presumption must be rebutted by clear and convincing evidence.[168]

163. 11 U.S.C. § 1301(c). *See, e.g.*, *In re* Shear, No. 23-8012, 2023 WL 6799970 (B.A.P. 6th Cir. Oct. 16, 2023) (in debtor's fourth case, in rem relief from codebtor stay was granted).

164. 11 U.S.C. §§ 362(c)(1) & (2). The discharge injunction in § 524 is discussed *supra* part 5.10.

165. *See* 11 U.S.C. § 362(c), *as amended by* BAPCPA. *See, e.g.*, *In re* Scarborough, 457 F. App'x 193 (3d Cir. 2012) (stay not in effect during gap period between dismissal and reinstatement of case, and foreclosure occurring during that gap was not stay violation).

166. 11 U.S.C. § 362(c)(3)(A). *See, e.g.*, *In re* Rodriguez, 487 B.R. 275 (Bankr. D.N.M. 2013) (§ 362(c)(3) applied when Chapter 11 case had been pending within one year of current Chapter 13 filing).

167. *Compare In re* Smith, 910 F.3d 576 (1st Cir. 2018), *and* Reswick v. Reswick (*In re* Reswick), 446 B.R. 362 (B.A.P. 9th Cir. 2011) (stay terminated as to both debtor and property of estate), *with* Rose v. Select Portfolio Servicing, Inc., 945 F.3d 226 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 158 (2020), *and* Holcomb v. Hardeman (*In re* Holcomb), 380 B.R. 813 (B.A.P. 8th Cir. 2008) (stay terminated only as to debtor). *See also In re* Yarbra, No. 22-05110-PMB, 2023 WL 162691 (Bankr. N.D. Ga. Jan. 11, 2023) (adopting majority view that the stay terminated only as to the debtor and property of the debtor but not as to property of the estate).

168. *See, e.g.*, *In re* Mason, No. 22-80414-PRT, 2022 WL 19073912 (Bankr. E.D. Okla. Oct. 11, 2022) (debtor failed to overcome presumption).

Section 362(c)(4), by contrast, provides that if the individual has been a debtor in two or more cases that were pending within the previous year, and those cases were dismissed, the automatic stay does not go into effect in the current case.[169] There is the potential for the debtor or another party in interest to move to impose the stay, but the motion must be filed within thirty days of the petition filing,[170] and the moving party must prove by clear and convincing evidence that the current case was filed in good faith to overcome the presumption of bad-faith filing.[171]

There are other provisions in § 362 that may affect how long the stay remains in effect. For example, § 362(e)(2), added in 2005, provides that the stay terminates on the sixtieth day after a motion for stay relief if the court has not entered a final order on that motion or extended the time for good cause.[172] Section 362(h) provides for termination of the stay if a debtor fails to comply with § 521(a)(2) requirements to timely file an intention as to secured personal property or to timely carry out the stated intention of redemption, reaffirmation, or assumption of a personal property lease.[173]

2.7.5

Stay Relief

Section 362(d) provides for stay relief on motion of a creditor or party in interest. The bankruptcy court may grant relief in several ways: termination, annulment, modification, or conditioning. And the court has discretion in deciding

169. *See In re* Abrams, No. CC-21-1240-SGF, 2022 WL 2719496 (B.A.P. 9th Cir. July 12, 2022) (appeal of no stay in third case was groundless); Singh v. Cusick (*In re* Singh), No. EC-11-1700-DJUMK, 2013 WL 1615849 (B.A.P. 9th Cir. Apr. 15, 2013) (no stay in effect in third case filed within year); Bates v. BAC Home Loans (*In re* Bates), 446 B.R. 301 (B.A.P. 8th Cir. 2011) (Section 362(c)(4) is clear, and stay didn't come into effect in third case within one year); *accord In re* Larsen, No. 23-20027-NGH, 2023 WL 4163461 (Bankr. D. Idaho June 23, 2023).

170. 11 U.S.C. § 362(c)(4)(B). *See, e.g.*, *In re* Williams, No. 12-02129-8-RDD, 2012 WL 2856124 (Bankr. E.D.N.C. July 11, 2012). *See also In re* Davies, 651 B.R. 445 (B.A.P. 8th Cir. 2023) (appeal of denial of motion to impose stay was moot when case was dismissed pending appeal).

171. 11 U.S.C. §§ 362(c)(4)(B) & (D).

172. *See, e.g.*, *In re* McKenzie, 737 F.3d 1034 (6th Cir. 2013) (bankruptcy court had good cause for extending stay under § 362(e)(2)).

173. *See, e.g.*, *In re* Blixseth, 684 F.3d 865 (9th Cir. 2012); *In re* Wright, 657 B.R. 26 (Bankr. D.S.C. 2024). *See* discussion of debtor's duties *supra* part 2.4.

the appropriate relief under the particular facts.[174] The grounds for relief, under § 362(d), are also varied, including the undefined "cause."[175] Lack of "adequate protection" is included in "cause" for relief.[176] A common issue in consumer cases is whether the debtor has equity in collateral that would protect the creditor pending a sale or confirmation of a plan.[177]

Section 362(d)(4) was added by the 2005 Amendments. It provides for in rem stay relief as to real property on which a creditor has a secured claim if the court finds (1) that the bankruptcy filing was part of a scheme to "hinder, delay or defraud creditors" and (2) that the bankruptcy filing involves the debtor's transfer of an interest in the property without the creditor's consent or in the event of multiple bankruptcy filings, which are often intended to delay foreclosure.[178]

Motions for stay relief are governed by Bankruptcy Rules 4001 and 9013. The ensuing motions and contested hearings comprise a considerable amount of a bankruptcy court's docket, in both consumer and nonconsumer cases.

2.7.6

Standing for a Stay Relief Motion

An issue often litigated is whether the party moving for stay relief has standing to seek that relief. The threshold standing question[179] must be reached before deciding the merits of the motion. For purposes of filing for stay relief, the moving party must have both constitutional and prudential standing. Constitutional standing requires injury in fact; an injury traceable to another party's conduct;

174. *See, e.g.*, *In re* Myers, 491 F.3d 120 (3d Cir. 2007) (approving dismissal of case and retroactive annulment of stay). *See also* Grady v. A.H. Robins Co., Inc., 839 F.2d 198 (4th Cir. 1998) (describing factors to consider for stay annulment); Cruz v. Stein Strauss Trust #1361 (*In re* Cruz), No. CC-13-1554-KITAD, 2014 WL 4258990 (B.A.P. 9th Cir. Aug. 29, 2014) (applying similar factors). *And see* Kadlecek v. Schwank USA, Inc., 486 B.R. 336 (M.D.N.C. 2013) (applying *Grady* factors). *Cf. In re* Hudson, 504 B.R. 569 (B.A.P. 9th Cir. 2014) (reversing stay annulment).

175. *See, e.g.*, *In re* Garcia, No. 21-12889, 2023 WL 3145123 (11th Cir. Apr. 28, 2023) (no error in granting stay relief); Lee v. Anasti (*In re* Lee), 461 F. App'x 227 (4th Cir. 2012) (cause existed to allow state court to determine quiet title action).

176. See 11 U.S.C. § 361 for adequate protection; see, e.g., *Rocco v. J.P. Morgan Chase Bank*, 255 F. App'x 638 (3d Cir. 2007), for discussion of adequate protection in Chapter 13.

177. *See, e.g.*, *In re* Crawford, No. 11-24158-SBB, 2012 WL 930281 (Bankr. D. Colo. Mar. 19, 2012) (oversecured creditor adequately protected pending sale of property). *See also, e.g.*, R&J Contractor Servs., LLC v. Vancamp, 652 B.R. 237 (D. Md. Apr. 6, 2023) (reversing denial of stay relief for lack of adequate protection when basis for valuation of property was not clearly expressed).

178. 11 U.S.C. § 362(d)(4). *See, e.g.*, *In re* Shear, No. 23-8012, 2023 WL 6799970 (B.A.P. 6th Cir. Oct. 16, 2023) (in rem relief appropriate in fifth Chapter 13 filing to prevent foreclosure).

179. *See* Warth v. Seldin, 422 U.S. 490 (1975).

and an injury that can be remedied by the relief being sought.[180] A finding of constitutional standing is not dispositive of prudential standing, which is the equivalent of *real party in interest*, a term not defined in the Bankruptcy Code.[181] Bankruptcy Rule 7017, incorporating Federal Rule of Civil Procedure 17(a), provides that "an action must be prosecuted in the name of the real party in interest," and unless ordered otherwise, Rule 7017 would apply in contested stay-relief motions.[182] Section 362(d) of the Code refers to relief from the automatic stay "on request of a party in interest."

The Ninth Circuit Bankruptcy Appellate Panel explored the need for standing for stay relief in the context of a mortgage servicer's and assignee's motion and the proof of claim. This is a common scenario in consumer cases. In *In re Veal*,[183] the assignee of the home mortgage did not establish existence or actual possession of the original note. In examining whether the assignee had established standing and was the real party in interest to enforce the note, the *Veal* court looked at Articles 3 and 9 of the Uniform Commercial Code, and at Rule 3001 requirements. The court concluded that an assignee and servicer of the mortgage who were not the original payees of the note must show facts to support standing.

> Simply put, if a claim is challenged on the basis of standing, the party who filed the proof of claim must show that it is either the creditor or the creditor's authorized agent in order to obtain the benefits of Rule 3001(f). Instead of obviating standing requirements, Rule 3001 conditions the availability of the presumptions contained in Rule 3001(f) upon the creditor first satisfying the standing requirement contained within Rule 3001(b). To hold otherwise would undermine the requirements of both constitutional and prudential standing and the important principles those requirements safeguard.[184]

While these standing issues seem to cross over into the merits of whether relief should be granted, they can be resolved in most instances if the moving party attaches sufficient documentation to its motion to establish assignment, possession of the note, or other evidence that the movant has a "colorable" right as owner,

180. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1962). *See generally* Judge Joan N. Feeney & Michael J. Stephan, Bankruptcy Law Manual (2023–2024).

181. See 11 U.S.C. § 1109 for a nonexclusive list of *party in interest*. *See also* Bennett v. Spear, 520 U.S. 154, 162 (1997) ("prudential principles . . . bear on the question of standing"); *In re* Smith, 522 F. App'x 760, 764 (7th Cir. 2013) (movant's standing under § 362(d) depends on movant being party in interest).

182. *See* Fed. R. Bankr. P. 9014(c).

183. 450 B.R. 897 (B.A.P. 9th Cir. 2011).

184. *Id.* at 922.

holder, or assignee of an enforceable obligation.[185] In other words, the fact that the party moving for stay relief is the mortgage servicer may not be enough: the movant may have to prove that it is authorized to enforce the underlying obligation.[186] To establish standing, the movant usually has to show it possesses the note, at least in the mortgage scenario.[187]

A *colorable claim* has a lesser requirement than ultimate proof, one of the grounds for stay relief under § 362(d). *Colorable claim* has been defined as "a plausible legal claim. In other words, a claim strong enough to have a reasonable chance of being valid if the legal basis is generally correct and the facts can be proven in court. *The claim need not actually result in a win.*"[188] This does not mean that a moving party's standing is always put at issue; but if standing is contested, the bankruptcy court should not reach the substantive merits of the motion before deciding the threshold issue of standing.[189]

2.7.7

Violations of the Automatic Stay and Damages

Another source of frequent litigation in the bankruptcy courts is whether violations of the automatic stay are willful and, if so, the extent of damages that may result. An initial issue may be whether an action that violates the § 362(a) stay is void or voidable. The majority view is that stay violations are void,[190] at least

185. *See, e.g.*, Sardana v. Bank of Am., N.A. (*In re* Sardana), No. AZ-10-1368-DMKMA, 2011 WL 3299861 (B.A.P. 9th Cir. June 7, 2011) (servicer bank failed to show colorable claim for standing purposes, when note had been assigned to another, and bank didn't show retention of right to enforce assigned note). *Cf.* Junk v. CitiMortgage, Inc. (*In re* Junk), 512 B.R. 584 (Bankr. S.D. Ohio 2014) (creditor had sufficient colorable interest in note and mortgage for standing).

186. *See, e.g.*, *In re* Alcide, 450 B.R. 526 (Bankr. E.D. Pa. 2011).

187. *See* Miller v. Deutsche Bank Nat'l Trust Co. (*In re* Miller), 666 F.3d 1255 (10th Cir. 2012) (remanding for bank to establish physical possession of mortgage note, to satisfy Colorado's UCC requirement that bank be holder of evidence of debt).

188. Elstner-Bailey v. Fed. Nat'l Mortg. Ass'n (*In re* Elstner-Bailey), No. CC-11-1038-DKIPA, 2011 WL 6934490, at *4 (B.A.P. 9th Cir. Oct. 4, 2011) (citing definition of *colorable claim* from Cornell University Law School's Legal Information Institute). *See also In re* Escobar, 457 B.R. 229, 236 (Bankr. E.D.N.Y. 2011) (level of proof for standing purposes "must be somewhere along the spectrum of providing some evidence of a litigable right or colorable claim at one end, to at the other end, demonstrating that the movant holds a valid, perfected and enforceable lien and more likely than not will prevail in the underlying [mortgage] litigation stayed by the bankruptcy filing").

189. *See In re* Thomas, 469 B.R. 915, 922 (B.A.P. 10th Cir. 2012) (citing *Miller*, 666 F.3d at 1260–64).

190. *See* United States v. White, 466 F.3d 1241 (11th Cir. 2006); *In re* Soares, 107 F.3d 969 (1st Cir. 1997); Rexnord Holdings, Inc. v. Bidermann, 21 F.3d 522 (3d Cir. 1994); *In re* Schwartz, 954 F.2d 569 (9th Cir. 1992). The Seventh Circuit indicated in *Matthews v. Rosene*, 739 F.3d 249 (7th Cir. 1984), that actions in violation of the stay were generally void.

unless the court retroactively annuls the stay, for cause, under § 362(d).[191] The minority view is that stay violations are voidable, and the cases so holding are fact-specific.[192] Although annulment of the stay in order to validate an action that otherwise was a violation is rare, it may be justified under particular facts, such as when the debtor has filed bankruptcy multiple times to stop a foreclosure, and the prior filings have been found to be in bad faith.[193]

Violation of the stay may not only result in the action being void, but it may also lead to monetary damages under § 362(k), which provides that "an individual injured by a willful violation of a stay . . . shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." Sometimes the violation does not require monetary damages—for example, when the creditor had no knowledge of the bankruptcy filing at the time it served a foreclosure complaint on the debtor. The complaint service was a stay violation and void, but the action was not willful.[194] That creditor simply had to start over by seeking § 362(d) stay relief to proceed with foreclosure.

It does not take much to satisfy the "willful" requirement of § 362(k). Any knowledge of the bankruptcy filing is generally sufficient to turn a stay violation from innocent to willful. Willfulness does not require that the violating party formed a specific intent to take egregious action; an intentional act taken with knowledge of the bankruptcy filing is enough, according to case law.[195] Once the creditor knows about the bankruptcy, it has the burden to prevent a stay violation.[196] However, as illustrated by *City of Chicago v. Fulton*,[197] not every action or inaction by a creditor constitutes a stay violation. In *Fulton* the city's maintenance of the status quo by retaining a vehicle that it had seized prebankruptcy was not a stay violation. If, for example, the city had, with knowledge of the bankruptcy filing, proceeded to sell the vehicle, a stay-violation issue would exist.

As to damages for a violation, under § 362(k) the bankruptcy court is required to award actual damages, which must be proved by the debtor.[198] Actual

191. *See, e.g.*, Easley v. Pettibone Mich. Corp., 990 F.2d 905 (6th Cir. 1993) (action void unless annulment of stay granted).

192. *See* Bronson v. United States, 46 F.3d 1573 (Fed. Cir. 1995); Sikes v. Global Marine, Inc., 881 F.2d 176 (5th Cir. 1989).

193. For a collection of case authority on annulment, see *In re Siciliano*, 13 F.3d 748 (3d Cir. 1994).

194. *In re* Kline, 472 B.R. 98 (B.A.P. 10th Cir. 2012), *aff'd*, 514 F. App'x 810 (10th Cir. 2013).

195. *See, e.g.*, Campbell v. Countrywide Home Loans, Inc., 545 F.3d 348 (5th Cir. 2008).

196. *See* Fleet Mortg. Grp., Inc. v. Kaneb, 196 F.3d 265 (1st Cir. 1999).

197. 141 S. Ct. 585 (2021), discussed *supra* note 122 and text accompanying note 126.

198. *See, e.g.*, *In re* Nixon, 419 B.R. 281 (Bankr. E.D. Pa. 2009) (debtor failed to prove any damages).

damages may include specifics, like lost wages or out-of-pocket expenses,[199] as well as emotional distress. Under the pre-2005 Code, in which damages for stay violation were in § 362(h), there was authority that actual damages should not include non-economic losses, such as emotional distress.[200] Increasingly, however, courts are more open to emotional distress damages if they are sufficiently supported by proof.[201] The Ninth Circuit adopted a three-part test: the debtor must show that emotional distress actually caused significant harm, clearly established in the proof, with a "causal connection between that significant harm and the violation of the automatic stay."[202] If allowed, damages for emotional distress can be significant.[203]

An element of damages recognized in § 362(k) and case law is the debtor's attorney fees and costs of prosecuting the motion related to a stay violation. But there is some disagreement about the extent to which fees are recoverable. In a Chapter 11 case, *Sternberg v. Johnston*,[204] the Ninth Circuit, applying § 362(k), pointed out that once the stay violation was remedied, the debtor may not be entitled to further fee recovery. Often the only significant—if not the only—actual damages suffered by the stay violation are the debtor's attorney fees related to that violation. Moreover, § 362(k) refers only to the "individual injured"[205] (typically a debtor) being allowed damage recovery. So, if the debtor has no liability to her attorney, are the attorney fees incurred the debtor's damages? Taking a strict view, a court might hold that if the debtor is not liable for the fees, the fees are not allowable under § 362(k).[206] Another court might view the allowance of attorney fee damages as independent of whether the fees were actually paid by the

199. *See, e.g.*, Stoker v. Aurora Loan Servs., Inc. (*In re* Stoker), No. 09-33976, 2010 WL 958030 (Bankr. S.D. Tex. Mar. 10, 2010).

200. *See, e.g.*, Aliello v. Providian Fin. Corp., 239 F.3d 876 (7th Cir. 2001).

201. *See* Lodge v. Kondaur Cap. Corp., 750 F.3d 1263 (11th Cir. 2014) (expressing three-part test to qualify emotional distress as actual damages); Young v. Repine (*In re* Repine), 536 F.3d 512 (5th Cir. 2008) (citing other circuit authority allowing recovery of emotional distress damages). *Cf.* Brittner v. Beach Anesthesia, LLC, No. 22-1511, 2023 WL 4146240 (4th Cir. June 23, 2023) (emotional distress damage not established, because no proof of demonstrable emotional distress).

202. *In re* Dawson, 390 F.3d 1139, 1149 (9th Cir. 2004). *See also Lodge*, 750 F.3d at 1271 (similar three-part test).

203. *See* America's Servicing Co. v. Schwartz-Tallard, 438 B.R. 313 (D. Nev. 2010), *aff'd*, 765 F.3d 1096 (9th Cir. 2014) ($20,000 in emotional distress damages).

204. 595 F.3d 937 (9th Cir. 2010).

205. *See In re* Pace, 67 F.3d 187 (9th Cir. 1995) (discussing whether trustee was "individual" entitled to § 362(k) damages).

206. *See In re* Thompson, 426 B.R. 759 (Bankr. N.D. Ill. 2010).

debtor.[207] The Ninth Circuit distinguished its prior opinion in *Sternberg*, recognizing that the debtor's attorney fees incurred in defending against a creditor's appeal of a stay-violation order were recoverable "actual damages," and that those fees were a part of enforcing the stay.[208] In another Ninth Circuit distinction from *Sternberg*, when the creditor made a conditional offer to settle without admitting its stay violation, the debtor was entitled to attorney fees as actual damages for continued litigation to remedy the stay violation.[209]

The statute also provides, "in appropriate circumstances," for recovery of punitive damages. The Fifth Circuit required a showing of "egregious conduct" to justify punitive damages, and that is a typical expression of the requirement.[210] The facts of each violation, the nature of the willfulness, and the extent to which it was "egregious" are all factors in the punitive-damages equation.[211]

Government entities may violate the stay and be subject to damages, since § 106(a) abrogates sovereign immunity as to § 362 compliance.[212] Under § 106(a)(3), however, this abrogation does not permit punitive damages against a governmental unit.[213]

207. *See* Young v. Repine (*In re* Repine), 536 F.3d 512 (5th Cir. 2008) (statute didn't require prevailing party to show fees had actually been paid).

208. Schwartz-Tallard v. America's Servicing Co. (*In re* Schwartz-Tallard), 765 F.3d 1096 (9th Cir. 2014) (distinguishing *Sternberg*).

209. Snowden v. Check into Cash of Wash., Inc. (*In re* Snowden), 769 F.3d 651 (9th Cir. 2014).

210. *Repine*, 536 F.3d 512. *See also In re* Knaus, 889 F.2d 77 (8th Cir. 1989).

211. *See, e.g.*, Credit Nation Lending Servs., LLC v. Nettles, 489 B.R. 239 (N.D. Ala. 2013) (punitive damages were appropriate for refusal to return repossessed vehicle, although only actual damages were debtor's attorney fees).

212. *See* Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S. Ct. 1689 (2023) (damages were sought for stay violation by lender owned by Indian Tribe, and § 106(a) unambiguously abrogated sovereign immunity of all governments, including federally recognized Indian tribes, which fell within the definition of *governmental unit*, in § 101(27)). *But see* Fla. Dep't of Rev. v. Diaz (*In re* Diaz), 647 F.3d 1073 (11th Cir. 2011) (discussing sovereign immunity as to a state governmental entity when debtor did not prosecute stay violation until four years after discharge).

213. *See, e.g.*, *In re* Griffin, 415 B.R. 64 (Bankr. N.D.N.Y. 2009). *See also* Harchar v. United States (*In re* Harchar), 694 F.3d 639 (6th Cir. 2012) (IRS didn't waive sovereign immunity under § 106(b) by filing proof of claim for tax years other than for year of refund in dispute).

2.7.8

The Effect of Stay Relief on the Eligibility to File Bankruptcy

Section 109(g) provides that an individual who has been a debtor in a case pending within the preceding 180 days is not eligible to file another bankruptcy case under two circumstances:

1. The prior case was dismissed for the debtor's willful failure to abide by a court order or to appear in court in prosecution of the case.[214]
2. The debtor requested and received voluntary dismissal of the prior case after a motion for relief from the automatic stay was filed.[215]

The second condition has resulted in some disagreement among courts as to whether the statute is to be applied literally or whether the court may consider the relevance of the stay relief motion to the new bankruptcy filing. In *Rivera v. Matos* (*In re Rivera*),[216] the Bankruptcy Appellate Panel reviewed three predominant views taken by various courts on § 109(g)(2): a strict or mandatory application whenever the voluntary dismissal occurred after a stay-relief motion was filed; an equitable or discretionary application; and a causal-connection view. Another court in *In re Richter*[217] applied a fourth approach, finding that it was relevant whether the stay-relief motion was actually pending and unresolved in the prior case when the debtor moved to voluntarily dismiss. Under the causal-connection approach, the court might consider the relationship between the prior stay-relief request and the new bankruptcy, for example, to determine if the creditor requesting the relief would be prejudiced by the new case filing.[218] Of course, there is authority that § 109(g)(2) must be applied literally.[219]

214. *See, e.g.*, Allen v. Wayside Transp. Corp. (*In re* Allen), No. MB 00-115, 2001 WL 36381911 (B.A.P. 1st Cir. June 15, 2001) (subsequent case properly dismissed when debtor had failed to appear for § 341 meeting of creditors in prior case).

215. 11 U.S.C. §§ 109(g)(1) & (2).

216. 494 B.R. 101 (B.A.P. 1st Cir. 2013).

217. No. 10-01260, 2010 WL 4272915 (Bankr. N.D. Iowa Oct. 22, 2010).

218. *See, e.g.*, *In re* Higgins, No. 22-12021-MDC, 2023 WL 2357740 (Bankr. E.D. Pa. Mar. 3, 2023) (examining various approaches to statute and applying causal connection approach, debtor had not dismissed prior case because of stay-relief motion but to take advantage of change in monetary limits for Chapter 13 relief). *See also In re* Payton, 481 B.R. 460 (Bankr. N.D. Ill. 2012); *In re* Durham, 461 B.R. 139 (Bankr. D. Mass. 2011).

219. *See, e.g.*, Moran v. Frisard (*In re* Ulmer), 19 F.3d 234 (5th Cir. 1994); *In re* Andersson, 209 B.R. 76 (B.A.P. 6th Cir. 1997). *See also* Ned W. Waxman, *Judicial Follies: Ignoring the Plain Meaning of Bankruptcy Code § 109(g)(2)*, 48 Ariz. L. Rev. 149, 152–57 (2006).

3

The Bankruptcy Estate and Exemptions

Principles of the Bankruptcy Estate

- The bankruptcy estate broadly includes all legal or equitable interests held by a debtor in property (§ 541(a)).
- Property that is not included in the estate is described in § 541(b).
- Although some property may be in possession of a third party, it may be subject to recovery by the estate through turnover or avoidance (§§ 542–550).
- Certain property may be exempt from the bankruptcy estate under either § 522 of the Bankruptcy Code or applicable state law.

A significant occurrence with the commencement of a bankruptcy case is the immediate creation of a bankruptcy estate, broadly consisting of all of the debtor's property rights in real and personal property, subject to the exceptions in § 541(b). The Code does not require that the debtor have possession of property for it to be brought into the estate, since § 541(a) states that the estate comprises property "wherever located or by whomever held."[220] This basic concept illustrates why property, such as a vehicle, that had been repossessed before the bankruptcy filing is property of the estate, potentially subject to turnover to the debtor or trustee,[221] assuming that the debtor's interest in the property has not been fully terminated under applicable law. The Supreme Court underscored this concept in *United States v. Whiting Pools, Inc.*,[222] recognizing that property in the hands of a creditor at the time of a bankruptcy filing may be property of the estate. This concept works in tandem with the automatic stay, under which a creditor may violate the stay by doing more than maintaining the status quo for repossessed property.

220. 11 U.S.C. § 541(a).

221. See *id.* §§ 542 and 543 for turnover, discussed *infra* part 3.3.

222. 462 U.S. 198 (1983).

Under *City of Chicago v. Fulton*,[223] the city's mere retention of vehicles impounded for pre-Chapter 13 traffic violations did not violate § 362(a)(3), with the Supreme Court holding that a stay violation required more than maintaining the status quo as to property of the bankruptcy estate. Actions by a prebankruptcy repossessing creditor beyond mere retention, without stay relief, present other stay violation issues,[224] and a creditor's retention is subject to the debtor seeking turnover under § 542, which is discussed later in this section. The debtor's interest in property is the focus of the bankruptcy estate under § 541(a), and except for what the Code prevents from coming in or excludes from the estate under §§ 541(b) and (c), the estate includes the debtor's "legal or equitable interests."[225]

Another characteristic underlying the bankruptcy estate is that, although federal law ultimately determines the estate's property, bankruptcy courts often look to nonbankruptcy law for purposes of a debtor's interest in property, a concept also recognized by the Supreme Court in *Butner v. United States*.[226] Examples of relevant state law include the Uniform Commercial Code and state statutes that fix a time when a debtor no longer has a right to redeem property that has been repossessed or foreclosed.[227]

3.1

Inclusions in the Estate Property

Under § 541(a), the bankruptcy estate includes

(1) All legal or equitable interests of the debtor as of case commencement (subject to § 541(d)'s provision that if the debtor holds only the legal interest, that is all that comes into the estate)

(2) All interests of the debtor and debtor's spouse (whether a joint filing or not) in community property (subject to exceptions reviewed below)

(3) Interests in property that the trustee may recover, and property preserved for benefit of creditors

223. 141 S. Ct. 585 (2021). The automatic stay is discussed *supra* part 2.

224. *See, e.g.*, *In re* Rakestraw, No. 22-40960-PWB, 2022 WL 4085881 (Bankr. N.D. Ga. Sept. 6, 2022) (repossessing creditor did not violate stay by retention but did violate § 362(a)(4) by selling vehicle without stay relief).

225. 11 U.S.C. § 541(a)(1).

226. 440 U.S. 48 (1979).

227. *See, e.g.*, Weber v. SEFCU (*In re* Weber), 719 F.3d 72 (2d Cir. 2013) (under New York law, debtor had equitable interest in repossessed vehicle, with right to redeem, which became property of Chapter 13 estate).

(4) Certain interests that the debtor acquires within 180 days after the bankruptcy filing

(5) Proceeds, profits, and other such additions to property of the estate

(6) Interests that the estate itself acquires after case commencement

Community property is determined by the law of a debtor's applicable state. In community-property jurisdictions, § 541(a)(2) includes within the bankruptcy estate community property in which the debtor has sole, equal, or joint management and control or property that is liable for a claim against the debtor or against the debtor's interest in the community property.[228] The Code distinguishes tenancy-by-entirety and joint-tenancy property from community property. In states recognizing tenancy by entirety or joint tenancy, the debtor's interest in such property is exempt, to the extent that the applicable nonbankruptcy law recognizes it as exempt from process.[229] Tenancy by entirety and joint tenancy are further discussed below in part 3.9.

Subsections 541(a)(3) and (4) recognize that if a bankruptcy trustee recovers property under one of the recovery, avoidance, or preservation powers,[230] that recovery belongs to the bankruptcy estate. This comes into play often. For example, if the trustee avoids an unperfected lien that would have priority to other liens, assuming it were valid, the avoided lien does not improve the position of the junior liens; instead, its position is preserved for the benefit of the estate.[231]

When a debtor files for bankruptcy, the estate is entitled to receive certain interests to which the debtor is entitled at that time or to which the debtor becomes entitled within 180 days from the filing date. Section 541(a)(5) includes within that description a bequest, devise, or inheritance; interests resulting from a property settlement agreement with the debtor's spouse, or from a divorce decree; and interests as a beneficiary of a life insurance policy or death-benefit plan. Some of the issues presented by these provisions include whether the debtor may

228. Inclusion of community-property interests in the bankruptcy estate may mean that the trustee could sell the community property, despite only one interest holder being a debtor in bankruptcy. *See, e.g.*, *In re* Baroni, 654 B.R. 334 (Bankr. C.D. Cal. 2023).

229. 11 U.S.C. § 522(b)(3)(B). The "applicable nonbankruptcy law" referred to in § 522(b)(3)(B) is the applicable state law where the property is located. *See, e.g.*, *In re* Wheatley, 631 B.R. 326 (Bankr. N.D. Ill. 2021).

230. *See id.* §§ 329(b), 363(n), 543, 510(c), 547, 548, 550, 551, 553, & 723.

231. 11 U.S.C. § 551. *See, e.g.*, *In re* Messina, 687 F.3d 74 (3d Cir. 2012) (trustee's avoidance of junior lien was for benefit of estate, priming debtors' exemption claim to sale proceeds). *But see* Degiacomo v. Traverse (*In re* Traverse), 753 F.3d 19 (1st Cir. 2014) (although trustee could avoid unperfected mortgage, preservation of lien yielded no benefit to estate).

disclaim an inheritance, preventing it from becoming property of the estate,[232] and whether there is a distinction made for property passing to the debtor, not by inheritance, but by "payable on death account" or "death deed."[233] Section 1306(a) may expand the 180-day time, including within the Chapter 13 bankruptcy estate more inheritances and other post-petition acquisitions. Although this is the majority view, including that held by the Fourth Circuit,[234] authority is split.[235]

Although § 541(a)(6) includes post-petition proceeds that accrue from property of the estate, in Chapter 7, post-petition "earnings from services performed by an individual debtor" are not included.[236] Section 1306 brings these post-petition earnings into the estate, at least to the extent necessary to fund the Chapter 13 plan. Property of the Chapter 13 estate is further discussed below in part 6.

3.2

Exclusions from the Estate

Although property is broadly included within the estate, there are exclusions, which are set forth in § 541(b). If the debtor has no legal or equitable interest in the property at issue—for example, because the debtor's interest had been irrevocably terminated—the property would not come into the estate under § 541(a)(1).[237] Under § 541(b)(1), if the debtor's interest in property is limited to a power that can be exercised solely for the benefit of another, that interest does not become property of the estate. Lease interests in nonresidential real property that have terminated prebankruptcy do not come into the estate, an exclusion that would not apply typically in consumer cases.[238]

232. *See, e.g.*, *In re* Chenoweth, 3 F.3d 1111 (7th Cir. 1993) (disclaimer could be set aside). *See also* Stephen E. Parker, *Can Debtors Disclaim Inheritances to the Detriment of Their Creditors?*, 25 Loy. U. Chi. L.J. 31 (1993).

233. *See In re* Hall, 441 B.R. 680 (B.A.P. 10th Cir. 2009) (such acquisitions did not become property of estate under § 541(a)(5)).

234. *See, e.g.*, Carroll v. Logan, 735 F.3d 147 (4th Cir. 2013) (§ 1306(a) included in estate inheritance received more than 180 days after petition filing).

235. *See, e.g.*, Dale v. Maney (*In re* Dale), 505 B.R. 8 (B.A.P. 9th Cir. 2014) (agreeing with *Carroll*); *In re* Roberts, 514 B.R. 358 (Bankr. E.D.N.Y. 2014) (adopting majority view). *Accord In re* Carla L. Tinney, No. 07-42020-JJR13, 2012 WL 2742457 (Bankr. N.D. Ala. July 9, 2012). *Contra In re* McAllister, 510 B.R. 409 (Bankr. N.D. Ga. 2014) (discussing conflicting authority and disagreeing with *Carroll*).

236. 11 U.S.C. § 541(a)(6).

237. *See, e.g.*, *In re* Graves, 609 F.3d 1153 (10th Cir. 2010) (debtor's pre-petition tax refund had been applied to other tax obligations).

238. 11 U.S.C. § 541(b)(2). Sections 541(b)(3) and (4) also would not apply in the typical consumer case.

Pursuant to §§ 541(b)(5) and (6),[239] the bankruptcy estate does not include funds placed in certain education, retirement, or tuition credit accounts. Section 541(b)(7) also excludes from the estate funds withheld from wages by a debtor's employer when the withholding is for contribution to described tax-deferred retirement accounts, such as Employee Retirement Income Security Act (ERISA)[240] benefit plans and others recognized by the IRS.[241] Views differ about the extent to which Chapter 13 debtors may make post-bankruptcy retirement contributions and deduct them from their calculation of disposable income.[242] In *Seafort v. Burden* (*In re Seafort*),[243] the Sixth Circuit held that only contributions being withheld at the time of the bankruptcy filing may be shielded by § 541(b)(7). In *Seafort*, the issue was whether a Chapter 13 debtor could continue to withhold from wages contributions to a 401(k) retirement account after the debtor had repaid an existing loan from that account. The Sixth Circuit, reading §§ 541(a), 541(b)(7), and 1306 together, held that the debtor could not continue withholding, since post-petition earnings were disposable income required to fund the plan. The split of authority on this issue is reviewed in *Saldana v. Bronitsky* (*In re Saldana*),[244] a Ninth Circuit opinion disagreeing with *Seafort*, and holding that § 541(b)(7) excludes voluntary retirement contributions from Chapter 13 debtors' calculation of disposable income. (This issue is discussed further, below in part 6, in the context of Chapter 13 disposable income.)

Section 541(b)(8) excludes described "pawned or pledged" property from the estate. But the "pawned or pledged" property is included in the bankruptcy estate

239. *See also id.* § 541(e) for definitions related to §§ 541(b)(5) and (6); *and see* § 521(c) for debtor's obligation to disclose records of such accounts. For further discussion of exemptions, see *infra* part 3.8.

240. 29 U.S.C. §§ 1001–1003.

241. For discussion of these exclusions, see Judge William H. Brown & William L. Norton III, Bankruptcy Exemption Manual 53–72 (2024) (annual editions).

242. See the discussion of division of authority over interpretations of 11 U.S.C. §§ 541(b)(7)(B) and 1325(b)(2), discussed *infra* part 6.

243. 669 F.3d 662 (6th Cir. 2012). The Sixth Circuit revisited the issue in *In re Davis*, 960 F.3d 346 (6th Cir. 2020), concluding that § 541(b)(7)(B)'s hanging paragraph changed pre-BAPCPA law, permitting deduction of monthly 401(k) contributions, provided the debtor had a history of contributions and did not contribute more than prebankruptcy deductions. *See also In re* Penfound, 7 F.4th 527 (6th Cir. 2021) (debtor could not resume post-bankruptcy deductions when deductions had not been made for six months prior to bankruptcy).

244. 122 F.4th 333 (9th Cir. 2024), *overruling* Parks v. Drummond (*In re* Parks), 475 B.R. 703 (B.A.P. 9th Cir. 2012). *See also In re* Cantu, 553 B.R. 565 (Bankr. E.D. Va. 2016), *aff'd*, 713 F. App'x 200 (4th Cir. 2017) (discussing three views on deduction). *Compare In re* Perkins, No. 22-20025, 2023 WL 2816687 (Bankr. S.D. Tex. Apr. 6, 2023) (§ 541(b)(7) did not limit Chapter 13 debtors contributing to 401(k) accounts).

to the extent that the debtor has the right to redeem it as of the commencement of the bankruptcy case.[245]

In addition to the § 541(b) exclusions, § 541(c) recognizes the validity of agreements and instruments such as spendthrift trusts that are valid under applicable nonbankruptcy law. If the debtor has only a beneficial interest in a trust with a restriction on transfer, and that trust is enforceable under applicable law, § 541(c)(2) continues the nonbankruptcy protection of a beneficiary's interest in that trust by insulating it from inclusion in the bankruptcy estate. Not surprisingly, this can be a source of litigation in the bankruptcy court, which may be asked to decide if the alleged trust is recognized by the applicable law.[246]

Section 541(c)(2)'s protections extend to retirement funds that are held in trust and have transfer restrictions under federal law, such as those under ERISA[247] and the Civil Service Retirement Act.[248] Individual retirement accounts may not fall within ERISA and may not be excluded under § 541(c)(2), but are subject to exemption under §§ 522(b) and (d),[249] discussed below.

3.3

Turnover

Sections 542 and 543 provide for turnover of the bankruptcy estate's property, a remedy commonly sought by debtors—especially in Chapter 13—to recover property that was repossessed just before the bankruptcy filing. Assuming that the debtor's interest in the repossessed property has not been terminated with finality under applicable nonbankruptcy law, the failure of a repossessing creditor to promptly return the property had been a stay violation, prior to the Supreme

245. *See, e.g.*, *In re* Sorensen, 586 B.R. 327 (B.A.P. 9th Cir. 2018) (right of redemption had not expired at bankruptcy filing). *Compare* Daniel v. TitleMax of Alabama, Inc., 621 B.R. 278 (M.D. Ala. 2020) (redemption right had expired, with title to vehicle passing to lender).

246. *See, e.g.*, Wetzel v. Regions Bank, 649 F.3d 831 (8th Cir. 2011) (debtor's beneficial interest in testamentary trust, containing spendthrift provision valid under Arkansas law, did not become property of estate).

