THE NACTT ACADEMY
FOR CONSUMER BANKRUPTCY EDUCATION
ConsiderChapter13.org

NACTT 50th Annual Seminar

Salt Lake City, UT

Written Materials for Attorneys Who Represent Trustees

AGENDA

Thursday July 2, 2015

1:30 - 2:30 **Defending Appeals.**

Moderator: Leo G. Spanos, Staff Attorney for Martha Bronitsky, Chapter 13 Standing Trustee for the Northern District of California (Hayward)

Jill D. Olsen, The Olsen Law Firm, LLC/Chapter 7 Panel Trustee (Kansas City, MO)

Vanessa Guerrero, Staff Attorney for Mary Viegelahn, Chapter 13 Standing Trustee (San Antonio, TX)

3:00 – 4:00 **Representing the Trustee in Litigation:** A Discussion of Attorney Responsibilities Such as Witness Preparation, Document Production Requests, Subpoenas, and Reviewing "Preservation of Estate" Arguments.

Moderator: Tami Gadd-Willardson, Staff Attorney for Kevin R. Anderson, Chapter 13 Standing Trustee for the District of Utah (Salt Lake City)

Honorable Michael B. Kaplan, United States Bankruptcy Judge for the District of New Jersey (Trenton)

Henry E. Hildebrand, III, Chapter 13 Standing Trustee for the Middle District of Tennessee (Nashville)

4:05 – 5:05 **Practice Pointers and Potential Pitfalls:** Maximizing Staff Attorney Effectiveness in the Courtroom.

Moderator: Mary Frances Fallaw, Staff Attorney for D. Sims Crawford, Chapter 13 Standing Trustee for the Northern District of Alabama, Southern Division (Birmingham)

Honorable R. Kimball Mosier, United States Bankruptcy Judge for the District of Utah (Salt Lake City)

Honorable John P. Gustafson, United States Bankruptcy Judge for the Northern District of Ohio (Toledo)

INDEX OF MATERIALS BY PANEL

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Speaker Biographies

Leo G. Spanos graduated from Hastings College of the Law in San Francisco in May 2008 and is a member of the California State Bar. Mr. Spanos has been Staff Attorney to Martha G. Bronitsky, the Chapter 13 Trustee in the Oakland Division of the Northern District of California, since 2009. Mr. Spanos conducts Section 341 Meeting of Creditors on a monthly basis, reviews motions to modify plans, reviews motions to approve sale of real property, works closely with the audit and claims departments, and is responsible for prosecuting appeals and adversary proceedings. Mr. Spanos has a five-year-old son (Sebastien) and a two-year-old daughter (Olivia) and has been happily married for over nine years. In his free time, Mr. Spanos enjoys cooking, traveling, wine tasting, sports, and spending time with his family. Mr. Spanos studied at the University of Bordeaux during his junior year of college, is fluent in French and has a working knowledge of Spanish.

Jill D. Olsen is a solo-practitioner at The Olsen Law Firm, LLC, in Kansas City, Missouri, practicing primarily in the areas of bankruptcy, collections, foreclosure and commercial litigation, representing both creditors and debtors. She is also a Chapter 7 panel trustee for the United States Bankruptcy Court for the Western District of Missouri. Ms. Olsen is admitted in both the federal and state bars of Missouri and Kansas. Ms. Olsen completed her undergraduate studies at Weber State University with a B.A. in English in 1990, and law school at the University of Missouri Kansas City, graduating with honors in 2000. Prior to law school, Ms. Olsen spent 11 years at the Internal Revenue Service as an analyst. After graduating from law school, Ms. Olsen worked as a law clerk to the Honorable Edwin H. Smith at the Missouri Court of Appeals – Western District. Ms. Olsen was a member of the Bankruptcy Bench-Bar Committee for the District of Kansas and the Ad-Hoc Advisory Committee for the U. S. Bankruptcy Court, Western District of Missouri. She is also a member of the following bar associations: The Kansas City Metropolitan Bar Association, the Association of Women Lawyers, the Kansas City Bankruptcy Bar Association, the Topeka Area Bankruptcy Counsel, the American Bankruptcy Institute, the National Association of Chapter 13 Trustees, the National Association of Bankruptcy Trustees, International Women's Insolvency and Restructuring Confederation, and is chairperson for the Kansas City Women's Bankruptcy Association.

Vanessa DeLeon Guerrero has experience representing Debtors, Creditors and the Standing Chapter 13 Trustee for the Western District of Texas in all stages of litigation and bankruptcy proceedings, including discovery, motions practice, and trial. Since joining the Mary K. Viegelahn, Office of the Chapter 13 Trustee, as a staff attorney in 2011, Vanessa has also represented the Trustee in many appeals. She has successfully argued before the Fifth Circuit; and was co-counsel in a matter before the United States Supreme Court. In addition to her duties as a staff attorney, Vanessa is the Comptroller. She received a B.A. in Political Science from the University of Texas at San Antonio in 1995. She received a J.D. from the University of Houston Law Center in 2003. She is admitted to the bars of the Supreme Court of the United States, United States Court of Appeal for the Fifth Circuit, United States District Court for the Western District of Texas, and the United States District Court for the Southern District of Texas. She currently serves as Secretary for the San Antonio Bankruptcy Bar Association and as Secretary for the Texas Western District of Texas Bench Bar Association. She is an Associate of the LEK Inn of Court, served on the Board of Directors of the San Antonio Bankruptcy Bar Association from 2012-2014 and Membership Chair for the San Antonio Bankruptcy Bar Association from 2010-2011.

NACTT: 2015 ANNUAL SEMINAR, SALT LAKE CITY

A NUTS-AND-BOLTS GUIDE TO APPEALS

For Chapter 13 Staff Attorneys

Thursday, July 2, 2015: 1:30 p.m. – 2:30 p.m.

SPEAKERS

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APPELLATE OVERVIEW

Steps to Consider Before Appealing

- If you have an issue that you think you may appeal if you lose, *make sure your pleadings in* the *bankruptcy court raise all the relevant issues*. Better to be over inclusive than under inclusive. If you don't raise it, the reviewing court may not consider it. *In re Bankruptcy Petition Preparers*, 307 B.R. 134, 141 (9th Cir. BAP 2004). In addition, you want the bankruptcy court's analysis of all the issues in its written opinion so you can use it in your brief.

- *Hearings. Be conscious of the written record.* Everything you say is being recorded. The transcript will be a part of the record on appeal. Make sure you raise your issues and don't be afraid to ask for a continuance to brief new issues raised by the judge. Your comments will be scrutinized by your opponent and the reviewing court. If you create a bad impression in the transcript, it may be difficult to overcome.

- *Request a written opinion.* If it appears that the judge is going to rule against you, request a written opinion. This will be your starting point in attacking the decision in your brief. You will want to see the cases cited by the court and its analysis.

- *Consider a motion for reconsideration*, especially if you think the judge failed to consider your arguments. Even if you don't prevail, it may be beneficial to have an additional review of the issues to put things in perspective. If, however, the ruling was made after several hearings and pleadings and counter-pleadings, this may be a waste of time and you risk annoying the judge if you don't have anything new to say.

- *Consider the facts and the issue.* Do you have good facts to get a good decision on the particular issue? Would it be wise to wait for a different set of facts? Consider *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010). The facts were perfect for a ruling against the mechanical approach to Form B22C ("means test"). Is the issue worth appealing, i.e, is this a discrete issue that will only affect your client or are there larger ramifications?

- *How much time will it take?* Do you have time to work on an appeal? An appeal is time consuming. Are the issues complex or relatively straight forward? Do you enjoy legal research and writing? Do you have the time to devote several hours to it? The appellate process is long and exhaustive, so be prepared!

Procedure

1. **Appellate Jurisdiction: 28 U.S.C. § 158**

2. **FRBP 8001-8020**[1]

   Rule 8001: Manner of Taking Appeal; Voluntary Dismissal; Certification to Court of Appeals
   Rule 8002: Time for Filing Notice of Appeal
   Rule 8003: Leave to Appeal
   Rule 8004: Service of Notice of Appeal
   Rule 8005: Stay Pending Appeal
   Rule 8006: Record and Issues on Appeal
   Rule 8007: Completion and Transmission of the Record; Docketing of the Appeal
   Rule 8008: Filing and Service
   Rule 8009: Briefs and Appendix: Filing and Service
   Rule 8010: Form of Briefs; Length
   Rule 8011: Motions
   Rule 8012: Oral Argument

[1] If your Circuit has a Bankruptcy Appellate Panel ("BAP"), you should also refer to your BAP's Local Rules.

Rule 8013: Disposition of Appeal; Weight Accorded Bankruptcy Judge's Findings of Fact
Rule 8014: Costs
Rule 8015: Motion for Rehearing
Rule 8016: Duties of Clerk of District Court and Bankruptcy Appellate Panel
Rule 8017: Stay of Judgment of District Court or Bankruptcy Appellate Panel
Rule 8018: Rules by Circuit Councils and District Courts; Procedure Where There is No Controlling Law
Rule 8019: Suspension of Rules in Part VIII
Rule 8020: Damages and Costs for Frivolous Appeal

You should at least skim through all the rules before getting started. Some are more arcane than others. Here are some important ones to be aware of:

- **Rule 8001(b)** governs appeals by leave. This applies to appeals from interlocutory orders. The party must file a timely notice of appeal accompanied by a motion for leave to appeal as contemplated under Rule 8003.

  - *Practice tip*: If you are not sure if the appeal is interlocutory or final, file a motion for leave to appeal.

- **Rule 8001(e)** governs elections to have appeal heard by District Court instead of Bankruptcy Appellate Panel.

- **Rule 8001(f)** governs Certification for Direct Appeal to Court of Appeals. *You still need to file a timely appeal.*

- **Rule 8002(a)** governs the deadline for filing an appeal. *There is a strict 14 day deadline from the date of the entry of the order or decree.*

- **Rule 8002(c)** governs extension of time to file appeal. *You must file a request for extension within the 14 day limit* with the *limited exception* that a motion made within 21 days of the 14 day deadline may be granted upon a showing of *excusable neglect.*

- **Rule 8003(a)** governs motions for leave to appeal.

- **Rule 8005** governs motions for stay pending appeal. *Motion must ordinarily be filed first in the bankruptcy court.*

- **Rule 8006 governs the record and issues on appeal.**

  - Within 14 days of notice of appeal, you must file and serve "*designation of items to be included on the record on appeal*" and "*statement of the issues to be presented.*"

  - The record on appeal shall include the designated items, the notice of appeal, and the judgment or order being appealed.

  - If the designation includes a transcript, the party shall "immediately after filing the designation, deliver to the reporter and file with the clerk a written request for transcript. . ."

- **Rule 8007** governs completion and transmission of the record and docketing of the appeal. If you receive a notice saying that the record is not complete, you need to take appropriate steps to certify the record. *If you have questions, you can call the Clerk of the Bankruptcy Court.*

- **Rules 8009 & 8010** govern the mechanics of the brief and appendix.

3. **Vocabulary**

   - **Appellant** is the party appealing the order (the party that lost).

- **Appellee** is the party responding to the appeal (the party that won).

- **Interlocutory Order** is an order that relates to some intermediate matter in the case; any order other than a final order. (Black's Law Dictionary, Seventh Edition)

- **Final Order** is an order that is dispositive of the entire case. (Black's Law Dictionary, Seventh Edition).

  - An order denying confirmation of a chapter 13 plan may not be a final order. The party seeking to appeal may be required to allow the plan to be confirmed first and then a file an appeal of the confirmation order. This issue is on appeal to the United States Supreme Court. *Bullard v. Hyde Park Savings Bank (In re Bullard)*, 752 F.3rd 483 (1st Cir. 2014).

  - Debtors have standing to appeal confirmation of amended plan when the plan was amended to overcome denial of confirmation of original plan. *In re Giesbrecht*, 429 B.R. 682 (BAP 9th Cir. 2010)

  - "A disposition is final if it contains 'a complete act of adjudication,' that is, a full adjudication of the issues at bar, and clearly evidences the judge's intention that it be the court's final act in the matter." *In re Slimick*, 928 F.2d 304, 307, (9th Cir. 1990).

  - BAP (Bankruptcy Appellate Panel): A group of bankruptcy court judges appointed to hear appeals governed by the Circuit Court in which the appeal rises. Currently, only the First, Sixth, Eighth, Ninth, and Tenth Circuits have created a BAP.

District Court or BAP

- In California, an appeal from a bankruptcy court may be heard by the District Court or the Ninth Circuit Bankruptcy Appellate Panel ("BAP"). 28 U.S.C. § 158(a), (b)(1).

- The default rule, however, is that appeals are heard by the BAP. 28 U.S.C. § 158 (c)(1). If the appellant wants district court review, this must be elected by separate writing. FRBP 8001(e).

- The Ninth Circuit has not decided whether BAP decisions are binding but most bankruptcy courts and district courts consider them influential. *Bank of Maui v. Estate Analysis, Inc.*, 904 F.2d 470 (9th Cir. 1990) (BAP decisions not binding on district court; the occurring opinion is also insightful); *In re Arnold*, 471 B.R. 578 (Bankr. C.D.Cal 2012)(BAP decisions are not binding on bankruptcy court); *In re Mi Jung Hong*, 2014 WL 465562 (Bank. C.D.Cal, February 5, 2014) (BAP decisions are persuasive authority); *In re Barakat*, 173 B.R. 672 (Bankr. C.D. Cal. 1994)(BAP decision is *stare decisis* on bankruptcy court; district court decisions are not binding in the district unless the decision is issued en banc). Read *Barakat* for overview of precedential value of different courts.

- The BAP is composed of bankruptcy court judges. Because of their experience, BAP judges are more knowledgeable with bankruptcy matters than district court judges.

- *If you elect the district court, don't assume the judge has any knowledge of bankruptcy.* Unlike the BAP, a district court judge may not have any knowledge of bankruptcy. As such, your brief needs to be clear and concise. You cannot assume that the judge will understand the intricacies of Chapter 13. You need to explain how the Code and Rules work together and put your case in perspective so the judge can easily grasp the issues.

- If the appeal is in District Court, consider including an "Introduction" as a prelude to your argument. Here is an example:

- Chapter 13 Bankruptcy is intended to help individuals with regular income reorganize their debts. An individual filing for Chapter 13 relief must propose a plan indicating how their debts will be repaid. 11 U.S.C. §1321. The plan must have a commitment period – usually 60 months – and must be approved or "confirmed" by the Bankruptcy Court. The plan must meet numerous requirements to be confirmed. See 11 U.S.C. § § 1322 and 1325. The plan acts as a blueprint that details how claims are to be paid. In general, secured, priority, and administrative claims must be paid in full during the life of the plan unless the claimants agree to different treatment. 11 U.S.C. § § 1322(a)(2), 1325(a)(5). Depending on the individual's income, an individual may also be required to pay a certain percentage on the remaining claims, known as general unsecured claims. 11 U.S.C. §1325(b)(1)(B), (b)(2). General unsecured creditors must receive at least as much as they would receive in a Chapter 7 liquidation. 11 U.S.C. §1325(a)(4).

  A confirmed plan is binding on the debtor and each creditor "whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." 11 U.S.C. §1327(a). Creditors are bound by confirmed plans even if the plan contains language that is contrary to provisions of the Bankruptcy Code. See *United Student Aid Funds, Inc. v. Espinosa,* No. 559 U.S. 260 (2010). The Bankruptcy Court has a duty to ensure plans comply with "applicable provisions" of the Bankruptcy Code. *Id.* at 15-16.

  If an individual completes payments and performs other enumerated duties, the individual will receive a discharge of his debts. See 11 U.S.C. §1328. Secured debts that are not paid in full throughout the plan, will survive discharge. *Johnson v. Home State Bank*, 501 U.S. 78 (1991). This pertains primarily to mortgages or other long-term debt. For example, a debtor must continue making payments on her mortgage even after a discharge.

Appellate Brief

This brief is the central component of your appeal. It will be the most consuming part of the process.

- **Outline Must be Concise & Strong**: The outline of your argument is critical. The heading and subsections must be concise and strong. They need to tell the court why it should rule in your favor. When the judge writes his decision, you want him citing your headings and subsections in the opinion. The outline acts as blueprint for your argument. Once you have a good outline, writing the brief becomes easier because you know exactly what you want to argue in each section.

- **Analyze and Distinguish Cases**: You need to analyze and distinguish cases especially if your opponent is citing them or they are cited in the ruling you are appealing. Your opponent may cite cases for general propositions that support their argument but the cases may contain significantly different facts. You need to read entire cases not just the summaries and headnotes. You may need to educate the appellate court on the specific issue and let them know if certain cases were taken out of context.

- **Know the Difference Between Holdings & Dicta**: Know the difference between holdings and dicta and what is binding and what is persuasive.

  - A **holding** is a court's determination of a matter of law pivotal to its decision; a principal drawn from such a decision. (Black's Law Dictionary, Seventh Edition)

  - **Dicta** is a court's stating of a legal principal more broadly than is necessary to decide the case; a court's discussion of points or questions not raised by the record or its suggestion of rules not applicable in the case at bar. (*gratis dictum,* definitions (2) and (3), Black's Law Dictionary, Seventh Edition).

If your opponent cites a case for a holding that is actually dicta or asserts a certain case is binding when it is only persuasive, make sure you put this in the brief.

If there is binding authority on an issue, you must cite it even if it goes against you. If you don't, you will lose your credibility and maybe subject to sanctions. If you are not sure, you should cite it and try to distinguish it.

Shepardize or cross reference your cases. Make sure the cases you cite are still good law. If you rely on a case and the court discovers it was later overruled, your credibility is lost.

- **Respond to the Arguments Raised in the Opposing Brief**: This shows the reviewing court that you did your homework and considered the arguments raised by your opponent. It gives you credibility because you acknowledge the legitimacy of the opposing position. In addition, it helps you better explain your arguments because you understand both sides of the issue. This is particular helpful in preparation for oral argument.