247. Patterson v. Shumate, 504 U.S. 753 (1992). *See also* McDonnell v. Gilbert (*In re* Gilbert), 120 F.4th 114 (3d Cir. 2024) (Plain reading of § 541(c)(2) excludes from the bankruptcy estate retirement plans governed by ERISA, even if the plan is allegedly not tax-qualified.).

248. 5 U.S.C. §§ 8331–8351. *See also* Whetzel v. Alderson, 32 F.3d 1302 (8th Cir. 1994) (Civil Service Retirement Act restricted transfer). See Brown & Norton, *supra* note 241, at 60–72, for discussion of spendthrift trusts and federal-law exclusions.

249. *See* Rousey v. Jacoway, 544 U.S. 320 (2005) (holding individual retirement account (IRA) exempt under § 522(d)(1)(E)). The Code was subsequently amended to add exemptions under § 522(b)(3)(C) and (d)(12).

Court's decision in *City of Chicago v. Fulton*[250] (discussed in this part, above). The secured creditor may move for stay relief and seek adequate protection, under §§ 362(d) and 361, but it is common for the debtor in Chapter 13 to seek turnover if agreement cannot be reached with the creditor. The trustee may also seek turnover,[251] although there are limits on the scope of §§ 542 and 543.[252]

3.4

Avoidance Recovery

Property of the estate includes recoveries by a trustee under the various avoidance sections of the Code, including preferences,[253] fraudulent transfers,[254] and unauthorized post-petition transfers.[255] Section 550 addresses recovery from and liability of transferees of avoided transfers.[256] Section 551 preserves avoided transfers for the benefit of the bankruptcy estate. The debtor, more commonly in Chapter 13 than in Chapter 7, has some opportunity to exempt recoveries by the trustee[257] and to avoid transfers, to the extent that the trustee declines to pursue avoidance if the subject transfer was not voluntarily made by the debtor and if the debtor is able to claim the avoided transfer of a property interest as exempt.[258] The threshold to the debtor's use of avoidance power typically revolves around the question of whether the transfer at issue was voluntary. For example, when the debtor voluntarily transferred a security interest in a vehicle, the trustee was successful in objecting to the debtor's use of § 522(g) to claim an exemption in

250. 141 S. Ct. 585 (2021). For pre-*Fulton* decisions finding stay violations for retention of repossessed property, see, e.g., *Weber v. SEFCU* (*In re Weber*), 719 F.3d 72 (2d Cir. 2013), and *Thompson v. GMAC*, 566 F.3d 699 (7th Cir. 2009), and see discussion of the automatic stay *supra* part 2.

251. *See, e.g.*, Shapiro v. Henson, 739 F.3d 1198 (9th Cir. 2014) (concluding plain language of § 542 does not restrict turnover to property still in possession of defendant; disagreeing with *In re* Pyatt, 486 F.3d 423 (8th Cir. 2007)); *In re* Ruiz, 455 B.R. 745 (B.A.P. 10th Cir. 2011) (trustee obtained turnover of money in Chapter 7 debtor's checking account).

252. *See, e.g.*, Lovald v. Falzerano (*In re* Falzerano), 686 F.3d 885 (8th Cir. 2012) (trustee couldn't obtain debts owed to Chapter 7 debtor by turnover, based on theory of unjust enrichment).

253. *See* 11 U.S.C. § 547.

254. *See id.* § 548.

255. *See id.* § 549.

256. *See, e.g.*, *In re* Allen, No. 13-3543, 2014 WL 267211 (3d Cir. Sept. 26, 2014) (holding district court erred in applying narrow definition of *recover* under § 550, and discussing split among Fifth, Second, and Tenth Circuits on whether "recovery" of funds is required before they can be considered property of estate).

257. *See* 11 U.S.C. § 522(g).

258. *See id.* § 522(h).

the vehicle.[259] Although the security interest was not perfected by the creditor, and the trustee avoided that transfer, the transfer by the debtor was nevertheless voluntary.

3.5

Judicial Estoppel

The effect of a debtor's failure to schedule or otherwise disclose a cause of action is a common issue in the bankruptcy and appellate courts. There is a wealth of reported decisions in which courts have applied judicial estoppel, preventing the debtor or former debtor from pursuing a cause of action that was not scheduled in the bankruptcy case.[260] The theory is that the debtor is obligated to schedule and disclose all assets, including causes of action; the debtor's failure to disclose is equivalent to a representation that no cause of action exists. For example, in Chapter 13, courts have construed the debtor's failure to schedule a cause of action, in conjunction with obtaining a confirmation, to be reliance by the bankruptcy court on the nondisclosure in affirming the plan, thereby justifying application of judicial estoppel.[261] The duty to disclose is part of the § 521 duty to schedule all assets, and it is interpreted as a continuing duty, especially in Chapter 13 cases that may be in active plans for up to five years.[262] Exceptions have been found, however: when the cause of action belonged to the bankruptcy estate; when the failure to disclose was not the debtor's fault;[263] and when the "innocent trustee" had the opportunity to pursue the undisclosed action for the benefit of creditors.[264] The debtor's failure to schedule a cause of action is harmful—not simply to the debtor but to the unsecured creditors who would potentially benefit—and if the cause of action belongs to the bankruptcy estate, as it would if it arose pre-petition (and possibly post-petition in Chapter 13), the trustee perhaps

259. Russell v. Kuhnel (*In re* Kuhnel), 495 F.3d 1177 (10th Cir. 2007).

260. *See, e.g.*, Saili v. Waste Mgmt. of Kan., Inc., No. 22-3268, 2023 WL 6058710 (10th Cir. Sept. 18, 2023); Kimberlin v. Dollar Gen. Corp., 520 F. App'x 312 (6th Cir. 2013); Jones v. United States, 476 F. App'x 815 (11th Cir. 2012); White v. Wyndham Vacation Ownership, Inc., 617 F.3d 472 (6th Cir. 2010); Moses v. Howard Univ. Hosp., 606 F.3d 789 (D.C. Cir. 2010). For application of judicial estoppel by nonbankruptcy courts, based on a debtor's failure to schedule the cause of action, see Judge William H. Brown, Lundy Carpenter & Donna T. Snow, *Debtors' Counsel Beware: Use of the Doctrine of Judicial Estoppel by Nonbankruptcy Forums*, 75 Am. Bankr. L.J. 197 (Spring 2001).

261. *See, e.g.*, Robinson v. Tyson Foods, Inc., 595 F.3d 1269 (11th Cir. 2010).

262. *See, e.g.*, Rainey v. UPS, Inc., 466 F. App'x 542 (7th Cir. 2012).

263. *See, e.g.*, Javery v. Lucent Techs., Inc., 741 F.3d 686 (6th Cir. 2014) (failure to schedule was debtor's attorney's mistake).

264. *See, e.g.*, Stephenson v. Malloy, 700 F.3d 265 (6th Cir. 2012); Reed v. City of Arlington, 650 F.3d 571 (5th Cir. 2011).

should not be prejudiced by the debtor's nondisclosure. However, the appellate authority continues to strongly favor application of judicial estoppel.[265]

3.6

Exemptions

The basic concept behind exemptions, whether bankruptcy or state law controls, is to provide some level of protection for debtors. As one court expressed it, "The historical purpose of exemptions laws has been to protect a debtor from his creditors, to provide him with the basic necessities of life so that even if his creditors levy on all of his nonexempt property, the debtor will not be left destitute and a public charge."[266] The applicable exemptions for specific assets and their dollar limits may or may not serve this purpose in today's economy. A review of state exemptions reveals that some states have amended their laws within recent years, increasing exemption amounts for various types of property, including homesteads, while other states still have rather limited amounts or scope of available exemptions.[267] The federal homestead and other exemption amounts are listed in the Bankruptcy Code, § 522(d).[268]

Exemptions are frequent sources of litigation in bankruptcy and appellate courts. This is not surprising because if a debtor succeeds in claiming specific property as exempt, that property is protected from administration by the trustee or from collection processes by creditors. In some states, debtors in bankruptcy have choices between exemptions under the Bankruptcy Code and exemptions under their applicable state law. In other states, by state legislation to opt out of the § 522(d) exemptions, debtors are limited to the applicable state-law exemptions. Consequently, the Bankruptcy Code is not the only governing authority; state laws may also come into play.[269]

265. *See, e.g.*, Stanley v. FCA US, LLC, 51 F.4th 215 (6th Cir. 2022) (notwithstanding 100% confirmed plan, judicial estoppel prevented Chapter 13 debtor's pursuit of post-petition cause of action); Hudson v. Skinner, No. 3:22-CV-72-SA-JMV, 2023 WL 7391494 (N.D. Miss. Nov. 8, 2023) (Fifth Circuit authority required application of judicial estoppel to undisclosed pre-petition cause of action).

266. *In re* Krebs, 527 F.3d 82, 85 (3d Cir. 2008) (quoting H.R. Rep. No. 95-595, at 126 (1977)).

267. *See, e.g.*, Bulan v. Calloway (*In re* 1256 Hertel Ave. Assocs., LLC), 761 F.3d 252 (2d Cir. 2014) (New York's increased homestead applied to debtor's filing bankruptcy after amendment's effective date); *In re* Kyle, 510 B.R. 804 (Bankr. S.D. Ohio 2014) (debtor entitled to Ohio homestead increased one week before bankruptcy filing). For a summary of each state's exemptions, see appendices in Brown & Norton, *supra* note 241.

268. *See* 11 U.S.C. § 104. The exemption amounts in § 522(d) are subject to automatic increases every three years based on changes in the Consumer Price Index, with the most recent adjustment scheduled for April 1, 2025.

269. See Brown & Norton, *supra* note 241, for in-depth discussion of exemptions and related issues.

"[N]o property can be exempted . . . unless it first falls *within* the bankruptcy estate."[270] Section 522 describes the method for deciding which exemptions are available to a particular debtor, and this varies depending on the state in which the debtor is domiciled when filing bankruptcy, a different question from the venue of the case. For example, a debtor may properly file a bankruptcy case in the Western District of Tennessee, where the debtor has had a residence or domicile for at least 180 days,[271] but be unable to claim Tennessee exemptions because of § 522(b)'s requirements.

Explaining this difference in venue and exemption availability requires looking at how § 522(b) is structured. As background, in the 1978 Code, which still forms the foundation for the current Bankruptcy Code, Congress created an opt-out for each state, allowing a state legislature to decide if debtors domiciled in that state who filed for bankruptcy relief could claim exemptions under the Bankruptcy Code or would be restricted to using the state's exemptions. If it wished, a state could allow its domiciliaries to choose between the two exemption schemes, or it could eliminate that choice. Notably, the Supreme Court held that the earlier Bankruptcy Act of 1898, which relied on using exemptions for the state in which the "bankrupt" had been domiciled for six months, was constitutional, and that the variation in available exemptions did not violate the Uniformity Clause.[272] Subsequent constitutional attacks on the 1978 opt-out have failed.[273]

BAPCPA made the opt-out more complex by changing the time for measuring which state exemptions would be available, to try to deter debtors from moving from one state to another with more favorable exemptions just before filing bankruptcy. Under § 522(b), as amended in 2005, the debtor is first given a choice between claiming exemptions under § 522(d) or under state law applicable on the date of filing bankruptcy.[274] Then the Code states that the choice of § 522(d) exemptions is available "unless the State law that is applicable to the debtor . . . specifically does not so authorize"[275]—in other words, the state has opted out of § 522(d). The next hurdle for debtors is to determine which state's laws are applicable.

270. Owen v. Owen, 500 U.S. 305, 308 (1991).

271. 28 U.S.C. § 1408(1).

272. Hanover Nat'l Bank v. Moyses, 186 U.S. 181 (1902).

273. *See, e.g.*, *In re* Sullivan, 680 F.2d 1131 (7th Cir. 1982); Rhodes v. Stewart, 705 F.2d 159 (6th Cir. 1983). The history of congressional adoption of this opt-out procedure is interesting. *See* Brown & Norton, *supra* note 241, at 122–28.

274. 11 U.S.C. § 522(b)(1).

275. *Id.* § 522(b)(2).

Assuming that a debtor would like or is required to claim state exemptions under § 522(b)(3)(A), the appropriate state is the one in which the debtor was domiciled for "the 730 days immediately preceding the date of the filing of the petition," but if the debtor was not domiciled in a particular state for the full 730 days, then we look to "the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place."[276] The bottom line is that in each bankruptcy case, the debtor, trustee, parties in interest, and perhaps the court may have to determine where the debtor was domiciled for two years—easy, if the debtor was, in fact, in one place that long, but many debtors move more frequently. Remember that the venue for the case is still a six-month window, while exemption is governed by a different time. If a debtor has changed domicile within the preceding 730 days, looking back an additional 180 days is required. Why is this complicated? Counting days may be easy, but then we run into questions of whether the state law that ends up being applicable under that calculation would permit the debtor, who no longer resides or is domiciled in that state, to benefit from that state's exemption laws.

Let's look at an example. A debtor properly filed a consumer case in the District of Colorado, where the debtor had been domiciled for more than six months; but the debtor had moved within the 730 days before filing in the District of Colorado, and for the greater part of the 180 days before that 730 days, the debtor was domiciled in Texas. The debtor owns a home in Colorado and has not owned a home in Texas for two years. Colorado has opted out, which means that its residents or domiciliaries may not use the § 522(d) exemptions.[277] This debtor would like to claim exemptions. Would Texas law recognize that this debtor, who has not lived there for a couple of years, could still benefit from Texas exemptions? Texas has an unlimited homestead exemption, meaning that, if available, any equity above valid security claims on the home is exempt.[278] Texas is not an opt-out state, so its debtors may freely choose between whichever exemption scheme is more favorable, that offered by § 522(d) or the state. This raises at least two questions: Are Texas exemptions available generally to nonresidents? And are Texas's favorable homestead or other Texas exemptions available for use on property located in Colorado? As to the first question, it appears that Texas exemptions are generally not restricted only to its residents. As to the second question, Texas property law would limit the homestead to property "in this state."[279] There may

276. *Id.* § 522(b)(3)(A).

277. Colo. Rev. Stat. § 13-54-107.

278. Tex. Const. art. XVI, §§ 50, 51; Tex. Prop. Code §§ 41.001–41.002.

279. Tex. Prop. Code § 41.002(d).

be a different answer as to availability of exemptions other than the homestead. For example, a state's exemptions on personal property may not be restricted to its residents or domiciliaries.[280] The use of a state's exemptions outside that state is referred to as extraterritoriality, and state laws, if they exist, simply vary on that effect,[281] as well as on whether a nonresident or nondomiciliary may use that state's exemptions, regardless of location of the relevant property. It is no surprise, then, that since 2005 a considerable amount of litigation has ensued—reaching appellate levels—as to which state's exemptions are applicable, or if any are available.[282]

A question related to the transient debtor is whether the opt-out from the applicable state controls. The Fifth Circuit considered the case of a debtor who had moved from Florida to Texas within the 730 days before filing bankruptcy in Texas, a proper venue for the case. The debtor was not eligible for Texas exemptions, having been domiciled there for less than a full 730 days. The debtor was therefore required under § 522(b) to look to Florida for exemptions, but Florida's exemptions apply only to its residents, and Florida is an opt-out state. Since the debtor is no longer a resident of Florida, Florida's exemptions are not available, and its opt-out statute refers to "residents of the state."[283] Under these facts, the Fifth Circuit, in *Camp v. Ingalls* (*In re Camp*),[284] applied the fallback provision in § 522(b). This provision states that if the domiciliary requirements resulted in the debtor not having state exemptions available, the debtor may use the § 522(d) exemptions. Even though this debtor was not governed by Texas exemptions, which permit choice between state exemptions or § 522(d), the debtor could use § 522(d); whereas if Florida law had controlled, the debtor would not have had that exemption available. This savings provision, contained in a sentence at the end of § 522(b), provides that "[i]f the effect of the domiciliary requirement . . . is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d)."[285]

Section 522(b)(1) provides that if there are joint debtors in the case, one debtor may not elect to use state exemptions and the other elect to use the

280. See Brown & Norton, *supra* note 241, at 143–64, for a summary of each state's exemption restrictions on residency or domicile.

281. See *In re* Roberts, 450 B.R. 159 (N.D. Iowa 2011), as an example of a state's homestead—here, Iowa's—being available as to property located in another state—there, California.

282. *See, e.g.*, Sheehan v. Ash, 889 F.3d 171 (4th Cir. 2018); Camp v. Ingalls (*In re* Camp), 631 F.3d 757 (5th Cir. 2011); *In re* Long, 470 B.R. 186 (Bankr. D. Kan. 2012).

283. Fla. Stat. Ann. § 222.20 (1979).

284. 631 F.3d 757 (5th Cir. 2011).

285. See, e.g., *In re Abel*, 622 B.R. 312, 318 (Bankr. D. Utah 2020), for the meaning of "any exemption" in § 522(b)'s savings provision.

§ 522(d) exemptions. Each of the joint debtors is required to elect the same source of exemptions. If they cannot agree, they are "deemed to elect" § 522(d)—unless, of course, the applicable state has opted out of § 522(d). Under the look-back for domicile purposes, it is possible that the two joint filers were not both domiciled in the same state for 730 days or even the prior 180-day period. In *In re Connor*,[286] the joint filers (husband and wife) lacked common domicile for the look-back period. The court decided that the Code mandated the exemption source available to each debtor based on his and her domicile. Mr. Connor had to use North Carolina's exemptions. Mrs. Connor, however, was ineligible for exemptions from both North Carolina and her prior state, Florida, which required residency. The court concluded that Mrs. Connor was not "electing" a different choice: she had only the § 522(d) exemptions available under the § 522(b) savings provision (described above).

A twist in the Code comes into play if the debtor is able to, and does, choose state exemptions under § 522(b)(3). That debtor may also claim nonbankruptcy federal exemptions (i.e., under federal statutes other than § 522(d)), but if the debtor chooses the § 522(d) exemptions, § 522(b)(2) appears to limit the exemptions to those under § 522(d). At least one court has construed this literally to mean that a § 522(d) exemption debtor may not also benefit from the variety of federal exemptions that are outside the Bankruptcy Code.[287]

The debtor makes the exemption claim on Schedule 106C, an official form that is part of the required schedules to be filed with, or shortly after, a petition filing.[288] Generally, exemptions are determined as of the petition filing date, under application of the "snapshot rule" to that point in time.[289] Each joint debtor is entitled to that debtor's exemptions.[290]

286. 419 B.R. 304 (Bankr. E.D.N.C. 2009).

287. *In re* Schena, 439 B.R. 776 (Bankr. D.N.M. 2010). See also Brown & Norton, *supra* note 241, at 288–313, for a discussion of nonbankruptcy federal exemptions.

288. See 11 U.S.C. § 522(*l*), providing that the debtor "shall file a list of property that the debtor claims as exempt," but if the debtor does not, a dependent of the debtor may file such a list.

289. *See, e.g.*, Rockwell v. Hull (*In re* Rockwell), 968 F.3d 12 (1st Cir. 2020), *cert. denied sub nom.* Hull v. Rockwell, 141 S. Ct. 1372 (2021); Wolfe v. Jacobson (*In re* Jacobson), 676 F.3d 1193 (9th Cir. 2012).

290. 11 U.S.C. § 522(m). *See* Dykstra Exterior, Inc. v. Nestlen (*In re* Nestlen), 441 B.R. 135 (B.A.P. 10th Cir. 2010) (under § 522(m) each joint debtor had homestead exemption, essentially doubling amount available).

3.7

Objections to Exemption Claims

The procedure and general timing requirements for objecting to a debtor's exemption claims are set out in Bankruptcy Rule 4003(b), which provides that a party in interest may file an objection within thirty days after conclusion of the § 341 meeting of creditors or within thirty days after any amendment to Schedule 106C. The court may, for cause, extend that time, provided that a motion for extension is filed before the original time expired. Several issues have arisen about this timing, and the Supreme Court, in *Taylor v. Freeland & Kronz*,[291] interpreted Rule 4003(b) strictly, holding that a trustee who did not object within the thirty-day window was barred. *Taylor* involved a debtor's claim of exemption in a potential employment discrimination action, and the debtor valued the cause of action on then Schedule C [now 106C] as "unknown." The opinion in *Taylor* stands for the principle that the trustee was put on notice by the debtor's exemption claim and value of "unknown," triggering a requirement to object.

In *Schwab v. Reilly*,[292] the Supreme Court held that when the debtor claims exemption under a statute—in this case, §§ 522(d)(5) & (6)—that allows exemption only in the debtor's "interest" in an asset, rather than the asset itself, and the statute has a dollar cap on amount, the trustee is not required to object to an exemption that falls within the statute's cap. In *Schwab*, the debtor had claimed dollar exemptions in cooking equipment, but the trustee was able to sell the equipment for more than the exemption amounts, resulting in payment to the debtor for her exemption claims and a balance available for the bankruptcy estate. The debtor, relying on *Taylor*, argued that the trustee's failure to timely object was a bar. The Court distinguished the case at hand from its decision in *Taylor*, on the basis that the exemption at issue in *Schwab* was within the dollar amounts in the statute, and the statute did not allow exemption of the asset itself, only the debtor's interest in that asset.

In cases decided after *Schwab*, other courts have explained that a debtor's attempts to claim the entire asset—by means such as stating on Schedule 106C that the exemption is for the full market value or 100% of the asset's value—may trigger the need for an objection.[293] But when an exemption statute—whether

291. 503 U.S. 638 (1992). *See also* Duvall v. County of Ontario, N.Y., 83 F.4th 147 (2d Cir. 2023) (applying *Taylor*, holding County's failure to object to debtor's exemption claim in annuity prevented County from later contesting value of exempt property in fraudulent transfer proceeding).

292. 560 U.S. 770 (2010).

293. *See, e.g.*, *In re* Salazar, 449 B.R. 890 (Bankr. N.D. Tex. 2011). Schedule 106(C), as revised April 1, 2022, limits a debtor's exemption claim of "100% of fair market value, up to any applicable statutory limit."

§ 522(d) or state law—exempts only the debtor's interest in an asset, an objection may not be required under Rule 4003(b), assuming the dollar amount claimed is within the applicable statutory limits. This occurred in *In re Gebhart*,[294] where Chapter 7 trustees did not object to debtors' homestead exemption claims, but the trustees were allowed to sell the homes, paying the allowed exemption amounts to debtors, with the appreciated value of the homes, above the exemptions, available for distribution to creditors.[295]

There are some exemptions, under both § 522(d) and applicable state laws, that do not refer to the debtor's "interest" but permit exemption in an entire asset, without reference to a dollar cap. For example, § 522(d)(9) exempts "professionally prescribed health aids" without a dollar limit. For these exemptions, the *Schwab* analysis would not come into play. If a party in interest believed such an exemption was improper, a timely objection would be required.

3.8

The Exemption of Retirement Funds

Certain retirement funds are exempt from creditor claims in bankruptcy proceedings. The amendments to the Code in 2005 included the addition of two specific exemption sections for retirement funds "to the extent that those funds are in a fund or account that is exempt from taxation under" several sections of the Internal Revenue Code (IRC).[296] The same exemption appears in § 522(b)(3)(C), making it available to debtors who choose or must use state exemptions, and in § 522(d)(12) for debtors using the Bankruptcy Code exemptions. The exemption is for federally recognized, tax-exempt retirement accounts, such as pension plans under IRC § 401, annuity plans under IRC § 403, individual retirement accounts (IRAs) under IRC § 408, Roth IRAs under IRC § 408A, and plans covered by IRC §§ 414, 457, and 501(a). Specific restrictions on exemption of these funds—when there is a question about favorable IRS rulings on tax exemption—are set forth

294. 621 F.3d 1206 (9th Cir. 2010). *See also* Munding v. Masingale (*In re* Masingale), 108 F.4th 1195 (9th Cir. 2024). In *Masingale*, no party in interest objected to the Chapter 11 debtors' homestead-exemption claim of 100% fair market value. But on conversion to Chapter 7, the trustee was allowed to sell the home and pay the creditors the excess, above Washington's statutory homestead cap, because representations had been made to the Chapter 11 creditors that the debtors would not claim the 100% fair-market-value exemption until the claims were fully paid.

295. *See also In re* Orton, 687 F.3d 612 (3d Cir. 2012) (trustee had benefit of appreciated value of oil and gas leases, with debtor limited to receiving exempt amount).

296. 11 U.S.C. §§ 522(b)(3)(C) & (d)(12).

in § 522(b)(4).[297] There is a monetary cap on the exemption for IRA accounts, currently at $1,711,975, as automatically adjusted on April 1, 2025, and subject to adjustment every three years thereafter.[298]

Transfers or rollovers from one tax-exempt retirement fund to another qualified fund are permitted under § 522(b)(4)(C);[299] but there was a question whether an IRA is exempt from the bankruptcy estate when the fund was created by one person and then passed by inheritance to a beneficiary. The Fifth and Seventh Circuits had split on the issue.[300] Affirming the Seventh Circuit, the Supreme Court held, in *Clark v. Rameker*,[301] that an inherited IRA is not a "retirement fund" within the meaning of § 522(b)(3)(C).[302] *Rameker*'s effect on state-law exemptions—which are often similar to but contain different language from § 522(d)(3)(C)—has seen some case-law development, illustrating that exemption depends on the relevant state law. A state's statute may specifically allow exemption of an inherited IRA,[303] while other states may not provide for this exemption.[304] If the inheritance from a deceased spouse to the surviving spouse occurs prior to a bankruptcy filing, and the surviving spouse rolls over the inherited IRA into the surviving spouse's own IRA and then files bankruptcy, the IRA may be subject to exemption under § 522(b)(3)(C), assuming it satisfies other tax requirements.[305]

297. *See* Daley v. Mostoller (*In re* Daley), 717 F.3d 506 (6th Cir. 2013) (discussing effect of favorable IRS ruling on account that was not disqualified from tax exemption by debtor's grant of boilerplate lien to brokerage company, when debtor never incurred debt related to lien).

298. 11 U.S.C. § 522(n).

299. *See, e.g.*, *In re* Miller, 778 F.3d 711 (8th Cir. 2015).

300. *See* Chilton v. Moser, 674 F.3d 486 (5th Cir. 2012) (holding that inheritance did not prevent exemption); Mullen v. Hamlin (*In re* Hamlin), 465 B.R. 863 (B.A.P. 9th Cir. 2012) (same); *In re* Nessa, 426 B.R. 312 (B.A.P. 8th Cir. 2010) (same). *Cf. In re* Heffron-Clark, 714 F.3d 559 (7th Cir. 2013) (distinguishing spousal inheritances from IRAs inherited from someone other than the debtor's spouse, with the latter not exempt).

301. 573 U.S. 122 (2014), *aff'g Heffron-Clark*, 714 F.3d 559.

302. Since the language of § 522(d)(12) is identical to the language of § 522(b)(3)(C), the holding implicitly applies to both sections.

303. *See, e.g.*, *In re* Kara, 573 B.R. 696 (Bankr. W.D. Tex. 2017) (Texas exemption statute, Tex. Prop. Code Ann. § 42.0021(a), specifically included inherited retirement accounts).

304. *See, e.g.*, *In re* Mosby, 532 B.R. 167 (Bankr. D. Kan. 2015) (Kansas statute did not permit exemption of inherited IRA).

305. *See In re* Kelly, Bankr. No. 22-00089, 2023 WL 2903988 (Bankr. N.D. Iowa Apr. 11, 2023) (concluding that the debtor properly exempted an inherited IRA under § 522(b)(3)(C) when she rolled over that IRA prebankruptcy into her own IRA).

3.9

The Tenancy-by-Entirety and Joint-Tenancy Exemption

Property held in joint tenancy or tenancy by entirety is exempt from the bankruptcy estate under § 522(b)(3)(B), but the debtor's claim of this exemption depends on the applicable nonbankruptcy law protecting such property from process.[306] The applicable nonbankruptcy law referred to in § 522(b)(3)(B) has been construed to be the applicable state law where the property is located.[307] These tenancies are not recognized in all states, and there will be variations in the scope of the exemption, depending, for example, on whether the applicable state law protects both realty and personalty titled in one of these tenancies.[308] Issues arise in joint consumer cases as to whether both debtors' property interests are protected under applicable state tenancy law, and the outcome may depend on whether a creditor has a claim against only one tenant or against both.[309]

3.10

Limits on Homestead Exemptions: §§ 522(o), (p), and (q)

BAPCPA added three types of monetary caps on the homestead exemption under §§ 522(o), (p), and (q). The first, § 522(o), addresses perceived abuse when a debtor has attained value in the homestead by improper means. It applies to homesteads claimed under § 522(b)(3)(A), which means the debtor is using a state-law homestead exemption. Thus the available exemption amount is "reduced to the extent that such value is attributable to any portion of any property that the debtor disposed of in the 10-year period [before filing bankruptcy] with the intent to hinder, delay, or defraud a creditor," assuming that the debtor could not have exempted the disposed property.[310] This limitation is directed toward preventing a debtor's conversion of what would have been nonexempt property into an exemptible homestead within the ten years before bankruptcy filing, but it only applies when the conversion was done with intent to hinder, delay, or defraud

306. *See* Morgan v. Bruton, No. 22-1964, 2024 WL 1644381 (4th Cir. Apr. 17, 2024) (debtor's interest in tenancy by entirety property not exempt from federal tax debt).

307. *See, e.g.*, *In re* Wheatley, 631 B.R. 326 (Bankr. N.D. Ill. 2021).

308. *See, e.g.*, *In re* Crow, 987 F.3d 912 (10th Cir. 2021) (under applicable Wyoming law, investment account was held in tenancy by entirety); *In re* Scioli, No. 13-2762, 2014 WL 2119187 (3d Cir. May 22, 2014) (under Delaware law, debtor's claim of tenancy-by-entirety ownership of vehicles was invalid).

309. See Brown & Norton, *supra* note 241, at 184–205, for discussion of cases interpreting tenancy-by-entirety and joint-tenancy protection by exemption.

310. 11 U.S.C. § 522(o).

creditors.[311] The party objecting to the claimed homestead, seeking to limit the amount by § 522(o)'s reduction, bears the burden of proving the debtor's intent. And courts have applied traditional fraudulent-intent analysis, such as looking for "badges" of fraud.[312] The Eighth Circuit Bankruptcy Appellate Panel concluded that § 522(o) did not really change the prior law on fraudulent conversion of nonexempt to exempt assets; it simply imposed a ten-year look-back period for that examination.[313] Conversion of nonexempt to exempt property, in or outside of the ten-year period, is not prohibited in the absence of fraudulent intent.[314]

Converting nonexempt assets to exempt assets as part of prebankruptcy planning has always been controversial. The Bankruptcy Code does not prohibit this type of conversion unless it's made with the obvious intent to shield assets from creditors. But the line between acceptable and fraudulent conversions is cloudy, at best.[315] Most consumer debtors file bankruptcy on the eve of some event, such as foreclosure, without the benefit of prebankruptcy planning. Significant conversion of assets to gain exemptions is rare.

The second cap, § 522(p), places a monetary cap on the debtor's "interest" in a homestead that was acquired during a period of 1,215 days before filing bankruptcy. The current cap is $214,000, and that amount is subject to automatic adjustment every three years, with the most recent adjustment on April 1, 2025. Section 522(p)'s cap applies when a debtor "elects" exemptions under § 522(b)(3)(A), which led to some questions of whether the cap applied in states that had opted out of the bankruptcy exemptions. The bankruptcy court in *In re Oliver*[316] reviewed the judicial authority about the application of §§ 522(p) and (q) in opt-out states, noting that both subsections are prefaced with "as a result of electing under subsection (b)(2)(A) to exempt property under State or local law." The *Oliver* court adopted the majority view that every "election" or decision to claim any exemption under § 522(b)(1) leads to the application of the caps.[317] Some courts have construed the statute's inclusion of the word "interest" as referral to improvement in equity value

311. *See, e.g.*, *In re* Wolfson, No. 23-12564-PDR, 2023 WL 6970147 (Bankr. S.D. Fla. Oct. 19, 2023) (applying § 522(o), debtors used proceeds from sale of cabin to reduce mortgage on homestead property with intent to defraud creditor).

312. *See, e.g.*, *In re* Addison, 540 F.3d 805 (8th Cir. 2008).

313. *In re* Wilmoth, 397 B.R. 915 (B.A.P. 8th Cir. 2008).

314. *See In re* Willcut, 472 B.R. 88 (B.A.P. 10th Cir. 2012).

315. *See* Lawrence Ponoroff & Stephen Knippenberg, *Debtors Who Convert Their Assets on the Eve of Bankruptcy: Villains or Victims of the Fresh Start?*, 70 N.Y.U. L. Rev. 235 (May 1995).

316. 649 B.R. 206, 211 (Bankr. E.D. Cal. 2023).

317. See *id.* for an analysis of the majority view, including *Kane v. Zions Bancorporation, N.A.*, 631 F. Supp. 3d 854 (N.D. Cal. 2022), *appeal dismissed*, No. 22-16674, 2003 WL 3075944 (9th Cir. Feb. 28, 2023) (§ 522(p) applied to state exemptions when the state had opted out of the federal exemptions).

in the homestead;[318] but other courts have applied a title theory to the statute—for example, when the debtor acquired legal title within the look-back period.[319] Notice that § 522 (p) does not require a showing of fraudulent intent.

The third cap, § 522(q), like § 522(p), is prefaced with "[a]s a result of electing under subsection (b)(3)(A) to exempt property under State or local law," and as observed by the *Oliver* court, both subsections apply in states opting out of the federal bankruptcy exemptions. Section 522(q) has the same monetary cap, currently $214,000, subject to automatic adjustment every three years. Section 522(q) is triggered by one of the statute's designated criminal, fraudulent, or other acts. Included in the acts that would affect the limitation on homestead amount are felonies under Title 18 that would indicate the bankruptcy filing was an abuse of Title 11; violations of federal or state securities law; fraud in a fiduciary capacity or in relation to a security transaction; a criminal act; an intentional tort; and willful or reckless misconduct leading to serious physical injury or death. This statute has rarely come into play in reported decisions,[320] and most of the triggering events would be uncommon in consumer cases.

If § 522(q) is applicable, it triggers a nontypical time for objection to the exemption claim. Rule 4003(b)(3) permits an objection to an exemption based on § 522(q) to be made at any time prior to closing of the bankruptcy case, with objection under this subsection not limited to Rule 4003(b)(1)'s general thirty days after conclusion of the meeting of creditors.[321]

3.11

Lien Avoidance Under § 522(f)

A potential and often-used benefit to consumer debtors is § 522(f)(1) to "avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption" to which the debtor would otherwise be entitled.[322] The first subsection (A) of this statute allows avoidance of "judicial" liens and is not applicable to other types of liens, like voluntary security interests or statutory liens.[323] Under the wording of the statute, avoidance is allowed if the

318. *See, e.g.*, *Willcut*, 472 B.R. 88.

319. *See, e.g.*, *In re* Aroesty, 385 B.R. 1 (B.A.P. 1st Cir. 2008). *Cf. In re* Peake, 480 B.R. 367 (Bankr. D. Kan. 2012) (distinguishing *Aroesty* based on state law).

320. *See In re* Larson, 513 F.3d 325 (1st Cir. 2008) (applying § 522(q) in criminal act scenario).

321. Objections to exemptions are discussed *supra* part 3.7.

322. 11 U.S.C. § 522(f).

323. For distinction between judicial and statutory liens, see *City of Chicago v. Mance* (*In re Mance*), 31 F.4th 1014 (7th Cir. 2022).

debtor would have been entitled to claim exemption in the property, and the lien impairs that exemption right.[324] The debtor need not have formally claimed an exemption before using § 522(f).[325] There is a restriction on avoidance of judicial liens that secure a domestic support obligation excepted from discharge under § 523(a)(5).[326]

An issue with avoidance of judicial liens relates to the statute's "fixing" term, which, under *Farrey v. Sanderfoot*,[327] comes into play when the debtor acquires an interest in the property, compared to when the lien attached. In *Farrey*, the debtor acquired his interest in a house by award from a divorce court, and the spouse acquired a judicial lien at the same time. Avoidance of that lien was not permitted under § 522(f) because the debtor's interest was not acquired prior to fixing of the lien. Judicial liens in the domestic-relations arena are common in consumer cases, and *Farrey* continues to be a factor in the analysis.[328]

Section 522(f)(1)(B) permits lien avoidance of certain consensual, but nonpossessory, nonpurchase-money security interests in specific personal property, including household goods, which are defined under § 522(f)(4). Avoidance here is restricted by some monetary limits, which are subject to automatic adjustment every three years, and by use of a statutory formula for calculating the extent to which such a lien impairs an exemption.[329]

3.12

The Effect of Case Conversion on Exemption Objections

Rule 1019(2)(B) provides that when a case is converted to Chapter 7, a new objection period begins, unless "the case was converted . . . more than one year after the entry of the first order confirming a plan under chapter 11, 12, or 13," or the case had previously been in Chapter 7, and the time for objection had expired in the original Chapter 7 phase.

324. *See, e.g.*, *In re* Maresca, 982 F.3d 859 (2d Cir. 2020).

325. Botkin v. Dupont Cmty. Credit Union, 650 F.3d 396 (4th Cir. 2011).

326. *See, e.g.*, *In re* Johnson, 445 B.R. 50 (Bankr. D. Mass. 2011).

327. 500 U.S. 291 (1991).

328. *See, e.g.*, McCoy v. Kuiken (*In re* Kuiken), 484 B.R. 766 (B.A.P. 9th Cir. 2013) (construing § 522(f) as requiring debtor's continuous interest in homestead to avoid judicial lien; conveyance after judgment lien and then reconveyance to debtor defeated avoidance).

329. 11 U.S.C. § 522(f)(2)(A). For cases applying the formula, see, e.g., *In re Lehman*, 205 F.3d 1255 (11th Cir. 2000); *In re Holland*, 151 F.3d 547 (6th Cir. 1998); and *In re Silveira*, 141 F.3d 34 (1st Cir. 1998).

3.13

The Effect of Exemptions After Discharge

Section 522(c) broadly protects property that was exempt in the bankruptcy case, even after completion of the case and discharge of the debtor, but there are exceptions. Once property is allowed as exempt, the exempt interest passes back to the debtor. Section 522(c) states that the exempt interest is not liable for pre-petition claims.[330] The principal statutory exceptions from this general rule that are applicable in consumer cases are for (1) debts that are excepted from discharge under §§ 523(a)(1) and (5), which are certain tax and domestic support obligations; and (2) secured liens that are not avoided under an applicable Code section, including tax liens that have been properly filed.[331] Section 523(c)(1) provides that the exposure of exempt property to debts that are not discharged under §§ 523(a)(1) or (5) is applicable "notwithstanding any provision of applicable nonbankruptcy law to the contrary."[332]

3.14

The Constitutionality of Bankruptcy-Specific State Exemptions

Some states have adopted exemptions that are only available to residents or domiciliaries who file for bankruptcy relief. Sometimes these bankruptcy-specific exemptions are more favorable than the same type of exemption available to persons not filing bankruptcy. The constitutionality of these laws has been questioned as unfairly benefitting those seeking bankruptcy protection, but the appellate courts addressing the issue have upheld the laws. For example, the Sixth Circuit held that Michigan's homestead exemption—which was more favorable for bankruptcy filers than for debtors not in bankruptcy—survived constitutional attack.[333] The court concluded that the opt-out allowed Michigan to structure its exemption laws for bankruptcy purposes, and that the distinction was applied uniformly within the state.[334]

330. *See, e.g.*, Davis v. Cox, 356 F.3d 76 (1st Cir. 2004).

331. See 11 U.S.C. §§ 522(c)(3) and (4) for other exceptions that are not typically applicable in consumer cases.

332. For the effect of the pre-2005 amendment of § 523(c) on the Texas homestead exemption, see *In re Davis*, 170 F.3d 475 (5th Cir. 1999).

333. Richardson v. Schafer (*In re* Schafer), 689 F.3d 601 (6th Cir. 2012).

334. *Id. Accord* Sheehan v. Peveich, 574 F.3d 248 (4th Cir. 2009) (West Virginia); *In re* Kulp, 949 F.2d 1106 (10th Cir. 1991) (Colorado); *In re* Applebaum, 422 B.R. 684 (B.A.P. 9th Cir. 2009) (California); *In re* Westby, 486 B.R. 509 (B.A.P. 10th Cir. 2013) (Kansas).

3.15

The Surcharge of Exemptions

Prior to the Supreme Court's decision in *Law v. Siegel*,[335] the circuits were split on the issue of whether a debtor's exempt property may be surcharged to pay the expenses of a trustee. *Siegel* was a Chapter 7 case in which the Ninth Circuit affirmed surcharge against the debtor's homestead to allow the trustee's recovery of costs related to the debtor's misconduct.[336] This issue had arisen when the debtor had done something, typically in bad faith, such as concealing assets, causing the trustee to spend time and expense finding or recovering property for the benefit of creditors. The Code does not specify a surcharge remedy, nor do the rules. The Tenth Circuit, in *Scrivner v. Mashburn* (*In re Scrivner*),[337] had held that the absence of a Code provision was fatal to surcharging, even though the debtor had failed to comply with an order to turn over to the trustee nonexempt property. "Section 105(a) does not empower courts to create remedies and rights in derogation of the Bankruptcy Code and Rules."[338] More recently, the First Circuit had approved the use of § 105(a) to allow a surcharge of exempt assets in a case of the debtor's concealment of nonexempt assets from the trustee.[339] In addition to the *Siegel* opinion, the Ninth Circuit has precedent allowing surcharge, as an equitable remedy, "when reasonably necessary."[340] The Eleventh Circuit has disapproved surcharge as inconsistent with the Code's specific exemption provisions.[341]

In *Siegel*, the Supreme Court held that the bankruptcy court exceeded its authority by imposing a surcharge, contravening § 522(k), which protects exempt property from liability for administrative claims.[342] The debtor's claim of homestead exemption had been allowed for lack of objection, and the trustee's attempted surcharge was for recovery of a portion of the attorney fees (an administrative expense) incurred in contesting the debtor's fabricated second mortgage. The Court pointed to remedies other than surcharge that might address a debtor's improper actions in the case.[343]

335. 571 U.S. 415 (2014).

336. Law v. Siegel, 435 F. App'x 697 (9th Cir. 2011).

337. 535 F.3d 1258 (10th Cir. 2008).

338. *Id.* at 1265.

339. Malley v. Agin, 693 F.3d 28 (1st Cir. 2012).

340. Latman v. Burdette, 366 F.3d 774, 786 (9th Cir. 2004). *See also In re* Onubah, 375 B.R. 549 (B.A.P. 9th Cir. 2007) (allowing surcharge of homestead).

341. *In re* Cox, 338 F.3d 1238 (11th Cir. 2003).

342. *Siegel*, 571 U.S. at 422.

343. *Id.* at 427. Potential remedies may include sanctions against the debtor's attorney for improperly claiming exemption. *See, e.g.*, Aldana v. Stadtmueller (*In re* De Jesus Gomez), 592 B.R. 698 (B.A.P. 9th Cir. 2018) (sanction included trustee's attorney fees and costs).

4

Claims Allowance and Distributions to Creditors

Process for Claims Held by Creditors

- Timely filing of a proof of claim on Official Form 410 (§ 501 & Fed. R. Bankr. P. 3002).
- Allowance or disallowance of the proof of claim, depending on whether an objection is filed (§ 502 & Fed. R. Bankr. P. 3007).
- Sufficient documentation of a proof of claim to support its validity (Fed. R. Bankr. P. 3001).
- If assets are available in the bankruptcy estate for payment of claims, a priority scheme exists (§ 507).

4.1

Overview

The majority of Chapter 7 consumer cases are *no-asset*, meaning that nothing from the bankruptcy estate will be distributed to unsecured creditors.[344] However, secured creditors may have their claims satisfied through redemption or reaffirmation,[345] or else their liens would typically continue to be valid after the bankruptcy case is closed, absent some avoidance of the lien by the debtor or trustee.[346] If there are potential assets that may be available for distribution to

344. The notice to creditors of the petition filing and that it is a no-asset, Chapter 7 case is on Official Form 309A. For more extensive discussion of the claims process, see, e.g., Judge William H. Brown, et al., The Law of Debtors and Creditors 835–978 (2023–2024).

345. Redemption under 11 U.S.C. § 722 and reaffirmation under 11 U.S.C. § 524 are discussed *infra* part 5.

346. The trustee's lien avoidance powers are not within the scope of this monograph, but the trustee has various powers, listed in 11 U.S.C. §§ 544–551. Lien avoidance under 11 U.S.C. § 522(f) is discussed *supra* part 3.

unsecured creditors, the creditors will be given notice of the opportunity to file proofs of claims.[347] In Chapter 13 cases, the amount and timing of distribution to creditors is determined by a confirmed plan. To have an allowed claim and participate in the distribution, creditors must file a proof of claim.[348] The Code's method for distribution to creditors in Chapter 7 cases is discussed below in part 4.11, and distribution for Chapter 13 cases is discussed below in part 6. Part 4 describes the proof-of-claim process (set forth in the Bankruptcy Code and Rules), highlights significant issues in consumer cases, and reviews the levels of priority for claims.

Creditor is defined in § 101(10), with the most common example being an "entity that has a claim that arose at the time of or before the order for relief."[349] The order for relief occurs automatically with the commencement, or filing, of the bankruptcy petition. As defined in § 101(5), *claim* includes either "a right to payment" or "a right to an equitable remedy for breach of performance," with the more common claim being a right to payment.[350] The general concept for claims that may be paid in consumer cases is that they arose pre-petition, before the filing of the bankruptcy case. In Chapter 13 cases, the Code provides for post-petition claims.[351]

4.2

Filing a Proof of Claim

To be eligible for a distribution from the bankruptcy estate, a creditor must file a proof of claim, and that claim must be allowed.[352] A valid secured lien typically passes through the bankruptcy administration unchanged,[353] especially in Chapter 7 cases, and secured creditors may not be required to file a proof of claim to facilitate that process. But if a secured creditor wants a distribution, particularly in Chapter 13 cases, the creditor must file a proof of claim. Bankruptcy Rule 3002(a) specifically addresses the need for both a secured and unsecured

347. This notice is given on Official Form 309C if it is an asset Chapter 7, and on Official Form 309I for a Chapter 13 case. If assets are discovered after original notice of a no-asset Chapter 7, Director's Form B2040 is used to notify creditors of the opportunity to file proofs of claims.

348. Fed. R. Bankr. P. 3002(a) ("A secured creditor, unsecured creditor . . . must file a proof of claim . . . for the claim to be allowed.").

349. 11 U.S.C. § 101(10)(A).

350. See *id.* § 101(5) for complete definition of *claim*.

351. *See id.* § 1305. Post-petition claims are discussed *infra* part 6.

352. Fed. R. Bankr. P. 3002(a).

353. *See, e.g.*, Shelton v. CitiMortgage, Inc. (*In re* Shelton), 477 B.R. 749 (B.A.P. 8th Cir. 2012) (disallowance of untimely proof of claim didn't void creditor's lien).

creditor to file a proof of claim in order to have an allowed claim,[354] and the reality of distribution in asset cases is that a trustee, be it Chapter 7 or Chapter 13, has no basis for paying anything to a creditor, unsecured or secured, without an allowed claim.[355] Section 501 authorizes the filing of a proof of claim (using Official Form 410 and its supplements), when necessary. The procedure for filing claims is fleshed out in Bankruptcy Rules 3001 and 3002, discussed below.

The proof of claim is filed with the bankruptcy-court clerk in the district where the case is pending.[356] While the typical claimant will be the creditor, the Code and rules provide for a claim to be executed and filed by others. Rule 3001(b) states that "a proof of claim shall be executed by the creditor or the creditor's authorized agent." If the creditor does not file a claim within the time provided, Code § 501(b) provides that an entity obligated with the debtor, or that has secured the claim, may file a proof of claim. Also, Rule 3004 permits either the trustee or the debtor to file a proof of claim on behalf of a creditor who fails to file a timely claim.[357]

4.3

Proof of Claim: Official Form 410

Bankruptcy Rule 3001 describes a proof of claim as "a written statement setting forth a creditor's claim." Official Form 410 is used for this purpose, and there are some supplements to that form that come into play under situations discussed below. The proof of claim is executed under penalty of perjury, and it may be filed by the actual creditor or the creditor's authorized agent.[358] Form 410 contains various spaces to designate the following: the current creditor; amount of the claim and its basis; identifying information about the account and debtor; whether the claim is secured, unsecured, or partially both; if secured, the value of collateral; whether it is a priority claim; and supporting documentation. Form 410 also requires identification of the addresses for notices and payment to be sent to the claimant filing the proof of claim.

354. Fed. R. Bankr. P. 3002(a).

355. For duties of Chapter 7 and 13 trustees, see 11 U.S.C. §§ 704 & 1302.

356. *See* Fed. R. Bankr. P. 3002(b) & 5005(a).

357. For an example of a Chapter 13 debtor having the opportunity to file a claim on behalf of a creditor, see *Michigan Dep't of Treasury v. Hight* (*In re Hight*), 670 F.3d 699, 703 (6th Cir. 2012). Rule 3004 imposes a thirty-day time, after expiration of the creditor's time, for the debtor or trustee to file such a proof of claim. *See, e.g.*, Municipality of Carolina v. Gonzalez (*In re* Gonzalez), 490 B.R. 642 (B.A.P. 1st Cir. 2013) (debtor's proof of claim on behalf of municipality was untimely).

358. *See* Fed. R. Bankr. P. 3001(b) and Official Form 410. The person authorized to file a proof of claim is often in dispute. *See infra* part 4.7.

An "informal" proof of claim—a pleading that establishes the equivalent of Official Form 410—has also been recognized.[359] But creditors run a severe risk that such an informal process may not measure up. The safe course of action is to file a claim on the official form.[360]

4.4

Time for Filing a Proof of Claim

The applicable bar dates for filing a proof of claim are found in Bankruptcy Rule 3002(c).[361] The time requirements are specific for Chapter 7 and 13 cases. The general rule is that "a proof of claim is timely filed if it is filed not later than 70 days after the order for relief under" Chapter 7 or Chapter 13, or the date of conversion of a case to Chapter 13.[362] For governmental units, the time is extended for pre-petition claims, permitting claim filing "before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide."[363] In Chapter 13 cases, the government has additional time to file a proof of claim related to a pre-petition tax return that is not filed by the debtor until after the case has been filed.[364]

These time limits are strictly construed and enforced.[365] Untimeliness is one of the grounds for disallowance of a claim under Code § 502(b)(9). While there are specific exceptions from the general timing rule (e.g., for infants, incompetents, foreign creditors),[366] the focus of this timing discussion is on the failure of creditors to file timely claims under the seventy-day deadline, running from the date of the order for relief. Rule 3002(c) leaves little room for lengthening the seventy-day time, and Bankruptcy Rules 9006(b)(1) and (3) allow enlargement of the time for claims "only to the extent and under the conditions

359. *See, e.g.*, Clark v. Valley Fed. Sav. & Loan Ass'n (*In re* Reliance Equities, Inc.), 966 F.2d 1338 (10th Cir. 1992) (establishing five-part test for informal proof of claim).

360. *See, e.g.*, *In re* Delucia, 654 B.R. 22 (Bankr. S.D.N.Y. 2023) (stay-relief motion was not informal proof of claim and would be untimely proof of claim).

361. 11 U.S.C. § 502(b)(9) contains requirements for a timely claim by a governmental entity.

362. Fed. R. Bankr. P. 3002(c).

363. *Id.* Rule 3002(c)(1). *See also* 11 U.S.C. § 502(b)(9).

364. Fed. R. Bankr. P. 3002(c)(1) and 11 U.S.C. § 502(b)(9) give the government sixty days after the debtor's tax return is filed, under 11 U.S.C. § 1308, to file a proof of claim for that return's liability. The government may obtain additional time upon the filing of a timely motion under Fed. R. Bankr. P. 3002(c)(1).

365. *See, e.g.*, Stutsman Constr., LLC v. Adair, No. 22-664-SDD-RLB, 2023 WL 6368123 (M.D. La. Sept. 28, 2023) (excusable neglect standard did not apply to extend time for proof of claim under Rule 3002(c)).

366. *See* Fed. R. Bankr. P. 3002(c)(2)–(6).

stated" in Rule 3002(c). These restrictions have been interpreted to mean that the bankruptcy court may not excuse a late proof of claim on the basis of excusable neglect.[367] Although occasionally a court will find equitable reasons to allow a late-filed claim—for example, when the creditor was not scheduled and did not receive timely notice of the case and claims bar date[368]—most courts have found that they lack equitable authority to extend the proof-of-claim bar date, even when the result is harsh.[369] Even though a creditor not scheduled in time to file a proof of claim would not receive a distribution in the case, other remedies are available. For example, § 523(a)(3) provides an exception from discharge for claims that were not scheduled in time to permit the filing of a timely proof of claim,[370] and in Chapter 13, a claim not provided for in a confirmed plan will survive discharge.[371]

Even though the time to file claims is strictly applied under the rule, the disallowance of a claim typically requires an objection to be filed by a party in interest under Code § 502(b).[372] There is some authority that, absent an objection, a late-filed claim could result in an untimely claim being paid.[373] The Chapter 13 debtor, for example, may have good reason for not objecting to an untimely claim: if that claim may not be discharged because the debtor bears some responsibility for failure to properly schedule the creditor; or if the debtor does not provide for the claim in the plan; or the debtor may simply prefer to pay the late claim.[374]

4.5

Claims Allowance

Under § 502(a), a claim filed under § 501 "is deemed allowed, unless a party in interest . . . objects." Without the filing of an objection, there is no contested issue to bring the court into the claim-allowance process, and the allowance happens

367. *See, e.g.*, *In re* Moore, No. 10-11491, 2012 WL 1192776 (Bankr. N.D.N.Y. Apr. 10, 2012).

368. *See, e.g.*, Goodman v. IRS (*In re* Adams), 502 B.R. 645 (Bankr. N.D. Ga. 2013); Russo v. Freda (*In re* Russo), No. 09-3274 (FLW), 2009 WL 4672669 (D.N.J. Dec. 7, 2009).

369. *See, e.g.*, *In re* Aleman, 499 B.R. 236 (Bankr. D.P.R. 2013); *In re* Harp, No. A10-00021-DMD, 2011 WL 6099551 (Bankr. D. Alaska Dec. 7, 2011).

370. *See infra* part 5.

371. *See* 11 U.S.C. § 1328(a) (discharge generally includes only debts "provided for by the plan"). *And see, e.g.*, N. Cal. Glaziers v. Wolter, No. 08-4487SC, 2009 WL 1458272 (N.D. Cal. May 26, 2009). See also *Rake v. Wade*, 508 U.S. 464 (1993), for definition of "provided for by the plan." Chapter 13 discharge is discussed *infra* part 6.

372. *See infra* part 4.6 for discussion of objections to claims.

373. *See, e.g.*, *In re* Smith, No. 09-43823, 2010 WL 5018379 (Bankr. W.D. Wash. Dec. 3, 2010).

374. See 11 U.S.C. § 1328(a) and *infra* part 6 for discussion of Chapter 13 plans and discharge.

as a matter of course.[375] Bankruptcy Rule 3007 provides for objections, discussed below. Rule 3001(f) states that "a proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." As explained below, whether a claim has been executed and filed in accordance with applicable rules is a significant, frequently litigated issue.

4.6

Objections to Claims

The key to preventing a claim's allowance is that a party in interest must object. Rule 3007, which governs objections, does not specify a time within which objections must be filed, only that an objection must be in writing and must be filed and served on the claimant and other required parties "at least 30 days before any hearing on the objection."[376] As in other areas of the Code, *party in interest* is not a defined term, but the case trustee clearly has standing as a party in interest. Code § 704(a)(5) authorizes the Chapter 7 trustee to "examine proofs of claims and object to the allowance," and § 1302(b)(1) gives this same authority to Chapter 13 trustees. It is not always clear that a Chapter 7 debtor has standing, since unless there are sufficient assets to pay all claims in full and return some funds to the debtor, a Chapter 7 debtor may have no financial stake in whether a claim is allowed.[377] If there is an issue whether a claim will be discharged (e.g., a tax claim), the debtor may be able to establish standing by showing that an objection to a claim affects the extent to which nondischargeable debts will burden the debtor after the case is over.[378] A Chapter 13 debtor may be able to establish standing to object, for example, when a debtor lacks the ability to fund a 100% plan, and nondischargeable debts will remain unpaid. A creditor may also have standing to object to another party's proof of claim, but that will depend on whether the objecting creditor has a legally protected interest that is adversely affected by the claim.[379]

375. *See In re* Mouzon Enters., Inc., 610 F.3d 1329 (11th Cir. 2010) (objection to claim triggered contested matter under Fed. R. Bankr. P. 9024).

376. Fed. R. Bankr. P. 3007(a). Official Form 420B is to be used for providing notice of objections to claims.

377. *See, e.g.*, Khan v. Regions Bank (*In re* Khan), 544 F. App'x 617 (6th Cir. 2013).

378. *See, e.g.*, *In re* Drost, 228 B.R. 208 (Bankr. N.D. Ind. 1998). Chapter 7 discharge and exceptions from discharge are discussed *infra* part 5; Chapter 13 discharge and its exceptions are discussed *infra* part 6.

379. *See, e.g.*, Adair v. Sherman, 230 F.3d 890 (7th Cir. 2000); *In re* FBN Food Servs., Inc., 82 F.3d 1387 (7th Cir. 1996).

Although the Bankruptcy Rules may affect claims allowance,[380] the Bankruptcy Code provides the substantive grounds for objection to claims. Section 502(b) sets forth nine grounds for disallowance of claims, most of which do not appear in typical consumer cases. The grounds include unenforceability under applicable law or the parties' agreement; a claim for unmatured interest; a claim unmatured at the petition date; property-tax assessments exceeding the value of property; and a late-filed claim.[381] An example covered by § 502(b)(1)—that the claim is unenforceable under a nonbankruptcy law—is when the claim is time-barred under state law.[382] Basically, any applicable law that provides a defense to the claim may be the source of this objection.

To illustrate some of the issues that are litigated in connection with claims disallowance, consider whether the filing of a proof of claim for a debt that is time-barred under applicable law is a ground for disallowance of the claim but also violates the Fair Debt Collection Practices Act (FDCPA). Prior to the Supreme Court's decision in *Midland Funding, LLC v. Johnson*,[383] most courts had held that filing a proof of claim does not form the basis for a FDCPA cause of action,[384] sometimes concluding that the claims allowance process preempts the FDCPA or perhaps other federal and state consumer-protection statutes.[385] In *Midland Funding* the Supreme Court held that a claim that was time-barred under Alabama's six-year statute of limitations was not false or misleading under the FDCPA, because the claim disclosed that the debt was more than ten years old. The Bankruptcy Code's provisions for disallowance of the claim due to unenforceability under applicable state law provided an affirmative defense to the proof of claim. These opinions recognize that objecting to a claim is relatively simple,[386] and that if nonbankruptcy law would affect the disallowance, the objecting party should raise it under § 502(b)(1).

As discussed in the next section, lack of documentation of the proof of claim presents claim-allowance issues, including whether the claim is objectionable under applicable nonbankruptcy law. For example, applicable state law may require that

380. *See infra* part 4.7.

381. *See* 11 U.S.C. §§ 502(b)(1)–(9).

382. *See, e.g.*, Dorsey v. PRA Receivables Mgmt., LLC (*In re* Dorsey), No. 07-21082PM, 2008 WL 2511897 (Bankr. D. Md. June 20, 2008).

383. 581 U.S. 224 (2017).

384. *See, e.g.*, Simmons v. Roundup Funding, LLC, 622 F.3d 93 (2d Cir. 2010); *In re* Varona, 388 B.R. 705 (Bankr. E.D. Va. 2008).

385. *See* B-Real, LLC v. Chaussee (*In re* Chaussee), 399 B.R. 225 (B.A.P. 9th Cir. 2008).

386. *See, e.g.*, Roberts v. Pierce (*In re* Pierce), 435 F.3d 891 (8th Cir. 2006) (discussing "negative notice" procedure for giving claimant notice of objection to claim; if claimant doesn't respond to objection and request hearing, claim may be disallowed, citing Fed. R. Bankr. P. 9007).

a creditor supply sufficient proof or documentation of its claim in order to have an enforceable right to payment; but disallowance based on state law is uncertain, with some courts finding that Rule 3001 requirements predominate over state-law provisions.[387]

Rule 3001(f) provides prima facie validity to a properly executed and filed proof of claim; thus opinions are written in terms of the objecting party having the burden to overcome or rebut this grant of prima facie validity.[388] As discussed in the next section, the burden of proof shifts between the objecting party and the claimant, but the claimant bears the ultimate burden to establish its claim. Assuming that an objection overcomes the prima facie validity, the claimant then must prove or persuade the court that the claim is valid.[389]

Clearly, the contested litigation over a proof of claim may involve Bankruptcy Rule 9011, if counsel for either the claimant or the objector stray beyond the bounds of required investigation and proper representations to the court.[390]

4.7

Documentation of Claims and the Applicable Bankruptcy Rule

The failure of a claimant to support the proof of claim with documentation, required by Bankruptcy Rule 3001(c), is a fertile area of litigation in the claims allowance process, with questions about whether insufficient documentation in itself is a ground for disallowance. To put the issues into focus, an understanding of Rule 3001(c) is necessary.

> **(c) Required Supporting Information.**
>
> (1) ***Claim or Interest Based on a Writing.*** If a claim or an interest in the debtor's property securing the claim is based on a writing, the

387. *See, e.g.*, *In re* Taranto, No. 10-76041-AST, 2012 WL 1066300 (Bankr. E.D.N.Y. Mar. 27, 2012) (under New York law, insufficient documentation of credit card debt barred claimant's right to payment). *Cf. In re* Myers, Nos. 22-16615 & 22-60037, 2023 WL 8047842 (9th Cir. Nov. 21, 2023) (insufficient documentation for enforceability of debt under applicable Nevada law was preempted under Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), with federal procedural law, including Rule 3001, governing requirements for allowable proof of claim).

388. *See, e.g.*, Stewart v. Batmanghelich (*In re* Stewart), 373 F. App'x 682 (9th Cir. 2010).

389. *See, e.g.*, *In re* Pursley, 451 B.R. 213 (Bankr. M.D. Ga. 2011) (discussing shifting burden).

390. *See, e.g.*, *In re* Taylor, 655 F.3d 274 (3d Cir. 2011) (counsel for claimant violated Rule 9011 by false representations in its response to claims and stay-relief objections); *In re* MacFarland, 462 B.R. 857 (Bankr. S.D. Fla. 2011) (debtor's counsel sanctioned under Rule 9011 for improper claims objections when claims were scheduled). *See also In re* Wingerter, 594 F.3d 931 (6th Cir. 2010) (discussing reasonable inquiry by claimant).

creditor must file a copy with the proof of claim—except for a claim based on a consumer-credit agreement under (4). If the writing has been lost or destroyed, a statement explaining the loss or destruction must be filed with the claim.

(2) ***Additional Information in an Individual Debtor's Case.*** If the debtor is an individual, the creditor must file with the proof of claim:

(A) an itemized statement of the principal amount and any interest, fees, expenses, or other charges incurred before the petition was filed;

(B) for any claimed security interest in the debtor's property, the amount needed to cure any default as of the date the petition was filed; and

(C) for any claimed security interest in the debtor's principal residence:

(i) Form 410A; and

(ii) if there is an escrow account connected with the claim, an escrow-account statement, prepared as of the date the petition was filed, that is consistent in form with applicable nonbankruptcy law.

(3) ***Sanctions in an Individual-Debtor Case.*** If the debtor is an individual and a claim holder fails to provide any information required by (1) or (2), the court may, after notice and a hearing, take one or both of these actions:

(A) preclude the holder from presenting the information in any form as evidence in any contested matter or adversary proceeding in the case—unless the court determines that the failure is substantially justified or is harmless; and

(B) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

(4) ***Claim Based on an Open-End or Revolving Consumer-Credit Agreement.***

(A) *Required Statement.* Except when the claim is secured by an interest in the debtor's real property, a proof of claim for a claim based on an open-end or revolving consumer-credit agreement must be accompanied by a statement that shows the following information about the credit account:

(i) the name of the entity from whom the creditor purchased the account;

(ii) the name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account;

(iii) the date of that last transaction;

> (iv) the date of the last payment on the account; and
>
> (v) the date that the account was charged to profit and loss.
>
> (B) *Copy to a Party in Interest.* On a party in interest's written request, the creditor must send a copy of the writing described in (1) to that party within 30 days after the request is sent.
>
> **(d) Claim Based on a Security Interest in the Debtor's Property.** If a creditor claims a security interest in the debtor's property, the proof of claim must be accompanied by evidence that the security interest has been perfected.[391]

As indicated by the rule's focus on security interests, especially when the security is the consumer debtor's principal residence, this rule often becomes relevant in Chapter 13 cases in which the debtor is attempting to cure prebankruptcy defaults and retain the residence.[392] One of the reasons that so much litigation over documentation occurs is that claims frequently are bought and sold, assigned from one entity to another,[393] opening the door to questions by the debtor or trustee as to whether the claimant is the proper person or entity to be filing the proof of claim.

In other words, standing of the claimant may be put at issue, with some courts concluding that an objection to standing is a substantive, statutory ground for disallowance under § 502(b)(1).[394] Under Rule 3001(c)(1), a copy of the writing should be filed with the proof of claim if the claim, or a security interest, is based on a writing. The rule spells out what the claimant should attach when the proof of claim is filed in an individual debtor's case, and when the proof of claim is based on open-end or revolving consumer credit, such as a credit card account. Subpart (c)(3) directly addresses accounts that have been transferred from one claimant to another. Rule 3001(d) requires that a proof of claim based on a security interest in property also "be accompanied by evidence" of perfection, and this is useful to trustees and perhaps debtors, who may find cause to object to the claim as secured when perfection is lacking.

Official Form 410's Attachment A must be filed by a home-mortgage creditor to implement the requirements of Rule 3001(c)(2). Attachment A itemizes the loan-payment history, pre-petition interest, fees, expenses, and charges that

391. Fed. R. Bankr. P. 3001(c).

392. *See infra* part 6.

393. See Fed. R. Bankr. P. 3001(e) for assignment of claims, both before and after a proof of claim is filed. *See also, e.g.*, *In re* Taranto, No. 10-76041-AST, 2012 WL 1066300 (Bankr. E.D.N.Y. Mar. 27, 2012) (Rule 3001(e) limits who may file assigned claims, but doesn't relieve assignee of otherwise proving underlying claim in response to objection).

394. *See, e.g.*, *In re* Richter, 478 B.R. 30 (Bankr. D. Colo. 2012) (failure to prove ownership of claim meant claim unenforceable under applicable state law).

are included in the proof of claim, as well as a statement of the amount required to cure any pre-petition default. If an escrow is a part of the claim, an escrow account statement is required by Rule 3001(c)(2)(C). Home-mortgage creditors must also file official forms for changes in ongoing mortgage payments and for any post-petition charges, such as attorney or late fees.[395] These rules and forms seem to have reduced some of the litigation over claims in consumer cases. But bankruptcy courts have disagreed about the extent to which documentation requirements under the rules form an independent basis for claim disallowance,[396] and so a brief overview of the rule changes is helpful.

The predominant view in the bankruptcy courts was that prior to the amendment of Rule 3001(c), effective December 2011, some level of documentation was required when a claim was supported by a writing. Code § 502(b) provides the only statutory grounds for disallowance of a proof of claim, with failure to document the claim not among those grounds.[397] Before Rule 3001(c) was amended, most bankruptcy courts held that a failure to attach the writing or to otherwise document the proof of claim results in loss of the prima facie effect of the proof of claim under Rule 3001(f), requiring the claimant to come forward with proof to support the claim in the face of an objection.[398] In other words, a failure to sufficiently document the basis for the claim results in no prima facie establishment of the claim's validity, and an objection based on lack of documentation rebuts that prima facie presumption, shifting the burden back to the claimant to supplement the proof of claim or amend it to sufficiently support the claim.[399] For example, prior to the amendment to Bankruptcy Rule 3001(c)(2), the Tenth Circuit held, in *Caplan v. B-Line, LLC* (*In re Kirkland*),[400] that the claimant's failure to attach any documentation at all, or to produce any in response to the trustee's objection to the claim, was sufficient cause to disallow the claim when an objection was made. The court's reasoning was based on a combination of the Code, the then applicable rule, and then Official Form 410.[401]

Kirkland illustrates the view that a claimant, here an assignee/purchaser of the original claim, may have its claim disallowed when it doesn't comply with the

395. *See* Fed. R. Bankr. P. 3002.1, discussed *infra* part 6; Official Forms 410S-1 and 410S-2.

396. *See In re* Brunson, 486 B.R. 759 (Bankr. N.D. Tex. 2013) (reviewing split of judicial views on effect of lack of documentation before Rule 3001(c) amendment, and suggesting that rule's amendment would resolve disagreement).

397. *See, e.g.*, *In re* MacFarland, 462 B.R. 857 (Bankr. S.D. Fla. 2011).

398. *See, e.g.*, Ahmadi v. CitiMortgage, Inc. (*In re* Ahmadi), 467 B.R. 782 (Bankr. M.D. Pa. 2012).

399. For a discussion of different views of the effect of lack of documentation and the shifting burden of proof, see, e.g., *In re Pursley*, 451 B.R. 213 (Bankr. M.D. Ga. 2011).

400. 572 F.3d 838 (10th Cir. 2009).

401. *Id.* at 840–41 (citations omitted).

applicable procedural requirements for a proof of claim. The literal application of *Kirkland*'s holding may have been put into question by the subsequent amendment to Bankruptcy Rule 3001(c), which "was directed at claim documentation and the appropriate sanction for failure to comply with Rule 3001's documentation requirement."[402] In *Kirkland*, the claimant's claim had been disallowed as a sanction for not complying with Rule 3001. But the amended rule's more restrictive counterpart, Rule 3001(c)(2)(D), provides that in the evidentiary hearing on claims allowance, following an objection based on lack of documentation, the claimant would be precluded "from presenting the omitted information in any form . . . unless the court determines that the failure was substantially justified or is harmless."[403] The 2011 Advisory Committee Note to amended Rule 3001(c) states that a lack of documentation "is not in itself a ground for disallowance of the claim. The claim can be disallowed only if it comes within one of the grounds for disallowance under § 502(b) of the Bankruptcy Code."[404]

It may be true that § 502(b)(1)'s focus on enforceability under applicable nonbankruptcy law requires the claimant to support its proof of claim with attachments, for example, when state law required that a creditor relying on a contractual obligation produce evidence of a written contract.[405] And there are reported opinions in which an assignee of a claim failed to support its proof of claim, or lacked standing to file the claim, when it did not attach any evidence of the assignment.[406] To put it another way, although amended Rule 3001(c) imposes an evidentiary sanction on the effect of insufficient documentation, it is not always clear when that evidentiary sanction and the application of § 502(b)(1) are different in the end result. Likewise, distinguishing between loss of prima facie validity and disallowance of the claim is not always easy.

Rule 3001(c) was amended again in 2012, adding paragraph (3) concerning open-end and revolving consumer credit agreements. The Advisory Committee

402. *In re* Reynolds, 470 B.R. 138, 142–43 (Bankr. D. Colo. 2012).

403. Fed. R. Bankr. P. 3001(c)(2)(D)(i). *See also Reynolds*, 470 B.R. at 143.

404. *Reynolds*, 470 B.R. at 144 (quoting Advisory Committee Note (2011) to Rule 3001, and citing Report of the Judicial Conference Committee on Rules of Practice and Procedure, 2011 U.S. Order 0018 (Apr. 26, 2011)).

405. *See, e.g.*, *In re* Lytell, No. 11-2473, 2012 WL 253111 (E.D. La. Jan. 26, 2012) (no contract attached); *In re* Foy, 469 B.R. 209 (Bankr. E.D. Pa. 2012) (Pennsylvania law required evidence of judgment assignment, with contractual obligation merging into judgment). *Cf. In re* Myers, Nos. 22-16615 & 22-60037, 2023 WL 8047842 (9th Cir. Nov. 21, 2023) (insufficient documentation for enforceability of debt under applicable Nevada law was preempted under Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), with federal procedural law, including Rule 3001, governing requirements for allowable proof of claim).

406. *See, e.g.*, *In re* Gauthier, 459 B.R. 526 (Bankr. D. Mass. 2011).

Note to that amendment states that the disclosures required would provide information about transfers of the account and the claim's timeliness.

There has been litigation and different interpretations of the scope of Rule 3001(c)(1)(D)'s potential penalties for a creditor's failure to comply with the required information. That rule provides that the claimholder's failure may preclude admission of the omitted information or "other appropriate relief, including reasonable expenses and attorney's fees caused by the failure."[407] Does the other appropriate relief include a finding of contempt or award of punitive damages for a creditor's repeated violations of the rule? In *PHH Mortgage Corp. v. Sensenich* (*In re Gravel*),[408] the Second Circuit held that contempt and punitive damages were not permitted under the rule, but lower courts have held otherwise.[409]

Litigation of home-mortgage claims (discussed below in part 6) arises in Chapter 7 cases and, even more commonly, in Chapter 13 cases, in which debtors usually are trying to keep their homes. Rule 3002.1 (discussed below in part 6) along with two supplements to Official Form 410 specifically address notices that are required for claims secured by a Chapter 13 debtor's principal residence. Rule 3002.1 seeks to prevent some of the recurring litigation over whether a home-mortgage creditor kept the debtor and trustee informed of changes in the mortgage payments and of post-petition charges, such as attorney fees.

4.8

The Redaction of Information from a Proof of Claim

Official Form 410 requires only the last four digits of any number (e.g., Social Security) as identifying information that the claimant uses to identify the debtor. Bankruptcy Rule 9037 specifically requires the claimant to redact personal information from an electronic or paper filing. In litigation over the failure of a claimant to comply with these requirements, most courts have found no private right of action for damages.[410] Generally, the appropriate remedy is redaction and the restriction of public access to the offending filing.[411]

407. Fed. R. Bankr. P. 3001(c)(1)(D).

408. 6 F.4th 503 (2d Cir. 2021), *cert. denied*, Sensenich v. PHH Mortg. Corp., 142 S. Ct. 2829 (2022).

409. *See, e.g.*, *In re* Dewitt, 651 B.R. 215 (Bankr. S.D. Ohio 2023) (rule does permit punitive damages).

410. *See, e.g.*, Holloway v. Cmty. Bank, No. 3:10-CV-75, 2011 WL 4500042 (E.D. Tenn. Sept. 27, 2011).

411. *See, e.g.*, Dunbar v. Cox Health Alliance, LLC (*In re* Dunbar), 446 B.R. 306 (Bankr. E.D. Ark. 2011).

4.9

The Reconsideration and Amendment of Claims

Section 502(j) and Bankruptcy Rule 3008 provide for the court to reconsider claims for cause. This authority has been used to reconsider a claim that was previously disallowed or allowed. The statute refers to "the equities of the case" justifying reconsideration, giving the court broad discretion to ascertain whether sufficient cause was shown to reconsider a prior claims allowance or disallowance.[412] Reconsideration may be a factor in a creditor's amendment of its proof of claim.[413] Amendment of claims is not mentioned in the Code or Bankruptcy Rules; whether a creditor is permitted to amend its prior proof of claim is within the court's discretion. Some courts apply Federal Rule of Civil Procedure 15, by analogy, to that determination.[414] Allowing a claim amendment may be tied to whether the amendment changes the nature of the original claim, for example from unsecured to secured, or whether it merely changes the amount of the claim.[415] If the amended claim is in reality a new claim, it would be untimely under § 502's time requirements.[416]

4.10

The Effect of a Claim-Allowance Order

Assuming proper notice of a claim objection, the entry of an order allowing or disallowing the claim has finality effect. For example, in *Hann v. Educational Credit Management Corp.* (*In re Hann*),[417] the First Circuit held that entry of an order allowing a student-loan claim at zero, following the Chapter 13 debtor's unrebutted proof that the debt had been paid in full, was a final order, preventing the creditor's collection attempts. Even though student-loan debt is excepted from discharge under § 523(a)(8), discharge was not the issue in *Hann*; rather, the claimant had notice of the objection and did not respond, and the bankruptcy court made a factual finding that the debt was fully paid.

412. *See, e.g.*, Nicholas v. Oren (*In re* Nicholas), 457 B.R. 202 (Bankr. E.D.N.Y. 2011) (applying Fed. R. Civ. P. 60); *In re* Brewster, No. 10-54254, 2011 WL 4458792 (Bankr. W.D. Tex. Sept. 14, 2011) (applying Fed. R. Civ. P. 59).

413. *See, e.g.*, *In re* Smith, 465 B.R. 350 (Bankr. D. Mass. 2012).

414. *See, e.g.*, *In re* Laney, 46 F.4th 628 (7th Cir. 2022) (amendment after Chapter 13 confirmation by secured creditor to add attorney fees was permitted under Rule 15(c)'s relation-back principle).

415. *See, e.g.*, *In re* Tanaka Bros. Farms, Inc., 36 F.3d 996 (10th Cir. 1994).

416. *See, e.g.*, *In re* Jackson, 482 B.R. 659 (Bankr. S.D. Fla. 2012).

417. 711 F.3d 235 (1st Cir. 2013).