IMPORTANT SOURCES

BAP JURISDICTIONS

FIRST CIRCUIT

http://www.bap1.uscourts.gov/

http://www.bap1.uscourts.gov/sites/bap1/files/BAP_Guide.pdf

SIXTH CIRCUIT

http://www.ca6.uscourts.gov/internet/bap/bap.htm

EIGHTH CIRCUIT

http://www.ca6.uscourts.gov/internet/bap/bap.htm

http://media.ca8.uscourts.gov/newbap/rules/iops1214.pdf

NINTH CIRCUIT

http://www.ca9.uscourts.gov/bap/

http://cdn.ca9.uscourts.gov/datastore/bap/2014/06/10/LitigantsManual_06_2014.pdf

TENTH CIRCUIT

http://www.bap10.uscourts.gov/

http://www.bap10.uscourts.gov/rules/2014LocalRulesAmendments.pdf

THE DIRECT APPEAL SAGA

Jill D. Olsen
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My Journey to the 10th Circuit (or, It's Great to be a Guinea Pig)
In re Jones, et al., Case No. 07-3256

In the Beginning, Was BAPCPA

It all started in 2005 when Congress enacted and the President signed the Bankruptcy Abuse Prevention and Consumer Protection Act. For what have come to be known as 910 car creditors, the changes to 11 U.S.C. §1325 were significant and, unfortunately,(or fortunately depending upon your point of view) imprecise. After the signing of BAPCPA on April 15, 2005, but before the enactment on October 17, 2005, the bankruptcy bar in the District of Kansas held multiple lunch-time CLE's to discuss the effects of the new law and possible interpretations of its many, varied provisions. I remember clearly sitting in one of these sessions happily enjoying my sub sandwich, when one of the bankruptcy judges indicated that he thought that the correct interpretation of the new law for 910 car creditors meant that they were unsecured and, thus, entitled to no interest. As I choked on my sub, I thought, "Say what?" The judge said that he had seen a commentary by Collier to this effect and that he agreed with it. Needless to say, I began to read commentaries from multiple esteemed sources, such as Colliers, Brown, Resnick and others. All of a sudden, I realized that this was a minefield for my car clients and set about to advise them accordingly. I had no idea what I was getting into.

The Case That Made The Bankruptcy World Go "Huh?"

On December 22, 2005, I had my first chance to litigate a 910 car issue with the case of Shane and Lori Wampler, 05-27659,[1] and the comedy of errors began. My client was Wells Fargo. The debtors' Chapter 13 plan provided that the 2001 Pontiac Aztek on which Wells Fargo had a lien and which the debtors had purchased 683 days before filing was to be paid in full, with 0% interest. The challenge was on. I filed an objection to confirmation on Jan. 23, 2006, and the first hearing was held on February 7, 2006. The judge decided that this issue needed more discussion and set the matter for a pre-trial conference on March 9. Time for more surprises. At the pre-trial conference, the judge listened to each party outline their thoughts on the issues and then very summarily issued an oral ruling denying my objection to confirmation. To say that I was surprised by this unorthodox and unexpected turn of events was an understatement. To add to the problem, the Chapter 13 trustee submitted a confirmation order to the judge, which was entered on March 14.

[1] For any of you familiar with 910 car loans, as the plethora of cases were decided across the county, this case quickly became an anomaly, referenced with confusion and/or credulity in most CLE materials, as the only other cases to agree with the judge's reasoning were *In re Carver* and *In re Green*, both issued by Judge Walker in the Middle District of Georgia. Those cases were not appealed.

So What Now?

So, I had an appealable order issued by the judge, but no written opinion. Since my time was running, I asked the judge to provide a written opinion and filed my appeal to the 10th Circuit BAP on March 16, Case No. 06-026. At this point, I started trying to determine the best course of action for my client. I knew that I had multiple cases in Kansas with this exact same issue and that I had pending objections to confirmation in those cases.[2] I also knew that I wasn't the only creditor's attorney in this position. It was in the best interests of my clients (as well as the debtors) to have a determinative opinion as soon as possible. My problem was that the judge had already stated on the record that he did not consider a BAP or District opinion to be precedential, but rather "the law of the case," meaning that he would only apply an opinion by the BAP or District in the particular case in which it was issued. Given his position, I was going to have to file appeals in every single case, which simply wasn't practical, efficient or cost-effective. I needed a decision that he would be forced to follow.

Navigating New Waters

I was aware of the new direct appeal provisions of 28 U.S.C. §158(d)(2)(A), but when I called the BAP clerk's office, they indicated that no one had, to date, attempted to utilize the new provision, so they had no procedures or rules in place. Time to wing it. On May 10, I filed my Certification to Court of Appeals by a Party. My bases were the fact that this was a brand new statute with no case law, the multiple pending cases, specifically the fact that the debtors in most of these cases could be harmed if a decision was not made timely, as they may not be able to complete within 36 or 60 months, and the issue with the judge's refusal to follow BAP decisions. I sometimes wondered if this last part wasn't the deciding factor in my favor with the BAP, but I'll never know.

While waiting for a ruling, I discovered that none of the BAP timelines are stayed because of a direct certification request. So, in addition to everything else, I kept having to request extensions of time to file my brief. I also became concerned that I still didn't have a written opinion from the bankruptcy judge and I didn't want that to negatively impact my appeal. All I had was the transcript from the pre-trial conference, which contained no findings of fact or conclusions of law, but only a statement by the judge that my objection was denied and that my client was not entitled to interest. So, on June 2, I filed a Motion to Stay the BAP Proceedings and for Temporary Remand to allow a written opinion to be entered. To my consternation, on June 14, the BAP entered an Order denying my motion to

[2] In what became common practice in the District of Kansas, the parties entered into "Conditional Confirmation Orders" providing that the 910 car claim would initially be paid at 0% interest, but that the confirmation order would be amended, if necessary, consistent with an opinion by the 10th Circuit. I personally had at least 20 of these orders entered by the time I appealed to the 10th Circuit.

stay/remand. I thought I was in trouble. But, my concern was short-lived, as that same day the BAP entered an Order granting my Request for Certification. Yea! Right?

Onward and Upward

Now, I just had to convince the 10th Circuit to hear the case. Once again, I called the 10th Circuit Clerk's office to ask them about the procedure for a direct appeal. Just like the BAP clerks, they stated that they didn't have any rules or procedures in place and that no one before me had tried for a direct appeal. Great! With the eternal optimism of the naïve, I filed my Petition for Certification with the 10th Circuit on June 24, 2006, alleging the same bases as I had with the BAP. Then, I waited.

On June 29, the bankruptcy judge finally issued his Memorandum and Opinion. Frankly, I didn't know whether I was happy or not over this, but better late than never. At least now I had concrete findings of fact and conclusions of law to attack in my brief.

The Vagaries of Appellate Procedure

Interestingly, while waiting, I received a notice from the BAP that my brief was due. Apparently, the fact that the BAP had granted my Request for Certification to the 10th Circuit didn't stay any of my BAP deadlines. I could envision myself completely briefing this case at the BAP and then doing it all again at the 10th. I didn't feel this was an effective use of time or money. So, I called the clerk's office to ask why the case wasn't automatically stayed, and they stated that they still didn't have any procedures or rules on this issue yet and that I should request a stay. So, on July 14, I filed a motion to stay all BAP activity pending a determination by the 10th Circuit. To my great relief, this motion was granted July 25.

We Have Arrived

On August 7, 2006, the 10th Circuit granted my petition. I had done it! So, I diligently set about preparing my brief, gathering all of the case law in my favor and compiling it into a literary masterpiece. Okay, that may be overstating it, but I thought it was well-done for my first-ever appellate brief. Besides, every other court to hear this issue on appeal had ruled in my favor. How could I lose?

The Unexpected Turn Of Events

As stated earlier, I had addressed this same issue in multiple other cases and thought that I was covered by having conditional confirmation orders entered

in those cases. What I didn't expect was for this case to implode. After having been told repeatedly by the debtors' attorney that he believed in this issue and was eager to litigate, the debtors filed a motion to amend their plan on August 30, 2006, stating that they were going to surrender the vehicle to Wells Fargo. I was floored! This could moot the appeal! To make matters worse, the motion had an objection deadline of September 16, but before I could file an objection to the surrender, the judge (yes, him again) entered an order on September 7 granting the motion. Given his jumping the gun without regard to procedure, I knew a motion to reconsider was a waste of time. So, I temporarily admitted defeat, and the 10th Circuit appeal was dismissed as moot on September 7, 2006.

Round Two – Older And Wiser

With renewed determination, I now scoured through my other pending cases on this issue to see where they were at procedurally. I found four cases: *Prince*, 06-20679, filed on May 19, 2006; *Kinsey*, 06-20921, filed on June 28, 2006; *Thompson*, 06-21083, filed on July 25, 2006; and *Walters*, 06-21113, filed on July 27, 2006. In all four of these cases, I had filed objections to confirmation in July and August, while *Wampler* was pending, but no hearings had been held and no orders had been entered. Five days after the dismissal of *Wampler*, the court held hearings on my objections in *Kinsey* and *Walters*. Once again, the judge denied my objection from the bench and stated that the plan was confirmed. But, I had learned my lesson. I requested that the trustee not submit a confirmation order and that the judge enter a written opinion of findings of fact and conclusions of law. I was not playing this game again. Further, I intended to appeal both of these cases; that way, if one was mooted, the other might survive until an opinion by the 10th Circuit.

The More, The Merrier

In *Prince* and *Thompson*, the hearings on my objections were held on November 7, 2006. Since the judge had yet to issue an opinion in *Kinsey* and *Walters*, I decided that I would add these two cases to my appeal. More cases equals better odds for survival. The hearing was the same. Same denial by the judge; same request by me. But, as was starting to become a procedural pattern of frustration, the trustee submitted the confirmation orders anyway and the judge signed them on November 13. I immediately called the clerk's office asking for an emergency conference call. After a somewhat terse conversation between myself, the judge and the trustee, they agreed that the orders should not have been entered, and they were vacated on November 17. The judge also agreed to include these two cases in his written opinion, when he finally wrote it.

A Decision At Last

Finally, on May 9, 2007, the judge entered his Memorandum Opinion and Order in all four cases. Given that it wasn't that different from the *Wampler* decision, I'm still not sure what took so long. In my mind, all he needed to do was change the names and dates and re-issue. But, that's why he's the judge. I was just happy that I had a written opinion to appeal and that it appeared that these cases were in a better procedural posture for appeal than *Wampler* had been. To cover all my bases, I filed Motions to Reconsider on May 18. Not surprisingly, my motions were denied on June 19, 2007. My notices of appeal to the BAP were filed the next day. Time to do it all again, times four.

Why Not Five?

During all of this, I had another case pending, *Jones*, filed on December 13, 2006. My objection to confirmation had been filed on December 21, but no hearings had been held, as the debtor kept amending his plan. Finally, a hearing was held on May 22, 2007. Same result as before and the judge referenced his May 9 decision in my other four cases as the basis for denial of my objection. As before, I requested a written opinion in this case and that the trustee not submit a confirmation order until the opinion was entered. The judge declined. I guess since he had already issued a written decision in the other cases, he didn't see the need to do it again in this one, despite my request. The trustee submitted a confirmation order and the judge signed it on May 24. Okay fine. My notice of appeal to the BAP was filed on June 1.

Here We Go Again

So, now I had five cases at the BAP. I was excited and confident that this time I would survive to a final decision from the 10th Circuit. But, first I had to get there. I had been successful before, but time had passed. The law wasn't quite so new and maybe the judges would be less inclined to certify or accept direct appeals. Still, I had to try.

So, I had five separate cases. Appealing them all separately would have been ridiculously burdensome, not to mention redundant, so I had to find some way to get them consolidated. I knew from my first experience that I needed to extend deadlines, file a Certification to the 10th Circuit, and request a stay and I knew how to do it. But, the rules provided no guidance on how to consolidate these five cases into one. Once more, I threw myself on the mercy of the BAP clerks. After a little discussion and research, we determined that the correct approach would be to "companion" the cases. I hadn't heard that word in a civil procedure context before, but I was willing to file whatever they told me to. So, on July 11,

2007, I filed my motion to companion the five cases and the BAP granted it on July 16. No hesitation there. Good sign. A copy of the Motion is attached as Exhibit A.

On July 12 & 13, I filed my Motions to Extend Time to File Briefs in the various cases. Three days later the Motion to Companion was granted, and two days later, on July 18, I filed my Certification to the 10th Circuit in the companioned cases, which had been designated, *In re Jones*, BAP Case No. 07-071. A copy of this Certification is attached as Exhibit B. My Certification was essentially a re-statement of my request in *Wampler* except that I now used the mootness of *Wampler*, the increased passage of time, and the increase in the number of pending cases to make my case for exigency. I hoped it would be enough. It was, at least for the BAP. On August 6, the BAP issued its Order Granting my Certification. One down, one to go. On August 16, I filed my Petition for Permission to Appeal to the 10th Circuit and then crossed my fingers. A copy of the Petition is attached as Exhibit C. On September 5, 2007, the 10th Circuit granted my Petition. I had arrived. Again.

I Will Survive (or, at least one of my cases will)

Not long after, on October 9, 2007, the *Thompson* case was converted to a Chapter 7. Uh, oh. There went 1/5 of my appeal for mootness. What if the others did the same? Were all of my efforts going to be in vain again? I tried not to panic and plowed onward.

The 10th Circuit appeal was captioned, *In re Jones, et al*, Case No. 07-3256. I brought out and brushed off the brief I had prepared and never submitted for *Wampler*. Not surprisingly, I completely re-wrote my legal argument, as the number of cases in my favor from other courts was even greater than before. To say that my side of the argument was in the majority was an understatement. I felt confident of a win, even though the debtors had an amicus brief from NACBA filed in support of their position. Briefing was completed by December 21, 2007, and we waited for the 10th Circuit to set a date for oral arguments. No other cases had mootness issues, so things were looking good.

I Have To Argue Where?

In January 2008, the 10th Circuit sent notice that oral argument was to be held on April 10, 2008. But, it wasn't going to be held at the 10th Circuit courthouse in Denver, CO. No, it was going to be held at Washburn Law School, in Topeka, KS and law students were going to be allowed to observe the arguments. First, no offense to my co-presenter Mr. Hamilton, but Topeka isn't that exciting. I go there all the time. I was looking forward to a trip to Denver. Maybe get in a little spring skiing after the argument. So much for that plan. Second, I have to

present my argument in front of an audience of a law school students? Talk about performance anxiety. Still, no time to panic, need to prepare.

It Helps To Have An Ally (and Unlimited Cell Phone Minutes)

As I referenced earlier, at the time *Wampler* was decided, there were only two other opinions with the same holding, both issued by Judge Walker from the Middle District of Georgia. Neither of those cases was appealed by the creditor. So, at the time *Wampler* was granted certification in August 2006, all eyes were on me to carry the banner on this issue. But, in September 2006, I got some help.

The creditor's attorney in those Georgia cases had contacted me when I first appealed *Wampler* and had been my sounding board throughout the process, suffering with me through the highs and lows. While I was being granted direct certification in the 10th Circuit, this attorney had gone the same route in the 11th Circuit, in the case of *In re Dean,* 07-14163, just not as quickly. From the time *Dean* was initially decided in the bankruptcy court on September 12, 2006, to its oral argument before the 11th Circuit on April 11, 2008, I had *Wampler* dismissed, *Jones et al,* filed, and was back at the 10th Circuit. Rumor has it the East coast moves at a faster pace than the mid-West, but obviously not for appeals.

In the weeks leading up to our respective oral arguments, this attorney and I spent hours each day on the phone, refining and critiquing arguments, playing devil's advocate and generally making sure we were both prepared. This was invaluable. There is no "overpreparing" for oral argument. One key issue that this attorney brought up during our phone conversations was how to deal with Collier's treatise, which essentially posited a position contrary to ours and was the basis for the position espoused by both of our judges. None of the multitude of court cases in our favor had felt the need to address the issue and I confess that I hadn't given it much thought. But, we researched, we discussed, we analyzed and we prepared. Thank goodness.

Oral Arguments

On the morning of April 10, 2008, I traveled to Topeka to argue my case before Judges Henry, Tacha and Lucero and a crowd of law school students. Court was being held in the school's moot court room. What was interesting was that there was a camera pointed at the attorneys and a big screen TV behind the judges facing the audience. They wanted the law school students to be able to see the attorney's faces during the arguments, not just the back of their heads. Considerate idea for the law school students, but it's very disconcerting to argue while you're staring at your own face on TV.

My case was the last one on the docket, so I was able to observe the demeanor and preparedness of the judges before I had to argue. Some people may tell you that some judges don't prepare or read the briefs before oral arguments. They couldn't be more wrong. What I did find fascinating was that it seemed to be a "cold" panel. They were obviously prepared, but weren't inclined to ask a lot of questions, content to let the attorney's make their arguments. I also noted that none of the attorneys had requested time for rebuttal and the judges hadn't offered rebuttal. Then it was my turn.

I stepped to the podium, asked for permission to speak, and began, "Your Honors, my name is Jill Olsen, and I am here today on behalf of Wells Fargo and WFS Financial on the issue of whether or not 910 car claims . . ." "Counselor," interrupted Chief Judge Henry, "I don't do a lot of bankruptcy, so when I get a bankruptcy case on appeal, I always turn to Colliers for help with the law on the issue. Colliers says you're wrong. What do you say?" At that point I wanted to kiss my friendly Georgia attorney and buy her the best dinner at the best restaurant in Atlanta. I answered the question, and the next, and the next, and before I knew it, time was done. I definitely had a "hot" panel, but I was happy with how the argument went and felt confident with my performance. The debtors' attorney had his turn to argue, and we were done. The judges thanked both of us and told us that we did an excellent job. I like to think we did, and it was very kind of them to say so.

Epilogue

As soon as I left the courtroom, I called the other attorney on my cell phone. I knew she was waiting on pins and needles, since her argument was the next day. I went over every detail I could remember from the argument and wished her good luck and told her I knew she would do great. Then the pressure of the months of hard work faded and a sense of relief and accomplishment washed over me. On July 7, 2008, the 10th Circuit issued its Order in my favor. I had survived and won.

SAMPLE PLEADINGS FOR DIRECT APPEALS

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
DISTRICT OF KANSAS (KANSAS CITY)

In re:	) Case No. 06-22074
	)
Edward Lee Jones	) Chapter 13
	)
Debtor(s)	)

NOTICE OF APPEAL

Wachovia Dealer Services, the Movant, appeals under 28 U.S.C. § 158 from the order of the Honorable Robert D. Berger denying Wachovia's objection to confirmation entered in this bankruptcy proceeding on the 24th day of May, 2007.

The names of all parties to the order appealed from and the names, addresses and telephone numbers of their respective attorneys are as follows:

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Dated: June 1, 2007

/s/ Jill D. Olsen
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ATTORNEYS FOR WACHOVIA DEALER SERVICES f/k/a WFS FINANCIAL, INC.