4.11

Priority Claims and the Order of Distribution

In addition to the categories of secured and unsecured claims, § 507 of the Bankruptcy Code establishes levels of priorities for certain claims. *Priority* simply refers to the order of payment, assuming that there are assets in a case available for distribution to creditors whose claims have been allowed. In Chapter 7 cases in which assets are available, § 726(a) of the Bankruptcy Code sets out the payment scheme. Section 726(a)(1) directs the first distribution to be made in the order of priority found in § 507. Section 726(a)(2) next provides for distribution to allowed unsecured claims, and a descending order of distribution follows in §§ 726(a)(3)–(6), with the last distribution of any excess to the debtor. Payments to Chapter 7 debtors are rare indeed, and § 726 doesn't come into play at all if the case is no-asset. In Chapter 13 cases, the order of distribution is not governed by § 726, but the priorities of § 507(a) are part of the requirements for a plan, under § 1322(a)(2), with a confirmed plan governing the distributions.[418]

Domestic support obligations are first priority in § 507(a)(1), which includes alimony, maintenance, and support. The definition of a domestic support obligation (DSO) contained in § 101(14A) is much broader than pre-BAPCPA. Although the concept of bankruptcy claims is tied to pre-petition debts, § 101(14A) includes interest accruing post-petition, as well as debt incurred pre- and post-petition. A DSO may be one "owed to or recoverable by" the spouse, former spouse, child, or other named relatives, as well as "a governmental unit."[419] By including "governmental units" in the definition of a DSO, the statute may also make "assistance provided by a governmental unit" a DSO.[420] Any unsecured debt that falls within the scope of § 101(14A)'s definition is entitled to § 507(a)(1) priority, to be paid from the first funds available for distribution from the bankruptcy estate. DSOs are also excepted from discharge under § 523(a)(5); thus to the extent there are not funds for payment of any, or all, of a DSO, the debt survives the discharge in both Chapter 7 and Chapter 13 cases.[421]

Section 507(a)(1) has three internal levels of priority. The first level is for a trustee's expenses related specifically to administration of assets for payment of

418. See *infra* part 6 for discussion of priorities and distributions in Chapter 13 cases.

419. 11 U.S.C. § 101(14A)(A).

420. *Id.* § 101(14A)(B). *See, e.g.*, Rivera v. Orange Cnty. Prob. Dep't (*In re* Rivera), 832 F.3d 1103, 1106 (9th Cir. 2016) ("Following the 2005 amendment, a debt does not lose its DSO status simply because it is owed to a governmental unit.").

421. Chapter 7 discharge and its exceptions are discussed *infra* part 5; Chapter 13 discharge is discussed *infra* part 6.

allowed DSOs.[422] The second level is for the obligations that are owed directly to, or recoverable by, a spouse, former spouse, or child of the debtor or the child's parent, legal guardian, or responsible relative. Included in this second level are domestic support claims filed by a governmental unit on behalf of one of the named individuals.[423] The third level is for DSOs assigned prior to the bankruptcy filing, unless the assignment was for the purpose of collection, in which event the assigned claim falls under the second level.[424] Since the 2005 amendments, there has been relatively little case law about the difference in priorities for governmental units under the second and third tiers; but when there is an issue of proper tier, the claimant has the burden of proof.[425] The difference in priority tier is significant in Chapter 13 plans, since § 1322(a)(4) permits a plan to pay less than 100% of a domestic support claim that has been assigned for purposes other than collection, provided the debtor's projected disposable income is dedicated to the plan for a full five years.[426]

The second level of priority under § 507(a)(2) is for administrative expenses that are allowed under § 503(b)'s categories. The most common examples in consumer cases are the trustee's expenses and the debtor's attorney fees. Section 503(b)(1)(A) provides for the "actual, necessary costs and expenses of preserving the estate," and § 503(b)(2) includes "compensation and reimbursement awarded under section 330(a)." Compensation of officers of the estate, including attorneys employed by the trustee under § 327, are addressed by § 330(a). Section 329 provides for attorney fees for the debtor's attorney, and Rule 2016 requires professionals seeking compensation from the bankruptcy estate to file an application, setting forth details of the services rendered and expenses incurred. Fees for debtors' attorneys in Chapter 7 and 13 cases are discussed below in parts 5 and 6.

The other priorities under §§ 507(a)(3)–(10) may be applicable in a particular consumer case, but they are rare enough to be beyond the scope of this monograph,[427] with the exception of § 507(a)(8)'s priority, which is relevant in Chapter 7 consumer cases in which a debtor has income or other tax obligations described in § 507(a)(8). Section 523(a)(1)'s exception from discharge (discussed below in part 5) refers in part to § 507(a)(8) for some of the taxes that may not be subject to discharge.

422. 11 U.S.C. § 507(a)(1)(C). Although this structurally appears in third order, to the extent the trustee administers assets for the benefit of a domestic-support creditor, the trustee's expenses prime other priorities.

423. *Id.* § 507(a)(1)(A).

424. *Id.* § 507(a)(1)(B).

425. *See, e.g.*, *In re* Hack, No. 08-72553, 2009 WL 1392068 (Bankr. C.D. Ill. May 14, 2009).

426. See *In re Penaran*, 424 B.R. 868 (Bankr. D. Kan. 2010), for discussion of the interface between § 507(a)(1)(B) priority and Chapter 13 plans, discussed *infra* part 6.

427. For a discussion of § 507(a) priorities, see, e.g., Norton Bankruptcy Law and Practice, ch. 49 (3d ed. 2023).

5
Relief Under Chapter 7

Major Components of Relief

- Eligibility as a debtor under the Code's "means test" (§ 707).
- Methods for retaining collateral and reaffirmation of secured debt (§§ 524 & 722).
- Discharge of pre-petition debts, objections to discharge, exceptions from discharge, and the effect of discharge (§§ 523, 524 & 727).
- Potential conversion of a case to another chapter, or case dismissal (§§ 706 & 707).

5.1
Overview

Chapter 7 bankruptcy relief is commonly referred to as liquidation. The Chapter 7 trustee may liquidate nonexempt assets, assuming they have value, and distribute proceeds for the benefit of creditors. But in reality, most Chapter 7 (consumer) cases have no assets available for the trustee's administration. The trustee may abandon an asset that has negligible or no value for the estate,[428] which would result in the asset passing back to the debtor. Relief for consumer debtors under Chapter 7 typically involves debtors having valid secured claims against their real and personal property, such as a home and vehicle, with the secured liens passing through the bankruptcy and with debtors receiving a discharge of their in personam liability to both secured and unsecured creditors.[429] There are exceptions to the general discharge,[430] and there may be objections to the overall discharge;[431] but assuming no discharge issues, the typical no-asset Chapter 7 case will move through administration quickly, with no distribution to creditors. To the extent

428. *See* 11 U.S.C. § 554.
429. *See id.* § 524(a).
430. *See id.* § 523.
431. *See id.* § 727.

the secured claims are not avoided or otherwise adversely affected during the Chapter 7 case administration,[432] the secured claims may be reaffirmed by debtors;[433] the collateral might be redeemed;[434] the debtor might surrender the collateral to creditors;[435] or the lien might simply remain intact after the bankruptcy case is closed.[436] Secured creditors often move for and obtain automatic stay relief to act on their state-law rights to the collateral.[437]

5.2

Eligibility and Dismissal Under the Means Test

The threshold test for Chapter 7 eligibility is set forth in § 707. To be eligible for Chapter 7 bankruptcy, a debtor must meet several criteria. This is referred to as the *means test*. Income cannot exceed a certain limit, and if it does, the debtor must pass the means test. The means test for Chapter 7 eligibility is whether the debtor has enough money to pay in a Chapter 13 case. Prior to the passage of BAPCPA in 2005, a bankruptcy judge had the discretion to dismiss a Chapter 7 bankruptcy case if the judge determined that the debtor's income was sufficient to fund a repayment plan under Chapter 13.[438] After BAPCPA, a Chapter 7 case filed by an individual whose debts are primarily consumer debts may be dismissed involuntarily if a presumption of abuse is found. Alternatively, the Chapter 7 case may be converted to Chapter 11 or 13 with the debtor's consent. When an individual filing for bankruptcy under Chapter 7 has enough money to repay creditors an amount specified in § 707(b)(2)'s means-test formula in a Chapter 13 bankruptcy, it is deemed an abuse of the bankruptcy system. Essentially, the application of the formula determines whether the debtor needs Chapter 7 relief.[439] Failure of the test amounts to presumption of abuse. Prior to 2005, under § 707 a

432. *See id.* § 506(d).

433. *See id.* § 524(c).

434. *See id.* § 722.

435. *See id.* § 521(a)(2).

436. *See id.* § 506.

437. See *supra* part 2 for discussion of relief from the automatic stay.

438. A Chapter 7 case may still be dismissed under a § 707(b)(3) totality-of-circumstances finding that the debtor is able to pay a significant amount of debt in a Chapter 13 case. *See, e.g.*, *In re* Pittman, 506 B.R. 496 (Bankr. S.D. Ohio 2014) (debtor's ability to pay 24% to unsecured creditors was cause for dismissal).

439. 11 U.S.C. § 707(b). *See, e.g.*, Witcher v. Early (*In re* Witcher), 700 F.3d 619 (11th Cir. 2012) (ability to pay debts is part of § 707(b)(3)'s totality-of-circumstances test). For discussion of the means test in Chapter 7, see Judge Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 Am. Bankr. L.J. 231 (2005).

Chapter 7 case could be dismissed if the court found it to be a *substantial* abuse of the Code's provisions.

If the court does not find the means test determinative as to whether the case constitutes an abuse, it may nevertheless dismiss the case under the more general abuse standards,[440] pursuant to § 707(b)(3)'s "bad faith" and "totality of circumstances" thresholds for Chapter 7 relief. In *Ng v. Farmer* (*In re Ng*),[441] for example, although the bankruptcy court did not grant the U.S. trustee's motion to dismiss under the means test, it properly applied a totality-of-circumstances test to dismiss the Chapter 7 case under § 707(b)(3)(B).[442]

Section 707(a) also permits dismissal of a Chapter 7 case for bad faith.[443] The Eleventh Circuit has held that a Chapter 7 debtor's pre-petition "bad faith" could be cause for dismissal under § 707(a), concluding that the statute's undefined "cause" was not limited to bad-faith actions occurring after the petition's filing.[444] In applying the bad-faith analysis, pre-2005 case law is still relevant because BAPCPA did not add a definition of bad faith.[445]

Dismissal may be granted, after notice and hearing, for other cause, including unreasonable delay by a debtor that is prejudicial to creditors, failure to pay required fees, and failure to file the documents required under § 521(a) within fifteen days of the petition filing, unless the court, for cause, grants additional time.[446] For purposes of Chapter 7 eligibility, the means test in § 707(b) begins with an exclusion, providing that the court should not consider in its calculation that the debtor has made, or continues to make, charitable contributions, as defined in Code §§ 548(d)(3) and (4).[447]

440. *See* Calhoun v. U.S. Trustee, 650 F.3d 338 (4th Cir. 2011) (even if there's no presumption of abuse under 11 U.S.C. § 707(b)(2)'s means test, court may dismiss case under totality of circumstances when evidence supports that Chapter 7 debtors were able to pay creditors). *See also* Kulakowski v. U.S. Trustee (*In re* Kulakowski), 735 F.3d 1296 (11th Cir. 2013) (§ 707(b)(2) did not subsume § 707(b)(3)).

441. 477 B.R. 118 (B.A.P. 9th Cir. 2012).

442. *See also* Perlin v. Hitachi Cap. Am. Corp., 497 F.3d 364 (3d Cir. 2007).

443. *See, e.g.*, *In re* Padilla, 222 F.3d 1184, 1191 (9th Cir. 2000) (discussing circuit disagreement on whether § 707(a) provides for dismissal based on debtor's bad faith).

444. Piazza v. Nueterra Healthcare Physical Therapy, LLC (*In re* Piazza), 719 F.3d 1253 (11th Cir. 2013) (noting circuit split and agreeing with Third, Eighth, and Ninth Circuits holding that pre-petition bad faith was sufficient "cause" for dismissal of voluntary Chapter 7 petition under § 707(a)).

445. For application of bad faith prior to 2005 amendments, see, e.g., *In re Tamecki*, 229 F.3d 205 (3d Cir. 2000); *In re Padilla*, 222 F.3d 1184 (9th Cir. 2000); *In re Huckfeldt*, 39 F.3d 829 (8th Cir. 1994); and *In re Zick*, 931 F.2d 1124 (6th Cir. 1991).

446. 11 U.S.C. §§ 707(a)(1)–(3). See *supra* part 2 for discussion of filing requirements.

447. *Id.* § 707(b)(1). *See* Wadsworth v. Word of Life Christian Ctr. (*In re* McGough), 737 F.3d 1268 (10th Cir. 2013) (interpreting § 548(a)(2)'s 15% limitation of charitable contributions).

The test then looks at a debtor's "current monthly income," which is a defined term under § 101(10A), going back to the six-month period before the bankruptcy filing[448] for the debtor's average monthly income from all sources. Current monthly income includes any amount contributed on a regular basis by anyone other than the debtor—or debtor's spouse, in a joint case—toward the household expenses of the debtor and dependents, but specifically excludes Social Security benefits and other less common exceptions.[449] For purposes of Chapter 7, the statutory exclusion of Social Security income from current monthly income and the subsequent means test seems clear.[450] Distinctions have been made between this specific statutory exclusion and other benefits, such as under the Railroad Retirement Act[451] and private disability insurance benefits.[452]

Official Form 122A-1[453] is used to make the calculations of current monthly income, and Official Form 122A-2[454] is used for the means-test calculation. There is a presumption of abuse if a debtor's current monthly income exceeds a statutory formula after deductions set forth in § 707(b)(2) for applicable monthly expenses. The monthly expenses are generally determined by use of IRS National Standards and Local Standards, plus deductions for contractual secured debt payments, priority claims, and other necessary expenses itemized in the

448. There is a different six-month period to be determined by the court when the debtor did not file with the petition the schedule of current income required by 11 U.S.C. § 521(a)(1)(B)(ii). *See* 11 U.S.C. § 101(10A)(A)(ii).

449. 11 U.S.C. § 101(10A)(B). *See* Miller v. U.S. Trustee (*In re* Miller), 519 B.R. 819 (B.A.P. 10th Cir. 2014) (wages received in six-month period were current monthly income, although wages were for work performed before period began); *In re* Strictland, 504 B.R. 542 (Bankr. D. Minn. 2014) (income earned in six-month pre-petition period was current monthly income, even though not received during that period).

450. Much of the judicial interpretation of § 707(b)'s means test has occurred in Chapter 13 cases, in which § 1325(b) incorporates § 707(b)(2). *See, e.g.*, Mort Ranta v. Gorman, 721 F.3d 241 (4th Cir. 2013); Drummond v. Welsh (*In re* Welsh), 711 F.3d 1120 (9th Cir. 2013); Beaulieu v. Ragos (*In re* Ragos), 700 F.3d 220 (5th Cir. 2012); Anderson v. Cranmer (*In re* Cranmer), 697 F.3d 1314 (10th Cir. 2012); Baud v. Carroll, 634 F.3d 327 (6th Cir. 2011) (all holding that Social Security benefits excluded in § 101(10A)(B) for purposes of Chapter 13 analysis).

451. *See* Meyer v. Scholz (*In re* Scholz), 477 B.R. 877 (B.A.P. 9th Cir. 2011) (Railroad Retirement Act benefits included in current monthly income).

452. *See* Blausey v. U.S. Trustee, 552 F.3d 1124 (9th Cir. 2009) (private disability insurance benefits included in current monthly income).

453. See 2015 Committee Note to Official Form 122A-1 for an explanation of the form and its relevant income and expense calculations, https://perma.cc/7P8E-U7WP.

454. See *id.* for an explanation of the form and its means test calculations, https://perma.cc/7P8E-U7WP.

statute.[455] If the resulting net current monthly income, multiplied by sixty, is not less than $17,150, or the greater of $10,275 and 25% of the debtor's nonpriority unsecured claims, there is a presumption of abuse.[456] Official Forms 122A-1 and 122A-2's step-by-step process of the presumptive-abuse testing leads the calculation through the debtor's income from all sources, and determines whether the means test applies, based on the debtor's applicable median family income. The median family income is a state-sensitive amount, based on a family of the same or smaller size, as determined by the Bureau of the Census each year,[457] and that information is available from the Department of Justice, U.S. trustee,[458] and the bankruptcy-court clerk. If the debtor's and spouse's current monthly income is less than the applicable median family income based on household size, no one may move for dismissal under the means test.[459] In other words, the means test ends up not applying to below-median-income Chapter 7 debtors.[460]

The determination of household size has not been carried out with a consistent methodology, since a debtor's family may be made up of various individuals living in the home less than full time. The Fourth Circuit addressed this issue in *Johnson v. Zimmer*.[461] After discussing the various approaches taken by bankruptcy courts (heads-on-bed, income-tax-dependent, and economic-unit approaches), the court adopted the economic-unit approach in a case with a debtor having part-time custody of two minor children and a spouse having part-time custody of three minor children. Although the case involved § 707(b)'s use in Chapter 13, the statutory analysis is applicable in Chapter 7. The court recognized that a fractional application of each individual's time spent in the home was relevant to the economic impact of actual time in the home on family expenses.

Most of the litigation over the application of IRS standards for determining allowable expenses takes place in Chapter 13 cases. (Judicial interpretations of this part of the means test are discussed below in part 6.) The IRS National Standards are for expenses—based on family size—for necessities like food, apparel,

455. *See* 11 U.S.C. §§ 707(b)(2)(i)–(iv). The IRS Standards are available at https://perma.cc/9X3G-YCP9.

456. Section 707(b)(2)'s monetary amounts are subject to automatic, periodic adjustment every three years for inflation, with the most recent adjustment on April 1, 2025. *See* 11 U.S.C. § 104.

457. *See id.* § 101(39A).

458. *See* https://www.justice.gov/ust.

459. 11 U.S.C. § 707(b)(7).

460. *See* Official Form 122A-1. If the debtor's current monthly income on the form is below the applicable median-family income, Form 122A-2 is not required, and there is no presumption of abuse.

461. 686 F.3d 224 (4th Cir. 2012). *See also* United States v. Jeffreys, No. 21-30214, 2022 WL 9730934 (B.A.P. 9th Cir. Oct. 17, 2022); Bonney v. Shaikh (*In re* Shaikh), No. EO-20-012, 2020 WL 6867920 (B.A.P. 10th Cir. Nov. 23, 2020).

household supplies, personal care, and miscellaneous expenses. IRS Local Standards are based on state or regional costs for expenses like housing, utilities, and transportation. Housing expenses are broken into categories like mortgage, rent, taxes, insurance, and utilities. Transportation costs consist of operating expenses and ownership costs.

In Chapter 13 cases, § 707(b) issues arise as to whether the IRS Standards are allowable deductible expenses without regard to actual expenses or whether the standards set caps, with a debtor limited to the lesser of that cap or actual expense.[462] The Supreme Court held, in the Chapter 13 case, *Ransom v. FIA Card Services, N.A.*,[463] that an above-median debtor owning a vehicle without any debt against it cannot claim an allowance for vehicle ownership expense under § 707(b)(2)(A)(ii)(I) and the related IRS Local Standards for vehicle ownership. In other words, a debtor must have an actual expense to justify a § 707(b)(2) deduction from current monthly income.[464] Using this rationale—which would be applicable in both Chapter 7 and 13 cases—other courts have held that if the debtor is surrendering a home or vehicle, there is not an allowance deduction in the means test for the secured debt on that surrendered collateral.[465] However, there is authority that contractual payments are deductible without regard to the necessity or nature of the collateral, since § 707(b)(2)(A)(iii) allows a deduction for the "average monthly payments on account of secured debts . . . scheduled as contractually due to secured creditors in each month of the 60 months following the date of the filing of the petition."[466]

In applying the Chapter 7 means test, the Ninth Circuit held that a debtor cannot deduct payments being made on a loan from a 401(k) retirement account, either as one of the "other necessary expenses" or as a "special circumstance," under § 707(b)(2).[467] The debtor argued that the monthly payments were for a

462. See *infra* part 6 for discussion of case authority. *See, e.g.*, Bledsoe v. Cook, 70 F.4th 746 (4th Cir. 2023) (holding that above-median Chapter 13 debtor could deduct contractual mortgage payment instead of lower Local Standard, agreeing with Sixth and Ninth Circuits).

463. 562 U.S. 61 (2011). *See also* Kramer v. Bankowski (*In re* Kramer), 505 B.R. 614 (B.A.P. 1st Cir. 2014) (no deduction for car being surrendered to secured creditor).

464. *See, e.g.*, *In re* Litton, 655 B.R. 101 (Bankr. W.D. La. 2023) (Chapter 7 debtor could not deduct nonpurchase money loan on vehicle).

465. *See, e.g.*, *In re* Fredman, 471 B.R. 540 (Bankr. S.D. Ill. 2012) (secured debt on surrendered home not deductible); *In re* Sterrenberg, 471 B.R. 131 (Bankr. E.D.N.C. 2012) (secured debt on surrendered car not deductible).

466. *See, e.g.*, Drummond v. Welsh (*In re* Welsh), 711 F.3d 1120, 1134 (9th Cir. 2013). "In enacting the BAPCPA, Congress did not see fit to limit or qualify the kinds of secured payments that are subtracted from current monthly income to reach a disposable income figure." *Id.* at 1135.

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

secured debt, and that § 707(b)(2)(A)(iii) allowed the deduction. But the court held that the debtor owed himself for a retirement account loan, and that the obligation was not a "debt" under § 101(12)'s definition.[468]

The Code and related Official Form 122A-2 permit specific deductions for family safety, as well as support of elderly, chronically ill, or disabled household members, certain education expenses for dependent children, and medical insurance.[469] If there is a resulting presumption of abuse after all of the allowable calculations, a debtor may attempt to rebut it by "demonstrating special circumstances," like a serious medical condition or a call to active military service. Special circumstances must be documented.[470]

5.3

The Chapter 7 Trustee

In each Chapter 7 case, a trustee is appointed by the U.S. trustee or bankruptcy administrator.[471] Although election of trustees is possible under § 702, it is not common in consumer cases, with election of a trustee usually seen only in large-asset cases, often those originally filed as Chapter 11 and then converted to Chapter 7. The trustee's duties are described in § 704, but generally the trustee will evaluate whether assets are available for administration, including potential fraudulent transfer,[472] preference,[473] and other avoidable transfers or potential recoveries for the bankruptcy estate.[474] The trustee may object to a debtor's claimed exemptions[475] and may also object to a debtor's discharge, under § 727(a).[476] Assuming there are assets available for liquidation,[477] the trustee will distribute property of the bankruptcy estate to expenses and claims allowed

468. *See also* Seafort v. Burden (*In re* Seafort), 669 F.3d 662 (6th Cir. 2012) (in Chapter 13 cases, after loan on 401(k) accounts was repaid, former monthly loan amount was disposable income); McCarty v. Lasowski (*In re* Lasowski), 575 F.3d 815 (8th Cir. 2009) (same). See the discussion of *Seafort* and *Parks v. Drummond* (*In re Parks*), 475 B.R. 703 (B.A.P. 9th Cir. 2012), *supra* part 3.2, and *infra* part 6.11.

469. 11 U.S.C. §§ 707(b)(2)(A)(ii)(I)–(V).

470. *Id.* § 707(b)(2)(B). *See* Official Form 122A-2, Part 4.

471. *Id.* § 701.

472. *See id.* § 548.

473. *See id.* § 547.

474. *See id.* §§ 542–552.

475. *See supra* part 3 for discussion of exemptions.

476. *See* 11 U.S.C. § 727(c).

477. *See id.* § 363(b) for sales of estate property.

under the procedure outlined in § 726. Chapter 7 trustees are compensated based on the statutory formula in § 326.[478]

5.4

Redemption and Valuation

One of the options for Chapter 7 debtors is to redeem personal property from a secured consumer lien, "if such property is exempted . . . or has been abandoned, . . . by paying the holder of such lien the amount of the allowed secured claim . . . in full at the time of redemption."[479] In other words, redemption requires full payment of the allowed amount of the secured claim unless the creditor agrees otherwise. The difference between redemption and reaffirmation of a secured debt is the requirement of full payment at the time of redemption. Reaffirmation, on the other hand, allows monthly payments in an amount agreed on by the parties. BAPCPA changed how the value of personal property secured by an allowed claim is determined, with § 506(a)(2) providing that for individuals in Chapters 7 and 13, the value is "replacement value . . . as of the date of the filing of the petition without deduction for costs of sale or marketing."[480] The statute goes on to specify that for property acquired for personal, family, or household purposes, the replacement value is "the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined."[481]

Section 348(f), as amended by BAPCPA, provides that upon conversion from Chapter 13 to Chapter 7, the allowed secured claim on property continues, unless the full amount of the claim, as determined under nonbankruptcy law, has been paid in full. Prior to the amendment, debtors often experienced a benefit on conversion, when the redemption value was reduced by the amount paid on a secured claim under a preconversion Chapter 13 plan.[482] Under the amended Code, any value fixed on the property in the Chapter 13 plan would not be binding when the case is converted to Chapter 7. Redemption in Chapter 7 thus requires payment of the secured claim, as described above.

478. The statutory formula has been interpreted to be a presumptively reasonable commission to be adjusted or reduced under extraordinary circumstances. *See, e.g.*, *In re* JFK Cap. Holdings, LLC, 880 F.3d 747 (5th Cir. 2018); *In re* Wilson, 796 F.3d 818 (7th Cir. 2015).

479. 11 U.S.C. § 722.

480. *Id.* § 506(a)(2).

481. *Id.*

482. *See, e.g.*, *In re* Cooke, 169 B.R. 662 (Bankr. W.D. Mo. 1994).

5.5

Abandonment

If an asset has inconsequential value for the bankruptcy estate, the trustee may abandon it under § 554 because administering the asset would burden the estate. The debtor (or another party in interest, such as a secured creditor) can move to compel the trustee to abandon the asset.[483] If an asset is scheduled by the debtor, and the trustee does not administer it, that property is automatically abandoned to the debtor when the case is closed.[484] In contrast, if property is not scheduled, it is not abandoned, and the case is subject to reopening for the trustee's administration.[485] Under the concept of judicial estoppel, a debtor's failure to schedule a cause of action may prevent the debtor from pursuing the action, but it does not result in abandonment of the trustee's opportunity to pursue the action.[486]

5.6

Reaffirmation and the Assumption of a Lease

A reaffirmation[487] is a written agreement between the debtor and creditor. The concept behind a reaffirmation is that, notwithstanding the dischargeability of an obligation, the debtor may need or want to retain the property securing the debt. The Code has built-in protections to prevent abuse. The agreement must be in writing and must be entered into before discharge is granted.[488] The debtor must have received the required disclosures, as set forth in § 524(k), including a right to rescind the agreement.[489] The debtor must complete the Official

483. *See* 11 U.S.C. § 554(b); Fed. R. Bankr. P. 6007(a). *See also, e.g.*, *In re* Burke, 863 F.3d 521 (6th Cir. 2017) (Chapter 7 debtor had standing to seek trustee's abandonment of property with inconsequential value to estate).

484. *See* 11 U.S.C. § 554(c). *See In re* Stevens, 15 F.4th 1214 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 1384 (2022) (§ 554(c) requires that property be scheduled under § 521(a)(1)).

485. *See id.* §§ 554(d) & 350.

486. *See, e.g.*, Kane v. Nat'l Union Fire Ins. Co., 535 F.3d 380 (5th Cir. 2008). *See also supra* part 3 for discussion of judicial estoppel.

487. For reaffirmation requirements, see 11 U.S.C. §§ 524(c), (d), & (j). BAPCPA amended § 524 to require more specificity.

488. Fed. R. Bankr. P. 4004(c)(2) permits the court to defer entry of discharge on motion of the debtor, which may allow time to reach reaffirmation agreement. Fed. R. Bankr. P. 4008 requires that the reaffirmation agreement be filed "no later than 60 days after the first date set for the meeting of creditors under § 341(a)" unless the court has enlarged that time.

489. For analysis of the 2005 amendments affecting reaffirmation, see David B. Wheeler & Douglas E. Wedge, *A Fully Informed Decision: Reaffirmation, Disclosure and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 Am. Bankr. L.J. 789 (2005).

Form 427 cover sheet for reaffirmation agreements, along with the recommended Director's Form 2400A or 2400A/B for the actual agreement. Forms 2400A and 2400A/B contain the required disclosure language. After the agreement is filed with the court, the debtor may rescind the agreement within sixty days by giving notice to the creditor.[490] If the debtor is not represented by an attorney in the reaffirmation process, the court must hold a hearing on approval of the agreement to determine if the agreement is in the best interest of the debtor or would be an undue hardship for the debtor or a dependent of the debtor.[491] Court approval is not required if the reaffirmation is for a consumer debt and secured by real property.[492]

Prior to BAPCPA, some courts had recognized an option for debtors—in addition to redemption or reaffirmation—called *ride-through*.[493] Under ride-through, the debtor might maintain payment on a secured debt after discharge in a Chapter 7 case. Other courts did not agree, concluding that the debtor must either redeem or reaffirm, unless the debtor wished to surrender the collateral.[494] As amended by BAPCPA, § 521(a)(2) requires the Chapter 7 debtor to file a statement of intention as to redemption, reaffirmation, or surrender of collateral.[495] If a debtor does not timely perform the stated intention as to personal property, § 362(h) provides stay relief to the secured creditor.[496] Ride-through has been held by some courts to continue as an option in real-property secured claims,[497] and a secured creditor might agree to allow a debtor to retain collateral and continue to make contractual payments despite absence of a formal reaffirmation agreement.[498]

490. *See* 11 U.S.C. § 524(c)(4). Neither the Bankruptcy Code nor Bankruptcy Rules specify how notice of rescission must be provided or that the rescission be filed with the court. See American Bankruptcy Institute, Commission on Consumer Bankruptcy, Final Report of the ABI Commission on Consumer Bankruptcy (2019), for recommendations for improvements to reaffirmation procedures, including that rescission should be in writing on a Director's Form.

491. *See* 11 U.S.C. § 524(c)(6).

492. *See id.* § 524(c)(6)(B).

493. *See, e.g.*, *In re* Belanger, 962 F.2d 345 (4th Cir. 1992); Lowry Fed. Credit Union v. West, 882 F.2d 1543 (10th Cir. 1989).

494. *See, e.g.*, *In re* Taylor, 3 F.3d 1512 (11th Cir. 1993); *In re* Edwards, 901 F.2d 1383 (7th Cir. 1990).

495. *See, e.g.*, *In re* Donald, 343 B.R. 524 (Bankr. E.D.N.C. 2006). The 2005 amendments to § 521(a)(2) are reviewed *supra* part 2.

496. *See, e.g.*, *In re* Miller, 443 B.R. 54 (Bankr. D. Del. 2011) (although § 521(a)(2) didn't completely eliminate ride-through option, failure to redeem or reaffirm would lead to stay relief under § 362(h)).

497. *See, e.g.*, *In re* Covel, 474 B.R. 702 (Bankr. W.D. Ark. 2012).

498. *See, e.g.*, *In re* Rhodes, 635 B.R. 849 (Bankr. S.D. Cal. 2021).

There has been some disagreement whether reaffirmation is required when a Chapter 7 debtor wants to assume an existing lease on personal property, typically a vehicle. Under § 365(p), a Chapter 7 debtor may notify the lessor of the desire to assume such a lease, and the creditor may then notify the debtor of the conditions, including curing of any default, under which it will agree to assumption. If the debtor agrees to those conditions, the "liability under the lease will be assumed by the debtor and not by the estate."[499]

5.7

Discharge

A goal of Chapter 7 debtors is to obtain a discharge of in personam liability of "all debts that arose before the date of the order for relief."[500] Upon entry of a discharge, a discharge injunction goes into place under § 524. The broad effect of discharge will be discussed later, but § 727(a) sets forth eleven grounds for denial of discharge, with an additional cause for delaying entry of discharge. The case law on most § 727(a) grounds is extensive; so, for purposes of this monograph, only a cursory review of the statutory elements is possible. Although some of these grounds rarely arise in the typical consumer Chapter 7, each of the following may trigger a denial of the discharge of all pre-petition debts:

- *Section 727(a)(1)*: Only individuals receive a discharge under Chapter 7.
- *Section 727(a)(2)*: Transfers of property within one year of filing bankruptcy, or property of the estate after filing, with intent to hinder, delay, or defraud creditors or the estate justifies denial of discharge. Concealment of assets that continues into the pre-petition year may be sufficient to deny discharge of liability,[501] but actual intent is a required element.[502] One of the points of disagreement among the circuits is whether a debtor who made an improper transfer may reverse the transfer and overcome § 727(a)(2).[503]
- *Section 727(a)(3)*: Acts such as concealment of, destruction of, or failure to keep financial information, including books and records, may be the

499. 11 U.S.C. § 365(p). *See, e.g.*, Bobka v. Toyota Motor Credit Corp., 968 F.3d 946 (9th Cir. 2020) (§ 365(p) allows Chapter 7 debtor to assume lease without also reaffirming the debt).

500. 11 U.S.C. § 727(b).

501. *See, e.g.*, *In re* Keeney, 227 F.3d 679 (6th Cir. 2000) (adopting continuous concealment).

502. *See, e.g.*, *In re* Pratt, 411 F.3d 561 (5th Cir. 2005). *See also In re* Wylie, 119 F.4th 1043 (6th Cir. 2024) (actual intent required intentional consequences of act, not merely the act).

503. *Compare In re* Adeeb, 787 F.2d 1339 (9th Cir. 1986) (property must remain transferred to trigger § 727(a)(2)), *with In re* Davis, 911 F.2d 560 (11th Cir. 1990) (rejecting *Adeeb*).

basis for discharge denial, unless the debtor can show the act or failure was justified under the circumstances. Per case authority, the objecting party must first show the statutory elements to demonstrate that relevant books and records (or other documents) don't exist.[504] Then the burden shifts to the debtor to show circumstances justifying loss or lack of relevant records.[505] A genuine consumer debtor would not be expected to have sophisticated financial records, and there is an overriding debtor-specific reasonableness inquiry involved in § 727(a)(3).[506]

- *Section 727(a)(4)*: Giving a false oath or claim is a ground for discharge denial if the falsehood is made knowingly or fraudulently in connection to the Chapter 7 case. A typical example is a debtor's omission of assets from the bankruptcy schedules.[507] Either fraudulent intent or reckless disregard for truthfulness may be sufficient.[508] The bankruptcy schedules are executed under penalty of perjury, so virtually any false statement or material omission may be the source of a § 727(a)(4) objection.[509]
- *Section 727(a)(5)*: Failure to sufficiently explain loss of assets may be a denial basis, for example, when a debtor's financial statement shows assets that are not on the bankruptcy schedules.[510] The issue is typically whether the debtor satisfactorily explains the discrepancy.[511]
- *Section 727(a)(6)*: The debtor's refusal to obey a lawful court order is a discharge denial ground, along with refusal to testify after the debtor has been given some grant of immunity. Obviously, self-incrimination issues are involved here, but the primary use of the statute is when a debtor has been ordered to do something, like turn over an asset to the trustee, and

504. *See In re* Shove, 83 F.4th 102 (1st Cir. 2023) (reviewing statutory elements); *In re* French, 499 F.3d 345 (4th Cir. 2007) (analyzing objecting party's initial burden).

505. *See, e.g.*, *In re* Wiess, 132 B.R. 588 (Bankr. E.D. Ark. 1991).

506. *See, e.g.*, Meridian Bank v. Alten, 958 F.2d 1226 (3d Cir. 1992); Hussain v. Malik (*In re* Hussain), 508 B.R. 417 (B.A.P. 9th Cir. 2014).

507. *See, e.g.*, *In re* Phillips, 476 F. App'x 813 (11th Cir. 2012); *In re* Retz, 606 F.3d 1189 (9th Cir. 2010).

508. *See, e.g.*, *In re* Khalil, 478 F.3d 1167 (9th Cir. 2009). *See also Phillips*, 476 F. App'x 813 (debtor acted with fraudulent intent in omission of asset).

509. *See, e.g.*, *In re* Retz, 606 F.3d 1189 (9th Cir. 2010).

510. *See, e.g.*, Kaler v. Charles (*In re* Charles), 474 B.R. 680 (B.A.P. 8th Cir. 2012) (undervaluing asset was material).

511. *See, e.g.*, *In re* Aoki, 323 B.R. 803 (B.A.P. 1st Cir. 2005) (court has discretion to determine what constitutes satisfactory explanation).

the debtor has refused to comply.[512] There is an intentional element to this statute.[513]

- *Section 727(a)(7)*: This objection addresses actions by the debtor in another case filed by an insider. This ground is rarely applicable in a consumer case.
- *Section 727(a)(8)*: If the debtor previously received a discharge in a Chapter 7 or 11 case that was "commenced within 8 years before the date of the filing of the [current] petition," another Chapter 7 discharge is not available.[514]
- *Section 727(a)(9)*: If the debtor previously received a discharge in a Chapter 12 or Chapter 13 case that was "commenced within six years before the date of the filing of the [current] petition," a Chapter 7 discharge is not available, unless in the prior case "allowed" unsecured claims had been paid in full, or at least 70% had been paid under a plan that was in good faith and that represented the debtor's best effort.[515]
- *Section 727(a)(10)*: This statute permits a debtor to waive a discharge, a rare event. Any waiver must be in writing, executed by the debtor after the case is filed, and approved by the court. The underlying concept is that any prebankruptcy waiver of discharge is not enforceable.[516]
- *Section 727(a)(11)*: A debtor's failure to complete a required course in personal financial management is a basis to deny a discharge. This requirement is separate from the eligibility requirement for filing bankruptcy, which refers to completion of credit briefing.[517]
- *Section 727(a)(12)*: This provision is not actually a basis to deny discharge; rather, it is a delay in the granting of discharge to give the court an opportunity to first determine if the debtor is subject to the § 522(q) limitation on homestead exemption, a rarely applied limitation.[518]

The § 727(a) objections to discharge must be brought in an adversary proceeding. Bankruptcy Rule 4005 puts the burden of proof on the plaintiff. That

512. *See, e.g.*, Moore v. Robbins, No. CV 13-1122 (BAH), 2014 WL 930852 (D.D.C. Mar. 11, 2014).

513. *See, e.g.*, *In re* Francis, 996 F.3d 10 (1st Cir. 2021), *cert. denied*, 142 S. Ct. 1674 (2022); *In re* Jordan, 521 F.3d 430 (4th Cir. 2008).

514. 11 U.S.C. § 727(a)(8).

515. *Id.* § 727(a)(9).

516. *See, e.g.*, *In re* Huang, 275 F.3d 1173 (9th Cir. 2002).

517. *See* 11 U.S.C. § 109(h). Filing requirements are reviewed *supra* part 2.

518. *See, e.g.*, *In re* Larson, 513 F.3d 325 (1st Cir. 2008). For discussion of § 522(q), see *supra* part 3.

burden is generally recognized to be preponderance of evidence.[519] To be timely, Rule 4004(a) provides that a complaint objecting to a Chapter 7 discharge must be filed within sixty days after the first date set for the § 341 meeting of creditors. Under *Kontrick v. Ryan*,[520] this procedural time is not jurisdictional, and a debtor might waive the time-for-filing requirement; however, the rule's time requirements are strictly construed. For example, Rule 4007(b) provides limitations on extensions of the sixty-day time, with motions to extend that time generally required to be filed before the original time expired.[521]

5.8

Exceptions from General Discharge

Most Chapter 7 debtors are not denied their discharge for any of the § 727(a) grounds; however, entitlement to an overall discharge does not mean that every debt is dischargeable. Section 523(a) exceptions from the general discharge come into play because of specific actions or failures by debtors. The case law on these exceptions is extensive, but here are some brief illustrations of the various exceptions that regularly arise in consumer Chapter 7 cases.

- *Section 523(a)(1)*: This exception from discharge prevents the discharge of many tax obligations, including those described as priority taxes under §§ 507(a)(3) and (8), as well as taxes for a return that was not filed or was filed within the period "after two years before the date of the filing of the petition."[522] The § 507(a)(8) priority taxes are generally income taxes for which a return was due within three years before the bankruptcy petition filing; but § 507(a)(8) also includes certain property, trust-fund, employment, excise, and custom taxes, as well as penalties on those taxes.[523] The § 507(a)(3) priority tax is uncommon in consumer cases, since it relates to income taxes accruing during the gap between an involuntary bankruptcy petition and the entry of an order for relief.[524] Section 507(a)(8) also includes some taxes that were assessed within 240 days of the bankruptcy filing. The assessment period

519. *See, e.g.*, *In re* Serafini, 938 F.2d 1156 (10th Cir. 1991) (applying rationale of Grogan v. Garner, 498 U.S. 279 (1991), which adopted preponderance standard for § 523(a) exceptions from discharge).

520. 540 U.S. 443 (2004).

521. *See, e.g.*, *In re* McCain, 652 B.R. 678 (Bankr. E.D. Tex. 2023).

522. 11 U.S.C. § 523(a)(1)(B). For discussion of what constitutes a "return" for purposes of § 523(a)(1), see *In re Smith*, 828 F.3d 1094 (9th Cir. 2016).

523. 11 U.S.C. §§ 507(a)(8)(A)–(G). For discussion of tax penalties and dischargeability of penalties, see *In re Roberts*, 906 F.2d 1440 (10th Cir. 1990).

524. *See* 11 U.S.C. § 502(f).

is tolled by the time an automatic stay is in effect in a prior case or by the time any nonbankruptcy law prevents the government from collecting a tax.[525] Section 523(a)(1)(C) excludes from discharge tax debts that stem from a fraudulent return or willful tax evasion.[526]

- *Section 523(a)(2)*: This three-part exception is one of the more frequently litigated and applied, including in consumer cases. The first part (A) prevents discharge of a debt when "money, property, services, or . . . refinancing of credit" was obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's . . . financial condition."[527] Assuming the elements are proven, the Supreme Court has held that a creditor's reliance on the falsity or fraud must be justifiable.[528] Under subpart (A), the Supreme Court held that "actual fraud" is broadly construed and that this subpart does not require a showing of misrepresentation.[529] The second part of the statute, subpart (B), addresses the use of a written financial statement that is "materially false" and given to a creditor with "intent to deceive."[530] The creditor's reliance on the statement must be reasonable, rather than justifiable.[531] In the distinction between these two parts of the exception, there was some disagreement about when a debtor's representation becomes a "statement concerning . . . financial condition" for purposes of § 523(a)(2)(A), in particular whether the statements about financial condition may be related to a single asset.[532] The Supreme Court held, in *Cohen v. De La Cruz*,[533] that when actual fraud is proven, the nondischargeable debt may include all damages flowing from the fraud, such

525. *Id.* § 507(a)(8), *as amended*. See, e.g., *In re Jones*, 657 F.3d 921 (9th Cir. 2011), for discussion of the tolling period. See also *Young v. United States*, 535 U.S. 43 (2002), in which the Court held, prior to the 2005 amendment to § 507(a)(8), that the automatic stay tolled the three-year look-back period for §§ 523(a)(1) and 507(a)(8).

526. For discussion of § 523(a)(1)(C) and other authorities, see *United States v. Coney*, 689 F.3d 365 (5th Cir. 2012).

527. 11 U.S.C. § 523(a)(2)(A).

528. Field v. Mans, 516 U.S. 59 (1995).

529. Husky Int'l Electrs. Inc. v. Ritz, 578 U.S. 355 (2016).

530. 11 U.S.C. § 523(a)(2)(B). *See* Lamar, Archer & Cofrin, LLP v. Appling, 584 U.S. 709 (2018).

531. *Id.* § 523(a)(2)(B)(iii). *See, e.g.*, *In re* Cohn, 54 F.3d 1108 (3d Cir. 1995) (creditor's reliance must be actual and reasonable).

532. *See In re* Bandi, 683 F.3d 671 (5th Cir. 2012) (discussing conflicting circuit authority on debtor's false representation about specific property, and whether such representation concerns debtor's financial condition). Statements about the debtor's financial condition may include statements about single assets. *Lamar, Archer & Cofrin*, 584 U.S. 709.

533. 523 U.S. 213 (1998).

as treble damages and attorney fees under an applicable statute.[534] The Supreme Court also held, in *Bartenwerfer v. Buckley*,[535] that if underlying applicable law on fraud makes a partner liable for the fraud of another partner, § 523(a)(2)(A) does not require that the debtor/partner be the one who committed or knew about the fraud to establish an exception from discharge. The third part, § 523(a)(2)(C), excepts from discharge consumer debts incurred within ninety days of the petition filing or defined cash advances obtained within seventy days of the filing.

- *Section 523(a)(3)*: This is an exception for debts that were not scheduled by the debtor in time to permit the applicable creditor to file a proof of claim or a complaint to determine dischargeability of the debt, provided it is debt for which such a complaint must be timely filed under §§ 523(a)(2), (4), or (6).[536] For these three types of exceptions, a complaint must be filed no later than sixty days after the first date set for the § 341 meeting of creditors,[537] a deadline that is discussed below. When the case is no-asset, in which creditors are notified that they do not need to file claims, there is some disagreement among courts over the effect that failure to schedule in time to file a proof of claim has on relevance.[538]
- *Section 523(a)(4)*: Although this exception shows up more often in business debtor cases, it may apply in a consumer case if the debtor, acting in a fiduciary capacity, committed fraud or defalcation or embezzled. The most commonly litigated issue is whether the particular action was

534. Courts of appeals agree that the bankruptcy court, when determining the dischargeability of a debt, may also determine the amount of money judgment. *See* Hart v. S. Heritage Bank (*In re* Hart), 564 F. App'x 773 (6th Cir. 2014); Ray Cai v. Shenzhen Smart-In Indus. Co. (*In re* Ray Cai), 571 F. App'x 580 (9th Cir. 2014); *In re* Morrison, 555 F.3d 473 (5th Cir. 2009); *In re* McGavin, 189 F.3d 1215 (10th Cir. 1999); *In re* Kennedy, 108 F.3d 1015 (9th Cir. 1997); *In re* McLaren, 3 F.3d 958 (6th Cir. 1993); *In re* Hallahan, 936 F.2d 1496 (7th Cir. 1991).

535. 143 S. Ct. 665 (2023).

536. *See, e.g.*, Licup v. Jefferson Ave. Temecula LLC (*In re* Licup), 95 F.4th 1234 (9th Cir. 2024) (distinguishing no-asset cases in which proof of claim is meaningless and holding failure to schedule creditor resulted in nondischargeable debt); Perle v. Fiero (*In re* Perle), 725 F.3d 1023 (9th Cir. 2013) (unscheduled creditor without notice of petition can file § 523(a)(3) complaint for § 523(a)(6) cause of action); Mahorn v. Petty (*In re* Petty), 491 B.R. 554 (B.A.P. 8th Cir. 2013) (creditor not given sufficient notice of petition filing to take meaningful action on § 523(a)(6) complaint, justifying § 523(a)(3) complaint).

537. *See* 11 U.S.C. § 523(c) and Fed. R. Bankr. P. 4007(c).

538. For a discussion of this issue and the holding that unscheduled debts may be subject to discharge in no-asset Chapter 7 cases, see, e.g., *In re Nielsen*, 383 F.3d 922 (9th Cir. 2004); *In re Smith*, 582 F.3d 767 (7th Cir. 2009); *In re Madaj*, 149 F.3d 467 (6th Cir. 1998); and *In re McIntosh*, 657 B.R. 279 (Bankr. S.D. Fla. 2024).

within a fiduciary capacity. Case law generally requires that the debtor acted within a technical or express trust, usually created under a specific statute.[539] *In re Baylis*[540] sets forth the elements of proving the § 523(a)(4) exception from discharge. Resolving a split of circuit authority on defalcation's mental-state requirement, the Supreme Court held the following in *Bullock v. BankChampaign, N.A.*:[541]

> [W]here the conduct at issue does not involve bad faith, moral turpitude, or other immoral conduct, the term requires an intentional wrong. We include as intentional not only conduct that the fiduciary knows is improper but also reckless conduct of the kind that the criminal law often treats as the equivalent. Thus, we include reckless conduct of the kind set forth in the Model Penal Code. Where actual knowledge of wrongdoing is lacking, we consider conduct as equivalent if the fiduciary "consciously disregards" (or is willfully blind to) "a substantial and unjustifiable risk" that his conduct will turn out to violate a fiduciary duty. . . . That risk "must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves *a gross deviation* from the standard of conduct that a law-abiding person would observe in the actor's situation."[542]

- *Section 523(a)(5)*: This exception comes up a lot in consumer cases because marital separation or divorce often happens before or during a bankruptcy. As amended in 2005, the exception broadly covers all domestic support obligations,[543] as that term is defined in § 101(14A). In many instances, the bankruptcy courts are called on to determine whether a debt falls within the statutory definition. Although the term *domestic support obligation* is broader than traditional alimony or support, the concepts of alimony and support are included within the term, and every circuit has authority from before the 2005 amendments on factors that are traditionally used to determine whether an obligation is alimony or support.[544]
- *Section 523(a)(6)*: This exception covers debts for willful and malicious injury to someone else or someone else's property. Courts may have

539. *See, e.g.*, *In re* Harwood, 637 F.3d 615 (5th Cir. 2011).

540. 313 F.3d 9 (1st Cir. 2002).

541. 569 U.S. 267 (2013).

542. *Id.* at 273–74 (quoting ALI Model Penal Code § 2.02(2)(c) (1985)).

543. The priority of domestic support obligations is reviewed *supra* part 4.

544. For in-depth discussion of domestic support obligations, including the extensive case law before and after the 2005 amendments, see Brown, *supra* note 148. The manual contains summaries of each circuit's authority on § 523(a)(5) debts.

to distinguish between an intentional act that causes an injury and an action taken with intent to cause injury. The Supreme Court has held that reckless or negligent injury is not enough; rather, a standard of intentional harm or injury applies.[545] But as the Seventh Circuit pointed out, courts still struggle with defining "willful and malicious" injury with certitude:

> [W]e imagine that all courts would agree that a willful and malicious injury, precluding discharge in bankruptcy of the debt created by the injury, is one that the injurer inflicted knowing he had no legal justification and either desiring to inflict the injury or knowing it was highly likely to result from his act.[546]

- *Section 523(a)(7)*: Fines, penalties, or forfeitures to a governmental unit are excepted from discharge, provided they are not "compensation for actual pecuniary loss."[547] In addition, tax penalties are covered by this exception if the underlying tax obligation is not dischargeable. A significant Supreme Court decision, *Kelly v. Robinson*,[548] held that § 523(a)(7) included a restitution obligation that was imposed as part of a criminal sentence.
- *Section 523(a)(8)*: This exception prevents the discharge of student-loan obligations that are made, insured, or guaranteed by a governmental unit or nonprofit institution unless the debtor is able to prove that paying the obligation will impose an "undue hardship," a term that is not defined in the Code.[549] The most commonly used test for determining undue hardship was developed by the Second Circuit in *Brunner v. New York State Higher Education Services Corp*.[550] The test requires proof that the debtor is unable to maintain a minimal standard of living for self and dependents if repayment is necessary; that the debtor's current health, employment, or other circumstances are likely to continue throughout the contractual repayment period; and that the debtor has made a

545. Kawaauhau v. Geiger, 523 U.S. 57 (1998).

546. Jendusa-Nicolai v. Larsen, 677 F.3d 320, 324 (7th Cir. 2012). See also *In re Hilgartner*, 91 F.4th 186 (4th Cir. 2024), holding that collection costs related to debt for willful and malicious injury were nondischargeable, applying *Archer v. Warner*, 538 U.S. 314 (2003).

547. 11 U.S.C. § 523(a)(7). *See, e.g.*, Disciplinary Bd. of Supreme Court of Penn. v. Feingold (*In re* Feingold), 730 F.3d 1268 (11th Cir. 2013).

548. 479 U.S. 36 (1986).

549. Section 523(a)(8) was amended in 2005 to increase the scope of the exception. *See, e.g.*, Roth v. Educ. Credit Mgmt. Corp., 490 B.R. 908 (B.A.P. 9th Cir. 2013) (describing statutory changes).

550. 831 F.2d 395 (2d Cir. 1987).

good-faith effort to repay the loan.[551] The *Brunner* test has been adopted, sometimes with modification, in the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits,[552] with the Eighth Circuit using a "totality of circumstances" evaluation.[553] One of the unresolved issues is the extent to which the undue-hardship evaluation depends on a debtor's participation in a nonbankruptcy repayment program that may be offered by the lender or government guarantor.[554] Section 523(a)(8)(A)(ii) includes in the exception from discharge "an obligation to repay funds received as an educational benefit, scholarship, or stipend," and subpart (a)(8)(B) refers to "other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code." This language has presented questions whether particular obligations fall within the exception from discharge.[555]

- *Section 523(a)(9)*: This exception applies to debts resulting from death or personal injury caused by the debtor's unlawful operation of a motor vehicle, vessel, or aircraft, when intoxicated.[556]
- *Section 523(a)(10)*: Debts that were or could have been scheduled in a prior bankruptcy case and that were not discharged—either because of discharge waiver or under §§ 727(a)(2) through (a)(7) objections—are not dischargeable in the current case. Basically, once a discharge is denied, its effect is binding in subsequent cases. But there are deviations from this general rule for certain debts that were excepted from discharge in a prior case.[557]
- *Sections 523(a)(11) & (12)*: These exceptions rarely apply in consumer cases because they deal with fraud and defalcation, or failure to maintain capital, with respect to an insured depository institution.

551. *See, e.g.*, Hedlund v. Educ. Res. Inst., Inc., 718 F.3d 848 (9th Cir. 2013) (good faith examined in light of debtor's efforts to obtain employment, maximize income, and minimize expenses); Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882 (7th Cir. 2013) (under *Brunner* test, bankruptcy court's finding of good-faith effort not clearly erroneous).

552. *See In re* McCoy, 810 F. App'x 315 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 2794 (2021).

553. *See In re* Reynolds, 425 F.3d 526 (8th Cir. 2005).

554. *See, e.g.*, Nielsen v. ACS, Inc. (*In re* Nielsen), 473 B.R. 755 (B.A.P. 8th Cir. 2012) (debtor eligible for income-contingent repayment program not able to discharge student loan). *But compare* Bene v. Educ. Credit Mgmt. Corp. (*In re* Bene), 474 B.R. 56 (Bankr. W.D.N.Y. 2012) (*Brunner* test did not require debtor to participate in nonbankruptcy repayment program under totality of circumstances).

555. *See, e.g.*, Homaidan v. Sallie Mae, Inc., 3 F.4th 595 (2d Cir. 2021); *In re* McDaniel, 973 F.3d 1083 (10th Cir. 2020).

556. *See, e.g.*, *In re* Reese, 91 F.3d 37 (7th Cir. 1996).

557. *See* 11 U.S.C. § 523(b).

- *Section 523(a)(13)*: A debt for restitution under Title 18 of the U.S. Code is not dischargeable.
- *Section 523(a)(14)*: A debt incurred for the purpose of paying a nondischargeable U.S. tax obligation is excepted from discharge.
- *Section 523(a)(14A)*: A debt incurred for the purpose of paying a nondischargeable tax obligation to a governmental entity other than the United States is excepted from discharge.[558]
- *Section 523(a)(14B)*: A debt incurred to pay fines or penalties under federal election laws is excepted from discharge.
- *Section 523(a)(15)*: This provision excepts from discharge in Chapter 7 cases marital obligations that are not within the domestic-support category but were incurred "in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order . . . or a determination."[559] This exception is used typically for property division debts that arise in divorce or separation agreements and orders.[560]
- *Section 523(a)(16)*: Fees or assessments of homeowner or condominium associations that arise after the filing of a Chapter 7 bankruptcy are excepted from discharge, so long as the debtor has legal, equitable, or possessory interests in the property.[561] Nevertheless, debtors may have trouble ridding themselves of post-petition liability, for example, if the mortgagee declines to foreclose because it doesn't want to assume homeowner association fees.[562]
- *Section 523(a)(17)*: This exception applies to prisoners who incur costs from court pleadings.
- *Section 523(a)(18)*: Loans from pension, profit-sharing, or bonus plans that are tax-sheltered under the Internal Revenue Code (IRC) are excepted from discharge.
- *Section 523(a)(19)*: An exception rarely seen in consumer cases, a debt arising from a security-law violation is not dischargeable.

558. *See, e.g.*, *In re* Dinan, 448 B.R. 775 (B.A.P. 9th Cir. 2011).

559. 11 U.S.C. § 523(a)(15), *as amended* in 2005.

560. See Brown, *supra* note 148, for in-depth discussion of § 523(a)(15) obligations and the extensive case law before and after the 2005 amendments. The manual contains summaries of each circuit's authority on § 523(a)(15) debts.

561. *See In re* Rosenfeld, 23 F.3d 833 (4th Cir. 1994).

562. *See, e.g.*, *In re* Ames, 447 B.R. 680 (Bankr. D. Mass. 2011). *See also In re* Canning, 706 F.3d 64 (1st Cir. 2013) (surrender of residence didn't require creditor to foreclose or take possession; refusal to foreclose didn't violate § 524 discharge injunction).

Procedurally, the type of debt makes a difference as to when a complaint (adversary proceeding) to determine dischargeability must be filed. Under § 523(c), the debts covered by exceptions §§ 523(a)(2), (4), and (6) are treated as dischargeable unless a timely complaint is filed; and Bankruptcy Rule 4007(c) provides that these three categories of debts require a complaint to be filed no later than sixty days after the first date set for the § 341 meeting of creditors; and like Rule 4004, discussed previously, the sixty-day restriction is strictly construed.[563] All of the other excepted debts are automatically excepted from a Chapter 7 discharge, but a complaint may be filed at any time if there is a question about the discharge of that debt.[564] For example, although student-loan debt is automatically excepted from discharge under § 523(a)(8), a debtor may file a complaint in an attempt to show undue hardship that would justify discharge of all or part of the debt or to show that the particular obligation is not one covered by the scope of § 523(a)(8).[565]

5.9

Revocation of a Discharge

The Code allows for revocation of a Chapter 7 discharge, but under strict timing requirements. Grounds for revocation include debtor fraud in obtaining discharge (the party seeking revocation must have had no knowledge of the fraud before discharge was granted)[566] and the debtor's failure to disclose acquisition of or entitlement to property of the estate.[567] Revocation must be sought within one year of the discharge or by the date the case is closed, depending on the grounds.[568] Revocation may be based on the debtor's failure to comply with a court order—for example, an order to turn over property of the estate to the trustee.[569]

563. *See, e.g.*, *In re* Delloso, 72 F.4th 532 (3d Cir. 2023) (Rule 4007(c) only allows expansion of time for complaints if a motion is filed before the time has expired, and Rule 9006(b) permits enlargement of that time only under conditions stated in Rule 4007(c)).

564. Fed. R. Bankr. P. 4007(b) ("A complaint other than under § 523(c) may be filed at any time.").

565. *See, e.g.*, Educ. Credit Mgmt. Corp. v. Jorgensen (*In re* Jorgensen), 479 B.R. 79 (B.A.P. 9th Cir. 2012) (partial discharge of student loan proper under *Brunner* test). *Cf.* Conway v. Nat'l Collegiate Trust (*In re* Conway), 559 F. App'x 610 (8th Cir. 2014) (partial discharge not available remedy under circuit's totality-of-circumstances test).

566. 11 U.S.C. § 727(d)(1). *See* Jones v. U.S. Trustee (*In re* Jones), 726 F.3d 897 (9th Cir. 2013) (fraud that would have supported denial of discharge supports revocation); Zedan v. Habash, 529 F.3d 398 (7th Cir. 2008) (§ 727(d) requires no knowledge of fraud before discharge granted).

567. 11 U.S.C. § 727(d)(2). *See, e.g.*, *In re* Thompson, 939 F.3d 1279 (11th Cir. 2019); *In re* Thunberg, 641 F.3d 559 (1st Cir. 2011).

568. 11 U.S.C. § 727(e). *See also* Fed. R. Bankr. P. 9024.

569. *See, e.g.*, *In re* Cableton-Wells, 657 B.R. 148 (Bankr. D. Utah 2024) (debtors failed to comply with order to turn over nonexempt tax refunds).

5.10

Discharge Injunctions

Upon entry of a § 727 discharge, a permanent injunction goes into place under § 524(a), voiding any judgment for personal liability on discharged debt, and enjoining the commencement or continuation of suits and collection efforts against the debtor personally. Valid liens, however, may remain subject to secured claims.[570] The Supreme Court, in *Johnson v. Home State Bank*,[571] underscored the typical survival of valid liens, holding that in a subsequent Chapter 13 case the in rem lien of a secured creditor was a claim, notwithstanding the debtor's discharge of in personam liability. Violations of the discharge injunction are frequent subjects of litigation. Although generally there is no private right of action under § 524,[572] violations of the discharge injunction may be remedied through contempt proceedings,[573] with the potential for monetary sanctions.[574]

The Supreme Court examined grounds for finding civil contempt as a sanction for violation of the discharge injunction in *Taggart v. Lorenzen*,[575] declining to apply a strict liability standard. The Court held that "civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful [under the discharge order]."[576] The Court evaluated civil contempt in the nonbankruptcy context, referring to the prior holding in *California Artificial Stone Paving Co. v. Molitor*[577] that civil contempt is not appropriate "where there is a fair ground of doubt as to the wrongfulness of the defendant's conduct."[578]

There is appellate authority that a class action is not appropriate for enforcement of the discharge injunction outside the district in which the discharge was

570. *See, e.g.*, Lee v. Yeutter, 917 F.2d 1104 (8th Cir. 1990).

571. 501 U.S. 78 (1991).

572. *See, e.g.*, Walls v. Wells Fargo Bank, N.A., 276 F.3d 502 (9th Cir. 2002).

573. *See, e.g.*, Barrientos v. Wells Fargo Bank, N.A., 633 F.3d 1186, 1191 (9th Cir. 2012) (agreeing with Solow v. Kalikow (*In re* Kalikow), 602 F.3d 82, 93 (2d Cir. 2010), that contempt is by motion practice (citing Fed. R. Bankr. P. 9014 & 9020)).

574. *See, e.g.*, Badovick v. Greenspan (*In re* Greenspan), 464 B.R. 61 (Table) (B.A.P. 6th Cir. 2011) (debtor's attorney fees for defending state court action after discharge awarded as sanction).

575. 139 S. Ct. 1795 (2019). *See also* Valdellon v. PHH Mortg. Corp. (*In re* Valdellon), BAP No. EC-24-1086-GCB, 2024 WL 5182900 (B.A.P. 9th Cir. Dec. 20, 2024) (concluding that *Taggart* did not eliminate bankruptcy court's authority to award emotional distress damages for violation of § 524(i) discharge injunction).

576. *Taggart*, 139 S. Ct. at 1799.

577. 113 U.S. 609 (1885).

578. *Id.* at 618.

entered, under the theory that only the bankruptcy court entering the discharge order has authority to enforce the injunction.[579]

5.11

The Conversion of a Case to Chapter 13

A Chapter 7 debtor may decide to convert the case to Chapter 13. Although § 706(a) states that a case may be converted to Chapter 11, 12, or 13 "at any time," in *Marrama v. Citizens Bank*,[580] the Supreme Court held that the right to convert to Chapter 13 is good-faith dependent. Therefore, if a debtor seeks to convert for reasons like being caught by a Chapter 7 trustee for concealing assets, the conversion may be denied for lack of good faith. Conversion from Chapter 7 to Chapter 12 or 13 requires the debtor's consent because those chapters provide only voluntary relief, but on request of a party in interest, the court may convert a Chapter 7 case to Chapter 11.[581]

5.12

Voluntary Dismissal of a Chapter 7 Case

In addition to involuntary dismissal of a Chapter 7 case,[582] § 707 may also allow the debtor to voluntarily dismiss a Chapter 7 case; but cause must be shown, after notice to all parties in interest and opportunity for a hearing.[583] If the debtor's attempt to dismiss the case is in bad faith or would be prejudicial to creditors, voluntary dismissal likely will be denied.[584]

5.13

Lien Avoidance and Stripping

In *Dewsnup v. Timm*,[585] the Supreme Court rejected a Chapter 7 debtor's attempt to "strip down" or "strip off" a valid lien because of the collateral's decline in value, rendering the lien wholly or partially unsecured. The Court held that

579. *See* Bruce v. Citigroup Inc., 75 F.4th 297 (2d Cir. 2023); *In re* Crocker, 941 F.3d 206 (5th Cir. 2019).

580. 549 U.S. 365 (2007).

581. 11 U.S.C. §§ 706(b), (c). See also Fed. R. Bankr. P. 1017 for conversion procedures.

582. *See supra* part 5.2.

583. 11 U.S.C. § 707(a).

584. *See, e.g.*, *In re* Zick, 931 F.2d 1124 (6th Cir. 1991) (citing to opinions and factors in § 707(a) dismissal consideration).

585. 502 U.S. 410 (1992).

§ 506(d) does not permit a Chapter 7 debtor to value the collateral of a secured creditor and redeem the property by paying only the value, thereby voiding the otherwise valid lien. The Court interpreted § 506(d)'s term *allowed secured claim* to include a lien that was valid under applicable state law, even though the lien had little or no value. As a result of *Dewsnup*, Chapter 7 debtors are not able to do what many debtors can do in Chapter 13—strip off the wholly unsecured lien, usually a second mortgage on a residence. For consumer debtors, this is a valuable distinction between Chapter 7 and Chapter 13 relief.[586]

Lien avoidance under § 522(f) is a different concept from lien stripping of property to reflect that its value may be less than the secured claim. Section 522(f) lien avoidance is dependent on the impairment of an otherwise valid exemption claimed by the debtor, and that avoidance power is discussed above in part 3.11.

586. See *Woolsey v. Citibank, N.A.* (*In re Woolsey*), 696 F.3d 1266 (10th Cir. 2012), for discussion of *Dewsnup* in a Chapter 13 context. The potential lien-stripping in Chapter 13 is discussed *infra* part 6.

6
Relief Under Chapter 13

Major Components of Relief

- Eligibility for relief under this chapter (§ 109(e)).
- Optional and required elements for plan proposals (§ 1322).
- Plan confirmation requirements and process, including objections to confirmation and effects of confirmation (§§ 1325 & 1327).
- Plan modification before and after confirmation (§§ 1323 & 1329).
- Discharge issues (§ 1328).
- Effects of conversion or dismissal of a case (§ 1307).

6.1
Overview

Chapter 13 relief is for an "individual with regular income,"[587] previously referred to as "wage earner" bankruptcy.[588] But it is not essential that a debtor's income be from wages; rather, as discussed in the next section on eligibility, the requirement is that a debtor's source of income be "regular."[589] The structure of the Code's provisions for Chapter 13 debtors is directed toward the proposal and ultimate confirmation of a plan to reorganize pre-petition debts, perhaps restructuring contractual terms of secured debts, and typically paying less than 100% of unsecured debts. Upon completion of a confirmed plan, a debtor hopes to obtain a discharge; but some long-term debt, such as a home mortgage, may continue after that discharge. Part 6 reviews the Code's provisions for Chapter 13, the applicable Bankruptcy Rules, and representative case authority.

587. 11 U.S.C. §§ 101(30), 109(e).

588. *See In re* Muhammad, 536 B.R. 469, 476 (Bankr. M.D. Ala. 2015) ("Most Chapter 13 cases involve wage earners. Indeed, Chapter 13 Plans were once referred to as wage-earner plans.").

589. *See* 11 U.S.C. § 109(e).

In 2005 BAPCPA made substantial changes to Chapter 13. The discussion in the next section emphasizes the current Code, as amended, and explores relevant judicial interpretations, including by the Supreme Court. Some of BAPCPA's impact has not been fully resolved on the appellate level, and relevant splits of authority are highlighted.[590]

6.2

Eligibility for Chapter 13 Relief

Code § 109(e) establishes the basic requirements for Chapter 13 eligibility. Only individuals are eligible, and they must have regular income, with a maximum debt limit. Regular income does not necessarily mean that a debtor must have regular employment, and there is substantial case authority that the test is not the source of the income, but whether the income is stable and regular.[591] Some examples of "sufficiently regular" income are retirement or pension income,[592] welfare payments,[593] and child-support payments.[594] If the regularity of income is put at issue—typically by a motion to dismiss the case—the facts of each case would be determinative. But "regular" does not mean that each month's income is the same; rather, emphasis is more on the stability, or predictability, of the income, since the principal concern for confirmation purposes is that a debtor have sufficient income to fund a proposed plan.[595]

One of the regular-income issues that has been litigated frequently is whether a loan from a family member or friend suffices, and, if that is the only source of

590. The sheer monthly volume of judicial opinions on Chapter 13 issues prevents complete case analysis in this monograph. For in-depth analysis and case summaries posted monthly, see Judge Keith M. Lundin, Lundin on Chapter 13 (2024), https://www.lundinonchapter13.com/Content/LundinOnChapter13 (by subscription only). For other sources of case law and statutory analysis, see For Further Reference, *infra*.

591. See 11 U.S.C. § 101(30) for definition of "individual with regular income." *See, e.g.*, *In re* Schauer, No. 99-31918, 2000 WL 33792712, at *7 (Bankr. D.N.D. Aug. 14, 2000) ("The benchmark for determining whether an individual has 'regular income' for purposes of section 101(30) of the bankruptcy code is not the type or source of income, but 'its stability and regularity.'") (citations omitted).

592. *See, e.g.*, *In re* Frysinger, No. 22-31202-THP13, 2022 WL 17835173, at *2–5 (Bankr. D. Or. Dec. 21, 2022) (IRA distribution is substitute for income); Regan v. Ross, 691 F.2d 81, 87 (2d Cir. 1982) (Congress clearly intended to include pension benefits in property of a Chapter 13 estate).

593. *See, e.g.*, *In re* Hammonds, 729 F.2d 1391 (11th Cir. 1984).

594. *See, e.g.*, *In re* Taylor, 15 B.R. 596 (Bankr. D. Ariz. 1981).

595. See 11 U.S.C. § 1325(a)(6)'s plan confirmation requirement that "the debtor will be able to make all payments under the plan." *See also, e.g.*, *In re* Mercado, 376 B.R. 430 (Bankr. M.D. Fla. 1990) (regular income tested by ability to make plan payments). Feasibility and other confirmation requirements are discussed *infra* part 6.10.

income, whether it likely does not satisfy the threshold requirement.[596] On the other hand, regular contributions from a family member to assist plan funding may be regular income, provided the contributions are verified.[597] Another issue often raised is whether a debtor who has the necessary regular income may fund a plan when the primary funding source is a future sale of property. Some courts hold that a speculative sale is not a source of regular income.[598] If a sale is reasonably reliable, it may constitute a plan-funding source—if not solely, at least sufficiently—for regular income purposes.[599] Issues like proposed sales of property present mixed questions of regular income and plan-funding requirements that are discussed below.

Other than the regular-income requirement, § 109(e) sets out specific monetary restrictions on eligibility. Before Code § 109(e) was amended by the Bankruptcy Threshold Adjustment and Technical Corrections Act, effective June 21, 2022, there were limits on the amount of secured and unsecured debt that could be owed by an individual filing Chapter 13. To be eligible under that prior § 109(e), on the date the petition is filed, the individual (or individual and spouse) must have had "noncontingent, liquidated, unsecured debts" of less than $ 526,700 and "noncontingent, liquidated secured debts" of less than $ 1,580,125, as automatically increased April 1, 2025, pursuant to 11 U.S.C. § 104. The 2022 Act eliminated the secured/unsecured standard, replacing it with a single, aggregate amount of $2,750,000, but the Act contains a sunset provision, expiring two years from enactment, unless Congress extends or otherwise modifies the sunset provision. Amended § 109(e) provided

> (e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated debts of less than $2,750,000 or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated debts that aggregate less than $2,750,000 may be a debtor under chapter 13 of this title.[600]

Because Congress did not extend the sunset by June 21, 2024, § 109(e) reverted to its previous provisions for limits on secured and unsecured debts. Although the

596. *See, e.g.*, Pellegrino v. Boyajian (*In re* Pellegrino), 423 B.R. 586 (B.A.P. 1st Cir. 2010) ($8,000 loan to fund plan not regular income when plan would be required to last thirty-six months).

597. *See, e.g.*, Mission Hen LLC v. Lee (*In re* Lee), No. CC-22-1250-FLC, 2023 WL 7489928 (B.A.P. 9th Cir. Nov. 13, 2023) (monthly contributions from debtors' parents were sufficiently stable).

598. *See, e.g.*, *In re* Nealen, 407 B.R. 194 (Bankr. W.D. Pa. 2009).

599. *See, e.g.*, *In re* Van Winkle, No. 11-13861-J13, 2012 WL 404956, at *7 (Bankr. D.N.M. Feb. 8, 2012) (citing 11 U.S.C. § 1322(b)(8), a plan may provide for payment of all or part of claims from sale of property of estate).

600. 11 U.S.C. § 109(e), *as amended* June 21, 2022.

amended statute would have eliminated the distinction between secured and unsecured debt, it retained the conditions that the debts be "noncontingent [and] liquidated," as well as within the statutory limit. There are judicial interpretations of these statutorily undefined terms *noncontingent* and *liquidated*. A typical concept of a contingent liability is one "in which the obligation to pay does not arise until the occurrence of a 'triggering event or occurrence . . . reasonably contemplated by the debtor and creditor at the time the event giving rise to the claim occurred.'"[601] Merely because the debtor contests a claim does not make it contingent.[602] Whether a debt is "liquidated" typically depends on the ability to determine the amount "by reference to an agreement or by a simple computation."[603]

The statute's monetary limits are subject to automatic, periodic adjustment every three years for inflation.[604] The debt limitation is fixed "on the date of the filing of the petition."[605] Under § 109(e), whether the total debt falls outside the limit is normally determined as of the petition date,[606] and courts typically look primarily to a debtor's schedules of debt, unless there is some issue of lack of good faith in preparing those schedules.[607] There is authority that the statutory debt limits are not jurisdictional and are subject to waiver if not timely asserted, typically in a motion to dismiss.[608]

Under the pre-amended § 109(e), an issue often arose as to whether a debt that is actually less than fully secured—because of collateral value—should be

601. Barcal v. Laughlin (*In re* Barcal), 213 B.R. 1008, 1013 (B.A.P. 8th Cir. 1997). *See also* Chan v. Frazer, No. 21-16462, 2023 WL 2674635 (9th Cir. Mar. 29, 2023) (memorandum decision) (amount of claim easily determined from complaint).

602. *See, e.g.*, *Chan*, 2023 WL 2674635, at *1. Whether there is a sufficient "triggering event" may require consideration of applicable state law, as illustrated by *In re Ibbott*, 637 B.R. 567 (Bankr. D. Md. 2022).

603. Mazzeo v. United States (*In re* Mazzeo), 131 F.3d 295, 305 (2d Cir. 1997). *See also Chan*, 2023 WL 2674635, at *1 (all events necessary to fix liability occurred before petition).

604. *See* 11 U.S.C. § 104. The next adjustment is scheduled for April 2025.

605. *See id.* § 109(e).

606. *See, e.g.*, Scovis v. Henrichsen (*In re* Scovis), 249 F.3d 975 (9th Cir. 2001); Bennett v. Bon Secours Mercy Health, Inc., No. 22-989, 2022 WL 2828991 (E.D. Pa. July 20, 2022).

607. *See, e.g.*, Martindale v. Meenderinck (*In re* Meenderinck), 256 F. App'x 913, 914 (9th Cir. 2007) ("'eligibility should normally be determined by the debtor's originally filed schedules, checking only to see if the schedules were made in good faith'") (citing *Scovis*, 249 F.3d at 982). *Accord* NCI Bldg. Sys. LP v. Harkness (*In re* Harkness), 189 F. App'x 311 (5th Cir. 2006); Comprehensive Acct. Corp. v. Pearson (*In re* Pearson), 773 F.2d 751 (6th Cir. 1985). *But see* Mission Hen LLC v. Lee (*In re* Lee), No. CC-22-1250-FLC, 2023 WL 7489928 (B.A.P. 9th Cir. Nov. 13, 2023) (*Scovis* did not establish inflexible standard, and eligibility analysis could consider post-petition valuation).

608. *See, e.g.*, Gen. Lending Corp. v. Cancio, 505 B.R. 63 (S.D. Fla. 2014), *aff'd*, No. 14-10838, 2014 WL 4099739 (11th Cir. Aug. 21, 2014) (creditor's motion to dismiss for exceeding eligibility amounts barred by laches when filed after plan confirmed).

bifurcated, with the portion supported by value treated as secured for eligibility purposes and the balance unsecured.[609] While all courts did not agree that bifurcation is necessary for eligibility purposes, the majority have concluded that bifurcation is required.[610] The result can be harsh, since in today's real estate markets many debtors' home values result in undersecured mortgages, with substantial unsecured portions pushing debtors over the unsecured limit.[611] The issue of bifurcating undersecured home loans runs into § 1322(b)(2)'s antimodification protection for claims secured only by a security interest in the debtor's principal residence.[612] Some courts concluded that an undersecured first mortgage may not be bifurcated for eligibility purposes, while a wholly unsecured junior mortgage—one not entitled to § 1322(b)'s protection—may be treated as completely unsecured for eligibility purposes.[613]

Another eligibility issue is whether a Chapter 13 debtor must include in the calculation debt that was discharged in a prior Chapter 7 case. *In re Scotto-DiClemente* is illustrative.[614] In that case, the bankruptcy court referred to the holding in *Johnson v. Home State Bank*[615] that an in rem claim remaining after Chapter 7 discharge of a debtor's in personam liability was still a claim in a subsequent bankruptcy case. The *Scotto-DiClemente* court concluded that such a claim must be included in, and counted for, eligibility purposes in a subsequent Chapter 13 case.

There are numerous issues and related case authority on Chapter 13 eligibility, and reference is made to other sources in the For Further Reference section for more complete discussion. General eligibility requirements (discussed above in part 2), including completion of prebankruptcy credit briefing, apply in Chapter 13 cases as they do in Chapter 7.[616]

609. *See In re* Day, 747 F.2d 405, 406 (7th Cir. 1984) ("Courts have consistently examined the true value of collateral securing a debt when evaluating a debtor's eligibility for Chapter 13 relief."). *See also* 11 U.S.C. § 506(a).

610. *See, e.g.*, *Scovis*, 249 F.3d at 983–84 (stating that this is majority view); Ficken v. United States (*In re* Ficken), 2 F.3d 299, 300 (8th Cir. 1993) (unsecured portion of debt is counted for eligibility); Brown & Co. Sec. Corp. v. Balbus (*In re* Balbus), 933 F.2d 246, 247 (4th Cir. 1991) (same). *Contra Pearson*, 773 F.2d 751.

611. *See, e.g.*, Santos v. Dockery (*In re* Santos), 540 F. App'x 622, 623 (9th Cir. 2013) (amount of unsecured junior liens made debtor ineligible); Smith v. Rojas (*In re* Smith), 435 B.R. 637, 646–49 (B.A.P. 9th Cir. 2010) (pointing out that resolving this difficulty is an issue for congressional action).