If a Bankruptcy Appellate Panel Service is authorized to hear this appeal, each party has a right to have the appeal heard by the district court. The appellant may exercise this right only by filing a separate statement of election at the time of the filing of this notice of appeal. Any other party may elect, within the time provided in 28 U.S.C. §158(c), to have the appeal heard by the district court.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served electronically to those parties who have entered an appearance in the court's Electronic Court Filing (ECF) System and conventionally, via first-class mail, postage prepaid, to those parties who have requested notice but are not participating in the ECF System, on the date entered on the court's docket.

/s/ Jill D. Olsen
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U.S. TRUSTEE
Office of the United States Trustee

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

In re EDWARD LEE JONES, Debtor	BAP No. KS-07-071 Bankr. No. 06-22074 Chapter 13
WACHOVIA DEALER SERVICES Appellant, v. EDWARD LEE JONES and WILLIAM GRIFFIN, Trustee, Appellees.	

APPELLANT'S MOTION TO COMPANION CASES WITH SUGGESTIONS IN SUPPORT

COMES NOW Appellant, Wachovia Dealer Services, pursuant to 10th Cir. BAP L.R. 8011-1, and respectfully requests this Court grant Appellant's Motion to Companion five cases currently on appeal. In support hereof, Appellant respectfully states as follows:

1. Counsel for Appellant has filed and presently has pending the following five (5) appeals at the 10th Circuit BAP on behalf of various clients:

   a. Wachovia Dealer Services v. Edward Lee Jones, et al., BAP No. KS-07-071;
   b. Wells Fargo Financial, Inc. v. Benjamin Dwight Walters, et al., BAP No. KS-07-072;

c. Wells Fargo Financial v. Valerie Elaine Kinsey, et al., BAP No. KS-07-078;
d. Wells Fargo Financial v. Jeffery Thompson, et al., BAP No. KS-07-079;
e. Wells Fargo Bank, N.A. v. Faron L. Prince, et al., BAP No. KS-07-080.

2. The Statement of Interested Parties, the Appellant's Designation of Record and the Statement of Issues have been filed in all of these cases.

3. All of these cases involve *identical* issues of fact and law, and are based upon an appeal of the same decision issued by Judge Berger in the United States Bankruptcy Court for the District of Kansas on May 9, 2007.

4. The time to file Appellant's briefs in these cases has not yet passed.

5. The Appellants in these cases are all represented by the same counsel.

6. It is in the interest of judicial economy, conservation of resources and convenience to companion these cases so that the briefing and any oral arguments may be consolidated. Such a consolidation of cases will not prejudice any of the parties to this action.

7. Counsel for Appellants has contacted the other parties to this action to see if they have any objections and all of the Appellees in all of the cases have indicated that they have no objection to the granting of this Motion.

WHEREFORE, Appellant Wachovia Dealer Services respectfully requests that this Court grant its Motion to Companion the five aforementioned cases and for such other and further relief as the court deems just and proper under the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was sent via first-class mail, postage prepaid, this 11th of July, 2007, to:

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT

In re EDWARD LEE JONES, Debtor --- WACHOVIA DEALER SERVICES Appellant, v. EDWARD LEE JONES and WILLIAM GRIFFIN, Trustee, Appellees.	BAP No. KS-07-071 Bankr. No. 06-22074 Chapter 13 **CERTIFICATION TO COURT OF APPEALS BY A PARTY**

In re BENJAMIN DWIGHT WALTERS and JAMIE MICHAELE WALTERS, formerly known as Jamie Michaele Pounds, formerly known as Jamie Michaele Morsett, Debtors. --- WELLS FARGO FINANCIAL, INC., Appellant, v. BENJAMIN DWIGHT WALTERS, JAMIE MICHAELE WALTERS and WILLIAM	BAP No. KS 07-072 Bankr. No. 06-21113 Chapter 13

GRIFFIN, Trustee,

Appellees.

In re VALERIE ELAINE KINSEY,
Formerly known as Valerie Elaine Kelley,

Debtor

BAP No. KS-07-078

Bankr. No. 06-20921
Chapter 13

WELLS FARGO FINANCIAL

Appellant,

v.

VALERIE ELAINE KINSEY and
WILLIAM H. GRIFFIN, Trustee,

Appellees.

In re JEFFERY THOMPSON,

Debtor

BAP No. KS-07-079

Bankr. No. 06-21083
Chapter 13

WELLS FARGO FINANCIAL

Appellant,

v.

JEFFERY THOMPSON and
WILLIAM H. GRIFFIN, Trustee,

Appellees.

In re FARON L. PRINCE and PARRISH K. PRINCE, Debtors.	BAP No. KS 07-080 Bankr. No. 06-20679 Chapter 13
WELLS FARGO BANK, N.A., Appellant, v. FARON L.PRINCE, PARRISH K PRINCE and WILLIAM GRIFFIN, Trustee, Appellees.	

CERTIFICATION TO COURT OF APPEALS BY A PARTY

Notices of appeal having been filed in the above-styled matters on June 1, 2007, and June 20, 2007, Wachovia Dealer Services and Wells Fargo and its subsidiaries and affiliated entities, who are the appellants in the companioned cases, hereby certify to the court under 28 U.S.C. § 158(d)(2)(A) that a circumstance specified in 28 U.S.C. § 158(d)(2) exists as stated below.

Leave to appeal in this matter is not required under 28 U.S.C. § 158(a).

This certification arises in appeals from final judgments, orders or decrees of the United States Bankruptcy Court for the District of Kansas entered on May 9, 2007, and June 19, 2007.

The judgments, orders or decrees involve a question of law as to which there is no controlling decision of the court of appeals for this circuit or of the Supreme Court of the United States, or involves a matter of public importance.

An immediate appeal from the judgment, order or decree may materially advance the progress of the case or proceeding in which the appeal is taken.

Pursuant to Rule 8001(f)(3)(C), this request for certification is proper for the following reasons:

1. **Facts**:

(a) In Case No. 06-22074, BAP No. KS-07-071, the appellee Edward Lee Jones ("Jones") obtained a purchase money loan from appellant Wachovia Dealer Services ("Wachovia") on December 20, 2005, to finance the purchase of a 2003 Ford Expedition, which vehicle was for the personal use of Jones. Jones filed his Chapter 13 bankruptcy on December 13, 2006. The elapsed time between the date of the purchase and the filing of the bankruptcy was 358 days. In his Chapter 13 plan, filed on December 13, 2006, Jones admitted that the vehicle loan was a "910 car loan" as defined in 11 U.S.C. §1325(a); however, he proposed to pay the full contract balance with zero interest. On December 21, 2006, Wachovia filed an Objection to Confirmation on the basis that it was entitled to payment in full of the contract balance at either contract interest of 17.49% per annum or the trustee's rate of interest pursuant to the Supreme

Court's decision in In re Till. On April 19, 2007, Jones amended the Chapter 13 plan, but did not change the proposed treatment of Wachovia's secured claim. Wachovia filed its Objection to Confirmation of the Amended Plan on April 26, 2007. The matter was heard at a hearing on May 22, 2007 by the Honorable Robert D. Berger, during which the judge overruled Wachovia's Objection to Confirmation and held that Wachovia was only entitled to be paid its full contract balance with zero interest. This appeal followed.

(b) In Case No. 06-21113, BAP KS-07-072, the appellees Benjamin D. Walters and Jamie Michaele Walters (collectively referred to as "Walters") obtained a purchase money loan from appellant Wells Fargo Financial, Inc. ("Wells Fargo") on August 1, 2005, to finance the purchase of a 1999 Chevrolet Blazer, which vehicle was for the personal use of Walters. Walters filed their Chapter 13 bankruptcy on July 27, 2006. The elapsed time between the date of the purchase and the filing of the bankruptcy was 360 days. In their Chapter 13 plan, filed on July 27, 2006, Walters admitted that the vehicle loan was a "910 car loan" as defined in 11 U.S.C. §1325(a); however, they proposed to pay the full contract balance with zero interest. On August 23, 2006, Wells Fargo filed an Objection to Confirmation on the basis that it was entitled to payment in full of the contract balance at either contract interest of 19.99% per annum or the trustee's rate of interest pursuant to the Supreme Court's decision in In re Till. The matter was heard at a hearing on September 12, 2006 by the Honorable Robert D. Berger, during which the judge orally overruled Wells Fargo's Objection to Confirmation and held that Wells Fargo was only entitled to be paid

its full contract balance with zero interest. On May 9, 2007, the Court entered its written Memorandum Opinion and Order overruling Wells Fargo's Objection to Confirmation. On May 18, 2007, Wells Fargo filed its Motion for Reconsideration, which Motion was denied by the Court in an Order dated May 25, 2007. This appeal followed.

(c) In Case No. 06-20921, BAP KS-07-078, the appellee Valerie Elaine Kinsey ("Kinsey") obtained a purchase money loan from appellant Wells Fargo Financial ("Wells Fargo") on November 3, 2005, to finance the purchase of a 2005 Mitsubishi Lancer, which vehicle was for the personal use of Kinsey. Kinsey filed her Chapter 13 bankruptcy on June 28, 2006. The elapsed time between the date of the purchase and the filing of the bankruptcy was 237 days. In her Chapter 13 plan, filed on June 28, 2006, Kinsey admitted that the vehicle loan was a "910 car loan" as defined in 11 U.S.C. §1325(a); however, she proposed to pay the full contract balance with zero interest. On July 21, 2006, Wells Fargo filed an Objection to Confirmation on the basis that it was entitled to payment in full of the contract balance at either contract interest of 19.65% per annum or the trustee's rate of interest pursuant to the Supreme Court's decision in In re Till. The matter was heard at a hearing on September 12, 2006 by the Honorable Robert D. Berger, during which the judge orally overruled Wells Fargo's Objection to Confirmation and held that Wells Fargo was only entitled to be paid its full contract balance with zero interest. On May 9, 2007, the Court entered its written Memorandum Opinion and Order overruling Wells Fargo's Objection to Confirmation. On May 18, 2007, Wells Fargo filed its Motion for

Reconsideration, which was denied by the Court in an Order dated June 19, 2007. This appeal followed.

(d) In Case No. 06-21083, BAP KS-07-079, the appellee Jeffery Thompson ("Thompson") obtained a purchase money loan from appellant Wells Fargo Financial ("Wells Fargo") on January 30, 2004, to finance the purchase of a 2002 Suzuki XL-7, which vehicle was for the personal use of Thompson. Thompson filed his Chapter 13 bankruptcy on July 25, 2006. The elapsed time between the date of the purchase and the filing of the bankruptcy was 907 days. In his Chapter 13 plan, filed on August 9, 2006, Thompson admitted that the vehicle loan was a "910 car loan" as defined in 11 U.S.C. §1325(a); however, he proposed to pay the full contract balance with zero interest. On August 21, 2006, Wells Fargo filed an Objection to Confirmation on the basis that it was entitled to payment in full of the contract balance at either contract interest of 18.74% per annum or the trustee's rate of interest pursuant to the Supreme Court's decision in In re Till. The matter was heard at a hearing on November 7, 2006 by the Honorable Robert D. Berger, during which the judge orally overruled Wells Fargo's Objection to Confirmation and held that Wells Fargo was only entitled to be paid its full contract balance with zero interest. On May 9, 2007, the Court entered its written Memorandum Opinion and Order overruling Wells Fargo's Objection to Confirmation. On May 18, 2007, Wells Fargo filed its Motion for Reconsideration, which was denied by the Court in an Order dated June 19, 2007. This appeal followed.

(e) In Case No. 06-20679, BAP KS-07-080, the appellees Faron L. Prince and Parrish K. Prince (collectively referred to as "Prince") obtained a purchase money loan from appellant Wells Fargo Bank, N.A. ("Wells Fargo") on September 20, 2004, to finance the purchase of a 2004 GMC Sierra, which vehicle was for the personal use of Prince. Prince filed their Chapter 13 bankruptcy on May 19, 2006. The elapsed time between the date of the purchase and the filing of the bankruptcy was 606 days. In their Chapter 13 plan and their two amended Chapter 13 plans filed on May 19, 2006, June 20, 2006, and October 5, 2006 respectively, Prince admitted that the vehicle loan was a "910 car loan" as defined in 11 U.S.C. §1325(a); however, they proposed to pay the full contract balance with zero interest. On July 14, 2006, and again on October 7, 2006, Wells Fargo filed Objections to Confirmation on the basis that it was entitled to payment in full of the contract balance at either contract interest of 7.84% per annum or the trustee's rate of interest pursuant to the Supreme Court's decision in In re Till. The matter was heard at a hearing on November 7, 2006 by the Honorable Robert D. Berger, during which the judge orally overruled Wells Fargo's Objection to Confirmation and held that Wells Fargo was only entitled to be paid its full contract balance with zero interest. On May 9, 2007, the Court entered its written Memorandum Opinion and Order overruling Wells Fargo's Objection to Confirmation. On May 18, 2007, Wells Fargo filed its Motion for Reconsideration, which was denied by the Court in an Order dated June 19, 2007. This appeal followed.

(f) Facts relevant to all of the above-referenced cases: In his Memorandum Opinion and Order dated May 9, 2007, Judge Berger held that under the plain language of the "hanging paragraph" of 1325(a)(9), which states that §506 is not applicable to 910 car loans, such loans are allowed, but not secured. As such, they were not entitled to be paid any interest. This appeal followed.

2. **Questions**:[1] (a) Did the bankruptcy court err when it held that because §506 does not apply to 910 car loans and because the only means by which creditors are entitled to an allowed secured claim is determined under §506, those creditors cannot hold allowed secured claims and are not entitled to treatment under §1325(a)? and (b) Did the bankruptcy court err when it held that because 910 car loans are allowed, but not secured, they are not entitled to be paid any postpetition interest?

3. **The Relief Sought**: The Appellants seek an Order from this Court finding and determining that a 910-car loan is a secured loan and is entitled to be paid its full contract balance plus interest at either the contract rate or the Chapter 13 trustee's rate. The appellant also seeks this Court's Order that the confirmed plans in Case Nos. 06-22074, 06-21113, 06-20921, 06-20679, and 06-21083 should be amended to reflect payment to the respective Appellants of the full contract balance plus interest and that Appellants must be so paid before a discharge may be entered.

4. **Reasons why appeal should be allowed and is authorized by statute or rule, including why a circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists:** This appeal should be allowed because it presents a matter of first impression for both the court of appeals for the 10th Circuit and for the United States Supreme Court. This case is based upon new provisions of the Bankruptcy Code made by the Bankruptcy

[1] All of the companioned cases have the identical issues to be presented on appeal.

Abuse Prevention and Consumer Protection Act of 2005, for which there is no controlling case law in any court of appeals for any circuit. Further, various individual state bankruptcy courts have issued conflicting decisions on this issue. Specifically, twenty-three (23) courts have found that 910 car loans are secured claims and are entitled to be paid the full contract balance at the *Till* rate of interest (see *In re Brooks*, 344 B.R. 417, 422 (Bankr. E.D. N.C. 2006); *In re Brown*, 339 B.R. 818, 821 (Bankr. S.D. Ga. 2006); *In re Brown*, 346 B.R. 246, 254 (Bankr. M.D. Ga. 2006); *In re Bufford*, 343 B.R. 827 (Bankr. N.D. Tex. 2006); *In re DeSardi*, 340 B.R. 790 (Bankr. S.D. Tex. 2006); *In re Fleming*, 339 B.R. 716, 722 (Bankr. E.D. Mo. 2006); *In re Henry*, 353 B.R. 261, 263 (Bankr. D. Or. 2006); *In re Johnson*, 337 B.R. 269 (Bankr. M.D.N.C. 2006); *In re Lowder*, 2006 WL 1794737 (Bankr. D. Kan. June 28, 2006); *In re McCormick*, __ B.R. __, 2006 WL 3499226, *2 (Bankr. E.D. Wis. Dec. 5, 2006); *In re Montgomery*, 341 B.R. 843, 845 (Bankr. E.D. Ken. 2006); *In re Montoya*, 341 B.R. 41 (D. Utah 2006); *In re Murray*, 346 B.R. 237, 243 (Bankr. M.D. Ga. 2006); *In re Phillips*, __ B.R. __, 2007 WL 706834, *11 (Bankr. E.D. Va. March 8, 2007); *In re Posey*, __ B.R. __, 2006 WL 2711845, *1 (Bankr. N.D. Ind. Sept. 21, 2006); *In re Robinson*, 338 B.R. 70, 73 (Bankr. W.D. Mo. 2006); *In re Ross*, 355 B.R. 53, 56 (Bankr. W.D. Tenn. 2006); *In re Rowley*, 348 B.R. 479, 481 (S.D. Ill. 2006); *In re Scruggs*, 342 B.R. 571, 574 (Bankr. E.D. Ark. 2006); *In re Shaw*, 341 B.R. 543, 546 (Bankr. M.D.N.C. 2006); *In re Sparks*, 346 B.R. 767 (Bankr. S.D. Ohio 2006); *In re Soards*, 344 B.R. 829, 831 (Bankr. D. Ky. 2006); *In re Trejos*, 352 B.R. 249, 266 (Bankr. D. Nev. 2006); *In re White*, 352 B.R. 633, 645 (Bankr. D. La. 2006); *In re Wright*, 338 B.R. 917, 919 (Bankr. M.D. Ala. 2006). Two (2) courts have held that 910 car loans are something other than secured claims and are

entitled to be paid the full contract balance with zero interest. (see *In re Carver*, 338 B.R. 521 (Bkrtcy. S.D. Ga. 2006; *In re Wampler*, 345 B.R. 730 (Bankr. D. Kan. 2006; *In re Kinsey, et al.*, __ B.R. __, 2007 WL 1366385 (Bankr. D. Kan. May 9, 2007). Thus, there exists a question of law requiring resolution of these conflicting decisions.

Further, as the above-cited decisions indicate, there presently exists a split of authority within the District of Kansas, as well as within the 10th Circuit. Specifically, Judge Berger sitting in the United States Bankruptcy Court for the District of Kansas at Kansas City has held in the instant cases and in *In re Wampler*, supra, that 910 car loans are not entitled to be paid any interest. In direct contradiction, Judge Janice Miller-Karlin sitting in the United States Bankruptcy Court for the District of Kansas at Topeka has specifically disagreed with Judge Berger's decision and has held in the case of *In re Lowder*, supra, that 910 car loans are entitled to be paid the full contract balance plus interest at the trustee's rate (in accordance with the U.S. Supreme Court decision of *In re Till*). Likewise, Judge Judith A. Boulden from the District of Utah has held in the case of *In re Montoya*, supra, that 910 car loans are secured claims that must be paid in full with interest. These conflicting decisions have resulted in a great deal of uncertainty within the District of Kansas on the state of the law on this issue.