612. *See infra* part 6.9.2.

613. *See, e.g.*, *In re* Munoz, 428 B.R. 516 (Bankr. S.D. Cal. 2010) (distinguishing *Scovis*, 249 F.3d at 983–84).

614. 463 B.R. 308 (Bankr. D.N.J. 2012).

615. 501 U.S. 78 (1991).

616. *See, e.g.*, Hayes v. Fay Servicing, LLC, No. 6:22-CV-00063, 2023 WL 2541129 (W.D. Va. Mar. 16, 2023) (dismissing case for failure to complete credit briefing before filing petition).

6.3

Good-Faith Filing and Conversion Eligibility

Underlying every Chapter 13 petition and proposed plan is the debtor's good faith or lack thereof. Section 1325(a)(3) requires that a plan be "proposed in good faith." Also, for confirmation purposes, "the action of the debtor in filing the petition [must have been] in good faith."[617] The debtor's good faith frequently is a factor in an early motion to dismiss the case, often joined with objections to confirmation of a proposed plan.[618] The grounds for dismissal under § 1307 are examined in more detail later, but good faith may be thought of as an element of eligibility, with motions to dismiss on bad-faith grounds perhaps joined with an attack on the debtor's eligibility under the statutory debt limit or separately with allegations of specific abuse.[619]

Because Chapter 7 debtors often convert voluntarily to Chapter 13, eligibility for conversion may be questioned early in the Chapter 13 phase. Section 348(a) treats a case converted from one Chapter to another as the same case. But the Supreme Court emphasized, in *Marrama v. Citizens Bank*,[620] that eligibility for Chapter 13 relief is fundamental for conversion to Chapter 13. In *Marrama*, the Chapter 7 debtor tried to convert to Chapter 13, asserting that § 706(a) provides "that the debtor may convert . . . at any time."[621] The Court affirmed the First Circuit's interpretation of that language as conditioned on eligibility:

> [W]e can discern no evidence that the Congress intended to override the presumptive power and responsibility of the bankruptcy court to weed out abuses of the bankruptcy process at any stage in the bankruptcy proceedings . . . . The word "may" has at least two connotations. It can simply denote that a debtor has the option to convert, or not convert. On the other hand, "may" often suggests conditionality, signifying that the event or status described is in no sense to be considered a foregone conclusion.[622]

617. 11 U.S.C. § 1325(a)(7), *as amended* 2005. For discussion of good faith under §§ 1325(a)(3) and (7), see, e.g., *In re Roby*, 649 B.R. 583 (Bankr. M.D. Ala. 2023), *aff'd*, No. 2:23-CV-169-ECM, 2023 WL 6883643 (M.D. Ala. Oct. 18, 2023).

618. *See, e.g.*, Brown v. Gore (*In re* Brown), 742 F.3d 1309 (11th Cir. 2014) (good-faith determination made case-by-case).

619. *See, e.g.*, *In re* Myers, 491 F.3d 120 (3d Cir. 2007) (debtor acted in bad faith by fraudulent pre-petition transfers to evade state-court judgment).

620. 549 U.S. 365 (2007).

621. 11 U.S.C. § 706(a).

622. Marrama v. Citizens Bank (*In re* Marrama), 430 F.3d 474, 478 (1st Cir. 2005).

Thus good faith is a threshold-eligibility issue, as well as a factor throughout a Chapter 13 case, including confirmation.[623]

There is a question whether a Chapter 13 case may be filed soon after a Chapter 7 case, in what is called a "Chapter 20." As a result of the Supreme Court's holding, in *Johnson v. Home State Bank*,[624] that the in rem lien on a home survives a Chapter 7 discharge and can be treated in a subsequent Chapter 13 case and plan, most courts have found no per se rule against "Chapter 20" cases; but good faith is an important factor. Yet when a debtor files the second case too quickly, resulting in simultaneous Chapter 7 and 13 cases—two pending at the same time—some courts conclude that there is a rule against such simultaneous cases.[625] Other courts, while assessing good faith and whether there is a justifiable reason for the simultaneous filings, have not found a per se rule.[626]

6.4

Property of the Chapter 13 Estate

Under § 541, the broad concept of property of the bankruptcy estate (discussed above in part 3) applies in Chapter 13 cases. The concept is broadened in Chapter 13 by § 1306. Section 1306 includes in the estate property "that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted" to another chapter, as well as "earnings from services performed by the debtor after the commencement of the case."[627] This inclusion of post-petition acquisitions and earnings is understandable when placed in context of funding for a plan. Courts have taken different views of how much remains in the bankruptcy estate after confirmation, as contrasted with what revests in a debtor at that point; but at the preconfirmation stage of a case, the Chapter 13 estate includes post-petition assets. With some exceptions listed in § 362(b), the automatic stay (discussed above in part 2) protects not only the debtor but also the bankruptcy-estate property, at least until confirmation, when some property may revest in the debtor, depending on the provisions of the order confirming the plan.

The broadened property concept poses tricky questions: Do § 541(a)(5)'s limitations on property of the estate also apply in Chapter 13? Or does § 1306 overcome them? As a particular example, § 541(a)(5)(A) provides that the bankruptcy

623. *See, e.g.*, *In re* Neal, 652 B.R. 497 (Bankr. S.D. Ohio 2023).

624. 501 U.S. 78 (1991).

625. *See, e.g.*, Turner v. Citizens Nat'l Bank (*In re* Turner), 207 B.R. 373 (B.A.P. 2d Cir. 1997).

626. *See, e.g.*, *In re* Gates, No. 23-20429 (JJT), 2023 WL 4413547 (Bankr. D. Conn. July 7, 2023) (although no per se bar, there was no good-faith rationale for second filing).

627. 11 U.S.C. §§ 1306(a) & (b).

estate includes inheritances that a debtor acquires within 180 days of the petition filing. Judicial authority is split on the effect of this 180-day limitation in Chapter 13. The Tenth Circuit Bankruptcy Appellate Panel held, in *Vannordstrand v. Hamilton* (*In re Vannordstrand*),[628] that an inheritance received two years after the Chapter 13 petition filing was property of the estate under § 1306(a)(1), but the decision hangs on that court's view that property of the estate did not revest in the debtor upon confirmation of the plan. Another decision simply concluded that "not applying the 180-day limitation under § 541(a)(5) when determining what is included within a chapter 13 estate under § 1306(a) is consistent with a major distinction between chapters 13 and 7."[629] Other courts have read § 1306's reference to "property specified in section 541" as including § 541(a)(5)'s 180-day restriction, and have concluded that inheritances received more than 180 days post-petition do not come into the bankruptcy estate.[630]

Whether a particular asset comes into or remains in the estate may depend on a court's view of vesting at plan confirmation. Vesting is discussed below in part 6.9.4, but for purposes of property of the estate, assume that the debtor's home vested at confirmation and then increased in value, presenting the question: Does the appreciated value above a previously allowed homestead exemption belong to the debtor or to the bankruptcy estate for benefit of creditors? The issue may arise in the context of the debtor moving to sell the home, seeking to retain the appreciated value, and asking to use sale proceeds to buy a replacement home. Some courts hold that the appreciation had vested in the debtor along with the property itself and did not come into the bankruptcy estate.[631] The Tenth Circuit, in *Rodriguez v. Barrera*,[632] held that when the Chapter 13 debtors had sold their home after confirmation and then converted in good faith to Chapter 7, the appreciated value, reflected in sale proceeds above the allowed homestead exemption, did not pass to the Chapter 7 estate. Under the *Barrera* court's analysis, the physical home, which had vested in the debtors at confirmation, was no longer in possession of or under control of the debtors at conversion, and the sale proceeds were property interests distinct from the physical residence. Other

628. 356 B.R. 788 (B.A.P. 10th Cir. 2007). *Accord* Carroll v. Logan, 735 F.3d 147 (4th Cir. 2013); Dale v. Maney (*In re* Dale), 505 B.R. 8 (B.A.P. 9th Cir. 2014); *In re* Roberts, 514 B.R. 358 (Bankr. E.D.N.Y. 2014).

629. *In re* Carla L. Tinney, No. 07-42020-JJR13, 2012 WL 2742457, at *3 (Bankr. N.D. Ala. July 9, 2012) (citing dicta from *In re* Waldron, 536 F.3d 1239, 1244 (11th Cir. 2008)). *Accord In re* Moore, 602 B.R. 40 (Bankr. E.D. Tenn. 2019) (reviewing case authority).

630. *See, e.g.*, *In re* McAllister, 510 B.R. 409 (Bankr. N.D. Ga. 2014); *In re* Key, 465 B.R. 709 (Bankr. S.D. Ga. 2012).

631. *See, e.g.*, *In re* Elassal, 654 B.R. 434 (Bankr. E.D. Mich. Aug. 28, 2023) (reviewing five views of vesting at confirmation, concluding that the sale proceeds did not "refill" the estate).

632. 22 F.4th 1217 (10th Cir. 2022).

courts hold that the appreciated value is a separate asset from the real property that vested in the debtor at confirmation and that upon a post-confirmation sale, any proceeds above the debtor's allowed homestead exemption belongs to the bankruptcy estate.[633]

Whether appreciated value passes to a Chapter 7 estate when the property has not been sold by the Chapter 13 debtors prior to conversion of the case is a related, but separate, issue. Both the Eighth and Ninth Circuits have distinguished the *Barrera* analysis when the debtor's home had increased in value during the Chapter 13 case, concluding that upon conversion, the appreciated value above the allowed homestead exemption passed to the Chapter 7 estate. In *Goetz v. Weber* (*In re Goetz*),[634] the Eighth Circuit distinguished *Barrera* as involving a preconversion sale of the home and concluded that the preconversion increase in equity resulting from market appreciation and payments on mortgage, in excess of the previously allowed homestead exemption, passed to the Chapter 7 estate. The court construed the plain text of § 348(f)(1)(A) to require this conclusion because property of the estate included the home and equity that remained under the possession and control of the Chapter 13 debtor. The value increase during the pendency of the Chapter 13 case fell within the scope of "proceeds" or equitable interest related to the property. "The post-petition, pre-conversion increase in equity in Goetz's residence—i.e. the difference between its value and the homestead exemption and lien—is therefore proceeds '*from* property of the estate.'"[635]

In *Castleman v. Burman*,[636] the Ninth Circuit also held that the post-petition, preconversion increase in equity of the debtor's asset belonged to the Chapter 7 estate, rather than the debtor, notwithstanding the conversion being in good faith. The *Castleman* court looked to § 348(f)(1), as well as its prior interpretations of §§ 541(a) and 541(a)(6), concluding that "post-petition 'appreciation [i]nures to the bankruptcy estate, not the debtor.'"[637]

Chapter 13 case conversion and dismissal are further discussed below in part 6.14.

633. *See, e.g.*, *In re* Adams, 654 B.R. 703 (Bankr. M.D.N.C. 2023) (citing Fourth Circuit authority). Exemptions are discussed *supra* part 3.

634. 95 F.4th 584 (8th Cir.), *cert. denied*, 220 L. Ed. 2d 24 (2024).

635. *Id.* at 589–90.

636. Castleman v. Burman (*In re* Castleman), 75 F.4th 1052 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 813 (2024).

637. *Id.* at 1056 (quoting Schwaber v. Reed, 940 F.2d 1317, 1323 (9th Cir. 1991)).

6.5

Codebtor Stays

One of the distinctions between Chapters 13 and 7 is that § 1301 provides a stay of most actions against an individual who cosigned or is obligated with the Chapter 13 debtor on a consumer debt.[638] Section 1301 has two exceptions: (1) The codebtor became liable on the debt in the ordinary course of the codebtor's business; and (2) the case was closed, dismissed, or converted to one under Chapter 7 or Chapter 11.[639] The second exception simply means that the codebtor stay terminates on one of those events. Also, the party seeking to proceed against the codebtor may move for relief, showing that the codebtor actually received the consideration underlying the claim, that the Chapter 13 plan does not propose to pay the debt in full, or that the creditor's interest would be "irreparably harmed by continuation of the stay."[640]

6.6

The Chapter 13 Trustee

Section 1302 describes the duties and powers of a Chapter 13 trustee, who is principally the one receiving plan payments from the debtor (or from the debtor's employer by payroll deduction) and making disbursements to creditors over the life of the plan, which may be up to five years.[641] The trustee's role is much broader than simple receipt and disbursement: The trustee has authority to, among other powers, examine and object to proofs of claim,[642] recommend for or against confirmation or modification of a plan,[643] ensure that the debtor makes timely plan payments,[644] and pursue avoidance actions when appropriate.[645]

Appellate courts have held that the Chapter 13 trustee may not receive a commission from payments made by the debtor when the case is dismissed prior to confirmation, with those courts reading § 1326(a)(2) in conjunction with 28 U.S.C.

638. *See In re* Sarner, No. 10-17487-JNF, 2011 WL 5240200 (Bankr. D. Mass. Oct. 31, 2011) (§ 1301 applies only to consumer debts). *See supra* part 2.

639. There is also a codebtor stay in Chapter 12 cases. *See* 11 U.S.C. § 1201.

640. 11 U.S.C. § 1301(d). *See, e.g.*, Shear v. Wells Fargo Bank, N.A. (*In re* Shear), No. 23-8012, 2023 WL 6799970 (B.A.P. 6th Cir. Oct. 16, 2023).

641. *See id.* § 1322(d). See *Nardello v. Balboa*, 514 B.R. 105 (D.N.J. 2014), for discussion of the Chapter 13 trustee's percentage commission on distributions to creditors.

642. *Id.* § 1302(b)(1) (incorporating 11 U.S.C. § 704(5)).

643. *Id.* § 1302(b)(2).

644. *Id.* § 1302(b)(5).

645. *See id.* § 103(a) (making Chapter 5 avoidance powers applicable in Chapter 13).

§ 586(e)(2) to require that preconfirmation payments must be returned to the debtor upon case dismissal.[646] Payment of the trustee's commission requires plan confirmation under this analysis.

6.7

The Debtor's Duties and Powers

The consumer debtor duties (discussed above in part 2) regarding commencing a case and filing of certain documents after commencement apply to Chapter 13 debtors. More specific obligations are imposed on Chapter 13 debtors, including the requirement to begin to make payments to the trustee before a plan is confirmed. Section 1326(a)(1) provides that "unless the court orders otherwise, the debtor shall commence making payments not later than 30 days after the filing of the plan or the order for relief, whichever is earlier." The feasibility of a proposed plan and the debtor's intentions to carry out that proposal are tested early in the case by the commencement of payments.[647] Only the debtor may propose and file a plan.[648] Bankruptcy Rule 3015(b) sets the time for filing a plan, if not with the petition, within fourteen days; failure to timely comply with this requirement may in itself be cause for dismissal of a case.[649] The Chapter 13 debtor must file tax returns and supply the trustee with copies of post-petition returns, if they are requested.[650] Section 1308 specifically requires the debtor to file all pre-petition tax returns that were required during the four years before the bankruptcy; and the returns must be filed "not later than the day before the date on which the meeting of the creditors is first scheduled to be held."[651] Section 1307(e) provides that failure to comply with this requirement is cause for dismissal.[652]

Most Chapter 13 debtors are not engaged in business; but if they are self-employed, § 1304 imposes reporting duties concerning the business.[653] Pursuant

646. Evans v. McCallister (*In re* Evans), 69 F.4th 1101 (9th Cir. 2023); Goodman v. Doll (*In re* Doll), 57 F.4th 1129 (10th Cir. 2023). Return of payments to the debtor upon dismissal of a case prior to confirmation is discussed *infra* part 6.14. *Accord* Marshall v. Johnson, 100 F.4th 914 (7th Cir. 2024).

647. *See* 11 U.S.C. § 1307(c)(4). Failure to commence plan payments is cause for case dismissal.

648. *Id.* § 1321 ("The debtor shall file a plan."). *See, e.g.*, Trantham v. Tate, 112 F.4th 223 (4th Cir. 2024) (holding that debtor had exclusive right to propose plan, which provided for vesting at confirmation, notwithstanding local plan form's provision for vesting at discharge).

649. *Id.* § 1307(c)(3).

650. *Id.* § 521(f). *See supra* part 2.4.

651. 11 U.S.C. § 1308(a).

652. *See, e.g.*, United States v. Cushing (*In re* Cushing), 401 B.R. 528 (B.A.P. 1st Cir. 2009); *In re* Lee, No. 16-53256, 2022 WL 4085882 (Bankr. E.D. Mich. Sept. 6, 2022).

653. *See also* Fed. R. Bankr. P. 2015(d).

to § 1303, debtors generally have the rights and powers to exercise control over property of the estate.[654] Essentially, a Chapter 13 debtor remains in possession and control of the property, with the obligation to dedicate income as required to fund the confirmed plan.

Determining whether a Chapter 13 debtor has the authority to exercise trustee powers that are not specified in § 1303 or elsewhere in the Code can be thorny. For example, the extent of a Chapter 13 debtor's power to pursue avoidance that a trustee could exercise is not always clear. As a reminder, the bankruptcy trustee's "avoidance" powers allow it to recover pre-petition transfers made by the debtor. As discussed above in part 3, §§ 522(g) and (h) restrict a debtor's avoidance power to recovery that would permit an allowable exemption; but to exercise that power, the trustee must have declined to pursue avoidance, or the transfer at issue must have been involuntary. Although this statutory authority has been recognized in Chapter 13 cases,[655] most courts have limited the debtor to that power, finding no statutory authority to allow a Chapter 13 debtor to broadly exercise avoidance powers such as preference and fraudulent transfer.[656] Outside of the avoidance powers, there is authority that a Chapter 13 debtor has standing to pursue causes of action that would benefit the bankruptcy estate and creditors.[657] Chapter 13 debtors are often plaintiffs in actions related to the validity of home mortgages and mortgage foreclosures.[658]

654. *See* 11 U.S.C. §§ 363(b), (d), (e), (f), & (*l*). *See also, e.g.*, A&D Prop. Consultants, LLC v. A&S Lending, LLC (*In re* Groves), 652 B.R. 104 (B.A.P. 9th Cir. 2023) (debtor's use of §§ 363(b), (f) and (h)).

655. *See, e.g.*, Dickson v. Countrywide Home Loans (*In re* Dickson), 655 F.3d 585 (6th Cir. 2011).

656. *See, e.g.*, Lee v. Anasti (*In re* Lee), 461 F. App'x 227 (4th Cir. 2012) (Chapter 13 debtor lacked § 544(a) avoidance power); Realty Portfolio, Inc. v. Hamilton (*In re* Hamilton), 125 F.3d 292 (5th Cir. 1997) (debtor's § 544 power limited to involuntary transfer when recovery would be exempt); Warfel v. 21st Mortg. Corp. (*In re* Warfel), No. 21-00002, 2023 WL 5123231 (Bankr. W.D. Wis. Aug. 9, 2023) (Chapter 13 debtor could not avoid unperfected security interest under § 544(b); however, trustee could be joined as plaintiff under Fed. R. Civ. P. 21).

657. *See, e.g.*, Wilson v. Dollar Gen. Corp., 717 F.3d 337 (4th Cir. 2013) (agreeing with Third, Fifth, Seventh, Tenth, and Eleventh Circuits, that Chapter 13 debtor had standing to bring nonbankruptcy causes of action for benefit of estate, here Americans with Disabilities Act claim); Smith v. Rockett (*In re* Smith), 522 F.3d 1080 (10th Cir. 2008) (debtor had standing to pursue Fair Debt Collection Practices Act cause of action); Thomas v. Indiana Oxygen Co., 32 F. Supp. 3d 983 (S.D. Ind. 2014) (debtor had concurrent standing with trustee to pursue employment-discrimination suit).

658. *See infra* part 6.16.

6.8

Plan Requirements

Section 1322(a) sets out the requirements for a proposed Chapter 13 plan, followed by § 1322(b)'s optional provisions. The mandatory provisions of a plan proposal include (1) That the debtor submit future earnings as necessary to execute the plan; (2) That all priority claims be paid in full, unless the creditor agrees otherwise, although these claims may be paid in deferred cash payments; and (3) That if the plan classifies claims, it shall provide the same treatment for each class member.[659] The most common examples of priority claims in Chapter 13 cases are domestic support obligations and taxes.[660] Under § 1322(a)(4), priority domestic support obligations assigned prebankruptcy to a governmental entity for purposes other than collection, or such obligations owed directly to a governmental entity, may be paid less than 100% in a plan only if the debtor devotes all disposable income to the plan for a full five years.[661]

There is an Official Form 113 for a Chapter 13 plan;[662] however, notwithstanding the general requirement that official forms are required,[663] Bankruptcy Rule 3015.1 permits bankruptcy courts in a district to adopt a single, "local plan" form for that district, provided that the form complies with the rule. The requirements for use of a local plan form include an initial paragraph designating whether the plan contains nonstandard provisions, valuations of secured claim collateral, and avoidance of security interests or liens. Moreover, the local plan form must contain separate paragraphs relating to curing of prebankruptcy defaults and maintaining ongoing payments of residential mortgages, payment of domestic support obligations, payment of loans for certain automobiles or other collateral incurred shortly before the bankruptcy filing, and surrender of collateral. Most bankruptcy courts have chosen to use local plan forms for their districts, opting out of the official form under Rule 3015.1.[664]

659. 11 U.S.C. §§ 1322(a)(1)–(3).

660. See, for example, *In re Burnett*, 656 F.3d 575 (8th Cir. 2011), for discussion of priority DSOs. See generally Brown, *supra* note 148, for in-depth discussion of DSOs and summaries of each circuit's authority. Priority claims are discussed *supra* part 4.

661. *See* 11 U.S.C. § 507(a)(1)(B). *See also In re* Penaran, 424 B.R. 868 (Bankr. D. Kan. 2010) (discussing burden of proof on governmental entity to show claim not subject to this lower priority and treatment).

662. Official Form 113 is available at https://www.uscourts.gov/forms-rules/forms/chapter-13-plan.

663. *See* Fed. R. Bankr. P. 9029(a)(1).

664. Each district's local plan form is available on a bankruptcy court's website, which can be found through a search tool on the Administrative Office's website, https://www.uscourts.gov/federal-court-finder/find, by entering the court location.

6.9

Optional Plan Provisions

Section 1322(b) describes optional plan provisions, although there are conditions for use of some of these provisions.

6.9.1

Separate Classification

One of the frequently litigated optional terms deals with classification. If the plan classifies different types of unsecured creditors, it may not "discriminate unfairly against any class so designated."[665] But § 1322 of the Code specifically permits separate treatment of claims for consumer debt on which there is a codebtor. Section 1322(b)(1) works in conjunction with § 1301's codebtor stay.[666] The Ninth Circuit Bankruptcy Appellate Panel analyzed the separate classification and preferred treatment of a consumer debt on which the debtor's mother was a co-obligor, holding that plan confirmation could not be denied solely because the plan favorably discriminated by paying that claim 100%.[667] The Code appears to allow this type of separate classification and favorable discrimination; but there is less clarity when the separate classification and preferred treatment are for other types of claims, like taxes and student-loan obligations that are excepted from discharge under § 1328(a)(2), incorporating §§ 523(a)(1) and 523(a)(8).[668]

When separate classification is contested, the courts have used various tests to determine if it would lead to "unfair discrimination" in favor of that separate class. A basic test was set forth in *In re Wolf*:[669] (1) A rational basis for the discriminatory treatment must be shown, (2) tested against whether the debtor could carry out the proposed plan without the proposed discrimination, (3) with the discrimination proposed in good faith, and (4) requiring that the degree of discrimination be directly tied to the reason for the separate classification. This test

665. 11 U.S.C. § 1322(b)(1).

666. *See supra* part 6.5.

667. *In re* Renteria, 470 B.R. 838, 841 (B.A.P. 9th Cir. 2012) ("The 'however clause' has been the subject of a significant amount of debate. Neither courts nor commentators have agreed on precisely what Congress intended to accomplish by adding the 'however clause' in section 1322(b)(1).").

668. *See, e.g.*, Copeland v. Fink (*In re* Copeland), 742 F.3d 811 (8th Cir. 2014) (plan unfairly discriminated by paying 100% of nondischargeable tax debt). *Compare In re* Eisenberger, 654 B.R. 762 (Bankr. W.D.N.Y. 2023) (separate classification and treatment of student-loan obligation as long-term debt under § 1322(b)(5) was not unfairly discriminatory when other unsecured creditors were paid 100%).

669. 22 B.R. 510 (B.A.P. 9th Cir. 1982). *See also In re* Crawford, 324 F.3d 539 (7th Cir. 2003) (refining *Wolf* test).

and its modifications demand a case-by-case analysis.[670] Demonstrated need for the separate and preferred treatment, as well as the debtor's good faith, are crucial elements, no matter how the test is expressed. As the Seventh Circuit pointed out, the rights of all creditors must be considered.[671]

Although some courts have found that separate classification and preferred treatment of nondischargeable student-loan claims pass the test,[672] most courts have concluded that paying 100% of student-loan debt or other nondischargeable claims, while paying a smaller percentage to other unsecured claims, is unfair discrimination.[673] Under § 1322(b)(10), added by the 2005 amendments, a plan may propose to pay interest on a nondischargeable claim only if the debtor has disposable income sufficient to pay all allowed claims in full. This prohibition against interest payment in a plan undercuts the justification for treating a nondischargeable claim more favorably in a separate classification.[674]

6.9.2

The Modification of Secured and Unsecured Claims

Section 1322(b)(2) broadly permits modification of secured claims, subject to the exception for "a claim secured only by a security interest in real property that is the debtor's principal residence," and it permits modification of unsecured claims, without statutory restriction.[675] Plans typically include some modification, especially of unsecured claims, by paying less than 100% and by extending payments. For secured claims, the power to modify may include reducing the

670. *See, e.g.*, *In re* Stella, No. 05-05422-TLM, 2006 WL 2433443 (Bankr. D. Idaho June 28, 2006). *See also Copeland*, 742 F.3d 811 (applying four-part test of unfair discrimination from *In re* Lesser, 939 F.2d 669 (8th Cir. 1991)).

671. *See Crawford*, 324 F.3d 539.

672. *See In re* Boscaccy, 442 B.R. 501 (Bankr. N.D. Miss. 2010) (reviewing conflicting authority). *See also In re* Eisenberger, 654 B.R. 762 (Bankr. W.D.N.Y. 2023) (separate classification and treatment of student-loan obligation as long-term debt under § 1322(b)(5) was not unfairly discriminatory when other unsecured creditors were paid 100%); *In re* Knowles, 501 B.R. 409 (Bankr. D. Kan. 2013) (monthly payment of student loan from discretionary income did not unfairly discriminate).

673. *See, e.g.*, Gorman v. Birts (*In re* Birts), No. 1:12CV427 (LMB/TCB), 2012 WL 3150384 (E.D. Va. Aug. 1, 2012); *In re* Jordahl, 516 B.R. 573 (Bankr. D. Minn. 2014). *See also* Susan Hauser, *Separate Classification of Student Loan Debt in Chapter 13*, 32 Am. Bankr. Inst. J. 38 (2013).

674. *See In re* Kubeczko, No. 12-13766 HRT, 2012 WL 2685115 (Bankr. D. Colo. July 6, 2012) (denying separate classification and discriminatory treatment of student-loan debt).

675. 11 U.S.C. § 1322(b)(2). Modification of secured claims is not without restrictions in plan treatment, as illustrated by *In re Barragan-Flores*, 874 F.3d 471 (5th Cir. 2021), holding that § 1325(a)(5) did not permit debtor to treat two motor vehicles differently—one to be surrendered and the other to be retained with modified debt—when the vehicle loans were cross-collateralized.

amount of the claim to the value of the collateral, by use of § 506. Section 506(a) provides that "[a]n allowed claim . . . secured by a lien . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property." There are Code limitations on this broad confinement of a secured claim to the value of its collateral.[676] Section 1322(b)(2)'s antimodification protection for home mortgages prevents a plan from stripping down the value of the collateral or changing other essential contractual terms, but it does not prevent the curing of pre-petition defaults to bring the loan current.[677]

In *Dewsnup v. Timm*,[678] the Supreme Court held that § 506(d) does not permit a Chapter 7 debtor to value collateral of a secured creditor and redeem the property by paying only the value, thereby voiding the otherwise valid lien. There was some uncertainty whether *Dewsnup* applied equally to Chapter 13 modifications, but in *Nobelman v. American Savings Bank*,[679] the Court held that § 506(d) could not be used to strip down an undersecured home mortgage to current market value, because that would contravene § 1322(b)(2)'s protection from modification. *Nobelman*'s reach has thus far been limited to the undersecured mortgage on a debtor's principal residence.[680] For junior mortgages that are wholly unsecured, with no value above a prior mortgage or lien to secure them, the majority view is that § 1322(b)(2) does not prevent modification by stripping off that unsecured lien and rendering the lien an unsecured claim.[681] A distinction has been made in Chapter 13 cases between the use of § 506(a) to determine if a lien has any value to support a secured claim and the *Nobelman*-prohibited use of § 506(d) to strip down a partially secured lien.[682]

676. *See* discussion *infra* this subsection. *See also supra* part 5 for discussion of valuation in Chapter 7 cases.

677. *See* 11 U.S.C. § 1322(b)(5), discussed *infra* part 6.9.3. *See, e.g.*, Mortg. Corp. of the S. v. Bozeman (*In re* Bozeman), 57 F.4th 895 (11th Cir. 2023) (stressing effect of § 1322(b)(2)).

678. 502 U.S. 410 (1992), discussed *supra* part 5.13.

679. 508 U.S. 324 (1993).

680. *See* Woolsey v. Citibank, N.A. (*In re* Woolsey), 696 F.3d 1266 (10th Cir. 2012) (holding § 506(d) applied in Chapter 13, but suggesting debtors could use combination of §§ 506(a) & 1322(b)(2) to strip off wholly unsecured junior lien).

681. *See, e.g.*, Minn. Hous. Fin. Agency v. Schmidt (*In re* Schmidt), 765 F.3d 877 (8th Cir. 2014) (agreeing with other courts of appeals, *Nobelman* does not prohibit modification of wholly unsecured junior mortgage); Zimmer v. PSB Lending Corp. (*In re* Zimmer), 313 F.3d 1220 (9th Cir. 2002) (agreeing with five other courts of appeals and two bankruptcy appellate panels that wholly unsecured second mortgage on debtor's principal residence is not protected from modification).

682. *See Woolsey*, 696 F.3d 1266. *Accord* Ryan v. United States (*In re* Ryan), 725 F.3d 623 (7th Cir. 2013).

Although the majority of bankruptcy and appellate courts allow Chapter 13 debtors to avoid unsecured liens,[683] the issue of modification of the wholly unsecured junior mortgage presents other issues, such as whether a debtor who is ineligible for Chapter 13 discharge because of a recent Chapter 7 discharge may strip off a wholly unsecured junior mortgage.

BAPCPA's amendments to the Code in 2005 included § 1325(a)(5)(B)'s plan confirmation requirement, giving three choices for "each allowed secured claim provided for by the plan": (1) acceptance by the secured creditor, (2) surrender of the collateral, or (3) lien retention, with the amended lien retention providing that the allowed secured creditor retain its lien until the debt is fully paid or the debtor receives a discharge.[684] The conditioning of lien retention on either payment under applicable nonbankruptcy law or entry of discharge is coupled with a change to § 1328(f)'s restriction on discharge:

> (f) Notwithstanding [§§ 1328(a) and (b)], the court shall not grant a discharge of all debts provided for in the plan or disallowed under section 502, if the debtor has received a discharge—
>
> (1) in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter, or
>
> (2) in a case filed under chapter 13 of this title during the 2-year period preceding the date of such order.[685]

Some bankruptcy courts had read the combination of §§ 1325(a)(5)(B) and 1328(f) as prohibiting a debtor ineligible for a Chapter 13 discharge from modifying a wholly unsecured junior lien;[686] however, the majority of bankruptcy courts have held otherwise—primarily looking to the prefatory language of § 1325(a)(5) to conclude that the lien retention and triggering of § 1328(f) only come into play for an "allowed secured claim."[687] By definition, under this latter view, a claim that has no value to support it is not a secured claim.[688] Courts of appeals and

683. *See* Lundin, *supra* note 590, Appendix M, for compilation of case authority from all circuits on modification of wholly unsecured liens.

684. 11 U.S.C. § 1325(a)(5)(B), *as amended* in 2005. This section also provides that if the case is dismissed or converted before plan completion, the lien is retained.

685. *Id.* § 1328(f), *as amended* in 2005.

686. *See, e.g.*, *In re* Geradin, 447 B.R. 342 (Bankr. S.D. Fla. 2011) (en banc), *overruled by* Wells Fargo Bank, N.A. v. Scantling (*In re* Scantling), 754 F.3d 1323 (11th Cir. 2014).

687. *See, e.g.*, *In re* Okosisi, 451 B.R. 90 (Bankr. D. Nev. 2011).

688. *See* 11 U.S.C. § 506(a).

bankruptcy appellate authority have agreed that a debtor ineligible for discharge is not prohibited from stripping off a wholly unsecured lien.[689]

Since the Chapter 13 debtor is not eligible for discharge because of a recent prior discharge, typically in a Chapter 7 in which in personam liability was erased but an in rem lien claim survived, good faith understandably becomes an issue. A fact-intensive examination of the reasons for the subsequent Chapter 13 case and why a debtor wants to modify a wholly unsecured lien may be required.[690] Good faith for plan-confirmation purposes will be examined in more detail later; but simply because a debtor is ineligible for discharge does not mean that a Chapter 13 is filed in bad faith. As the Fourth Circuit held, § 1328(f)'s restriction on discharge is not an eligibility requirement for Chapter 13 relief.[691]

Section 1322(b)(2)'s reference to a claim "secured *only* by a security interest in . . . the debtor's principal residence" raises other modification issues. There are many examples of additional security, or use of the property for other than principal residential purposes, which may deprive a creditor of the antimodification protection. For instance, when the property is income-producing and not exclusively the debtor's principal residence, the mortgage may be subject to modification, but there is not agreement among circuits on modification when the property has partial residential use.[692] There is also not complete agreement among the courts on the time for determining the use of the property for § 1322(b)(2) purposes. If the property was used as the debtor's principal residence at the time of the mortgage transaction, but the use had changed to nonresidential, the Ninth Circuit Bankruptcy Appellate Panel concluded that the appropriate date for purposes of § 1322(b)(2)'s application was the petition date.

689. *See, e.g.*, *In re* Blendheim, 803 F.3d 477 (9th Cir. 2015); *Scantling*, 754 F.3d 1323; Branigan v. Davis (*In re* Davis), 716 F.3d 331 (4th Cir. 2013); *In re* Cain, 513 B.R. 316 (B.A.P. 6th Cir. 2014); Fisette v. Keller (*In re* Fisette), 455 B.R. 177 (B.A.P. 8th Cir. 2011). *Cf.* Fisette v. Keller (*In re* Fisette), 695 F.3d 803 (8th Cir. 2012) (holding that this was not final order subject to appeal, since BAP remanded for consideration of other confirmation issues).

690. *See, e.g.*, *In re* Renz, 476 B.R. 382 (Bankr. E.D.N.Y. 2012). *But see In re* Lepe, 470 B.R. 851 (B.A.P. 9th Cir. 2012) (plan proposed by debtor ineligible for discharge to strip off wholly unsecured junior mortgage in good faith).

691. Branigan v. Bateman (*In re* Bateman), 515 F.3d 272, 281 (4th Cir. 2008).

692. *See, e.g.*, Scarborough v. Chase Manhattan Mortg. Corp. (*In re* Scarborough), 461 F.3d 406, 411 (3d Cir. 2006) ("claim secured by real property that is, even in part, *not* the debtor's principal residence does not fall under the terms of" the antimodification provision). *Contrast* Lee v. U.S. Bank Nat'l Ass'n, No. 21-13887, 2024 WL 2349896 (11th Cir. May 23, 2024) (disagreeing with *Scarborough* in Chapter 11 case; applying § 1123(b)(5)'s antimodification provision, which is identical to § 1322(b)(2), and holding that mortgage was not subject to modification when portion of property was debtor's residence but majority of property was leased for farming).

Its opinion in *Benafel v. One W. Bank, FSB* (*In re Benafel*)[693] discusses the split of authority: a minority of courts, including an earlier Third Circuit opinion,[694] look at the loan transaction time. BAPCPA added to the definitions of "debtor's principal residence" in § 101(13A) and of "incidental property" in § 101(27B), including in the scope of a security interest on the principal residence such collateral as rents, easements, appurtenances, fixtures, replacements, and additions, so that the inclusion of such items in the mortgage did not cause forfeiture of protection from modification in § 1322(b)(2).[695]

Another restriction on modifying a particular type of secured claims is found in the confirmation provisions of § 1325(a), known as the "910" car-loan protection provision. As amended in 2005, § 1325(a) prevents debtors' use of § 506 to value a motor vehicle that was acquired and financed by a purchase money security interest, within 910 days of the petition filing, for the personal use of the debtor. The clause also prohibits use of § 506 to value other collateral acquired within one year of the petition, but the primary application of the restriction has been for these "910 cars." A significant issue was whether this protection against modifying such loans extended to the "negative equity" resulting from a purchase by a buyer still owing a balance on the trade-in vehicle. All circuits but one addressing this issue adopted the view that the negative equity that was financed along with the 910 vehicle was a part of the purchase price included in the statute's protection.[696] However, despite the protection against modifying the value of the collateral or the amount of the secured claim, courts have interpreted the statute as still permitting a plan to modify other contractual terms, such as interest rate.[697]

6.9.3
Curing Defaults

Under § 1322(b)(3), a plan may "provide for the curing or waiving of any default." Section 1322(b)(5) adds that "notwithstanding" § 1322(b)(2)'s restriction on modification, a plan may "provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending." This "cure" provision is directed toward debt that contractually extends beyond the life of the

693. 461 B.R. 581, 588–91 (B.A.P. 9th Cir. 2011). *Accord* TD Bank, N.A. v. Landry, 479 B.R. 1, 7 (D. Mass. 2012) (citing *Benafel*).

694. *Scarborough*, 461 F.3d 406.

695. *See, e.g.*, *In re* Lyles, No. 22-18206, 2023 WL 2563533 (Bankr. D.N.J. Mar. 17, 2023).

696. *See* AmeriCredit Fin. Servs., Inc. v. Penrod (*In re* Penrod), 611 F.3d 1158 (9th Cir. 2010) (adopting minority position and citing eight circuits adopting majority view).

697. *See, e.g.*, *In re* Velez, 431 B.R. 567 (Bankr. S.D.N.Y. 2010).

plan—that is, "long-term" debt, such as a home mortgage.[698] Because "reasonable time" to cure default is not defined in the Code, the bankruptcy court has discretion to determine what is reasonable under the particular circumstances of a case, but the allotted time cannot exceed the life of the plan.[699] The combination of these "cure" provisions allows a plan to do things like cure pre-petition default on secured automobile loans and home mortgages, with the loan restored to a position of being current when the default has been paid.[700] As to home mortgages in particular, § 1322(b)(5) essentially divides the debt into two segments, constituting a "cure and maintain" plan, with pre-petition default to be cured within a reasonable time, and the ongoing, or maintenance, payments on the debt continuing after the plan is complete.[701] Under this concept, the curing of default is not a prohibited modification of a mortgage on the debtor's principal residence, although issues may arise as to how far the plan may go before its terms constitute a modification. The First Circuit indicated that a plan must be specific if a debtor is trying to direct what a mortgage creditor can and cannot do, since § 1322(b)(2) does not impose specific duties on the creditor.[702] Subsequent decisions have delved into what are called "best practices" plan provisions, in attempts to differentiate plan provisions that are prohibited loan modifications from those provisions that properly carry out the Code's "cure and maintain" opportunity.[703] The effect of Bankruptcy Rule 3002.1 on mortgage claim litigation is discussed below in part 6.16.

Another recurring issue is whether a debtor's opportunity to cure a pre-petition default has terminated before the bankruptcy filing, for example by foreclosure. Section 1322(c)(1) permits curing "until [the] residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy

698. 11 U.S.C. § 1322(b)(5). *See also In re* Nieves, 647 B.R. 809 (B.A.P. 1st Cir. 2023) (not necessary that mortgage be in default to pay long-term debt under § 1322(b)(5)).

699. *See, e.g.*, *In re* Hence, 225 F. App'x 28 (5th Cir. 2007) (discussing factors and bankruptcy court's discretion on length-of-cure period). *See also In re* deLone, 205 F. App'x 964 (3d Cir. 2006) (finding thirty-six months to cure reasonable, and discussing case authority on reasonable times).

700. *In re* Lazaro, 650 B.R. 651 (Bankr. E.D. Pa. 2023) (allowing monetary default of mortgage to be cured, notwithstanding nonmonetary default by transfer of property in violation of due-on-sale clause).

701. *See, e.g.*, Ameriquest Mortg. Co. v. Nosek (*In re* Nosek), 544 F.3d 34 (1st Cir. 2008) (§§ 1322(b)(2) & (b)(5) divide home mortgage into two claims for treatment: one for pre-petition arrearage and one for ongoing maintenance payments).

702. *Id.*

703. *See, e.g.*, Greenpoint Mortg. Funding, Inc. v. Herrera (*In re* Herrera), 422 B.R. 698 (B.A.P. 9th Cir. 2010), *aff'd and adopted sub nom.* Home Funds Direct v. Monroy (*In re* Monroy), 650 F.3d 1300 (9th Cir. 2011).

law."[704] Despite this provision, ascertaining when a foreclosure sale is final may present questions of fact and interpretation of applicable state law.[705]

Section 1322(c)(2) permits a short-term home mortgage—one on which the last contractual payment is due within the life of the plan—to be modified and paid within the life of the plan, so long as the proposed modification otherwise complies with § 1325(a)(5)'s confirmation requirements.[706]

An interesting issue presented by the potential for curing and modifying home mortgages is whether a claim that is subject to modification may be paid beyond the plan's life. In other words, may the provisions of §§ 1322(b)(2) and 1322(b)(5) be combined or "stacked" to modify contractual terms and pay the modified mortgage over a new long term? Most courts follow the Ninth Circuit's *Enewally v. Washington Mutual Bank* (*In re Enewally*),[707] holding that a modified mortgage must be paid within the plan life, which can be no longer than five years under § 1322(d).[708]

Section 1322(e) provides that when a plan proposes to "cure a default, the amount necessary to cure the default, shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law." This section was added to the Code in 1994, in reaction to *Rake v. Wade*'s[709] holding by the Supreme Court that under § 506(b), an oversecured home-mortgage creditor was entitled to interest accruing post-petition on the arrearage claim that was being cured in the plan. Under § 1322(e), whether a creditor is entitled to interest on the arrearage claim is dependent on the parties' contract and applicable nonbankruptcy (typically state) law.[710]

704. 11 U.S.C. § 1322(c)(1).

705. *See, e.g.*, *In re* Peralta, 48 F.4th 178 (3d Cir. 2022) (§ 1322(c)(1) applied to installment contract that terminated under state law); *In re* Connors, 497 F.3d 314 (3d Cir. 2007) (adopting "gavel rule" for finality of pre-petition foreclosure sale); TD Bank, N.A. v. LaPointe (*In re* LaPointe), 505 B.R. 589 (B.A.P. 1st Cir. 2014) (under New Hampshire law, foreclosure complete when auctioneer's hammer fell). A different issue may be presented when the home-mortgage foreclosure actually resulted in a judgment of foreclosure. *See, e.g.*, *In re* Tynan, 773 F.2d 177 (7th Cir. 1985) (foreclosure judgment left no default available for curing under § 1322(b)(5)).

706. *See, e.g.*, Mission Hen LLC v. Lee (*In re* Lee), No. CC-22-1250-FLC, 2023 WL 7489928 (B.A.P. 9th Cir. Nov. 13, 2023); *In re* Hubbell, 496 B.R. 784 (Bankr. E.D.N.C. 2013); Geller v. Grijalva (*In re* Grijalva), No. 4:11-BK-25386-EWH, 2012 WL 1110291 (Bankr. D. Ariz. Apr. 2, 2012). *See also*, *e.g.*, *In re* Godwyn, 651 B.R. 669 (Bankr. E.D.N.C. 2023) (reverse mortgage became short-term nonrecourse debt upon death of borrower and inheritance by child).

707. 368 F.3d 1165 (9th Cir. 2004).

708. *See, e.g.*, Bullard v. Hyde Park Sav. Bank (*In re* Bullard), 752 F.3d 483 (1st Cir. 2014), *aff'g* 494 B.R. 92 (B.A.P. 1st Cir. 2013); *In re* Hinkle, 474 B.R. 460 (Bankr. M.D. Pa. 2012). For the minority position, see *In re Gilbert*, 472 B.R. 126 (Bankr. S.D. Fla. 2012).

709. 508 U.S. 464 (1993).

710. *See, e.g.*, *In re* Hence, 255 F. App'x 28 (5th Cir. 2007) (interest on arrearage not required when contract ambiguous).

6.9.4

The Vesting of Property of the Estate

Under § 1322(b)(9), a plan can allow property of the estate to vest in the debtor, or another entity, at confirmation or a later date. Practice varies from district to district. Many local plans do not allow estate property to vest in the debtor until completion of the plan and entry of discharge; but absent such a provision, § 1327(b) states that "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." If estate property vests in the debtor at confirmation, it affects, for example, the automatic stay's protection of estate property, since the stay terminates as to property when it is no longer property of the estate.[711] There are questions about the bankruptcy court's jurisdiction over property if it is no longer part of the bankruptcy estate.[712]

Assuming that there is no specific provision in a plan for the timing of vesting, the courts have adopted five approaches toward what remains in the bankruptcy estate after confirmation:[713]

1. Estate termination, under which the bankruptcy estate completely terminates, with all property, whether acquired pre- or post-confirmation, vesting in the debtor[714]
2. Estate transformation, under which only that property necessary to implement the confirmed plan remains in the estate, with other property vested in the debtor[715]
3. Estate replenishment, under which the estate terminates at confirmation but is replenished, by post-confirmation property, as described in § 1306[716]

711. *See* 11 U.S.C. § 362(c)(1).

712. *See, e.g.*, *In re* Heath, 115 F.3d 521 (7th Cir. 1997) (bankruptcy court lacked jurisdiction over property that was not necessary to plan implementation).

713. *See, e.g.*, *In re* Elassal, 654 B.R. 434 (Bankr. E.D. Mich. 2023) (reviewing five approaches, adopting estate replenishment).

714. *See, e.g.*, Cal. Franchise Tax Bd. v. Jones (*In re* Jones), 420 B.R. 506 (B.A.P. 9th Cir. 2009), *aff'd on other grounds*, 657 F.3d 921, 928–29 (9th Cir. 2011) (finding it unnecessary to adopt one of the approaches, instead reading § 1327(b)'s plain language to vest all property in debtor unless plan provided otherwise).

715. *See, e.g.*, Telfair v. First Union Mortg. Corp., 216 F.3d 1333 (11th Cir. 2000), *cert. denied*, 531 U.S. 1073 (2001).

716. *See, e.g.*, Barbosa v. Soloman, 235 F.3d 31 (1st Cir. 2000).

4. Estate preservation, under which the bankruptcy estate continues to exist after confirmation, and property remains in the estate until the case is closed, dismissed, or converted to another chapter[717]
5. Conditional vesting, under which the debtor acquires use and control over property at confirmation, but property does not fully vest until plan completion and entry of discharge.[718]

As discussed further, below in part 6.13, vesting at confirmation affects what remains in or comes into the bankruptcy estate.

6.9.5

Miscellaneous Plan Provisions

A plan may provide that unsecured claims be paid concurrently with payment on other unsecured or secured debt.[719] The timing of payments of unsecured claims is flexible, with the potential to pay secured claims before any distribution to unsecured creditors, or concurrently. Allowed priority claims must be paid in full, although deferred cash payments, rather than lump sum distribution, are permitted.[720]

A plan may propose to pay post-petition claims that are allowed under § 1305.[721] Treatment of post-petition claims under Chapter 13 differs from Chapter 7 relief, in which claims are thought of as tied to pre-petition debt. Whether a post-petition claim is allowed largely depends on the creditor's choice.[722] Section 1305(a)(1) provides that a governmental unit may file a proof of claim for taxes that "become payable . . . while the case is pending," and § 1305(a)(2) permits a creditor to file a claim for a consumer debt arising post-petition when it is for "property or services necessary for the debtor's performance under the plan." However, there is a condition for the § 1305(a)(2) claim, requiring disallowance if the claimant knew or should have known that prior approval from the Chapter 13 trustee—or

717. *See, e.g.*, Annese v. Kolenda (*In re* Kolenda), 212 B.R. 851 (W.D. Mich. 1997).

718. *See, e.g.*, Woodard v. Taco Bueno Rests., Inc., No. 4:05-CV-804-Y, 2006 WL 3542693 (N.D. Tex. Dec. 8, 2006).

719. 11 U.S.C. § 1322(b)(4).

720. *Id.* § 1322(a)(2). *See supra* part 6.8. *See also supra* part 4 (priority claims).

721. *Id.* § 1322(b)(6).

722. *See, e.g.*, CenturyTel of Nw. Ark., LLC v. Laymon (*In re* Laymon), 360 B.R. 902 (Bankr. E.D. Ark. 2007) (post-petition creditor could not be forced to file proof of claim or participate in plan).

perhaps from the bankruptcy court—for incurring the consumer debt was "practicable and was not obtained."[723]

The provision for potential treatment of taxes that "become payable . . . while the case is pending," under § 1305(a)(1), has raised questions about when the taxes first became payable; that answer may be driven by whether the claim is pre- or post-petition. If the tax claim is pre-petition, the debtor may be authorized by § 501(c) and Bankruptcy Rule 3004 to file a proof of claim on behalf of the creditor who does not file a timely claim. If, on the other hand, the tax is a post-petition debt, the creditor controls whether a proof of claim may be filed. In *Michigan Department of Treasury v. Hight* (*In re Hight*),[724] the debtor filed Chapter 13 in 2009, owing income taxes for 2008; the return was not due until April 2009. A combination of §§ 501(i) and 507(a)(8) led the Sixth Circuit to conclude that this tax obligation was treated as a pre-petition claim, and the debtor could file a proof of claim for the government, forcing it to participate in the plan's treatment of the claim.

Circuits are split as to whether "becomes payable" means "legally due." In *Joye v. Franchise Tax Board* (*In re Joye*),[725] the Ninth Circuit concluded that a tax for the year 2000 became payable for purposes of § 1305(a)(1) when it was capable of being paid, rather than when the tax return was timely filed in 2001. In so holding, the Ninth Circuit agreed with a Tenth Circuit Bankruptcy Appellate Panel,[726] but disagreed with the Fifth Circuit's decision in *United States v. Ripley* (*In re Ripley*).[727] In *Joye*, the government had an opportunity to file a proof of claim for its pre-petition tax claim but did not; therefore, in a case filed on March 7, 2001, in which the debtor scheduled an estimated $10,000 state income-tax debt, the government lost its opportunity to collect the actual tax debt by failing to file a proof of claim or object to treatment of the estimated taxes in the plan.

Another optional plan provision may address the "assumption, rejection, or assignment of . . . executory contract[s] or unexpired lease[s]" subject to § 365.[728] Questions are often presented about whether a particular obligation is an executory contract.[729] Assumption or rejection of such contracts or leases may be ac-

723. 11 U.S.C. § 1305(c). *See, e.g.*, *In re* Key, 465 B.R. 709 (Bankr. S.D. Ga. 2012) (permission to incur post-petition debt denied when debt unnecessary for plan performance).

724. 670 F.3d 699 (6th Cir. 2012).

725. 578 F.3d 1070 (9th Cir. 2009).

726. Dixon v. IRS (*In re* Dixon), 218 B.R. 150 (B.A.P. 10th Cir. 1998).

727. 926 F.2d 440 (5th Cir. 1991).

728. 11 U.S.C. § 1322(b)(7). *See also* Fed. R. Bankr. P. 6006.

729. *See, e.g.*, Johnson v. Smith (*In re* Johnson), 501 F.3d 1163 (10th Cir. 2007) (completed contract for purchase of vehicle not executory).

complished either through the plan confirmation process or by separate motion; however, in a Chapter 13 case, if the lease is not assumed in the confirmed plan, the lease is deemed rejected, and the automatic stay is terminated as to that property.[730]

Section 1322(b)(10) permits a plan to pay interest on nondischargeable unsecured claims, but only if the debtor has sufficient disposable income available to pay both the proposed interest and all allowed claims in full.[731] As a practical matter, very few Chapter 13 debtors would have that potential income.[732]

Finally, § 1322(b)(11) states that a plan may "include any other appropriate provision not inconsistent with this title." The Supreme Court pointed out the bankruptcy court's responsibility to ensure that plans do not contain provisions inconsistent with general Code requirements, since § 1325(a)(1)'s confirmation prerequisite is that a plan "complies with the 'applicable provisions' of the Code."[733] In practice, the bankruptcy court relies on the Chapter 13 trustee's recommendation for or against confirmation;[734] the bankruptcy court also relies on interested parties, including the trustee, objecting to confirmation of plans that contain terms with which they do not agree.[735]

6.10

Plan Confirmation Requirements

After the debtor files a proposed plan, the plan is "noticed" to the trustee and creditors, with at least twenty-eight days' notice of the hearing to consider confirmation of the plan.[736] A confirmation hearing may be held within twenty to forty-five days after the § 341 meeting of creditors; the time may be shortened if the court finds it to be in the best interests of the creditors and the bankruptcy estate.[737] A party in interest may object to confirmation; an objection is essential if an interested party, including the trustee, wants to compel a confirmation

730. 11 U.S.C. § 365(p)(3). *See also* Fed. R. Bankr. P. 6006(a) & 9014. See *In re Cumbess*, 960 F.3d 1325 (11th Cir. 2020), for the Eleventh Circuit's distinction between the trustee's assumption under § 365(p)(1) on behalf of the bankruptcy estate and the Chapter 13 debtor's assumption under § 365(p)(3).

731. *See supra* part 6.8.

732. *See, e.g.*, *In re* Kubeczko, No. 12-13766 HRT, 2012 WL 2685115 (Bankr. D. Colo. July 6, 2012).

733. United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 277 (2010).

734. *See* 11 U.S.C. § 1302(a)(2).

735. *See id.* § 1325(b).

736. Fed. R. Bankr. P. 2002(b).

737. 11 U.S.C. § 1324(b).

hearing.[738] The Chapter 13 trustee typically recommends for or against confirmation and is required to attend a confirmation hearing.[739]

Section 1325(a) establishes the basic requirements for plan confirmation, beginning with the condition that the proposed plan comply with all of Chapter 13 and any other applicable Title 11 provisions.[740] Although good faith is fundamental, both in the proposal of the plan and in the filing of the case itself,[741] it is not defined in the Code. As a result, courts have developed a variety of factors to measure the debtor's good faith—factors that typically encompass a totality-of-circumstances test, including both pre- and post-petition conduct.[742] These factors include the debtor's pre-petition actions toward creditors, the motivation in filing the case and plan, the degree of effort toward paying creditors, and the truthfulness and accuracy of statements made in the schedules.[743] BAPCPA added § 1325(a)(7), requiring as a confirmation consideration that the case was filed in good faith, although courts had already considered this good-faith factor as a part of the implicit grounds for dismissing a case under § 1307(c).[744] Whether the plan and case were carried out in good faith is one of the commonly litigated issues in the bankruptcy courts. Inquiry has included whether it is good faith to file the case and propose a plan that essentially pays only the debtor's attorneys' fees and trustee fees,[745] and whether it is bad faith to file a Chapter 13 case when the debtor is not eligible for discharge.[746] Because confirmation implicitly includes a finding of the required good faith, subsequent attacks on that factor by, for example, a motion to dismiss the case likely will fail.[747]

738. *See id.* § 1324(a) and Fed. R. Bankr. P. 2002(b).

739. *See* 11 U.S.C. § 1302(b)(2).

740. *Id.* § 1325(a)(1). *See also* United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 278 (2010) (discussing bankruptcy court's responsibility to ensure compliance with Code requirements).

741. 11 U.S.C. §§ 1325(a)(3), (7), *as amended* in 2005.

742. *See, e.g.*, *In re* Love, 957 F.2d 1350 (7th Cir. 1992); *In re* Colston, 539 B.R. 738 (Bankr. W.D. Va. 2015).

743. See, e.g., *United States v. Estus* (*In re Estus*), 695 F.2d 311 (8th Cir. 1982) and *Kitchens v. Georgia R.R. Bank & Trust Co.* (*In re Kitchens*), 702 F.2d 885 (11th Cir. 1983), for two of the early good-faith factors. See also Lundin, *supra* note 590, Appendix F, for a compilation of case authority on good faith from all circuits.

744. *See* Rocco v. King (*In re* King), No. AZ-07-1317-PAJUK, 2008 WL 8444814 (B.A.P. 9th Cir. Mar. 12, 2008).

745. *See* Sikes v. Crager (*In re* Crager), 691 F.3d 671 (5th Cir. 2012) (holding not per se bad faith to propose attorney-fee-only plan); *In re* Puffer, 674 F.3d 78 (1st Cir. 2012) (same). *Cf.* Brown v. Gore (*In re* Brown), 742 F.3d 1309 (11th Cir. 2014) (affirming dismissal of case filed for purpose of paying debtor's attorneys' fees).

746. *See* Branigan v. Bateman (*In re* Bateman), 515 F.3d 272 (4th Cir. 2008) (holding § 1328(f) not an eligibility requirement for filing case).

747. *See, e.g.*, *In re* Burkes, No. 21-23813-RMB, 2023 WL 6395417 (Bankr. E.D. Wis. Sept. 29, 2023).

Section 1325(a)(4) establishes what is called the "best interests of creditors" test, requiring that a plan's distribution of allowed unsecured claims be no less than those claimants would have received in a Chapter 7 liquidation. This requires comparison of the plan's distribution to a hypothetical liquidation, taking into consideration factors like the costs of the hypothetical Chapter 7 case administration and any exemptions or exclusions from the bankruptcy estate that would occur in such a case.[748]

For allowed secured claims, three different tests apply under § 1325(a)(5): (1) The creditor must have accepted the plan's proposed treatment;[749] or (2) The creditor's lien must be retained while present value (appropriate interest rate) of the claim is paid, with the secured claim's periodic payments in equal monthly amounts and providing adequate protection;[750] or (3) The debtor must surrender the collateral securing the claim.[751] In actuality, the plan's terms often are accepted by default because the creditor had sufficient notice of the plan and did not object.[752] The Supreme Court underscored this acceptance potential in *United Student Aid Funds, Inc. v. Espinosa*,[753] which involved an unsecured creditor. In *Espinosa*, a student-loan creditor had notice of a plan's provisions for paying less than 100% of the claim and did not object or otherwise contest confirmation, becoming bound by the plan under § 1327(a).

Surrender, although typically clear-cut, is not a defined term and may create contested issues when, for example, a debtor proposes to surrender less than all of the collateral.[754] When a debtor proposes surrender, questions may arise as to whether the court has authority to force an unwilling creditor to accept the collateral. Based on precedent, the surrender option does not include power to compel a mortgage creditor to foreclose.[755]

748. *See, e.g.*, Mallon v. Keenan (*In re* Keenan), 431 B.R. 308 (B.A.P. 10th Cir. 2009); *In re* Phelps, 654 B.R. 634 (Bankr. M.D. Fla. 2023).

749. 11 U.S.C. § 1325(a)(5)(A). *Acceptance* is not a defined term in the Code.

750. *Id.* §§ 1325(a)(5)(B)(i), (ii), & (iii).

751. *Id.* § 1325(a)(5)(C).

752. *See, e.g.*, *In re* Smith, No. 20-40870-CJP, 2022 WL 5223992 (Bankr. D. Mass. Oct. 5, 2022) (silence was acceptance).

753. 559 U.S. 260 (2010). *See also In re* Tiffany D. Smith, 102 F.4th 643, 655–56 (3d Cir. 2024) (applying *Espinosa*'s res judicata principles to creditor that had notice of and opportunity for objection to prior confirmation that contained same terms as proposed modified plan).

754. *See, e.g.*, *In re* Chatham, No. 22-13094, 2023 WL 2637275 (Bankr. N.D. Miss. Mar. 24, 2023) (debtor could not comply with surrender provision because of partial sale of collateral); *In re* Snyder, No. 10-62052, 2012 WL 1110119 (Bankr. N.D.N.Y. Apr. 2, 2012) (§ 1325(a)(5)(C) did not permit partial surrender).

755. *See, e.g.*, Pratt v. GMAC (*In re* Pratt), 462 F.3d 14 (1st Cir. 2006). *See also In re* Canning, 706 F.3d 64 (1st Cir. 2013) (creditor's refusal to foreclose didn't violate § 524 discharge injunction); *In re* Rose, 512 B.R. 790 (Bankr. W.D.N.C. 2014) (mortgage creditor not required to accept surrendered property).

The more frequently litigated options for dealing with secured claims are § 1325(a)(5)(B)'s provisions for lien retention, present value, and payment. As explained in the context of lien modification,[756] BAPCPA's amended Code also provides that if the case is dismissed or converted before the plan is completed, a secured creditor's lien is retained "to the extent recognized by applicable nonbankruptcy law."[757] This change to the Code works along with an amendment to § 348(f)(C), which says that for cases converted from Chapter 13, the claim of a secured creditor retains its value unless the claim was paid in full in the Chapter 13 phase, "notwithstanding any valuation or determination of the amount of an allowed secured claim" for any Chapter 13 purposes, such as claim modification in a plan.[758]

Section 506(a)(2) governs valuation of collateral in Chapter 13 cases. It specifies that the value of personal property collateral is "determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing,"[759] statutorily adopting but expanding the replacement-value standard for "cramdown" plans in the Supreme Court's *Associates Commercial Corp. v. Rash*.[760] The *Rash* standard was expanded to define "replacement value" as "the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined."[761] Section 1325(a), as amended by BAPCPA, makes valuation under § 506 inapplicable, for confirmation purposes, to certain personal property (primarily vehicles) that were financed by purchase-money security interests within 910 days of the bankruptcy filing.[762]

In addition to valuation and lien retention, § 1325(a)(5)(B) also requires that secured claims be paid at present value—in other words, with interest to compensate for the delay resulting from monthly payments.[763] The Supreme Court addressed this in *Till v. SCS Credit Corp.*,[764] adopting a requirement that the interest rate be based on a formula, starting with the current national prime rate, with the potential addition of a risk factor if appropriate under the particular facts of

756. *See supra* part 6.9.

757. 11 U.S.C. § 1325(a)(5)(B)(i)(II).

758. *Id.* § 348(f)(C)(i). *See, e.g.*, *In re* McGregor, 449 B.R. 468 (Bankr. D.S.C. 2011).

759. 11 U.S.C. § 506(a)(2). *See* Santander Consumer USA, Inc. v. Brown (*In re* Brown), 746 F.3d 1236 (11th Cir. 2014) (§ 506(a)(2)'s replacement-value standard applies when collateral is surrendered).

760. 520 U.S. 953 (1997).

761. 11 U.S.C. § 506(a)(2). *See, e.g.*, *In re* Henry, 457 B.R. 402 (Bankr. E.D. Pa. 2011).

762. *See supra* part 6.9.

763. 11 U.S.C. § 1325(a)(5)(B)(ii).

764. 541 U.S. 465 (2004).

each case. The Court did not establish the floor or ceiling for the risk adjustment, and, absent consent of the parties, a creditor would be required to prove the need for a specific risk enhancement to the prime rate.[765] Disputes over appropriate interest rates typically arise in personal-property-collateral claims, rather than home-mortgage claims, since § 1322(b)(2) generally prohibits modification of contractual terms for security interests in the debtor's principal residence.[766]

For allowed secured claims, any "periodic" payments must be in equal monthly amounts,[767] and if a claim is secured by personal property, the monthly payments must adequately protect the creditor from any loss of security during the life of the plan.[768]

As a general confirmation requirement, the plan must be feasible, expressed in the Code as the debtor's ability "to make all payments under the plan and to comply with the plan."[769] When inability to make the proposed plan payments is put at issue by an objection to confirmation, determining plan-feasibility becomes a practical test of whether there is sufficient income to meet the proposed obligations, including normal living expenses that are not part of the plan payments.[770]

If a debtor has domestic support obligations, as defined in § 101(14A), and if those obligations first became payable after the filing of the Chapter 13 petition, the debtor must have fully paid those obligations prior to confirmation.[771] These post-petition domestic support obligations are distinct from the pre-petition obligations, which are usually priority claims that may be treated in a plan but must be paid as a condition of receiving a discharge.[772] The final confirmation requirement is that any tax returns mandated under § 1308 must have been filed.[773]

765. *See, e.g.*, Oliver v. Samadi (*In re* Oliver), 306 F. App'x 458 (11th Cir. 2008).

766. See *supra* part 6.9 for discussion of § 1322(b)(2).

767. 11 U.S.C. § 1325(a)(5)(B)(iii)(I), *as amended by* BAPCPA. *See, e.g.*, Hamilton v. Wells Fargo Bank, N.A. (*In re* Hamilton), 401 B.R. 539 (B.A.P. 1st Cir. 2009); *In re* Vazquez Marcano, No. 22-00289 (ESL), 2023 WL 2190612 (Bankr. D.P.R. Feb. 23, 2023).

768. 11 U.S.C. § 1325(a)(5)(B)(iii)(II). *See, e.g.*, DaimlerChrysler Fin. Servs. Ams., LLC v. Rivera (*In re* Rivera), No. 1:08-CV-21-TS, 2008 WL 1957896 (N.D. Ind. May 2, 2008).

769. 11 U.S.C. § 1325(a)(6). *See, e.g.*, *In re* Brown, No. 23 B 837, 2023 WL 4106253 (Bankr. N.D. Ill. June 15, 2023).

770. *See, e.g.*, *In re* Tiffany D. Smith, 102 F.4th 643 (3d Cir. 2024) (discussing feasibility requirement and holding that feasibility determination is reviewed on appeal for clear error). *See also In re* Scarborough, 457 F. App'x 193 (3d Cir. 2012).

771. 11 U.S.C. § 1325(a)(8). *See, e.g.*, *In re* Bailey, No. 09-2564, 2010 WL 3813847 (Bankr. N.D. W. Va. Sept. 24, 2010) (debtor must be current in post-petition obligations).

772. *See* 11 U.S.C. § 1328(a).

773. *Id.* § 1325(a)(9). *See supra* part 6.7.

6.11

Objections to Confirmation, the Disposable Income Test, and the Applicable Commitment Period

Although creditors do not vote on confirmation, they may object. Unsecured creditors enjoy an opportunity to contest whether a debtor is devoting sufficient disposable income to a proposed plan. Pursuant to § 1325(b), the trustee or holders of allowed unsecured claims can object to the confirmation, and if they do, the court can't confirm the plan unless the plan either distributes no less than the amount of the claim or devotes the debtor's "projected disposable income" to unsecured creditors for the "applicable commitment period" of the plan.[774]

These two terms—*disposable* and *current monthly*—became a source of litigation and conflicting judicial interpretation. Under BAPCPA, the term *disposable income* is defined in § 1325(b)(2) by reference to § 101(10A)'s "current monthly income," which is a look-back to the debtor's average income for the six months prior to filing bankruptcy. *Current monthly income* is a part of the means test in § 707(b)(2).[775] The means test becomes a factor in the projected-disposable-income analysis for Chapter 13 debtors who fall above the median income for a comparable-size family in their state.[776] The Supreme Court recognized, in *Ransom v. FIA Card Services, N.A.*,[777] that the congressional purpose of having the means test apply in Chapter 13 is to ensure that debtors who are able to pay their creditors do, in fact, pay. Because the means test in Chapter 13 includes the pre-petition current monthly income, it is not surprising that courts disagreed on whether projected disposable income was a look-back to the pre-petition income or a "look-forward," if you will, to what a debtor's income would actually be after filing for bankruptcy.

The Supreme Court resolved that disagreement by adopting the forward-looking approach. In *Hamilton v. Lanning*,[778] the Court held that bankruptcy courts should begin their disposable-income inquiry with the statutory framework, but when appropriate in particular cases, should then look "further and take into account other known or virtually certain information about the debtor's future income or expenses."[779] In other words, if there are changes in a debtor's financial

774. 11 U.S.C. § 1325(b)(1).

775. *See supra* part 5.2.

776. 11 U.S.C. § 1325(b)(3).

777. 562 U.S. 61 (2011).

778. 560 U.S. 505 (2010).

779. *Id.* at 519.

situation from what had occurred in the six-month "current monthly income" period, and those changes are "known or virtually certain," the bankruptcy court should consider those changes. Although *Lanning* involved a substantial change in the debtor's present income from what had been earned in the six months before bankruptcy, such "known or virtually certain" changes can apply to either income or expenses. For example, the Fourth Circuit applied *Lanning* in *Morris v. Quigley* (*In re Quigley*),[780] in which the debtor was surrendering some collateral and would not have the secured payments to deduct as a monthly expense.

Assume, for example, the trustee or unsecured creditor files an objection to confirmation, which triggers the disposable-income test because less than 100% of unsecured claims are proposed to be paid (which would be the typical case).[781] For all Chapter 13 debtors, the plan must devote disposable income, which is the current monthly income after deducting the amounts reasonably necessary for maintenance and support of the debtor and dependents, as well as any charitable contributions or normal business expenses if the debtor is engaged in business.[782] For debtors below the median-family income for their state, the meaning of a "reasonably necessary" expense is subject to judicial interpretation and discretion, and is thus often litigated.[783] For Chapter 13 debtors whose current monthly income is above the median income for a similarly sized family in their applicable state, reasonably necessary expenses are determined by applying § 707(b)(2)'s means test, which uses IRS Local and National Standards.[784]

Courts have differed on the method of determining family size for purposes of the means test.[785] The Fourth Circuit addressed this issue in *Johnson v. Zimmer*.[786] After examining the various approaches taken by bankruptcy courts (heads-on-bed, income-tax dependent, and economic unit), the court adopted the economic-unit approach in a case with a debtor who had part-time custody of two minor children, and a spouse who had part-time custody of three minor

780. 673 F.3d 269 (4th Cir. 2012).

781. *But see In re* Johnson, No. 10-03184C, 2011 WL 1671536 (Bankr. N.D. Iowa May 3, 2011) (for plan paying 100% of unsecured claims, disposable-income test not triggered).

782. 11 U.S.C. §§ 1325(b)(2)(A)–(B).

783. *See, e.g.*, Dow Chem. Emps. Credit Union v. Collins, No. 10-20718, 2011 WL 2746210 (E.D. Mich. July 14, 2011) (issues included reasonable necessity of $300 monthly cigarette expense); *In re* Nicholas, 458 B.R. 516 (Bankr. E.D. Ark. 2011) (issue was reasonableness of home mortgage monthly amount).

784. 11 U.S.C. § 1325(b)(3). See Official Form 121C-1 for calculation of current monthly income and applicable commitment period, and Official Form 121C-2 for calculation of disposal income for above-median debtors.

785. *See supra* part 5.2.

786. 686 F.3d 224 (4th Cir. 2012). *See also, e.g.*, *In re* Poole, No. 21-32224, 2022 WL 5224087 (Bankr. N.D. Tex. Sept. 30, 2022) (adopting economic-unit approach).

children. The Fourth Circuit recognized that a fractional application of each individual's time spent in the home was relevant to the economic impact of actual time in the home on family expenses.

The deductible expenses are set forth in the IRS National and Local Standards, as well as in "other necessary expenses" recognized by the IRS for its purposes in tax collection.[787] The variety and amount of litigation over what is an appropriately deductible expense under the IRS Standards are too extensive to cover in this monograph, but the Supreme Court established a baseline, in *Ransom v. FIA Card Services, N.A.*,[788] that what is "reasonably necessary" for above-median-income debtors should be based on "applicable" expenses under § 707(b)(2)(A)(ii)(I). "If a debtor will not have a particular kind of expense during his plan, an allowance to cover that cost is not 'reasonably necessary' within the meaning of the statute."[789] Following the *Ransom* rationale, if a debtor does not have an expense, for example, because of surrendering collateral, there may be no deductible expense, even though the applicable IRS Standards would allow an expense to a taxpayer.[790]

On the other hand, assuming the debtor would have a contractual secured payment that continued after the bankruptcy filing, appellate authority holds that if a debtor is above the applicable median income, § 707(b)(2)'s means test is triggered. Under § 707(b)(2)(A)(iii), actual, contractually due, secured debt payments are deductible expenses, regardless of whether that expense is reasonably necessary or above the IRS Standard.[791]

Among the many issues litigated is whether the exclusions from "current monthly income" found in § 101(10A)'s definition are always excluded for Chapter 13 plan purposes, and the best example is Social Security income. Those benefits are expressly excluded in the statute's description of "current monthly income," and appellate authority has applied that exclusion in Chapter 13's disposable-

787. *See supra* part 5.2.

788. 562 U.S. 61 (2011).

789. *Id.* at 70–71.

790. *See, e.g.*, Morris v. Quigley (*In re* Quigley), 673 F.3d 269 (4th Cir. 2012); *In re* Turner, 574 F.3d 349 (7th Cir. 2009); Kramer v. Bankowski (*In re* Kramer), 505 B.R. 614 (B.A.P. 1st Cir. 2014); Zeman v. Liehr (*In re* Liehr), 439 B.R. 179 (B.A.P. 10th Cir. 2010). *See also In re* Litton, No. 23-10189, 2023 WL 6140596 (Bankr. W.D. La. Sept. 18, 2023) (IRS only recognizes purchase-money car loan in Local Standard for transportation, and above-median debtor could not deduct nonpurchase-money debt).

791. Bledsoe v. Cook, 70 F.4th 746 (4th Cir. 2023) (actual mortgage payment is deductible, although above IRS housing allowance); Parks v. Drummond (*In re* Parks), 475 B.R. 703 (B.A.P. 9th Cir. 2012) (home-mortgage payment, although above IRS housing allowance, was deductible under § 707(b)(2)(A)(iii)). *Accord* Drummond v. Welsh (*In re* Welsh), 711 F.3d 1120 (9th Cir. 2013).

income inquiry.[792] The reality is that a debtor with only Social Security income will have to devote a portion to a proposed plan or the plan will not be feasible.[793]

Another issue involves a debtor's proposal to continue to make voluntary contributions to a retirement account. Section 541(b)(7)(A) excludes from property of the bankruptcy estate withholdings by an employer for contributions to specific retirement accounts. Authority is split on whether this exclusion permits a Chapter 13 debtor to continue making retirement contributions that would be deducted for purposes of disposable income, with the Ninth Circuit holding, in *Saldana v. Bronitsky* (*In re Saldana*),[794] that under a plain reading of § 541(b)(7), which was enacted as part of BAPCPA, voluntary retirement contributions from the debtor to employer-managed retirement plans are properly deducted from the calculation of disposable income. The *Saldana* opinion disagreed with the Sixth Circuit, which had held that such voluntary, post-petition retirement contributions are not excluded from the disposable income calculation.[795] In subsequent decisions, the Sixth Circuit modified that holding, concluding that BAPCPA's amendment to § 541(b)(7)'s "hanging paragraph" provided that contributions to a qualified retirement account were not to be considered disposable income for purposes of § 1325(b)(2). As a result, the Sixth Circuit held that the debtor could continue to deduct ongoing contributions provided they did not exceed what historical contributions demonstrated, but a good-faith analysis is required to ensure that the debtor does not begin to make contributions in contemplation of filing for Chapter 13 relief.[796]

Under § 1322(f), a "plan may not materially alter the terms of a loan" owed to a retirement account, as defined in § 362(b)(19), and the amounts required to

792. *See, e.g.*, Mort Ranta v. Gorman, 721 F.3d 241 (4th Cir. 2013); *Welsh*, 711 F.3d 1120; Beaulieu v. Ragos (*In re* Ragos), 700 F.3d 220 (5th Cir. 2012); Anderson v. Cranmer (*In re* Cranmer), 697 F.3d 1314 (10th Cir. 2012); Baud v. Carroll, 634 F.3d 327 (6th Cir. 2011); Fink v. Thompson (*In re* Thompson), 439 B.R. 140 (B.A.P. 8th Cir. 2010).

793. *See* 11 U.S.C. § 1325(a)(6). *See, e.g.*, *In re* Williamson, No. 22-60625, 2023 WL 2144534 (Bankr. N.D. Ohio Feb. 21, 2023) (not bad faith for debtors to propose less than full Social Security benefits to plan because those benefits are excluded from disposable income).

794. 122 F.4th 333 (9th Cir. 2024), *overruling In re* Parks, 475 B.R. 703. *Cf. In re* Perkins, No. 22-20025, 2023 WL 2816687 (Bankr. S.D. Tex. Apr. 6, 2023) (§ 541(b)(7) excludes all post-petition contributions from disposable income); *In re* Drapeau, 485 B.R. 29 (Bankr. D. Mass. 2013) (good-faith post-petition contributions excluded from disposable income).

795. Seafort v. Burden (*In re* Seafort), 669 F.3d 662 (6th Cir. 2012).

796. *In re* Davis, 960 F.3d 346 (6th Cir. 2020). *See also In re* Penfound, 7 F.4th 527 (6th Cir. 2021) (debtor who had previously made contributions but was unable to do so in six months prior to filing Chapter 13 could not deduct post-petition contributions from disposable income).

repay this kind of loan are excluded from disposable income.[797] The Sixth Circuit and courts in agreement hold that once the debtor had repaid such a loan, new contributions to a retirement account could be disposable income.[798]

Finally, once the disposable-income test is triggered, there is an *applicable commitment period* (ACP) to consider. The ACP is an expression of how long the debtor's plan must last—either three or five years—depending on where the debtor's current monthly income falls within the median-family income applicable to the particular debtor. Under § 1325(b)(1)(B), disposable income for the ACP must be devoted to the plan. The ACP is defined in § 1325(b)(4) as three years for debtors who fall below the applicable median-family income, and as not less than five years for debtors who fall above the applicable median-family income.[799] If the plan provides for full payment of allowed unsecured claims, it may be for less than the three- or five-year period, but most plans stipulate less than 100% unsecured distribution. The interpretive disagreement is whether there is an ACP for a debtor who has no actual projected disposable income after calculation under the means test. For example, a debtor with higher than median-family income whose combined actual income and substantial secured debt payments resulted in negative projected disposable income under the means test would be required to remain in a plan for five years under a literal application of the ACP.[800]

6.12

Plan Modifications

A debtor's proposed plan may be modified prior to confirmation. If that happens, all of § 1322's requirements for a proposed plan must be incorporated.[801] A confirmed plan may also be modified, in which event judicial authority is split on whether all of § 1325's requirements apply. Under § 1329(b)(1), a plan that is modified after confirmation incorporates the requirements of §§ 1322(a) and (b),

797. 11 U.S.C. § 1322(f). Section 362(b)(19)'s exception from the automatic stay permits the continued withholding from a debtor's wages to repay a loan from a pension, profit-sharing, stock bonus, or other plan, as defined in that section.