Moreover, an appeal of a previous decision of Judge Berger on this same, exact issue was taken on behalf of CitiFinancial Auto and Ford Motor Credit in the consolidated cases of *In re Hernandez-Simpson*, Bankruptcy Case No. 06-21384. In that case, the creditors filed their appeals of Judge Berger's decision denying their objections to confirmation on 910 car loans to the United States District Court for the District of Kansas, Case No. 06-2527-JAR. On May 17, 2007, the Honorable Julie A. Robinson

issued her Memorandum Order and Opinion overruling Judge Berger's decision and holding that 910 car claims are secured claims that must be paid in full, with interest. Thereafter, the instant Appellants, Wells Fargo and Wachovia, filed Motions for Reconsideration in the instant cases based upon Judge Robinson's decision. In denying the Motions for Reconsideration, Judge Berger held that "[t]he Court is not bound by *Hernandez-Simpson* in this case . . . neither the doctrine of law of the case nor issue or claim preclusion make it binding in *Kinsey* and the cases consolidated therewith . . . ." Just as Judge Berger is not required and has indicated he will not follow a decision by the District Court in any other cases on identical issues, he is not bound by a decision of this honorable Bankruptcy Appellate Panel and almost certainly will not apply any decision of this Court to any cases other than the instant cases. Such action will result in continued appeals and continued uncertainty unless a decision is issued by a higher court with binding, precedential authority, such as the 10th Circuit Court of Appeals.

Finally, the instant cases have already been confirmed, subject to the appeal of the court's decision. Likewise, numerous other plans with identical provisions have been filed in the District of Kansas and many of these plans have either been confirmed, subject to the final appellate ruling in this case or confirmation is being held pending a final determination from an appellate court with controlling authority. Most of these debtors are making plan payments for thirty-six (36) months, after which, they will receive a discharge. Given the fact that an appeal through the BAP and then to the 10th Circuit could take as long as two (2) years to reach a final decision, there exists a possibility that these plans could be almost completed by the time a final decision is issued. If the final decision is ruled in favor of Appellants, all of these debtors would be

required to remain in their plans for whatever time is necessary to pay the additional amount due to Appellants. It is in the best interests of all of these debtors, as well as the various creditors who have objected, to have a final ruling by the 10th Circuit as early as possible, as such a decision will materially advance the progress of these cases.

5. **Copy of the Judgment, Order, or Decree Complained of and any Related Opinion or Memorandum**: Attached hereto is a copy of the Memorandum Opinion and Order dated May 9, 2007, and a copy of the Orders Denying Motion for Reconsideration dated May 25, 2007 and June 19, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was sent via first-class mail, postage prepaid, this 18th of July, 2007, to:

/s/ Jill D. Olsen
Attorney of Record

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UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

In re EDWARD LEE JONES, Debtor. --- WACHOVIA DEALER SERVICES, Appellant, v. EDWARD LEE JONES and WILLIAM GRIFFIN, Trustee, Appellees.	BAP No. KS-07-071 Bankr. No. 06-22074 Chapter 13 ORDER GRANTING REQUEST FOR CERTIFICATION August 6, 2007

In re BENJAMIN DWIGHT WALTERS and JAMIE MICHAELE WALTERS, formerly known as Jamie Michaele Pounds, formerly known as Jamie Michaele Morsett, Debtors. --- WELLS FARGO FINANCIAL, INC., Appellant,	BAP No. KS-07-072 Bankr. No. 06-21113 Chapter 13

v.

BENJAMIN DWIGHT WALTERS,
JAMIE MICHAELE WALTERS and
WILLIAM GRIFFIN, Trustee,

Appellees.

In re VALERIE ELAINE KINSEY,
formerly known as Valerie Elaine Kelley,

Debtor.

BAP No. KS-07-078

Bankr. No. 06-20921
Chapter 13

WELLS FARGO FINANCIAL,

Appellant,

v.

VALERIE ELAINE KINSEY and
WILLIAM GRIFFIN, Trustee,

Appellees.

In re JEFFERY THOMPSON,

BAP No. KS-07-079

Debtor.

Bankr. No. 06-21083
Chapter 13

WELLS FARGO FINANCIAL,

Appellant,

v.

JEFFERY THOMPSON and WILLIAM GRIFFIN, Trustee,

Appellees.

In re FARON L. PRINCE and PARRISH K. PRINCE,

Debtors.

BAP No. KS-07-080

Bankr. No. 06-20679
Chapter 13

WELLS FARGO BANK, N.A.,

Appellant,

v.

FARON L. PRINCE, PARRISH K. PRINCE and WILLIAM GRIFFIN, Trustee,

Appellees.

Before McFEELEY, BOHANON, and CORNISH, Bankruptcy Judges.

The matter before the Court is Appellants Wachovia Dealer Services and Wells Fargos' Certification to Court of Appeals by a Party, filed July 18, 2007 (the "Request for Certification"). No response to the Request for Certification has been filed. The Request for Certification arises from Appellant's timely notice of appeal, which has taken effect under Rule 8002, of the final orders by the bankruptcy court confirming the various Debtors-Appellees' Chapter 13 Plans over Appellants' objections. Fed. R. Bankr. P. 8002. In the Request for Certification, Appellants posit that:

> the bankruptcy court [erred] when it held that because § 506 does not apply to 910 car loans and because the only means by which creditors are entitled to an allowed secured claim is determined under § 506, those creditors cannot hold allowed secured claims and are not entitled to treatment under § 1325(a) [and that] because 910 car loans are allowed, but not secured, they are not entitled to be paid any postpetition interest[.]

Request for Certification at 9, ¶ 2.

Under 28 U.S.C. § 158(a)(1), this Court has jurisdiction over these appeals. See Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996). The parties have consented to this Court's jurisdiction by failing to elect to have the appeals heard by the United States District Court for the District of Kansas. 28 U.S.C. § 158(c)(1); Fed. R. Bankr. P. 8001.

However, the Tenth Circuit Court of Appeals shall have jurisdiction where it authorizes direct appeal, and where this Court, upon the timely request by a party to the order being appealed, permits certification. 28 U.S.C. § 158(d)(2)(A)-(E). This Court may permit certification where 1) the order being appealed involves a question of law for which there is no controlling decision, 2) resolution of conflicting decisions is required,

and 3) certification may materially advance the progress of the case. 28 U.S.C. § 158(d)(2)(A)(i)-(iii).

Here, the Request for Certification was timely filed within sixty (60) days of the entry of the bankruptcy court orders confirming the various Debtors' plans. See 28 U.S.C. § 158(d)(2)(E). Each of the Debtors filed their Chapter 13 petitions subsequent to when the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 made the new provisions of the bankruptcy code effective. As Appellants note in the Request for Certification, these appeals present a matter of first impression for the Court of Appeals and no controlling case law exists regarding these new provisions as they relate to Chapter 13 relief and confirmation of plans, and conflicting decisions on this point have been entered by various bankruptcy courts, even within the same district. Appellants state that absent certification, the Debtors' Chapter 13 plans may be substantially completed so as to moot any appeals filed in due course and as such, certification may materially advance these appeals.

Therefore, after careful consideration, it is HEREBY ORDERED that:

1. The Request for Certification is GRANTED.
2. Appellants are directed to file their petition requesting permission to appeal with the Tenth Circuit Court of Appeals within ten days from the date of this order. Fed. R. Bankr. P. 8001(f)(1) [Interim].

3. All deadlines previously set by the Clerk of this Court remain in effect. 28 U.S.C. § 158(d)(2)(D).

For the Panel:
Barbara A. Schermerhorn, Clerk of Court

By: Stephanie Freeman

Stephanie Freeman
Panel Attorney

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re EDWARD LEE JONES, Debtor WACHOVIA DEALER SERVICES Appellant, v. EDWARD LEE JONES and WILLIAM GRIFFIN, Trustee, Appellees.	BAP No. KS-07-071 Bankr. No. 06-22074 Chapter 13 **PETITION FOR PERMISSION TO APPEAL BY APPELLANTS**

In re BENJAMIN DWIGHT WALTERS and JAMIE MICHAELE WALTERS, formerly known as Jamie Michaele Pounds, formerly known as Jamie Michaele Morsett, Debtors. WELLS FARGO FINANCIAL, INC., Appellant, v. BENJAMIN DWIGHT WALTERS, JAMIE MICHAELE WALTERS and WILLIAM	BAP No. KS 07-072 Bankr. No. 06-21113 Chapter 13

GRIFFIN, Trustee,

Appellees.

In re VALERIE ELAINE KINSEY,
Formerly known as Valerie Elaine Kelley,

Debtor

BAP No. KS-07-078

Bankr. No. 06-20921
Chapter 13

WELLS FARGO FINANCIAL

Appellant,

v.

VALERIE ELAINE KINSEY and
WILLIAM H. GRIFFIN, Trustee,

Appellees.

In re JEFFERY THOMPSON,

Debtor

BAP No. KS-07-079

Bankr. No. 06-21083
Chapter 13

WELLS FARGO FINANCIAL

Appellant,

v.

JEFFERY THOMPSON and
WILLIAM H. GRIFFIN, Trustee,

Appellees.

In re FARON L. PRINCE and PARRISH K. PRINCE, Debtors. WELLS FARGO BANK, N.A., Appellant, v. FARON L.PRINCE, PARRISH K PRINCE and WILLIAM GRIFFIN, Trustee, Appellees.	BAP No. KS 07-080 Bankr. No. 06-20679 Chapter 13

PETITION FOR PERMISSION TO APPEAL
BY APPELLANTS WACHOVIA DEALER SERVICES AND WELLS FARGO

COMES NOW Appellants, Wachovia Dealer Services and Wells Fargo and its subsidiaries and affiliated entities, who are the appellants in the above-referenced companioned cases,[1] and respectfully file their Petition for Permission to Appeal

[1] Appellants originally filed five separate Notices of Appeal to the 10th Circuit BAP in each of these cases and paid the filing fee in each case. On July 16, 2007, the 10th Circuit BAP granted Appellants' Unopposed Motion to Companion (consolidate) these cases, as all of them deal with identical issues of fact and law and all are appeals from the same decision and/or order of the U.S. Bankruptcy Court for the District of Kansas. At the instruction of the BAP, Appellants filed one Certification to Court of Appeals by a Party, using the companioned case-caption. This Certification was granted, in the companioned cases, on August 6, 2007. Pursuant to discussions with and instruction from Doug Cressler at the 10th Circuit Court of Appeals, this Petition is being filed on behalf of all Appellants in all of these cases using the companioned case-caption authorized by the 10th Circuit BAP.

pursuant to 28 U.S.C. § 158(d)(2) and Fed. R. App. P. Rule 5. In support hereof, Appellants respectfully state as follows:

Facts Necessary to Understand the Questions Presented

(a) In Case No. 06-22074, BAP No. KS-07-071, the appellee Edward Lee Jones ("Jones") obtained a purchase money loan from appellant Wachovia Dealer Services ("Wachovia") on December 20, 2005, to finance the purchase of a 2003 Ford Expedition, which vehicle was for the personal use of Jones. Jones filed his Chapter 13 bankruptcy on December 13, 2006. The elapsed time between the date of the purchase and the filing of the bankruptcy was 358 days. In his Chapter 13 plan, filed on December 13, 2006, Jones admitted that the vehicle loan was a "910 car loan" as defined in 11 U.S.C. §1325(a); however, he proposed to pay the full contract balance with zero interest. On December 21, 2006, Wachovia filed an Objection to Confirmation on the basis that it was entitled to payment in full of the contract balance at either contract interest of 17.49% per annum or the trustee's rate of interest pursuant to the Supreme Court's decision in In re Till. On April 19, 2007, Jones amended the Chapter 13 plan, but did not change the proposed treatment of Wachovia's secured claim. Wachovia filed its Objection to Confirmation of the Amended Plan on April 26, 2007. The matter was heard at a hearing on May 22, 2007 by the Honorable Robert D. Berger, during which the judge overruled Wachovia's Objection to Confirmation and held that Wachovia was only entitled to be paid its full contract balance with zero interest. The Order Confirming Plan was entered by the Court on May 24, 2007. Appellant filed its Notice of Appeal on June 1, 2007.

(b) In Case No. 06-21113, BAP KS-07-072, the appellees Benjamin D. Walters and Jamie Michaele Walters (collectively referred to as "Walters") obtained a purchase money loan from appellant Wells Fargo Financial, Inc. ("Wells Fargo") on August 1, 2005, to finance the purchase of a 1999 Chevrolet Blazer, which vehicle was for the personal use of Walters. Walters filed their Chapter 13 bankruptcy on July 27, 2006. The elapsed time between the date of the purchase and the filing of the bankruptcy was 360 days. In their Chapter 13 plan, filed on July 27, 2006, Walters admitted that the vehicle loan was a "910 car loan" as defined in 11 U.S.C. §1325(a); however, they proposed to pay the full contract balance with zero interest. On August 23, 2006, Wells Fargo filed an Objection to Confirmation on the basis that it was entitled to payment in full of the contract balance at either contract interest of 19.99% per annum or the trustee's rate of interest pursuant to the Supreme Court's decision in In re Till. The matter was heard at a hearing on September 12, 2006 by the Honorable Robert D. Berger, during which the judge orally overruled Wells Fargo's Objection to Confirmation and held that Wells Fargo was only entitled to be paid its full contract balance with zero interest. On May 9, 2007, the Court entered its written Memorandum Opinion and Order overruling Wells Fargo's Objection to Confirmation. On May 18, 2007, Wells Fargo filed its Motion for Reconsideration, which Motion was denied by the Court in an Order dated May 25, 2007. On June 1, 2007, the Appellant filed its Notice of Appeal.

(c) In Case No. 06-20921, BAP KS-07-078, the appellee Valerie Elaine Kinsey ("Kinsey") obtained a purchase money loan from appellant Wells Fargo

Financial ("Wells Fargo") on November 3, 2005, to finance the purchase of a 2005 Mitsubishi Lancer, which vehicle was for the personal use of Kinsey. Kinsey filed her Chapter 13 bankruptcy on June 28, 2006. The elapsed time between the date of the purchase and the filing of the bankruptcy was 237 days. In her Chapter 13 plan, filed on June 28, 2006, Kinsey admitted that the vehicle loan was a "910 car loan" as defined in 11 U.S.C. §1325(a); however, she proposed to pay the full contract balance with zero interest. On July 21, 2006, Wells Fargo filed an Objection to Confirmation on the basis that it was entitled to payment in full of the contract balance at either contract interest of 19.65% per annum or the trustee's rate of interest pursuant to the Supreme Court's decision in In re Till. The matter was heard at a hearing on September 12, 2006 by the Honorable Robert D. Berger, during which the judge orally overruled Wells Fargo's Objection to Confirmation and held that Wells Fargo was only entitled to be paid its full contract balance with zero interest. On May 9, 2007, the Court entered its written Memorandum Opinion and Order overruling Wells Fargo's Objection to Confirmation. On May 18, 2007, Wells Fargo filed its Motion for Reconsideration, which was denied by the Court in an Order dated June 19, 2007. The Appellant filed its Notice of Appeal on June 20, 2007.

(d) In Case No. 06-21083, BAP KS-07-079, the appellee Jeffery Thompson ("Thompson") obtained a purchase money loan from appellant Wells Fargo Financial ("Wells Fargo") on January 30, 2004, to finance the purchase of a 2002 Suzuki XL-7, which vehicle was for the personal use of Thompson. Thompson filed his Chapter 13 bankruptcy on July 25, 2006. The elapsed time between the

date of the purchase and the filing of the bankruptcy was 907 days. In his Chapter 13 plan, filed on August 9, 2006, Thompson admitted that the vehicle loan was a "910 car loan" as defined in 11 U.S.C. §1325(a); however, he proposed to pay the full contract balance with zero interest. On August 21, 2006, Wells Fargo filed an Objection to Confirmation on the basis that it was entitled to payment in full of the contract balance at either contract interest of 18.74% per annum or the trustee's rate of interest pursuant to the Supreme Court's decision in In re Till. The matter was heard at a hearing on November 7, 2006 by the Honorable Robert D. Berger, during which the judge orally overruled Wells Fargo's Objection to Confirmation and held that Wells Fargo was only entitled to be paid its full contract balance with zero interest. On May 9, 2007, the Court entered its written Memorandum Opinion and Order overruling Wells Fargo's Objection to Confirmation. On May 18, 2007, Wells Fargo filed its Motion for Reconsideration, which was denied by the Court in an Order dated June 19, 2007. The Appellant filed its Notice of Appeal on June 20, 2007.

(e) In Case No. 06-20679, BAP KS-07-080, the appellees Faron L. Prince and Parrish K. Prince (collectively referred to as "Prince") obtained a purchase money loan from appellant Wells Fargo Bank, N.A. ("Wells Fargo") on September 20, 2004, to finance the purchase of a 2004 GMC Sierra, which vehicle was for the personal use of Prince. Prince filed their Chapter 13 bankruptcy on May 19, 2006. The elapsed time between the date of the purchase and the filing of the bankruptcy was 606 days. In their Chapter 13 plan and their two amended Chapter 13 plans filed on May 19, 2006, June 20, 2006, and October 5, 2006

respectively, Prince admitted that the vehicle loan was a "910 car loan" as defined in 11 U.S.C. §1325(a); however, they proposed to pay the full contract balance with zero interest. On July 14, 2006, and again on October 7, 2006, Wells Fargo filed Objections to Confirmation on the basis that it was entitled to payment in full of the contract balance at either contract interest of 7.84% per annum or the trustee's rate of interest pursuant to the Supreme Court's decision in In re Till. The matter was heard at a hearing on November 7, 2006 by the Honorable Robert D. Berger, during which the judge orally overruled Wells Fargo's Objection to Confirmation and held that Wells Fargo was only entitled to be paid its full contract balance with zero interest. On May 9, 2007, the Court entered its written Memorandum Opinion and Order overruling Wells Fargo's Objection to Confirmation. On May 18, 2007, Wells Fargo filed its Motion for Reconsideration, which was denied by the Court in an Order dated June 19, 2007. The Appellant filed its Notice of Appeal on June 20, 2007.

(f) Facts relevant to all of the above-referenced cases: In his Memorandum Opinion and Order dated May 9, 2007, Judge Berger held that under the plain language of the "hanging paragraph" of 1325(a)(9), which states that §506 is not applicable to 910 car loans, such loans are allowed, but not secured. As such, they were not entitled to be paid any interest. After the separate appeals were filed with the 10th Circuit BAP, Appellants filed a joint, unopposed Motion to Companion the five (5) cases on July 11, 2007. .On July 16, 2007, the Court granted the Motion to Companion these cases. On July 18, 2007, Appellants filed their Certification to Court of Appeals by a Party in the companioned cases. On August 6, 2007, the United States Bankruptcy Appellate Panel

for the Tenth Circuit issued its Order Granting Request for Certification and directed the Appellants to file their Petition requesting permission to appeal with the Tenth Circuit Court of Appeals within ten days from the date of the order.

Questions Presented[2]

A. Did the bankruptcy court err when it held that because §506 does not apply to 910 car loans and because the only means by which creditors are entitled to an allowed secured claim is determined under §506, those creditors cannot hold allowed secured claims and are not entitled to treatment under §1325(a)?

B. Did the bankruptcy court err when it held that because 910 car loans are allowed, but not secured, they are not entitled to be paid any postpetition interest?

Relief Sought

The Appellants seek an Order from this Court finding and determining that a 910-car loan is a secured loan and is entitled to be paid its full contract balance plus interest at either the contract rate or the Chapter 13 trustee's rate. The appellant also seeks this Court's Order that the confirmed plans in Case Nos. 06-22074, 06-21113, 06-20921, 06-20679, and 06-21083 should be amended to reflect payment to the respective Appellants of the full contract balance plus interest and that Appellants must be so paid before a discharge may be entered.

Reasons Why the Appeal Should be Allowed and is Authorized by Statute or Rule

These matters are appeals from final judgments, orders or decrees of the United States Bankruptcy Court for the District of Kansas entered on May 9, 2007, and May 24, 2007.

[2] All of the companioned cases have the identical issues to be presented on appeal.

These appeals should be allowed because they present a matter of first impression for both the court of appeals for the 10th Circuit and for the United States Supreme Court. These cases are based upon new provisions of the Bankruptcy Code made by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, for which there is no controlling case law in any court of appeals for any circuit. Further, counsel for Appellant has previously brought this same issue of law before this honorable Court in the case of Wells Fargo Financial v. Shane Wampler, et al., Case No. 06-3275, using the direct certification authorized by 28 U.S.C. §158(d)(2). In that case, this Court accepted the Petition from the BAP, recognizing the need for an immediate, controlling decision. Unfortunately, that case was mooted by the debtors/appellees surrender of the vehicle. Thus, the issue remains undecided and time is of the essence.

In this regard, various individual state bankruptcy courts have issued conflicting decisions on this issue. Specifically, twenty-three (23) courts have found that 910 car loans are secured claims and are entitled to be paid the full contract balance at the *Till* rate of interest (see *In re Brooks*, 344 B.R. 417, 422 (Bankr. E.D. N.C. 2006); *In re Brown*, 339 B.R. 818, 821 (Bankr. S.D. Ga. 2006); *In re Brown*, 346 B.R. 246, 254 (Bankr. M.D. Ga. 2006); *In re Bufford*, 343 B.R. 827 (Bankr. N.D. Tex. 2006); *In re DeSardi*, 340 B.R. 790 (Bankr. S.D. Tex. 2006); *In re Fleming*, 339 B.R. 716, 722 (Bankr. E.D. Mo. 2006); *In re Henry*, 353 B.R. 261, 263 (Bankr. D. Or. 2006); *In re Johnson*, 337 B.R. 269 (Bankr. M.D.N.C. 2006); *In re Lowder*, 2006 WL 1794737 (Bankr. D. Kan. June 28, 2006); *In re McCormick*, __ B.R. __, 2006 WL 3499226, *2 (Bankr. E.D. Wis. Dec. 5, 2006); *In re Montgomery*, 341 B.R. 843, 845 (Bankr. E.D. Ken. 2006); *In re Montoya*, 341 B.R. 41 (D. Utah 2006); *In re Murray*, 346 B.R. 237, 243

(Bankr. M.D. Ga. 2006); *In re Phillips*, __ B.R. __, 2007 WL 706834, *11 (Bankr. E.D. Va. March 8, 2007); *In re Posey*, __ B.R. __, 2006 WL 2711845, *1 (Bankr. N.D. Ind. Sept. 21, 2006); *In re Robinson*, 338 B.R. 70, 73 (Bankr. W.D. Mo. 2006); *In re Ross*, 355 B.R. 53, 56 (Bankr. W.D. Tenn. 2006); *In re Rowley*, 348 B.R. 479, 481 (S.D. Ill. 2006); *In re Scruggs*, 342 B.R. 571, 574 (Bankr. E.D. Ark. 2006); *In re Shaw*, 341 B.R. 543, 546 (Bankr. M.D.N.C. 2006); *In re Sparks*, 346 B.R. 767 (Bankr. S.D. Ohio 2006); *In re Soards*, 344 B.R. 829, 831 (Bankr. D. Ky. 2006); *In re Trejos*, 352 B.R. 249, 266 (Bankr. D. Nev. 2006); *In re White*, 352 B.R. 633, 645 (Bankr. D. La. 2006); *In re Wright*, 338 B.R. 917, 919 (Bankr. M.D. Ala. 2006). Two (2) courts have held that 910 car loans are something other than secured claims and are entitled to be paid the full contract balance with zero interest. (see *In re Carver*, 338 B.R. 521 (Bkrtcy. S.D. Ga. 2006; *In re Wampler*, 345 B.R. 730 (Bankr. D. Kan. 2006; *In re Kinsey, et al.*, __ B.R. __, 2007 WL 1366385 (Bankr. D. Kan. May 9, 2007). Thus, there exists a question of law requiring resolution of these conflicting decisions.

More specifically, as the above-cited decisions indicate, there presently exists a split of authority within the District of Kansas, as well as within the 10th Circuit. Specifically, Judge Berger sitting in the United States Bankruptcy Court for the District of Kansas at Kansas City has held in the instant cases and in *In re Wampler*, supra, that 910 car loans are not entitled to be paid any interest. In direct contradiction, Judge Janice Miller-Karlin sitting in the United States Bankruptcy Court for the District of Kansas at Topeka has specifically disagreed with Judge Berger's decision and has held in the case of *In re Lowder*, supra, that 910 car loans are entitled to be paid the full contract balance plus interest at the trustee's rate (in accordance with the U.S. Supreme Court decision of

In re Till). Likewise, Judge Judith A. Boulden from the District of Utah has held in the case of *In re Montoya*, supra, that 910 car loans are secured claims that must be paid in full with interest. These conflicting decisions have resulted in a great deal of uncertainty within the District of Kansas on the state of the law on this issue.

Moreover, an appeal of a previous decision of Judge Berger on this same, exact issue was taken on behalf of CitiFinancial Auto and Ford Motor Credit in the consolidated cases of *In re Hernandez-Simpson*, Bankruptcy Case No. 06-21384. In that case, the creditors filed their appeals of Judge Berger's decision denying their objections to confirmation on 910 car loans to the United States District Court for the District of Kansas, Case No. 06-2527-JAR. On May 17, 2007, the Honorable Julie A. Robinson issued her Memorandum Order and Opinion overruling Judge Berger's decision and holding that 910 car claims are secured claims that must be paid in full, with interest. Thereafter, the instant Appellants, Wells Fargo and Wachovia, filed Motions for Reconsideration in the instant cases based upon Judge Robinson's decision. In denying the Motions for Reconsideration, Judge Berger held that "[t]he Court is not bound by *Hernandez-Simpson* in this case . . . neither the doctrine of law of the case nor issue or claim preclusion make it binding in *Kinsey* and the cases consolidated therewith . . . ." Just as Judge Berger does not believe he is required and has indicated he will not follow a decision by the District Court in any other cases on identical issues, he may not deem himself bound by a decision of the Bankruptcy Appellate Panel and almost certainly will not apply any decision of that Court to any cases other than the instant cases. Such action will result in continued appeals and continued uncertainty unless a decision is issued by this honorable court, which has binding, precedential authority on the issues.

Finally, the instant cases have already been confirmed, subject to the appeal of the court's decision. Likewise, over one hundred other plans with identical provisions have been filed in the District of Kansas and many of these plans have either been confirmed, subject to the final appellate ruling in this case or confirmation is being held pending a final determination from an appellate court with controlling authority. Most of these debtors are making plan payments for thirty-six (36) months, after which, they will receive a discharge. Given the fact that an appeal through the BAP and then to the 10th Circuit could take as long as two (2) years to reach a final decision, there exists a possibility that these plans could be almost completed by the time a final decision is issued. If the final decision is ruled in favor of Appellants, all of these debtors would be required to remain in their plans for whatever time is necessary to pay the additional amount due to Appellants. It is in the best interests of all of these debtors, as well as the various creditors who have objected, to have a final ruling by the 10th Circuit as early as possible, as such a decision will materially advance the progress of these cases.

Copy of the Judgment, Order, or Decree Complained of and any Related Opinion or Memorandum

Attached hereto as Exhibit A is a copy of the Memorandum Opinion and Order dated May 9, 2007, and a copy of the Orders Denying Motion for Reconsideration dated May 25, 2007 and June 19, 2007, attached as Exhibits B and C, respectively. Finally, a copy of the Order Granting Request for Certification from the United States Bankruptcy Appellate Panel of the Tenth Circuit is attached hereto as Exhibit D.

Conclusion

WHEREFORE, for the above and foregoing reasons, Appellants Wachovia Dealer Services and Wells Fargo, and its subsidiaries and affiliated entities, respectfully

request this Court to issue an Order Granting them Permission to Appeal pursuant to 28, U.S.C. §158(d)(2).

Respectfully submitted,

s/ Jill D. Olsen
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was sent via first-class mail, postage prepaid, this 14th of August, 2007, to:

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s/ Jill D. Olsen
Attorney of Record

Certificate of Digital Submissions

The undersigned hereby certifies, in compliance with the Tenth Circuit's Order Regarding Electronic Submission of Selected Documents, that all required privacy redactions have been made to the above and foregoing document and that this document is an exact copy of the written document filed with the Court on August 15, 2007. The undersigned further states that this digital submission has been scanned for viruses with the most recent version of Trend Micro Office Scan, which was updated at 9:00 a.m. on August 15, 2007, and according to that program, this submission is free of viruses.

Dated this 15th day of August, 2007.

s/ Jill D. Olsen
Jill D. Olsen

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

WACHOVIA DEALER SERVICES; WELLS FARGO FINANCIAL, INC.; WELLS FARGO BANK, N.A., Petitioners, v. EDWARD LEE JONES; WILLIAM H. GRIFFIN, Trustee; BENJAMIN DWIGHT WALTERS; JAMIE MICHAELE WALTERS, formerly known as Jamie Michaele Pounds, formerly known as Jamie Michaele Morsett; VALERIE ELAINE KINSEY; JEFFERY THOMPSON; FARON L. PRINCE; PARRISH K. PRINCE, Respondents.	No. 07-603

ORDER

Filed September 4, 2007

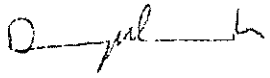
Before **TACHA**, Chief Judge, **BRISCOE**, and **HOLMES**, Circuit Judges.

This matter is before the court on a "Petition for Permission to Appeal by Appellants" filed by Wachovia Dealer Services and Wells Fargo subsidiaries pursuant to 28 U.S.C. § 158(d)(2). No objection to the petition was filed.

The petition for permission to appeal is granted. No filing fee is due as the required appellate filing fees have already been paid to the Clerk of the Bankruptcy Appellate Panel for the Tenth Circuit. The date this order is entered shall serve as date of the notice of appeal. *See* Fed. R. App. P. 5(d)(2).

The Clerk of the U.S. Court of Appeals for the Tenth Circuit shall open a new appeal forthwith. The parties will be notified how to proceed in separate directives issued in the new appeal.

Entered for the Court
ELISABETH SHUMAKER, Clerk of Court

by: 

Douglas E. Cressler
Chief Deputy Clerk

APPELLATE PRACTICE AND PROCEDURE – A BRIEF SUMMARY

by Vanessa DeLeon Guerrero
Comptroller & Senior Staff Attorney
Office of Mary K. Viegelahn, Chapter 13 Trustee
Western District of Texas – San Antonio Division

I.
INTRODUCTION

Part VIII of the Federal Rules of Bankruptcy Procedure [Rules 8001 – 8028] governs bankruptcy appeals to District Court or Bankruptcy Appellate Panel [BAP]. If the Rules of Bankruptcy Procedure do not address a question regarding appellate procedure review the rules of Federal Appellate Procedure. Also look to local rules of the court, whether it be the Bankruptcy Court, District Court or BAP, for procedure.

II.
STANDING

Standing, in the most general sense, is a doctrine regarding a party's rights to make a legal claim. Regarding bankruptcy appeals, the rules of standing differ. Many circuit courts of appeal have determined that to have "standing" to pursue an appeal of a bankruptcy court's order a party must be a "person aggrieved" by the court's order. *In re Fisher Island Investments, Inc.*, 778 F.3d 1172, 1196 (11th Cir. 2015); *In re DBSD North America, Inc.*, 634 F.3d 79, 89 (2nd Cir. 2011); *In re LTV Steel Co., Inc.*, 560 F.3d 449, 454 (6th Cir. 2009); In Matter of the Watch Ltd., 257 Fed. Appx. 748, 750 (5th Cir. 2007); *In re P.R.TC. Inc.*, 177 F.3d 774, 777 (9th Cir. 1999). *In re Yukon Energy Corp.*, 138 F.3d 1254, 1259 (8th Cir. 1998); *Travelers Ins. Co. v. H.K. Porter Co.*, 45 F.3d 737, 741 (3d Cir. 1995); *In re American Ready Mix, Inc.*, 14 F.3d 1497, 1500 (10th Cir.).

Courts have developed, to determine standing to appeal, a two prong inquiry for the "person aggrieved" doctrine: 1) is the appellant a party in interest? and 2) does the appellant possess a pecuniary interest? *Westwood Cmty. Two Ass'n, Inc. v. Barbee*, 293 F.3d 1332, 1334-35 (11th Cir. 2002) (discusses standards and cites to circuit decisions). Some circuits also require attendance and objection at the bankruptcy court proceedings as prerequisites to standing under

the "person aggrieved" test. *See In Matter of Watch*, at 750 (Cites to circuit decisions in the 4th, 7th, 9th and 10th Circuits).

III.
APPEALABLE ORDERS

Orders that can be appealed are final orders or judgments and in certain circumstances interlocutory orders.

Statutory Provisions

28 U.S.C. §158(a)(1)-(3)

28 U.S.C. §158(b)(1)

28 U.S.C. §158(c)(1)

28 U.S.C. §158(d)

28 U.S.C. §1291

28 U.S.C. §1292

IV.
STAYS PENDING APPEAL

Bankruptcy Rule 8007 governs the procedure for seeking a stay pending an appeal. The motion for stay pending appeal must first be filed in the bankruptcy court. If denied, the motion may be filed in the District Court of BAP. If impracticable to file the motion in the first instance in bankruptcy court, you may file it with the District Court or BAP. Fed. R. Bankr. P. 8007(b). Be advised, and don't be surprised if a bankruptcy court automatically denies the motion.

> NOTE: If the appeal has not yet been docketed with the District Court or BAP and you are in need of filing the motion, contact the clerk's office for the District Court or BAP and see if they can docket the motion for consideration with or without argument as a miscellaneous case.

Stays pending appeal from the District Court or BAP are governed by Fed. R. Bankr. P. 8025. The standards are the same for appeals from bankruptcy court.

Generally, the issuance of a stay pending appeal requires the consideration of four factors (standards). Be cautious that the general standard and application differ among the courts. So, be sure to know your jurisdiction's standards regarding stays pending appeal.

Four Factors:

1. The likelihood of success on the merits;
2. Irreparable harm to the moving party;
3. Harm to other interested parties; and
4. Whether the stay will serve the public interest.

V.
STEPS IN APPEALING TO DISTRICT COURT OR BAP

1. File Notice of Appeal with the bankruptcy clerk within fourteen calendar days of the entry of the bankruptcy court's order. Fed. R. Bankr. P. 8002(a) and 8003.

2. File Statement of Issues and Designation of Record within fourteen days of the filing of the Notice of Appeal. The Appellee has fourteen days after the filing of the Statement of Issues and Designation of Record by Appellant to file a supplemental designation. Fed. R. Bankr. P. 8009.

    a. NOTE: a party filing a designation of items may be required to provide copies of the designated items to the bankruptcy clerk.

        i. CAUTION: if you are in a jurisdiction that is required to provide copies of the designated items and hearing transcripts are included in the designation, be sure to request the transcripts as soon as possible. Word to the wise, if you think you are going to appeal, request the transcript in advance of the filing of the notice of appeal.

3. After the bankruptcy clerk has received all documents, the clerk will transmit the record to the District Court or BAP. Fed. R. Bankr. P. 8010. This will prompt the clerk of the

District Court or BAP to enter the appeal on the court's docket. Upon entry of the appeal in the District Court or BAP the clock starts ticking on filing briefs.

4. Briefing Schedule:
    a. Generally the Appellant's brief is due within fourteen days from the date the appeal is docketed. And, the Appellee's brief is due fourteen days thereafter. The Appellant will have fourteen days after the filing of the Appellee's brief to file a reply.
        i. CAUTION: local rules may change the briefing deadlines.
    b. Know the rules regarding page limits, font, type size, number of copies to submit and color of cover. Fed. R. App. P. 28, 31, 32.
    c. Don't forget to check the District Court's or BAP's briefing requirements.

VI.
STEPS IN APPEALING TO CIRCUIT COURT AFTER DISTRICT COURT'S DECISION

1. File Notice of Appeal in the District Court or BAP within thirty days of the entry of the court's order. Fed. R. App. P. 3, 4.

2. Some Circuits will require the filing of an appearance form. Check your Circuit's rules regarding appearance before the Court. In addition, if not admitted to practice before the Circuit, visit the court's website for instructions and application.