798. *Seafort*, 669 F.3d 662. *See also* Nowlin v. Peake (*In re* Nowlin), 576 F.3d 258 (5th Cir. 2009); McCarty v. Lasowski (*In re* Lasowski), 575 F.3d 815 (8th Cir. 2009). *But see Saldana*, 122 F.4th 333.

799. See also 11 U.S.C. § 1322(d) for similar provision for maximum length of plans, depending on debtors' median-family income. Official Form 122C-1 is used for calculation of the applicable commitment period.

800. *See, e.g.*, Pliler v. Stearns, 747 F.3d 260 (4th Cir. 2014); Danielson v. Flores (*In re* Flores), 735 F.3d 855 (9th Cir. 2013); Baud v. Carroll, 634 F.3d 327 (6th Cir. 2011); Whaley v. Tennyson (*In re* Tennyson), 611 F.3d 873 (11th Cir. 2010); Coop v. Frederickson (*In re* Frederickson), 545 F.3d 652 (8th Cir. 2008).

801. 11 U.S.C. § 1323(a).

1323(c), and 1325(a), leaving a question of whether § 1325(b)'s disposable-income test comes into play.[802] Three factors affect whether the disposable-income test applies. First, modification of a confirmed plan is only possible prior to completion of payments under that plan.[803] Second, a confirmed plan is only subject to modification on motion of the debtor, trustee, or holder of an allowed unsecured claim.[804] And third, a confirmed plan may be modified for the following purposes: to increase or reduce the amount of payments on a claim; to extend or reduce the time for payments; to alter the amount of distribution to a creditor to take into account payments made other than under the plan; or to reduce payments to allow a debtor to buy health insurance for the debtor or dependents.[805]

Courts disagree about whether § 1329(a) permits a previous secured creditor's status and treatment to be changed to unsecured, taking into account, for example, that the debtor has surrendered a vehicle to the secured creditor and changing the creditor's remaining claim to unsecured deficiency. The Sixth Circuit held, in *Chrysler Financial Corp. v. Nolan* (*In re Nolan*),[806] that modification was not permitted to change the classification of a secured creditor to unsecured. Other courts have concluded that § 1329(a) is broad enough to permit actions such as surrender and have altered the classification and treatment of a previously secured creditor.[807]

Another unsettled issue is whether § 1329 requires a change in circumstances as a condition for moving to modify a confirmed plan. The theory behind requiring a demonstrated change in circumstances is that it is necessary to overcome the res judicata effect of the prior confirmation order.[808] Other courts have not discerned a change-of-circumstances test in § 1329.[809] In reality, a debtor or other

802. *Compare* Freeman v. Schulman (*In re* Freeman), 86 F.3d 478, 481 (6th Cir. 1996) (disposable-income test applied), *with* Mattson v. Howe (*In re* Mattson), 468 B.R. 361, 370 (B.A.P. 9th Cir. 2012) (§ 1325(b) and its disposable-income test did not apply). *See also In re* Elassal, 654 B.R. 434 (Bankr. E.D. Mich. 2023) (distinguishing *Freeman,* finding proceeds of post-petition sale of home not disposable income for modification purposes).

803. 11 U.S.C. § 1329(a). *See, e.g.*, Brown v. Brown (*In re* Brown), 378 B.R. 416 (B.A.P. 6th Cir. 2007).

804. 11 U.S.C. § 1329(a).

805. *Id.*

806. 232 F.3d 528 (6th Cir. 2000).

807. *See, e.g.*, *In re* Cooke, 655 B.R. 181 (Bankr. N.D. Ill. 2023) (modification allowed, with good faith required).

808. *See, e.g.*, Murphy v. O'Donnell (*In re* Murphy), 474 F.3d 143, 149–50 (4th Cir. 2007) (change of circumstance required for postconfirmation modification); Johnson v. Fink (*In re* Johnson), 458 B.R. 745, 749 (B.A.P. 8th Cir. 2011) (same).

809. *See, e.g.*, Mattson v. Howe (*In re* Mattson), 468 B.R. 361 (B.A.P. 9th Cir. 2012) (discussing circuit split). *See also In re* Tiffany D. Smith, 102 F.4th 643, 652 n.17 (3d Cir. 2024) (citing circuit authority but declining to "weigh in here on the circuit split regarding whether a court must find a change in the debtor's circumstances before allowing a modification under § 1329(a).").

party moving to modify will not be able to relitigate matters that were, or could have been, tried at the original confirmation.[810]

Good faith is an overriding factor in modifications, allowing the court to consider a full range of issues, including whether a debtor proposing modification is attempting to pay less to creditors than the debtor is able.[811]

An issue that has arisen because of ACP requirements in § 1325(b) is whether a confirmed plan may be shortened by lump-sum payment through the modification process.[812] A split of judicial authority exists, one that is not easily resolved because § 1329 does not specifically refer to § 1325(b)'s ACP in modified plans.[813]

6.13

The Effects of Confirmation

Section 1327 addresses the effects of confirmation. The Supreme Court has emphasized the significance of § 1327(a)'s provision that "a confirmed plan bind[s] the debtor and each creditor." In *United Student Aid Funds, Inc. v. Espinosa*,[814] the issue was whether a plan that did not comply with Code or rule requirements about an adversary proceeding to determine discharge of student-loan debt was nevertheless binding on the creditor.[815] The creditor was given adequate notice of the plan, which contained a warning that it impaired the creditor's rights by a provision to pay the principal debt but discharge the accruing interest. The creditor did not object or appeal confirmation. Although the creditor was deprived of the procedural protections of an adversary proceeding to determine undue hardship, the plan became binding when the creditor did not pursue remedies to contest the confirmation's effect. A plan that is not adequately "noticed" will not

810. *See Smith*, 102 F.4th 643 (applying res judicata to bar mortgage creditor from objecting to modified plan's terms that were decided in prior confirmation). *See also* Storey v. Pees (*In re* Storey), 392 B.R. 266 (B.A.P. 6th Cir. 2008).

811. *See, e.g.*, King v. Robenhorst, No. 11-C-573, 2011 WL 5877081 (E.D. Wis. Nov. 23, 2011).

812. *See, e.g.*, Fridley v. Forsythe (*In re* Fridley), 380 B.R. 538 (B.A.P. 9th Cir. 2007) (discussing this issue).

813. *See In re* Montenegro, 655 B.R. 607, 610 (Bankr. S.D. Fla. 2023) (discussing split of authority on statutory issue "whether § 1325(b), which requires above-median debtors to commit to a five-year plan, applies to modified plans," and concluding that debtor could modify to pay off plan early from sale proceeds).

814. 559 U.S. 260 (2010).

815. *See* 11 U.S.C. §§ 523(a)(8) & 1328(a)(2), *and* Fed. R. Bankr. P. 7001(6).

have binding effect.[816] Section 1327(a) states that the binding effect applies not only to the creditor, but also to the debtor.[817] Although the statute does not mention the trustee, the trustee is bound by confirmation as well.[818]

Section 1327(b) states that unless the plan or its related order provides otherwise, confirmation vests property of the estate in the debtor.[819] Section 1327(c) provides that a confirmed plan's vesting of property in the debtor effectively frees the property of claims and interests, unless stated otherwise in the plan or confirmation order. It is the statutory recognition that a plan's provisions are binding. However, § 1327(c) must be read in conjunction with §§ 1322(b)(2) and 1325(a)(5), the lien modification and retention provisions.[820] Moreover, § 1327(c) is restricted by the requirement that the claim or interest of an affected creditor must be "provided for by the plan." A plan must be specific enough in its provisions to support a particular claim.[821]

6.14

Case Conversion and Dismissal

Under § 1307(a), a Chapter 13 debtor "may convert a case under this chapter to a case under chapter 7 . . . at any time." In *Marrama v. Citizens Bank*,[822] the Supreme Court stressed the need for good faith on the part of a debtor who wants to convert from Chapter 7 to Chapter 13. As a result, the question arose after *Marrama* as to whether good faith was a threshold requirement for voluntary conversion the other way—from Chapter 13 to 7. Appellate authority then distinguished *Marrama*, concluding that § 1307(a) voluntary conversion to Chapter 7 is not conditioned on a good-faith analysis, with the debtor remaining before the

816. The Supreme Court disapproved future plan provisions that would accomplish discharge of student loans without the filing of an adversary proceeding to determine undue hardship. *Espinosa*, 559 U.S. at 276–78. *See also In re* Bozeman, 57 F.4th 895 (11th Cir. 2023) (distinguishing *Espinosa,* confirmed plan improperly modified home mortgage, in violation of § 1322(b)(2)).

817. *See, e.g.*, *In re* Darden, 474 B.R. 1 (Bankr. D. Mass. 2012) (debtor bound by plan's provision for what creditors would receive).

818. *See, e.g.*, Boyajian v. Vargas (*In re* Vargas), No. 10-13103-ANV, 2012 WL 2450170 (B.A.P. 1st Cir. June 8, 2012).

819. *See supra* part 6.9.4. *See also* Trantham v. Tate, 112 F.4th 223 (4th Cir. 2024).

820. *See supra* part 6.10. *And see, e.g.*, *In re* Bozeman, 57 F.4th 895 (11th Cir. 2023) (plan could not modify home mortgage in violation of § 1322(b)(2)).

821. *See, e.g.*, Taumoepeau v. Mfrs. & Traders Trust Co. (*In re* Taumoepeau), 523 F.3d 1213 (10th Cir. 2008) (plan did not adequately provide for post-petition default).

822. 549 U.S. 365 (2007). The importance of good faith is discussed *supra* part 6.3 in the context of converting a case from Chapter 7 to Chapter 13.

court and remedies available in the Chapter 7 phase to deal with any bad faith.[823] In contrast, when a Chapter 13 debtor seeks to voluntarily dismiss a case under § 1307(b), there is a split of authority as to whether good faith is required.[824] The Sixth and Ninth Circuits have held that a Chapter 13 debtor has a clear, statutory right to voluntarily dismiss the case if it previously had not been converted from Chapter 7, 11, or 12.[825] However, voluntary dismissal under § 1307(b) does not mean that the court lacks authority under § 349(a) to impose conditions on the dismissal if cause exists.[826] If the court has entered an order converting the case from Chapter 13, the debtor no longer has the right to voluntarily dismiss.[827]

Section 1307(c) sets out eleven nonexclusive grounds for involuntary dismissal or conversion of Chapter 13 cases on motion of a party in interest, and it states that whether the remedy is dismissal or conversion is based on "the best interests of creditors and the estate."[828] The list of causes ranges from "unreasonable delay by the debtor that is prejudicial to creditors"[829] to failure to pay any post-petition domestic support obligation.[830] Although lack of good faith is not a specific statutory factor, it has been found implicitly to be a basis for involuntary dismissal or conversion.[831]

Section 348 sets forth the effects on a case when converting from one bankruptcy chapter to another. A secured creditor's lien remains intact on conversion, and any valuations of property in the Chapter 13 phase are ineffective in the Chapter 7 phase.[832]

When conversion occurs before confirmation, § 1326(a)(2) stipulates, in part, that "the trustee shall return any such payments not previously paid and

823. *See, e.g.*, Nady v. DeFrantz (*In re* DeFrantz), 454 B.R. 108 (B.A.P. 9th Cir. 2011). *Accord In re* Taylor, 472 B.R. 570 (C.D. Cal. 2012).

824. The Fifth Circuit, for example, held that *Marrama*'s good-faith analysis was a required condition before allowing dismissal. Jacobsen v. Moser (*In re* Jacobsen), 609 F.3d 647, 660–63 (5th Cir. 2010).

825. *In re* Smith, 999 F.3d 452 (6th Cir. 2021); *In re* Nichols, 10 F.4th 956 (9th Cir. 2021). *See also* TICO Constr. Co. v. Van Meter (*In re* Powell), 119 F.4th 597 (9th Cir. 2024) (holding that under plain language of § 1307(b), debtor had absolute right to dismiss the case, notwithstanding creditor's allegation that debtor was ineligible to file Chapter 13).

826. *See, e.g.*, *In re* Duran, 630 B.R. 797 (B.A.P. 9th Cir. 2021) (cause for dismissal with prejudice).

827. Pino v. Martinez (*In re* Pino), 657 B.R. 264 (B.A.P. 10th Cir. 2024).

828. 11 U.S.C. § 1307(c).

829. *Id.* § 1307(c)(1). *See, e.g.*, Vivenzio v. Office of the Standing Chapter 13 Tr. (*In re* Vivenzio), No. 22-944, 2023 WL 2147600 (2d Cir. Feb. 22, 2023); Paulson v. Wein (*In re* Paulson), 477 B.R. 740 (B.A.P. 8th Cir. 2012).

830. 11 U.S.C. § 1307(c)(11).

831. *See, e.g.*, *In re* Mondelli, 558 F. App'x 260 (3d Cir. 2014); *In re* Myers, 491 F.3d 120 (3d Cir. 2007).

832. 11 U.S.C. § 348(f). *See, e.g.*, *In re* Airhart, 473 B.R. 178 (Bankr. S.D. Tex. 2012).

not yet due and owing to creditors . . . to the debtor, after deducting any unpaid [administrative] claim allowed under section 503(b)."[833]

The Supreme Court held, in *Harris v. Viegelahn*,[834] that when a confirmed case is converted from Chapter 13 to Chapter 7, funds held by the trustee that were not yet distributed to creditors must be returned to the debtor rather than turned over to the Chapter 7 trustee. The *Harris* decision has led to other returns of funds held by the Chapter 13 trustee to debtors when the case is converted to Chapter 7 or voluntarily dismissed prior to confirmation of the Chapter 13 plan.[835]

6.15

Discharge

Section 1328(a)(2) incorporates into Chapter 13 most of the § 523(a) exceptions for discharges[836] that are granted on completion of a plan. Another type of discharge, called a *hardship discharge*, may be granted before plan completion, but only if the debtor shows that failure to complete the plan is because of circumstances beyond the debtor's control, modification is not practicable, and allowed unsecured claims have received at least as much as they would have received in a Chapter 7 liquidation.[837] For those rare hardship discharges, all of the § 523(a) exceptions from discharge apply.[838] In the plan completion discharges, the primary debts that are not excepted from discharge are willful and malicious injuries under § 523(a)(6) and the § 523(a)(15) debts, which are typically debts related to marital separation or divorce.[839]

In addition to the § 523(a) exceptions, a Chapter 13 discharge excludes restitution and criminal fines and excludes damages awarded in a civil action related to personal injury or death resulting from the debtor's willful and malicious

833. 11 U.S.C. § 1326(a)(2). *But see In re* Clements, 495 B.R. 74 (Bankr. E.D. Pa. 2013) (§ 348(f)(1) requires that preconfirmation funds held by trustee be refunded to debtor, before paying administrative expenses, including debtor's attorneys' fee).

834. 575 U.S. 510 (2015).

835. *See, e.g.*, *In re* Montilla, No. 22BK02585, 2022 WL 12165276 (Bankr. N.D. Ill. Oct. 12, 2022) (funds must be returned to debtors and cannot be paid to debtors' counsel as administrative expense). *See also In re* Doll, 57 F.4th 1129 (10th Cir. 2023) (same); *In re* Evans, 69 F.4th 1101 (9th Cir. 2023) (holding trustee may not be paid fee from funds on hand upon dismissal of case prior to confirmation); *contra In re* Baum, 650 B.R. 852 (Bankr. E.D. Mich. 2023) (disagreeing with *Doll*).

836. *See supra* part 5.7 in context of Chapter 7.

837. 11 U.S.C. § 1328(b).

838. *Id.* § 1328(c)(2).

839. For in-depth discussion of § 523(a)(15) debts, and summaries of each circuit's case authority, see Brown, *supra* note 148.

action.[840] The discharge also does not include § 1322(b)(5) long-term debts (e.g., home mortgages) that continue after the plan is concluded in three to five years.[841] Thus, if the plan provides that certain debts will be cured of default and payments maintained for the contractual terms, those continuing debts are not discharged. The prefatory language of §§ 1328(a) and (b) states that a discharge only applies to "debts provided for by the plan or disallowed under section 502." This requirement presents issues of whether a plan addressed treatment of a specific claim, as well as whether the plan was properly "noticed" to the affected creditor—issues closely related to whether § 1327(a)'s binding effect is triggered.[842]

Section 1328(f)'s restriction on discharge concerning the effect on liens when a debtor is not eligible for discharge was discussed above in part 6.9.2. Section 1328(f) also limits how quickly a Chapter 13 debtor may obtain a discharge following a prior discharge. If a debtor obtained a discharge in a prior Chapter 7, 11, or 12 case that was filed within four years of the current Chapter 13, or a discharge in a prior Chapter 13 case filed within two years of the current case, then a discharge in the current Chapter 13 case is not permitted.[843]

The § 524 discharge injunction goes into effect upon entry of a Chapter 13 discharge, just as it does in Chapter 7.[844] Violations of the discharge injunction are frequent topics of litigation in the bankruptcy courts.[845]

6.16

Claims and Home-Mortgage Litigation

Claims allowance and objections to claims[846] form a significant portion of bankruptcy litigation. Because many debtors are trying to retain some collateral (e.g., vehicles, homes), it is not surprising that claim issues often are at the forefront of plan confirmation. Litigation over the amount of a secured claim and its treatment is common.[847] The bankruptcy courts have ruled on a wide range of

840. 11 U.S.C. §§ 1328(a)(3)–(4). This willful and malicious injury is different from the § 523(a)(6) exception, which may apply to property, as well as personal injury or death.

841. *Id.* §§ 1328(a)(1) and (c)(1).

842. *See, e.g.*, Ellett v. Stanislaus (*In re* Ellett), 506 F.3d 774 (9th Cir. 2007) (plan did not provide for specific tax claim).

843. 11 U.S.C. § 1328(f).

844. *See supra* part 5.10.

845. *See, e.g.*, Fla. Dep't of Rev. v. Diaz (*In re* Diaz), 647 F.3d 1073 (11th Cir. 2011); Hann v. Educ. Credit Mgmt. Corp. (*In re* Hann), 476 B.R. 344 (B.A.P. 1st Cir. 2012).

846. *See supra* part 4.

847. *See supra* part 6.10 (discussing § 1325(a)(5) confirmation requirements for liens).

home-mortgage claims, including actions related to mortgage lenders or mortgage servicers.[848]

Home-mortgage claim litigation may be related to whether the mortgage creditor had standing to move for stay relief.[849] The authority of a particular party to enforce a mortgage is also an issue.[850] The Third Circuit addressed inappropriate representations by a creditor and its attorney in moving for stay relief, illustrating that potential sanctions are available for violations of Bankruptcy Rule 9011.[851] Factual and legal issues as to whether a mortgage creditor violated the automatic stay, subjecting itself to damages, are often litigated.[852]

Home-mortgage lawsuits are often connected to the bankruptcy issue of whether the creditor complied with the terms of the plan. This in turn presents related issues of whether the plan improperly modified the home mortgage.[853] Many of the issues that trigger mortgage litigation relate to post-petition charges by the creditor for expenses like attorneys' fees, late charges, and inspections.[854] To help manage the high volume of this type of litigation, Federal Bankruptcy Rule 3002.1 was adopted by the Supreme Court, effective December 2011. Rule 3002.1 applies only in Chapter 13 cases that have claims secured by the debtor's principal residence, and the plan proposes that either the debtor or trustee will maintain ongoing, contractual mortgage payments. The rule requires the creditor to give notice to the debtor, the debtor's attorney, and the trustee of payment changes resulting from things like interest rate or escrow adjustments, as well as notice of post-petition charges and fees. Opportunity is provided for objection to those notices and for court determination in the event of objection. Rule 3002.1 also provides for a procedure to determine, at the conclusion of a plan, that the secured claim has been cured.

848. *See, e.g.*, Rodriguez v. Countrywide Home Loans, Inc. (*In re* Rodriguez), 695 F.3d 360 (5th Cir. 2012).

849. *See supra* part 2.7.5. *See also, e.g.*, Miller v. Deutsche Bank Nat'l Trust Co. (*In re* Miller), 666 F.3d 1255 (10th Cir. 2012).

850. *See, e.g.*, Allen v. U.S. Bank, NA (*In re* Allen), 472 B.R. 559 (B.A.P. 9th Cir. 2012) (discussing standing to enforce note and mortgage).

851. *In re* Taylor, 655 F.3d 274 (3d Cir. 2011).

852. *See, e.g.*, Jacks v. Wells Fargo Bank, N.A. (*In re* Jacks), 642 F.3d 1323 (11th Cir. 2011).

853. *See* 11 U.S.C. §§ 1322(b)(2) and 1327(a). *See, e.g.*, Ameriquest Mortg. Co. v. Nosek (*In re* Nosek), 544 F.3d 34 (1st Cir. 2008) (discussing need for plan specificity).

854. *Compare, e.g.*, Padilla v. Wells Fargo Home Mortg., Inc., 379 B.R. 643 (Bankr. S.D. Tex. 2007) (holding Rule 2016 applied to both pre- and post-petition creditor's fees and charges), *with* Padilla v. GMAC Mortg. Corp., 389 B.R. 409 (Bankr. E.D. Pa. 2008) (discussing creditor's obligation to disclose and obtain court approval before assessing post-petition charges).

An Official Form Supplement S1 to Official Form 410 for claims implements Rule 3002.1, which addresses the need for notice of a change in the amount of the ongoing mortgage payments. Supplement S2 to Official Form 410 further implements Rule 3002.1, providing the required notice of post-petition fees, charges, and expenses related to the Chapter 13 debtor's home mortgage. Rule 3002.1 and related forms reduced somewhat the amount of litigation over post-petition charges by home-mortgage creditors, although questions that arise may require interpretation of the rule, including whether violation of the rule permits a sanction for contempt.[855]

Separate from the claims allowance process, there is frequent litigation in the bankruptcy courts over alleged violations of the Truth in Lending Act, as well as applicable state and federal consumer-protection statutes.[856] The Real Estate Settlement Procedures Act (RESPA) and other federal and state statutes related to home mortgages often raise issues in bankruptcy litigation.[857] In many instances, the bankruptcy court must decide whether it has authority to hear a cause of action, for example, when a foreclosure has already occurred under state law.[858] The Supreme Court's decision in *Stern v. Marshall*[859] requires an examination of the bankruptcy court's authority, including in those Chapter 13 cases in which the plan has been completed and the debtor is attacking the validity of the mortgage claim. But § 524(i) specifically recognizes a discharge-injunction violation for a creditor's "willful failure . . . to credit payments received under a [confirmed] plan."[860]

855. *See, e.g.*, PHH Mortg. Corp. v. Sensenich (*In re* Gravel), 6 F.4th 503 (2d Cir. 2021), *cert. denied*, Sensenich v. PHH Mortg. Corp., 142 S. Ct. 2829 (2022) (violation of Rule 3002.1 did not provide basis for contempt in light of Taggart v. Lorenzen, 139 S. Ct. 1795 (2019)). *Contra In re* Dewitt, 651 B.R. 215 (Bankr. S.D. Ohio 2023).

856. *See, e.g.*, Crawford v. LVNV Funding, LLC, 758 F.3d 1254 (11th Cir. 2014); DiVittorio v. HSBC Bank USA, NA (*In re* DiVittorio), 670 F.3d 273 (1st Cir. 2012); Option One Mortg. Corp. v. Sterten (*In re* Sterten), 546 F.3d 278 (3d Cir. 2008).

857. *See, e.g.*, Campbell v. Countrywide Home Loans, Inc., No. 07-20499, 2008 WL 3906382 (5th Cir. Aug. 26, 2008), *opinion withdrawn and superseded by* Campbell v. Countrywide Home Loans, Inc., 545 F.3d 348 (5th Cir. 2008); Knowles v. Bayview Loan Servicing, LLC (*In re* Knowles), 442 B.R. 150 (B.A.P. 1st Cir. 2011).

858. *See, e.g.*, Stewart v. Chase Bank (*In re* Stewart), 473 B.R. 612 (Bankr. W.D. Pa. 2012) (bankruptcy court lacked jurisdiction after foreclosure).

859. 564 U.S. 462 (2011), discussed *supra* part 1.1.

860. *See, e.g.*, Valdellon v. PHH Mortg. Corp. (*In re* Valdellon), BAP No. EC-24-1086-GCB, 2024 WL 5182900 (B.A.P. 9th Cir. Dec. 20, 2024) (holding that Chapter 13 debtors sufficiently stated a § 524(i) cause of action against the mortgage servicer for failure to properly credit plan payments to cure defaults; and that the servicer may be liable for emotional distress damages for violating the discharge injunction). *See also* Mattox v. Wells Fargo, NA (*In re* Mattox), No. 07-51925, 2011 WL 3626762 (Bankr. E.D. Ky. Aug. 17, 2011).

For Further Reference

Bankruptcy and Debt Under the Servicemembers Civil Relief Act (2009)
Susan H. Seabury & Jack F. Williams
Handbook explaining protections under the Code and SCRA for debtors in the armed forces; includes sample forms and letters.

Bankruptcy and the Supreme Court (2009)
Kenneth N. Klee
An examination of Supreme Court bankruptcy decisions since 1898.

Bankruptcy Best Practices Discussion Forum
https://fjc.dcn/forums/bankruptcy-best-practices
Access available only to members of the federal judiciary.

Bankruptcy Evidence Manual (2023) (annual editions)
Judge Barry Russell
An examination of the Federal Rules of Evidence, with specific case examples of evidence issues in bankruptcy proceedings (available on Westlaw).

Bankruptcy Law Manual (5th ed. 2023–2024)
Judge Joan N. Feeney & Michael J. Stephan
An examination of the Bankruptcy Code, with specific case examples (available on Westlaw).

Bankruptcy Procedure Manual (2024) (annual editions)
Lawrence R. Ahern III & Nancy Frass MacLean
A two-volume examination of the Federal Rules of Bankruptcy Procedure, with specific case examples (available on Westlaw).

Chapter 13: Practice and Procedure (2023–2024 ed.) (published biannually)
Judge Paul W. Bonapfel & Adam M. Goodman
A two-volume examination of Chapter 13 issues, with specific case examples (available on Westlaw).

Collier Consumer Bankruptcy Practice Guide (2024)
Henry J. Sommer
A transaction-based guide to consumer bankruptcy.

Collier Family Law and the Bankruptcy Code (2023)
Judge Margaret Dee McGarity & Henry J. Sommer
A comprehensive, practice-oriented examination of the interface between bankruptcy and family law.

Collier on Bankruptcy (2024) (updated regularly)
Henry J. Sommer & Richard Levin eds.
A multivolume analysis of the Bankruptcy Code, with specific chapters discussing Code sections affecting Chapter 7 and Chapter 13 relief.

Consumer Bankruptcy: Fundamentals of Chapter 7 and Chapter 13 of the U.S. Bankruptcy Code (4th ed. 2017)
David Cox & Judge Elizabeth Gunn
An introduction to consumer bankruptcy issues, with a focus on the general practitioner (available at the American Bankruptcy Institute).

The Consumer Bankruptcy Creditor Distribution Study (2013)
Lois R. Lupica (Reporter & Principal Investigator), Maine Law Foundation Professor of Law, University of Maine School of Law

Consumer Bankruptcy Manual (2023–2024) (published annually)
Judge Michael B. Kaplan & Judge Stacey L. Meisel
An examination of consumer bankruptcy issues (available on Westlaw).

The Evolution of U.S. Bankruptcy Law: A Time Line (Federal Judicial Center 2019)
https://perma.cc/96A3-DMV9
Two-page pamphlet maps the evolution of bankruptcy law from inception through 2019; provides statistics on bankruptcy caseloads and historical snapshots of select sociopolitical events.

Graduating with Debt: Student Loans Under the Bankruptcy Code (2d ed. 2018)
Daniel A. Austin & Susan E. Hauser
An introduction to student loans and the difficulty of discharging them under the Bankruptcy Code (available at the American Bankruptcy Institute).

When Worlds Collide: Bankruptcy and Its Impact on Domestic Relations and Family Law (4th ed. 2010)
Michaela M. White
An introductory examination of the interface of bankruptcy and family-law issues; available to judges at no cost from the American Bankruptcy Institute.
General bankruptcy statistics are available at https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables.

Glossary

Bankruptcy practice is filled with specialized terms, some of which may be alien to people not regularly involved in this area of law. Section 101 of the Bankruptcy Code defines many terms, but the following terms used in consumer bankruptcies may be useful to review. These definitions are based on the glossary of the Administrative Office of the U.S. Courts, https://www.uscourts.gov/glossary.

abuse. Under § 707(b), abuse of the provisions of Chapter 7 is cause for dismissal of the case or conversion to Chapter 11 or Chapter 13.

adversary proceeding. A lawsuit arising in or related to a bankruptcy case that is commenced by filing a complaint with the court. A nonexclusive list of adversary proceedings is set forth in Federal Rule of Bankruptcy Procedure 7001.

automatic stay. An injunction that automatically stops lawsuits, foreclosures, garnishments, and all collection activity against the debtor the moment a bankruptcy petition is filed.

bankruptcy estate. All legal or equitable property interests of the debtor at the time of the bankruptcy filing. The estate includes all property in which the debtor has an interest, even if it is held by another person.

claim. A creditor's assertion of a right to payment from the debtor or to the debtor's property.

confirmation. The bankruptcy judge's approval of a reorganization plan filed by the debtor in Chapter 13.

contested matters. Matters other than objections to claims that are disputed but are not within the definition of an adversary proceeding contained in Rule 7001. Basically, this refers to motion practice.

credit counseling. Generally refers to two events in individual bankruptcy cases: (1) the "individual or group briefing" from a nonprofit budget- and credit-counseling agency that individual debtors must attend before filing under any chapter of the Bankruptcy Code; and (2) the "instructional course in personal financial management" in Chapters 7 and 13 that an individual debtor must complete before a discharge is entered. Both requirements provide exceptions for certain categories of debtors and for exigent circumstances, or for if the U.S. trustee or bankruptcy administrator determines that there are not enough approved credit-counseling agencies available for the necessary counseling.

creditor. One to whom the debtor owes money or who claims to be owed money or property by the debtor.

current monthly income. The average monthly income received by the debtor over the six calendar months before commencement of the bankruptcy case, including regular contributions to household expenses from nondebtors and income from the debtor's spouse if the petition is a joint petition, but not including Social Security income and certain other payments made because the debtor is the victim of certain crimes. 11 U.S.C. § 101(10A).

debtor. A person seeking bankruptcy relief in a case under Chapter 7 or Chapter 13 of Title 11.

discharge. A release of a debtor from personal liability for certain debts known as dischargeable debts, which prevents the creditors owed those debts from taking any action against the debtor to collect the debts. The discharge also prohibits creditors from communicating with the debtor about the debt, including telephone calls, letters, and personal contact.

dischargeable debt. A debt for which the Bankruptcy Code allows the debtor's personal liability to be eliminated.

equity. The value of a debtor's interest in property that remains after liens and other creditors' interests are considered. (Example: If a house valued at $100,000 is subject to an $80,000 mortgage, there is $20,000 of equity.)

executory contract or lease. This generally includes contracts or leases under which both parties to the agreement have duties remaining to be performed. If a contract or lease is executory, a debtor may assume it or reject it, subject to conditions set forth in 11 U.S.C. § 365.

exemptions or exempt property. Certain property owned by an individual debtor that the Bankruptcy Code or applicable state law permits the debtor to keep from unsecured creditors. For example, in some states the debtor may be able to exempt all or a portion of the equity in the debtor's primary residence (homestead exemption), or some or all "tools of the trade" used by the debtor to make a living (e.g., auto tools for an auto mechanic or dental instruments for a dentist). The availability and amount of property the debtor may exempt depends on the state the debtor lives in.

joint administration. A court-approved mechanism under which two or more cases can be administered together. Assuming no conflicts of interest, these separate businesses or individuals can do things like pool resources and hire the same professionals.

joint petition. A bankruptcy petition that the Code or law permits to be filed by two individuals, typically spouses.

lien. The right to take and hold or sell the property of a debtor as security or payment for a debt or duty.

liquidation. A sale of a debtor's property, often by a bankruptcy trustee, with the proceeds to be used for the benefit of creditors.

means test. Section 707(b)(2) of the Bankruptcy Code applies a "means test" to determine whether an individual debtor's Chapter 7 filing is presumed to be an abuse of the Bankruptcy Code, requiring dismissal or conversion of the case (generally to Chapter 13). Abuse is presumed if the debtor's aggregate current monthly income (see glossary definition) over five years, net of certain statutorily allowed expenses, is more than (1) $17,150 or (2) 25% of the debtor's nonpriority unsecured debt, as long as that amount is at least $10,275 (these amounts are subject to periodic adjustment for inflation, with the most recent adjustment on April 1, 2025). The debtor may rebut a presumption of abuse only by a showing of special circumstances that justify additional expenses or adjustments of current monthly income.

meeting of creditors. The meeting held under 11 U.S.C. § 341 soon after a bankruptcy petition is filed, with the debtor required to attend.

no-asset case. A Chapter 7 case where there are no assets available to satisfy any portion of the creditors' unsecured claims.

nondischargeable debts. A debt that cannot be eliminated in bankruptcy. Examples include debts for alimony or child support, certain taxes, debts for most government-funded or guaranteed educational loans or benefit overpayments, debts arising from death or personal injury caused by driving while intoxicated or under the influence of drugs, and debts for restitution or a criminal fine included in a sentence on the debtor's conviction of a crime. Some debts, such as debts for money or property obtained by false pretenses and for fraud or defalcation while acting in a fiduciary capacity, may be declared nondischargeable only if a creditor timely files and prevails in a nondischargeability action.

petition. The Official Form 101 that the debtor must use to commence a bankruptcy case. It is executed under penalty of perjury.

petition preparer. A business that prepares bankruptcy petitions but is not authorized to practice law. *See* 11 U.S.C. § 110.

prebankruptcy planning. The arrangement (or rearrangement) of a debtor's property to allow the debtor to take maximum advantage of exemptions. Prebankruptcy planning typically includes converting nonexempt assets into exempt assets.

priority and priority claims. The Bankruptcy Code's statutory ranking of unsecured claims that determines the order in which unsecured claims will be paid if there is not enough money to pay all unsecured claims in full. For example, under the Bankruptcy Code's priority scheme, money owed to the case trustee or for pre-petition alimony and/or child support must be paid in full before any general unsecured debt (i.e., trade debt or credit card debt) is paid. *See* 11 U.S.C. § 507.

proof of claim. A written statement and verifying documentation filed by a creditor that describes the reason the debtor owes the creditor money. There is an Official Form 410 for this purpose. *See* 11 U.S.C. § 501.

property of the bankruptcy estate. All legal or equitable interests of the debtor in property as of the commencement of the case. *See* 11 U.S.C. § 541.

reaffirmation. An agreement by a Chapter 7 debtor to continue paying a dischargeable debt (such as an auto loan) after completion of the bankruptcy, usually for the purpose of keeping collateral (such as a car) that would otherwise be subject to repossession. *See* 11 U.S.C. § 524(c). There is an Official Form 427 cover sheet for reaffirmation agreements, and Director's Forms B2400A and B2400AB.

schedules and statements of financial affairs. Detailed lists filed by the debtor along with (or shortly after filing) the petition showing the debtor's assets, liabilities, and other financial information. The debtor must use Official Forms 106 and 107, also executed under penalty of perjury.

secured creditor. A creditor holding a claim against the debtor, who has the right to take and hold or sell certain property of the debtor in satisfaction of all or a portion of the claim.

statement of intention. A declaration made by a Chapter 7 debtor about plans for dealing with consumer debts that are secured by property of the estate. The debtor must use Official Form 108.

trustee. The representative of the bankruptcy estate who exercises statutory powers, principally for the benefit of the unsecured creditors, under the general supervision of the court and the direct supervision of the U.S. trustee or bankruptcy administrator. The trustee is a private individual or corporation appointed in all Chapter 7, 12, and 13 cases and some Chapter 11 cases. The trustee's responsibilities include reviewing the debtor's petition and schedules and bringing actions against creditors or the debtor to recover property of the bankruptcy estate. In Chapter 7, the trustee liquidates property of the estate and makes distributions to creditors. Trustees in Chapters 12 and 13 have similar duties to a Chapter 7 trustee, plus the additional responsibilities of overseeing the debtor's plan, receiving payments from debtors, and disbursing plan payments to creditors.

undersecured or underwater claim. A claim or debt for which the creditor's collateral is worth less than the total claim.

United States (U.S.) trustee. An officer of the Justice Department responsible for supervising the administration of bankruptcy cases, estates, and trustees; monitoring plans and disclosure statements; monitoring creditors' committees; monitoring fee applications; and performing other statutory duties. In a few districts, the role of the U.S. trustee is fulfilled by a bankruptcy administrator.

unsecured claim. A claim or debt for which a creditor holds no special assurance of payment, such as a mortgage or lien; a debt for which credit was extended based solely on the creditor's assessment of the debtor's future ability to pay.

wholly unsecured claim. A claim that has security, but the collateral has no actual value, rendering the claim unsecured.

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About the Author

Honorable William Houston Brown (retired) served as a U.S. bankruptcy judge for the Western District of Tennessee from 1987 to 2006. By designation, he also sat in the Middle District of Tennessee, Southern District of Florida, Eastern District of Michigan, and Western District of Kentucky. In addition, Judge Brown served a four-year term on the Bankruptcy Appellate Panel for the Sixth Circuit from 1999 through 2002.

Judge Brown received his law degree from the University of Tennessee College of Law, where he was Order of the Coif. A member of the American Bankruptcy Institute, as well as having served on its board and executive committee, Judge Brown is a Fellow in the American College of Bankruptcy. Judge Brown is the author or coauthor of several texts, including the *Bankruptcy Exemption Manual*, *2005 Bankruptcy Reform Legislation* with Analysis (1st & 2d eds.), the *Bankruptcy and Domestic Relations Manual*, and *The Law of Debtors and Creditors*, as well as bankruptcy-form books, all published by Thomson Reuters. He is also a principal contributing editor for *Norton Bankruptcy Law and Practice* (3d ed. Thomson Reuters), and editor/adviser for the Academy for Consumer Bankruptcy Education. For more than fifteen years, he presented at the Federal Judicial Center's National Workshops for U.S. Bankruptcy Judges and continues to prepare quarterly consumer-bankruptcy case updates (*Consumer Case-Law Update for Bankruptcy Judges*) for the Center. In 2011 Judge Brown received the Excellence in Education award from the National Conference of Bankruptcy Judges, and in 2012 he received the Judicial Excellence Award from the American Bankruptcy Institute and Thomson Reuters.

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