3. Briefing Schedule:
    a. Appellant must file a brief within forty days after the record is filed. And the Appellee has thirty days to file a response. Appellant may file a reply brief within fourteen days of the Appellee's brief, however, if the case is set for oral argument, the deadline may be shortened as the brief must then be filed at least seven days prior to the argument. Fed. R. App. P. 31.
        i. CAUTION: many circuits require the Appellant's brief to be filed within thirty days. Check your circuit court of appeals website to learn the briefing deadlines.

b. Know the rules regarding page limits, font, type size, number of copies to submit and color of cover. Fed. R. App. P. 28, 31, 32.

c. Don't forget to check your circuit's briefing requirements. And, requirement to file a separate record of excerpts – much like the Joint Appendix filed in the Supreme Court.

VII.
STEPS IN APPEALING TO THE U.S. SUPREME COURT

1. If you are not admitted to the bar of the Supreme Court of the United States – file an application for admission quickly. An attorney seeking to file a document in the Supreme Court must first be admitted to practice before the Court. Visit http://www.supremecourt.gov/bar/barinstructions.pdf for instructions and application.

2. Visit http://www.supremecourt.gov/ctrules/2013RulesoftheCourt.pdf for guidance in handling your case before the Supreme Court.

3. Writ and Briefing Schedules:

   a. Petition for Writ of Certiorari must be filed within ninety days after entry of the order or judgment. S.Ct. R. 13, 14. For guidance online look at: http://www.supremecourt.gov/casehand/guidetofilingpaidcases2014.pdf.

   b. A brief in opposition must be filed within thirty days after the case is placed on the docket, unless extended by the court.

      i. CAUTION: any objection to consideration of the question presented by the Petitioner may be deemed waived if not called to the Supreme Court's attention in the brief in opposition. S.Ct. R. 15.

   c. If the writ of certiorari is granted, the Petitioner (Appellant) must file the opening brief within forty-five days of the order granting writ. Respondent (Appellee) must file its reply brief within thirty days of the Petitioner's brief. Petitioner may file a reply brief within thirty days of the Respondent's brief. However, if oral

argument is set, the reply brief is due no later than one week before the date of oral argument. S.Ct. R. 25.

4. The Petitioner (Appellant) must also file within forty-five days after entry of the order granting the writ of certiorari the joint appendix, which includes docket entries from the courts below; opinions; and any other parts of the record the parties want to bring to the Court's attention. S. Ct. 26. Petitioner and Respondent should work together on the Joint Appendix as the Court encourages the parties to agree on the contents. To the extent an agreement cannot be reached see S. Ct. R. 26.2.

5. Know the Court's rules regarding page limits, font, size, number of copies to submit and color of cover. And, follow the Supreme Court's rules regarding content. Below is a chart providing rule numbers that are applicable to various pleadings to be filed. Consider employing a service for printing, proof reading, filing and service of the writ and/or briefs. This chart below is available online at: http://www.supremecourt.gov/casehand/courtspecchart02162010.aspx (chart below).

Pursuant to Rules Effective February 16, 2010	Rule No(s).	Word Limit	Cover Colors*
Petition for a Writ of Certiorari; Motion for Leave to File a Bill of Complaint and Brief in Support; Jurisdictional Statement; Petition for an Extraordinary Writ	14, 17.3, 18.3, 20.2	9,000	WHITE
Brief in Opposition; Brief of Respondent or Appellee in Support of Petition; Brief in Opposition to Motion for Leave to File an Original Action; Motion to Dismiss or Affirm; Brief in Opposition to Mandamus or Prohibition; Response to a Petition for Habeas Corpus	15.3, 12.6, 17.5, 18.6, 20.3(b), 20.4(b)	9,000	ORANGE
Brief for an *Amicus Curiae* at the Petition Stage or pertaining to a Motion for Leave to file a Bill of Complaint	37.2	6,000	CREAM
Reply to Brief in Opposition; Brief Opposing a Motion to Dismiss or Affirm	15.6, 17.5, 18.8	3,000	TAN

Supplemental Brief	15.8, 17, 18.10, 25.5	3,000	TAN
Joint Appendix[7]	26	No word limits	TAN
Brief on the Merits for Petitioner or Appellant; Exceptions by Plaintiff to Report of Special Master	24, 17	15,000	LIGHT BLUE
Brief on the Merits for Respondent or Appellee; Brief on the Merits for Respondent or Appellee Supporting Petitioner or Appellant; Exceptions by Party Other than Plaintiff to Report of Special Master	24.2, 12.6, 17	15,000	LIGHT RED
Brief for an *Amicus Curiae* in Support of the Plaintiff, Petitioner, or Appellant, or in Support of Neither Party, on the Merits or in an Original Action at the Exceptions Stage	37.3	9,000	LIGHT GREEN
Brief for an *Amicus Curiae* in Support of the Defendant, Respondent, or Appellee, on the Merits or in an Original Action at the Exceptions Stage	37.3	9,000	DARK GREEN
Reply to Plaintiff's Exceptions to Report of Special Master	17	15,000	ORANGE
Reply Brief on the Merits	24.4	6,000	YELLOW
Reply to Exceptions by Party Other than Plaintiff to Report of Special Master	17	15,000	YELLOW
Petition for Rehearing	44	3,000	TAN

6. If the case is called for oral argument, the Clerk will advise counsel when they are required to appear and will publish a hearing list on the Court's website. S.Ct. 27, 28.
   a. Visit http://www.supremecourt.gov/oral_arguments/guideforcounsel.pdf, which is a guide for counsel in cases to be argued before the Supreme Court.
   b. NOTE: Each side is permitted thirty minutes for argument.

Recommended Reading: Making Your Case, The Art of Persuading Judges by Antonin Scalia and Bryan Garner.

IN THE UNITED STATES DISTRI CT COURT
WESTERN DISTRICT OF TEXAS

IN RE:	§	CHAPTER 13
	§	
MANUEL PALOMERA LOPEZ	§	
DOLORES RONQUILLO LOPEZ	§	BK CASE NO. 09-52365K
	§	
DEBTORS	§	Appeal Case No. _____

MOTION FOR STAY PENDING APPEAL (RELIEF OPPOSED)

TO THE HONORABLE JUDGE OF SAID COURT:

CONFERENCE – RELIEF OPPOSED

The Debtors, by and through counsel of record in court below, does not consent to a stay pending appeal.

I.
INTRODUCTION

The Trustee timely filed a Notice of Appeal of final bankruptcy court orders in bankruptcy proceeding case number 09-52365 in the United States Bankruptcy Court for the Western District of Texas – San Antonio Division. Manuel Palomera Lopez and Dolores Ronquillo Lopez are the Debtors in the chapter 13 bankruptcy case. The Debtors seek to enforce distribution of homestead sales proceeds not reinvested within six months from the date of sale that are currently in possession of the Trustee. The Trustee challenges the alleged right of the Debtors to receive the funds. The Trustee contends the amount of $42,148.58, less the applicable Trustee fee, is nonexempt and should be distributed to creditors.

II.
RELIEF SOUGHT

Federal Rules of Bankruptcy Procedure (herein after referred to as FRBP) 8007(a)(1) requires that a party seeking a stay from a bankruptcy court must first move for a stay pending appeal from the bankruptcy court. If the bankruptcy court denies the stay, the party may thereafter seek a stay from the District Court. The Trustee has complied with this pre-requisite. *See* FRBP 8007(b).

Mary K. Viegelahn, the Chapter 13 Trustee, filed a Motion for Stay Pending Appeal in the United States Bankruptcy Court for the Western District of Texas – San Antonio Division on March 20, 2015 in bankruptcy case number 09-52365. On March 23, 2015 the bankruptcy court issued an order denying the Trustee's Motion for Stay Pending Appeal. The order issued by the bankruptcy court denying the Trustee's Motion did not set out the reasons for the denial. Attached hereto as Exhibit A is a true and correct copy of the order denying the stay issued by the bankruptcy court on March 23, 2015. Because a hearing on the Trustee's Motion for Stay Pending Appeal was not held and the bankruptcy court simply issued an order within one business day of its filing, a transcript is not available.

The Trustee now hereby moves this Court, pursuant to FRBP 8007 for an Order staying the bankruptcy court's orders entered March 10, 2015 granting the Debtors' Motion to Dismiss and entered March 10, 2015 mooting the Trustee's Motion to Modify, pending appeal to this Court and the rendering of a decision. Attached hereto as Exhibit B is a true and correct copy of the bankruptcy court's order entered March 10, 2015 granting Debtor's Motion to Dismiss. And, attached hereto as Exhibit C, is a true and correct copy of the order mooting the Trustee's Motion to Modify.

In support of this Motion for Stay Pending Appeal, the Chapter 13 Trustee states as follows:

III.
STATEMENT OF FACTS

On June 29, 2009 Debtors filed a voluntary petition for relief under chapter 13 of the Bankruptcy Code. The Debtors' plan was confirmed on October 9, 2009. In this case, the aggregate amount of allowed general unsecured claims is $80,238.45. The plan as confirmed was scheduled to pay a dividend of 2.99% or $2,399.13 to this class of creditors assuming all payments made.

Close to five years after the filing for relief under the Code and after the Trustee filed her third Motion to Dismiss for failure to make plan payments, Debtors filed a Nunc Pro Tunc Motion to Sell Property located at 311 Jeanette Dr. San Antonio, Texas 78216 on August 22, 2014. According to Debtors' Motion to Sell, the property had sold on July 5, 2011. It was learned thereafter that the terms of the agreement of sale were that the buyer would make monthly installment payments plus a balloon payment that would be financed by the buyer. Per the Motion to Sell, the net proceed to the Debtors was estimated at $53,251.00; and the Debtors sought to retain the alleged $53,251.00 in the remaining net proceeds to be used toward payment of Joint Debtor's eye surgery.

On August 25, 2014 the Trustee filed an Objection to Debtors' Nunc Pro Tunc Motion. And, on September 4, 2014, the Trustee filed an Amended Objection. The Trustee asserted among other things, that Debtors elected to exempt the property subject to the sale pursuant to Tex. Prop. Code §41.001. Texas state law provides an exemption in real property that is an individual's homestead in its entirety provided the property is not sold. To the extent a homestead is sold, the proceeds from the sale of said property maintain an exempt status for a

period of six months only, and only to the extent reinvested in another homestead within that six month period following the sale. A hearing was held on the Debtors' Motion to Sell and an Order was entered September 15, 2014. The Order granting the sale stated that the net proceeds from the sale of the home (after satisfying all claims secured by liens on the Property) would be submitted to the Chapter 13 Trustee; and the Trustee would hold said funds in trust until an order modifying the plan was granted. On December 8, 2014 Independence Title Company delivered to the Trustee $42,148.58, an amount less than that originally estimated by the Debtors in their Motion to Sell.

Prior to the receipt of the net proceeds from the sale of the homestead, the Trustee, on October 1, 2014 filed a Motion to Modify the Confirmed Plan. In said Motion the Trustee sought authority from the bankruptcy court to distribute to creditors the nonexempt sales proceeds from the sale of the property located at 311 Jeanette Dr., San Antonio, Texas 78216. The Trustee further asserted in her Motion to Modify that given the time remaining under the plan, the Debtors could not satisfy the best interest of creditors test and therefore, the only alternative that exists is to disburse the funds on hand to creditors.

The hearing on the Trustee's Motion to Modify the plan was scheduled for December 4, 2014. After argument of the parties, this Court adjourned the hearing on the Trustee's Motion to Modify to January 8, 2015 giving an opportunity to the Debtors to provide documentation to the Trustee to prove out of pocket costs for an alleged eye surgery. This Court ruled that the creditors would be entitled to monies from the sale less any out of pocket expenses associated and that could be proven with the alleged eye surgery.

Pending the adjourned hearing on the Trustee's Motion to Modify, on January 7, 2015, the Debtors filed a Motion to Voluntarily Dismiss Chapter 13 Case. Per said Motion, Debtors no

longer wished to continue their chapter 13 case. The Trustee objected to Debtors' Motion to Voluntarily Dismiss for a number of reasons, including but not limited to, the fact that the sales proceeds are a nonexempt asset of the estate as of the expiration of the six months from date of sale, which would have been no later than January 5, 2012; that the Motion to Dismiss should be perceived as having been filed in bad faith or is otherwise an abuse of the bankruptcy process; and that cause exists to overcome the presumption that property of the estate revests in Debtors at time of dismissal. After hearing oral argument of the parties, the bankruptcy court took the matters under advisement with permission for the parties to file briefs in support of their position. On February 12, 2015 the Trustee filed a Brief in Support of her Motion to Modify and Objection to Debtors' Motion to Dismiss.

On March 10, 2015 the bankruptcy court entered the following orders: granting the Debtors' Motion to Dismiss; mooting the Trustee's Motion to Modify; and mooting the Trustee's Motion to Dismiss.

The Trustee filed her notice of appeal to this Court from the bankruptcy court's orders granting the Debtors' Motion to Dismiss and mooting the Trustee's Motion to Modify. Soon thereafter, the Trustee filed a Motion for Stay Pending Appeal with the bankruptcy court, which was denied. The Trustee therefore files this Motion for Stay Pending Appeal before this Court.

Rule 8007 of the FRBP does not set a deadline for the presentation of a motion for stay pending appeal. The underlying bankruptcy court's orders have an effect on what clearly was considered a nonexempt asset of the bankruptcy estate; and it has a certain monetary amount.

The Chapter 13 Trustee seeks a stay of the bankruptcy court's orders to prevent the loss of the subject matter of the appeal and to preserve the status quo so that the appellate process

may proceed. More specifically, the Trustee seeks a stay as it relates to the proceeds from the sale of the Debtors' homestead in July 2011 and not reinvested within six months of the sale.

IV.
ARGUMENT

The standards for granting a motion for stay pending appeal are well established and an applicant seeking this relief must satisfy the criteria for granting such relief. In considering motions for stay pursuant to Fed. R. App. P. 8 and precedent, this Court must consider four factors: 1) whether the movant made a showing of the likelihood of success on the merits; 2) whether the movant has made a showing of irreparable injury if the stay is not granted; 3) whether the granting of the stay would substantially harm other parties; and 4) whether the granting of the stay would serve the public interest. *Ruiz v. Estell*, 650 F.2d 555, 565 (5th Cir. 1981).

A. Substantial Case on the Merits.

The first element this Court must weigh is the likelihood of the Trustee's success on the merits of the appeal. As to the first factor, the widely held view is that a stay can never be granted unless the movant has shown that success on appeal is probable. *Id.* at 565. However, the Fifth Circuit has not applied these factors in a rigid and mechanical fashion; and has held that *in cases involving a serious legal question, the movant need not always show a probability of success on the merits, but must present a substantial case on the merits and show that the balance of equities weigh heavily in favor of granting the stay in order to maintain the status quo.* *Id.* at 565-566. (emphasis added).

In this case, the Trustee submits the issues on appeal involve significant legal questions regarding the Chapter 13 Trustee's interest in nonexempt property. The issues presented to the

United States District Court for review on appeal include: 1) whether the bankruptcy court erred in permitting the Debtors to dismiss their Chapter 13 case after the court ordered that nonexempt proceeds from the sale of Debtors' homestead not reinvested within six months from date of sale should be tendered to the Trustee and distribution to creditors was conditioned on the granting of an order to modify the plan; 2) whether the Debtors have an absolute right to dismiss their bankruptcy case after a Motion to Modify the Plan pursuant to 11 U.S.C. §1329 was filed by the Trustee and/or issues of bad faith or abuse of the bankruptcy process are present; and 3) whether the bankruptcy court should have found that "cause" exists and "ordered otherwise" pursuant to 11 U.S.C. §349(b)(3) at time of dismissal of Debtors' chapter 13 case such that nonexempt funds in possession of the Trustee should have been disbursed to creditors.

In this case, the bankruptcy court entered an order granting the Debtors' Motion to Dismiss stating "although Debtor Dolores Ronquillo Lopez sold her homestead without prior approval of the Court, the Court does not find cause for conversion to Chapter 7 or for an involuntary modification of the Chapter 13 Plan. The funds in the hands of the Trustee shall be returned to the Debtor Dolores Ronquillo Lopez after payment of the Trustee's commission."

The Trustee asserts herein that the dismissal was neither appropriate in this instance nor in the best interest of creditors for a number of reasons, including but not limited to:

1. Returning the sales proceeds to the Debtors is contrary to Fifth Circuit precedent because the proceeds were not reinvested in another homestead within six months from the date of sale and by operation of state law said proceeds passed into the estate for the benefit of creditors,. *See In re Frost*, 744 F.3d 384 (5th Cir. 2014)
2. Modification of the plan is not necessary to capture the nonexempt proceeds from the sale of the homestead. *Id.* In *Frost*, the Fifth Circuit held proceeds belonged to the creditors

and did so without reliance on 11 U.S.C. §§ 1329; 1325; and 1306. *Id.* In addition, and without waiving the same, modification of the plan by the Trustee, although filed but not necessary, would not constitute an involuntary modification of a plan as the right to modify is expressly provided in §1329 of the Code.

3. Dismissal in this case and under these circumstances sanctions abuse of the bankruptcy process and provides Debtors an "escape hatch," which is contrary to Fifth Circuit jurisprudence. *See In re Jacobsen*. 609 F.3d 647, 660 (5th Cir. 2010).

4. Considerations of policy and equity, in addition to law, dictate that the creditors have superior rights to the monies in possession of the Trustee. *See In re Harris*, 757 F.3d 468 (5th Cir. 2014).

The Fifth Circuit in *In re Frost* determined that the proceeds from the sale of a homestead not reinvested in another homestead were subject to distribution to creditors. *In re Frost*, 744 F.3d 384 (5th Cir. 2014). The Fifth Circuit stated "the sale of the homestead voided the homestead exemption and (ii) the failure to reinvest the proceeds within the six months voided the proceeds exemption, regardless of whether the sale occurred pre- or post-petition." *Id.* at 388. What is important to note here is that the Fifth Circuit did not rely on §1306, which expands the definition of property of the estate, nor did they rely on §1325(b) of the Code, which discusses disposable income. Nor did the Fifth Circuit rely on or indicate §1329 of the Code was the vehicle to increase the dividend to a particular class of creditors based on nonexempt homestead sales proceeds. The filing of a Motion to Modify, although filed by the Trustee in this case, was

not necessary. Creditors were entitled to the net proceeds when Debtors did not and could not reinvest the anticipated sales proceeds within six months of the sale.

In this case, and in addition to asserting that the Debtors lost their right to withhold the sales proceeds from the estate,[1] the Trustee raised the issues of bad faith and abuse of the bankruptcy process when Debtors' filed a Motion to Dismiss after the bankruptcy court ruled the nonexempt sales proceeds, in part, belonged to creditors; and after the proceeds passed to the estate by operation of state law. The Trustee asserted that a debtor in chapter 13 does not have an unqualified right to dismiss.

More specifically, the Trustee asserted that based on the facts and circumstances of the case, it appeared that the Debtors were attempting to avoid Fifth Circuit precedent and circumvent the requirement to satisfy the 11 U.S.C. §§1306 and 1325(a)(4) in order to retain a "windfall" – proceeds from the sale of the homestead that occurred in July 2011. The dismissal in this instance was not in the best interest of creditors. A dismissal, in fact, would advance an abuse of the bankruptcy system.

The Fifth Circuit has held that the "right to dismiss under 11 U.S.C. §1307(b) is subject to a limited exception for bad faith conduct or abuse of the bankruptcy process." *In re Jacobsen*, 609 F.3d 647, 649 (5th Cir. 2010). Following *In re Jacobsen*, the construction of the 11 U.S.C. §1307(b) should be rejected when it would provide a debtor an escape hatch. *Jacobsen* at 660. And, the sequence of events in regard to the timing of motion to dismiss and motion to modify is not significant. The Fifth Circuit, quoting the Supreme Court in *Marrama*, noted that "bankruptcy courts have 'broad authority...to take any action that is necessary or appropriate to prevent an abuse of process [under] §105(a) of the Code...and that they would have such power

[1] *In re Frost*, 744 F.3d 384, 389 (5th Cir. 2014)

even in the absence of §105(a) due to the inherent power of every federal court to sanction abusive litigation practices." *Id.* at 661.

In addition to the foregoing and without waiving the same, considerations of policy and equity dictate that the funds should have been distributed to creditors as opposed to entry of an order requiring return of funds to the Debtors. Creditors rights to the monies in possession of the Trustee are superior to that of the Debtor. *See Frost, supra. See also In re Harris*, 757 F.3d 468 (5th Cir. 2014).

For the reasons stated above a substantial case on the merits of the appeal is established. Absent a stay pending appeal, the Trustee will be required to return the sales proceeds to the Debtors. Return of the sales proceeds to the Debtors would likely moot the appeal as the proceeds from the sale would be spent or otherwise used. There is currently no adequate protection that would preclude diminution of the proceeds from the sale of the homestead that remain.

Further, the balancing of equities favor the Trustee. There is no evidence that the Debtor would be able to turn over the proceeds from the sale if the Chapter 13 Trustee prevails on appeal for the benefit of Debtors' creditors. To hold otherwise would result in a "windfall" to the Debtors, a result that Congress could not have intended; and would not preserve the status quo.

B. Applicant Will Suffer Irreparable Injury Absent a Stay

The second element this Court must consider in making a determination on the Trustee's Motion for Stay pending appeal is whether the estate will suffer irreparable injury if the stay is not granted.

It is the position of the Trustee that the estate will suffer irreparable injuries in the absence of a stay if Debtor is permitted to retain the proceeds from the sale. Should the Trustee

prevail on the merits of her appeal and if Debtor is permitted to retain the proceeds it would be impractical, most likely improbable for the Debtor to turn over the funds for distribution to creditors as such funds would be utilized in light of human nature to spend cash readily available. There is no evidence that the Debtors will financially be able to turn over the funds to the Trustee for disbursement to unsecured creditors with allowed claims if the Trustee prevails.

Retention of the sales proceeds by the Trustee allows for preservation of the funds for the estate and preservation of the status quo. If the Trustee prevails on the merits of her appeal and Debtor is permitted to keep the funds, absent a stay, the Trustee for the estate would have a right without a remedy.

C. Substantial Harm to Others – Debtors' Creditors

The third element this Court must consider is harm to others. Other parties in interest in this proceeding would be better served with a stay – the Debtors' creditors. In this case, the Trustee contends that it is in the best interest of the creditors if the funds in question be maintained by the Trustee pending appeal.

There would be substantial harm to the creditors as the monies, if in possession of the Debtors, would be available to them to use for whatever purpose they choose. The parties that would suffer harm in this case, absent a stay, are the creditors who have been deprived of the funds to which they should be entitled by operation of state law and federal bankruptcy laws.

D. Public Interest Weights in Favor of a Stay

This Court must also evaluate the public interest in part to ensure that it does not favor an applicant's personal interest.

In this case, there is great public interest in the efficient administration of the bankruptcy system.

> The federal system of bankruptcy is designed not only to distribute the property of the Debtor, not by law exempted, fairly and equally among his creditors, but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of certain character, after the property of which he owned at the time of bankruptcy has been committed for the benefit of creditors. Our decisions lay great stress upon this feature of the law, as one not only of private but of great public interest in that is secures to the unfortunate debtor, who surrenders his property for distribution, a new opportunity in life.
> *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918).

Requiring the Trustee to return the sales proceeds to the Debtors or otherwise permitting the Debtor to maintain and utilize the proceeds does not serve the public interest. A debtor in bankruptcy is required to act in good faith in dealing with his or her creditors in exchange for the protection and benefits afforded to him or her as a result of the filing of a bankruptcy. In this case, Debtors received a benefit and protection until the point of dismissal. Debtors' creditors are entitled to the equivalent of the nonexempt asset or liquidation thereof in exchange for the benefit the Debtors received. Holding otherwise would promote abuse of the bankruptcy system. Therefore, the public interest does weigh in favor of a stay.

V.
CONCLUSION

For the reasons stated above, the Chapter 13 Trustee respectfully requests this Court grant this Motion for Stay Pending appeal until such time as the Appeal is concluded by decision; and for such other relief as to which the Chapter 13 Trustee may be entitled at law or in equity.

WHEREFORE PREMISES CONSIDERED, Mary K. Viegelahn, Chapter 13 Trustee prays that this Honorable Court grant a staying the return of $42,148.58. less the applicable trustee's commission, pending appeal for all the foregoing reasons.

Dated: April 9, 2015

Respectfully submitted:

/s/ Vanessa Guerrero
Mary K. Viegelahn, Chapter 13 Trustee
Vanessa DeLeon Guerrero, SBN 24040788
10500 Heritage Blvd., Ste. 201
San Antonio, Texas 78216
Telephone: (210) 824-1460
Telecopier: (210) 824-1328
vguerrero@sach13.com

The relief described hereinbelow is SO ORDERED.

Signed March 23, 2015.

Ronald B. King
United States Chief Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

IN RE:	§	
	§	
MANUEL PALOMERA LOPEZ AND	§	CASE NO. 09-52365-RBK
DOLORES RONQUILLO LOPEZ,	§	
	§	
DEBTORS	§	CHAPTER 13

ORDER DENYING MOTION

On this day came on to be considered the *Trustee's Motion for Stay Pending Appeal* (Court document #115), and the Court is of the opinion that the Motion should be denied.

It is, therefore, ORDERED, ADJUDGED, AND DECREED that the above-referenced *Motion for Stay Pending Appeal* is hereby DENIED.

// // //

EXHIBIT A

The relief described hereinbelow is SO ORDERED.

Signed March 10, 2015.

Ronald B. King
United States Chief Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

IN RE:	§	
	§	
MANUEL PALOMERA LOPEZ AND	§	CASE NO. 09-52365-RBK
DOLORES RONQUILLO LOPEZ,	§	
	§	
DEBTORS	§	CHAPTER 13

ORDER GRANTING MOTION

On this day came on to be considered the "Debtors' Motion to Voluntarily Dismiss Chapter 13 Case" (Court document #94), and it appears to the Court that the Motion should be granted and this case dismissed.

It is, therefore, ORDERED, ADJUDGED, AND DECREED that the above-referenced *Motion to Voluntarily Dismiss Case* is hereby GRANTED. Although Debtor Dolores Ronquillo Lopez sold her homestead without prior approval of the Court, the Court does not find cause for conversion to Chapter 7 or for an involuntary modification of the Chapter 13 Plan. The funds in the hands of the Trustee shall be returned to Debtor Dolores Ronquillo Lopez after payment of the Trustee's commission.

# # #

EXHIBIT
B

The relief described hereinbelow is SO ORDERED.

Signed March 10, 2015.

Ronald B. King
United States Chief Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

IN RE:	§	
	§	
MANUEL PALOMERA LOPEZ AND	§	CASE NO. 09-52365-RBK
DOLORES RONQUILLO LOPEZ,	§	
	§	
DEBTORS	§	CHAPTER 13

ORDER DISMISSING MOTION AS MOOT

On this day came on for review the docket sheet in the above-referenced case, and it appears to the Court that the "Trustee's Motion to Modify Confirmed Plan Pursuant to 11 U.S.C. § 1329(a)(1)" (Court document #88), which was previously heard and taken under advisement on February 5, 2015, should be dismissed as moot.

It is, therefore, ORDERED, ADJUDGED, AND DECREED that the above-referenced *Trustee's Motion to Modify Confirmed Plan* is hereby DISMISSED AS MOOT.

# # #

EXHIBIT C

IN THE UNITED STATES DISTRI CT COURT
WESTERN DISTRICT OF TEXAS

IN RE:	§	CHAPTER 13
	§	
MANUEL PALOMERA LOPEZ	§	
DOLORES RONQUILLO LOPEZ	§	BK CASE NO. 09-52365K
	§	
DEBTORS	§	Appeal Case No. _____

CERTIFICATE OF SERVICE

The undersigned certifies that the Motion for Stay Pending Appeal was filed with the Court on April 9, 2015. In addition, the undersigned certifies the Motion for Stay Pending Appeal was mailed via first class regular mail on this 9th of April 2015 to the following parties:

Manuel Palomera Lopez, Debtor
311 Jeanette
San Antonio, Texas 78216

Dolores Ronquillo Lopez, Joint Debtor
2311 Pue Road
San Antonio, Texas 78245

J. Todd Malaise, Attorney for Debtors
Malaise Law Firm
909 N.E. Loop 410, Ste. 300
San Antonio, Texas 78209
Telephone: (210) 732-6699

Dated: April 9, 2015

Respectfully Submitted,

/s/ Vanessa Guerrero
Mary K. Viegelahn, Chapter 13 Trustee
Vanessa Del.eon Guerrero. SBN 24040788
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Telecopier: (210) 824-1328
vguerrero@sach13.com

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

IN RE:	§	CHAPTER 13
	§	
MANUEL PALOMERA LOPEZ	§	
DOLORES RONQUILLO LOPEZ	§	BK CASE NO. 09-52365K
	§	
DEBTORS	§	Appeal Case No. _____

ORDER ON MOTION FOR STAY PENDING APPEAL

Came on for consideration the Trustee's Motion for Stay Pending Appeal. The Court having considered the Motion finds that said Motion is meritorious and is GRANTED.

IT IS THEREFORE ORDERED the stay pending appeal is granted.

IT IS FURTHER ORDERED that funds from the sale of Debtor's homestead in the amount of $42,148.58 and currently in possession of the Trustee shall continue to be held in trust by the Trustee in order to preserve the present value and fully secure the funds that would be due to the creditors should the Trustee prevail on appeal.

If is SO ORDERED this _____ day of _____, 20_____.

_____
United States District Judge

Order prepared and submitted by:

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Thursday July 2, 2015

3:00 – 4:00 **Representing the Trustee in Litigation:** A Discussion of Attorney Responsibilities Such as Witness Preparation, Document Production Requests, Subpoenas, and Reviewing "Preservation of Estate" Arguments.

Moderator: Tami Gadd-Willardson, Staff Attorney for Kevin R. Anderson, Chapter 13 Standing Trustee for the District of Utah (Salt Lake City)

Honorable Michael B. Kaplan, United States Bankruptcy Judge for the District of New Jersey (Trenton)

Henry E. Hildebrand, III, Chapter 13 Standing Trustee for the Middle District of Tennessee (Nashville)

INDEX

4. Litigation Involving The Trustee

5. Trustee As Witness

a. Most Importantly – Should The Trustee Be The Witness?

Speaker Biographies

Tami Gadd-Willardson has been involved in bankruptcy since 1996 when she started working for the Chapter 13 trustee in Salt Lake City and later in Las Vegas until she applied to law school. She entered the William S. Boyd School of Law, University of Nevada, Las Vegas and graduated Magna Cum Laude in 2009. Thereafter, she clerked for Chief Judge William T. Thurman, District of Utah. Since 2011 she has been employed as Staff Attorney with Kevin Anderson, Chapter 13 Trustee for the District of Utah.

Honorable Michael B. Kaplan was appointed as a bankruptcy judge on October 3, 2006, for the District of New Jersey, Trenton Vicinage. Prior to taking the bench, Judge Kaplan served as a Standing Chapter 13 Bankruptcy Trustee. Judge Kaplan received his A.B. degree from Georgetown University (1984) and his J.D. Degree from Fordham University School of Law (1987). He is licensed to practice law in New Jersey, New York and Connecticut, and is admitted to practice before the U.S. Supreme Court, Third Circuit Court of Appeals, U.S. Court of International Trade and various federal district courts. Over the past twenty-five years, Judge Kaplan has spoken to numerous bar associations and business organizations, including: the New Jersey Judicial College, National Association of Chapter 13 Trustees, National Association of Bankruptcy Trustees, Turnaround Management Association, NY Institute of Credit, Bloomberg, L.P., Federal Reserve Bank of Philadelphia, American Conference Institute, Pennsylvania Bar Institute, National Business Institute and the New Jersey Institute for Continuing Legal Education. Judge Kaplan teaches as an adjunct professor at the Newark and Camden campuses of Rutgers University School of Law. He has authored several articles relating to bankruptcy issues and is a co-author of West's *Consumer Bankruptcy Manual*. Judge Kaplan was the recipient of the National Association of Chapter 13 Trustees' 2006 Distinguished Service Award and New Jersey State Bar Association's 1999 Legislative Recognition Award. In December of 2009, Judge Kaplan was appointed by the Director of Administrative Office of the Courts to a four year term as the Third Circuit representative to the Bankruptcy Judges Advisory Group, and most recently selected as the Bankruptcy Judge representative on the Human Resources Advisory Council to the AO. Judge Kaplan has also served as Mayor and Councilman for the Borough of Norwood, NJ, and in 2005, he was a candidate for Bergen County Freeholder.

Henry E. Hildebrand, III has served as Standing Trustee for Chapter 13 matters in the Middle District of Tennessee since 1982 and as Standing Chapter 12 Trustee for that district since 1986. He also is of counsel to the Nashville law firm of Lassiter, Tidwell & Davis, PLLC. Mr. Hildebrand graduated from Vanderbilt University and received his J.D. from the National Law Center of George Washington University. He is a fellow of the American College of Bankruptcy and serves on its Education Committee. He is Board Certified in consumer bankruptcy law by the American Board of Certification. He is Chairman of the Legislative and Legal Affairs Committee for the National Association of Chapter 13 Trustees (NACTT). In addition, he is on the Board of Directors for the NACTT Academy for Consumer Bankruptcy Education, Inc. Mr. Hildebrand has served as case notes author for *The Quarterly*, a newsletter

dealing with consumer bankruptcy issues and Chapter 13 practice in particular, since 1991. He is a regular contributor to the American Bankruptcy Institute Journal. He is an adjunct faculty member for the Nashville School of Law and St. Johns University School of Law.

Trustee Immunity and Personal Liability

IMMUNITY

Our role as Trustee often means making difficult decisions which will ultimately dissatisfy someone

- Difference between a decision with Trustee discretion/business judgement and something that requires a ruling

> A bankruptcy trustee's immunity from suit in official capacity stems from judicial immunity granted to judges acting in official capacity. This quasi-judicial immunity doctrine applies to a person performing tasks intertwined with the judicial process.

- Chapter 13 Trustee "protected by absolute immunity" for the miscalendaring and noticing error of confirmation hearing resulting in dismissal of the bankruptcy case because scheduling of hearings is part of the judicial function of the Court. Curry v. Castillo (In re Castillo), 297 F.3d 940 (9th Cir. 2002)
    - Both the scheduling and giving notice of hearings are part of the judicial function of managing the bankruptcy court's docket in the resolution of disputes
- Chapter 13 Trustee's disbursement errors in trying to reconcile administration under the BAPCPA disbursement scheme and Court's Order in another case resulting in no payment to debtor's counsel for two months was entitled to absolute immunity for exercise of discretionary judgment. Denton v. Massey (In re Denton), 370 B.R. 441 (Bankr. S.D.Ga. 2007).

Distinguish between Trustee liability for acts done in accordance with the duties of the Trustee (administering estate assets, objecting to claims etc.) and those actions undertaken by a trustee which have been specifically delegated to the Trustee by the Court.

If actions related to the Trustee's duties as Trustee – immunity does not apply

Proceed to determination of "standard of care" for Trustee liablity

If actions undertake as a result of delegation of judicial power, then the Trustee derives immunity from that delegation

Proceed to determination of "immunity"

PERSONAL LIABILITY

Over 60 years ago, the Supreme Court issued its first and only opinion on trustee personal liability in Mosser v. Darrow, 341 U.S. 267 (1951) – divergent interpretations have spread among the Circuits.

> *The most effective sanction for good administration is personal liability for the consequences of forbidden acts, and there are ways by which a trustee may effectively protect himself against personal liability.*
> Mosser v. Darrow, 341 U.S. 267 (1951)

The Supreme Court offered two suggestions to avoid personal liability:

1. Seek court approval with notice to parties in interest/creditors
2. Account at prompt intervals, placing the burden on others to raise objections

Immunity often gets crossed over into personal liability analysis:

"[C]ourts have established certain standards and instructions whereby the trustees can protect themselves by complying with these standards and, thus, gain judicial immunity. Those instructions include: the trustee should give notice to the debtor and obtain prior court approval of the proposed act; the disclosure by the trustee to the court in furtherance of the requested approval must be candid; and the act must be within the trustee's official duties." In re Kashani, 190 B.R. 875 (9th Cir. BAP 1995).

A Trustee acting within scope of authority performing a judicial function with the benefit of a properly noticed motion and subsequent order authorizing action, performs their duties with the benefit of judicial immunity. It may be that once a Court order is entered, the Court delegates the power to administer the estate to the Trustee and in reconciling the order with administration of the estate exercises discretion in performing a task intertwined with the judicial administration of the case – the business judgement of the Trustee comes into play. *See* Denton v. Massey (In re Denton), 370 B.R. 441 (Bankr. S.D. Ga. 2007).

STANDARD OF CARE FOR PERSONAL LIABILITY: BREACH OF FIDUCIARY DUTIES

Intentional and Deliberate

Circuit	Name	Holding
Tenth	Sherr v. Winkler, 552 F.2d 1367 (10th Cir. 1977)	Reorganization Trustee not personally liable except for willful and deliberate acts. Damages from negligence would be paid only from estate, not Trustee's assets
Fourth	United States v. Sapp, (In re S.Found Corp.), 641 F.2d 182 (4th Cir. 1981)	Not liable on bond for failure to pay claim as there was no intentional and deliberate conduct. *See also* Yadkin Valley Bank & Trust Co. v. Ling McGee, Trustee, 5 F.3d 750 (4th Cir. 1993) – no personal liability as no allegation that Trustee deliberately violated fiduciary duties

Sixth	Ford Motor Credit Co. v. Weaver, 680 F.2d 451 (6th Cir. 1982)	Debtor in possession not personally liable for negligence and only liable to creditor for intentional and deliberate conduct. *See also* United States by Central Sav. Bank v. Lasich (In re Kinross Mfg. Corp.), 174 B.R. 702 (Bankr. D. Mich. 1994)
Seventh	In re Chicago Pacific Corp., 773 F.2d 909 (7th Cir. 1985)	A trustee may be held personally liable only for a willful and deliberate violation of his fiduciary duties. *But see* In re Chicago Art Glass, Inc., 155 B.R. 180 (Bankr. N.D. Ill. 1993): A trustee will not be liable for misjudgments in matters where discretion is allowed, but may be held liable for both negligent and intentional violations of the duties imposed by law.

Mere negligence

Circuit	Name	Holding
Ninth	Hall v. Perry (In re Cochise College Park, Inc.), 703 F.2d 1339 (9th Cir. 1983)	Trustee no liable in any manner for mistakes in judgment were discretion is allowed, but is subject to personal liability no not only intentional, but also negligent violations of the duties imposed by law
Second	In re Gorski, 766 F.2d 723 (2d Cir. 1985)	Trustee may be personally liable for both negligent and intentional breaches of fiduciary duties – chapter 12 trustee's failure to carry out obligations and ensure debtors were making payments to creditors was a material breach of fiduciary duties and negligent disregard of the rights and interests of creditors
Third	In re Sturm, 121 B.R. 443 (Bankr. E.D. Pa. 1990)	Following two decisions pre-Mosser v. Darrow, found that a trustee may be subject to personal liability for negligent conduct
Eleventh	Red Carpet Corp. v. Miller, 708 F.2d 1576 (11th Cir. 1983)	Trustee is liable for wrongful conduct or negligence and may be personally liable.

Gross negligence

Circuit	Name	Holding
First	DeStefano v. Stern (In re J.F.D. Enterprises, Inc.), 223 B.R. 610 (Bankr. D. Mass.	Trustees should not be subject to personal liability unless they have acted with gross negligence (intentional failure to perform duty in reckless disregard of consequents – beyond the mere failure to exercise ordinary care). The middle standard of care strikes the balance between the

	1998), *aff'd* 236 B.R. 112 (D. Mass. 1999), *aff'd* 215 F.3d 1312 (1st Cir. 2000)	difficulties of the tasks taken by Trustees and the need to protect the interest of creditors, estate and interested parties in bankruptcy.
Fifth	In re Smyth, 207 F.3d 758 (5th Cir. 2000)	Reviewed the analysis in DeStefano and agreed that the proper standard is gross negligence

Uncertain

Circuit	Name	Holding
Eighth	In re Haugen Constr. Service, Inc., 104 B.R. 233 (Bankr. D.N.D. 1989)	A trustee may be held liable for losses proximately caused by willful and deliberate violation of fiduciary duties – will not be responsible for mistakes in judgment which was discretionary and reasonable under the circumstances
D.C.	In re Vel Rey Properties, Inc., 174 B.R. 859 (Banrk. D.D.C. 1994)	Court will not issue advisory opinion on whether Trustee would be personally liable or enjoy immunity for violations of housing code.

Preservation of the Estate

Intersection between code sections:

- 541/1306 Property of the estate
- 544 Lien creditor/547 Preferences/548 Fraudulent conveyances
- 546 Limitations on avoiding powers
- 363(b) – Use of property with 1303 & 1306 rights/powers of debtors
- 522(g) – Exemptions
- 348 Effect of conversion
- 1325(a)(4) best interest on creditors

Chapter 13 is often the chapter used to "pay back" preferences or conveyances rather than having the chapter 7 trustee sue the transferee by proposing a pot to cover the value of the preference/conveyance.

Fraudulent conveyance or preference actions not typically pursued in chapter 13.

Little incentive to pursue the actions – the code does not authorize the chapter 13 trustee to use, sale or lease property of the estate once recovered (see 1303 and 363(b)). The chapter 13 trustee may not recover value by selling it – the estate is benefitted by increasing payment as debtor no longer servicing the claim or the debtor's desire to stay in the property requires an increase return to creditors. In re Ramsey, 356 B.R. 217 (Bankr. D. Kan. 2006)

See also 7/2/2015 materials from 1:30-2:30 Breakout Session: Chapter 13 Trustee's Avoidance Powers – Preferences and Fraudulent Transfers

In order to achieve confirmation, the debtor must propose a plan that satisfies 1325(a)(4)

- Conditioning the liquidation amount based on the Trustee's recovery of avoidance action does not satisfy 1325(a)(4). In re Engle, 496 B.R. 456 (Bankr. S.D. Ohio 2013).
    - Question is not whether the conveyance is voidable but whether a trustee could reasonably be expected to succeed in setting aside the transfer. In re Carter, 4 B.R. 692 (Bankr. D. Colo. 1980)
- Trustee an indispensable party as the only person with standing to bring the avoidance action and creditors would not be accorded full relief without his joinder – just because a trustee reaps little benefit from the avoidance action, that does not excuse the trustee from bringing an action that will inure to benefit the unsecured creditors. Wood v. Mize (In re Wood), 301 B.R. 558 (Bankr. W.D. Mo. 2003).

Hiring outside counsel to pursue the avoidance action –

1) Section 327 allows employment of attorneys
2) Section 330 allows payment of reasonable compensation
3) Issue with § 326(b) no reimbursement of expenses?
    - Should general expense fund pay for the fees despite benefitting creditors of only one estate?
    - Would contingency based fee arrangement work?

Perhaps including provision as condition of confirmation (sending notice to all creditors) that the litigation expenses would be paid as part of administrative expenses in that case.

- If avoidance successful – have lump sum payment to pay the fees
- If avoidance not successful – the ongoing payments pay the fees from funds that otherwise would have been available to pay pro rata portion to unsecured class.

Extending time under § 546

- If debtors proposing pot to resolve 1325(a)(4) based on avoidance, should Trustee take further action.
- If debtors convert their case years down the line – the cause of action may likely be gone

    - Murphy v. Wray (In re Wray), 258 B.R. 777 (Bankr. D. Idaho 2001)
- Consider entering a "tolling" agreement or bringing motion to extend the time under § 546
    - Turns on whether § 546 is a true statute of limitations (instead of jurisdictional) and may be extended by parties. *See* Pugh v. Brook (In re Pugh), 158 F.3d 530 (11th Cir. 1998); *But see* Martin v. First National Bank of Louisville (In re Butcher), 829 F.2d 596 (6th Cir. 1987).
- Extension by agreement or stipulation
    - Transferee must be a party and sign – it is their statute of limitation that is being extended
    - Include:
        - There appears to be an avoidable transfer under Chapter 5 of Title 11 based on (testimony, SOFA Question 3/7/10, review of bank statements, etc.)
        - The Debtors have proposed return to unsecured in amount sufficient to resolve – matter need not be litigated at this time
        - If case dismisses or converts prior to meeting the liquidation value, a chapter 7 trustee may have (time period) to bring the avoidance action
        - File the document at court
- Extension by motion
    - Available in complex chapter 7 cases – In re ThermoView Industries, Inc., 381 B.R. 225 (Bankr. W.D. Ky. 2008)(the court's prior order extending the deadlines for commencing avoidance actions is "law of the case" as no party objected or appealed the order).
    - Possibly available rather than filing adversary proceeding only to enter stipulation with the transferee
- Extension by settlement agreement

- File an adversary proceeding and settle with the transferee that the proceeding is stayed during the pendency of the chapter 13

Special issues:
Trustee as lien creditor –

- Trustee avoiding interest due to issue with security
- Trustee lacks authority to sell or dispose of property – but if the debtor elects to retain the property, must pay into the plan the liquidation amount that would be netted in chapter 7 case.
  - If debtors cannot pay the 1325(a)(4) amount the case must either convert (for the 7 trustee to liquidate) or dismiss (and the unperfected lien reverts back to the creditor). In re Ramsey, 356 B.R. 217 (Bankr. D. Kan. 2006).
- Confirmation issues:
  - Hope v. Acorn Financial, Inc., 731 F.3d 1189 (11th Cir. 2013): chapter 13 trustee bound by confirmed plan and could not pursue avoidance post-confirmation when trustee knew of defective security interest prior to confirmation
  - In re Steele, 403 B.R. 882 (Bankr. D. Kan. 2009): chapter 13 trustee successful at post-confirmation 544 adversary proceeding for unfiled mortgage – the debtors must modify the plan to comply with 1325(a)(4)
  - Hildebrand v. Hays Imports, Inc. (In re Johnson), 279 B.R. 218 (Bankr. M.D. Tenn. 2002): confirmation did not foreclose trustee's avoidance action when post-confirmation proof of claim indicated avoidable security interest

Liquid assets –

- Cash/bank balance/tax refunds – should this be turned over immediately for disbursement even if proposing a pot to resolved 1325(a)(4) over time

- Property of estate, but under the debtors control (363(b) and 1303)
- Effect of conversion – remains in possession or under the control of the debtor on date of conversion (348(f)(1))
- Should a turnover motion be filed if debtors do not voluntarily agree to contribute – provide personal liability protection
    - In re Diaz Esteras, 2011 WL 5953483 (Banrk. D. P.R. 2011): nonexempt funds from pre-petition sale of property under control of the debtor absent a confirmed plan or order providing otherwise.
- Should there be an adjustment to the distribution scheme to allow disbursement to unsecured creditors immediately

Cases converted from chapter 7

- Distinguish between asset cases and 707 motions
- If asset, almost always should be converted back to allow the chapter 7 trustee to continue administering
- Be diligent about avoidance litigation – another set of eyes will be reviewing your preserved estate
- See also materials from Conversion from Chapter 13 to Chapter 7 from 7/4/2015 4:05-5:05 section

Removal of Trustee

Trustees have no constitutional right to continue acting as trustees and have no property right in assignment of new cases. Richman v. Straley, 48 F.3d 1139 (10th Cir. 1995).

- Distinguish between assignment of new cases and cases already assigned to the Trustee

Monitored by the Program – Resistance is Futile – U.S. Trustee Program

> 28 U.S.C. § 586(b) The United States trustee may appoint standing trustee under chapter 12 or 13 and shall supervise any such individual appointed as standing trustee in the performance of the duties of standing trustee.

Power to appoint an individual confers power to terminate that individual. Carlucci v. Doe, 488 U.S. 93 (1988)

ASSIGNMENT OF NEW CASES

28 C.F.R. § 58.6: Procedures for suspension and removal of panel trustees and standing trustees

- Notify in writing decision to suspend or terminate ASSIGNMENT of cases
- State the reason for the decision
    - Non-exclusive list of 14 reasons
- Sent via overnight courier to office of the trustee
- State final and unreviewable UNLESS trustee requests in writing a review no later than 20 days from the date of issuance
- Takes effect upon expiration of the time to seek review

Termination from appointment in future cases has no legal impact on continued administration of previously assigned cases. 62 Fed. Reg. 51,742 (October 2, 2997)
http://www.justice.gov/ust/eo/rules_regulations/docs/frul_191.pdf

REMOVAL FROM PREVIOUSLY ASSIGNED CASES

11 U.S.C. § 324: The court, after notice and a hearing, may remove a trustee for cause. Whenever the court removes a trustee, such trustee shall be removed in all other cases under which the trustee is then serving unless the court orders otherwise

The Bankruptcy Code does not define sufficient cause for removal – courts must determine on case by case basis.

"Removal of a trustee is a matter committed to the sound discretion of the bankruptcy court." In re Miller, 302 B.R. 705, 708 (10th Cir. BAP 2003) (citing In re BH&P, Inc., 949 F.2d 1300, 1313 (3d Cir. 1991)).

- Standard for overturning abuse of discretion on appeal
    - Clear error or judgement or exceeded bounds of permissible choice in the circumstances
    - Defer to trial court's judgment for assessing evidence and witness credibility

In the Matter of Chapter 13, Pending and Future Cases, 19 B.R. 713 (Bankr. W.D. Wash. 1982): "Kleinman has efficiently and honestly performed his duties as chapter 13 trustee. His sexual harassment of his female employees…is reprehensible, but it is not legal cause for his removal."

In re Sheehan, 185 B.R. 819 (Bankr. D. Ariz. 1995): No cause exists to remove chapter 7 trustee from existing cases after she reimbursed estates from employee's theft – "trustee is not to be removed unless actual injury or fraud occurs."

Walden v. Walker (In re Walker), 515 F.3d 1204 (11th Cir. 2008): Chapter 7 Trustee removed after Court determined statements under oath were not truthful.

In re AFI Holding, Inc., 530 F.3d 832 (9th Cir. 2008): "Cause may include trustee incompetence, violation of trustee's fiduciary duties, misconduct or failure perform the trustee's duties."

Morgan v. Goldman, 375 B.R. 838 (8th Cir. BAP 2007) *aff'd* 573 F.3d 615 (8th Cir. 2008): Court can remove trustee sua sponte for cause – false testimony constitutes cause for removal. Whether false testimony actually occurred is question of fact reviewed for clear error – the testimony at each of the hearings was "unclear and was sometimes evasive and contradictory" and this constitutes cause for removal.

Litigation involving the Trustee

- Attorney's fees
  - Actual necessary expenses
    - In re Myers, 147 B.R. 221 (Bankr. D. Or. 1992)
      - Issue is not whether "employment discrimination claims" are actual, necessary expenses – claims are not expenses and instead the issues relates to whether the *expenses* incurred defending such a claim are "actual, necessary" expenses under the statute
  - Non-prevailing party could pay – if frivolous cause of action or if part of settlement agreement
- Disbursement disputes
  - In re Nevels, 415 B.R. 832 (Bankr. D. N.M. 2009)
    - Chapter 13 Trustee's standard procedure regarding disbursement of funds appropriate when attorney filed untimely fee application on same date as disbursement of $50,000 lump sum payment
  - In re Wilson, 274 B.R. 4 (Bankr. D. D.C. 2001)
    - Disbursement to general unsecured class prior to government bar date resulted in prejudice to IRS and District of Columbia – the onus of resolving the shortfall of funds necessary to administer the debtors' case falls upon the Chapter 13 Trustee
  - Liberty Mutual Insurance Company v. United States of America by Lamesa National Bank (In re Schooler), 725 F.2d 498 (5th Cir. 2013).
    - Chapter 7 Trustee found grossly negligent when failed to take action in probate proceeding to have alternate executor appointed and the debtor's liquidated the

inherited assets. Unsecured creditor able to collect on the Trustee's bond.

Litigation appurtenant to the Trustee – not as a party

- Dischargeability disputes with creditor and debtor
- Lien strip/motions to value/criminal investigation/other contested matters
- During Trustee's investigation, may come in possession of items one or both parties want (trusts, bank records, divorce decrees)
    - Subpoena should be standard operating request - privacy
    - With sufficient time for debtor or parties in interest to comply

Financial privacy becomes a concern. Be sure to comply with suggested privacy requirements

- Account numbers – only last four digits should be visible
- Social Security numbers should be blacked out
- Date of Births
- Be wary of documents containing minors' information

- Notes made by Trustee or staff
    - Work product doctrine applies
        - Tangible material or its intangible equivalent collected or prepared in anticipation of litigation not discoverable
        - Memoranda, briefs, communications, other writings prepared for use in the case
        - Mental impressions, conclusions, opinions or legal theories of the case

Trustee as Witness

- Be Truthful
  - MAGIC WORDS – TELL THE TRUTH
- Listen carefully –
  - PAUSE before answering
  - WAIT until question is completed before answering
    - Answer only the question that is asked
  - Sometimes "I don't know" is the appropriate answer
- Cooperate
  - DON'T be antagonistic
  - DON'T be emotional
  - DON'T be impatient
  - RELAX
  - Witness credibility often determined by demeanor
- Be consistent
  - Morgan v. Goldman, 573 F.3d 615 (8th Cir. 2008)
    - Testified at hearing on 5/10/2006
    - Testified at subsequent hearing on 10/13/2006 in a manner not consistent with prior testimony
    - On 11/20/2006 Court issued sua sponte order to show cause why Trustee should not be removed "for cause" for giving "false testimony under oath."
- See also 7/2/2015 material from 4:05-5:05 Breakout Session: Evidence How to Effectively Examine and Cross Examine a Witness

Attorney – client privilege: Remember Trustee is our client, some conversations may be protected

1. Trustee is the holder of the privilege
2. Confidential communications incident to the attorney-client relationship (consulting attorney in professional capacity)
3. Presence of third party may make communications no longer confidential
4. Waiver: be careful with testimony on direct – if Trustee refers to communications, may be waived on cross-examination

MOST IMPORTANTLY – SHOULD THE TRUSTEE BE THE WITNESS?

- What purpose does the Trustee as witness serve
- Can a staff member provide the testimony – probably even better than the Trustee can on:
    - Business records
    - Liquidation analysis
    - Feasibility

Thursday July 2, 2015

4:05 – 5:05 **Practice Pointers and Potential Pitfalls:** Maximizing Staff Attorney Effectiveness in the Courtroom.

Moderator: Mary Frances Fallaw, Staff Attorney for D. Sims Crawford, Chapter 13 Standing Trustee for the Northern District of Alabama, Southern Division (Birmingham)

Honorable R. Kimball Mosier, United States Bankruptcy Judge for the District of Utah (Salt Lake City)

Honorable John P. Gustafson, United States Bankruptcy Judge for the Northern District of Ohio (Toledo)

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Speaker Biographies

Mary Frances Fallaw has been the staff attorney for D. Sims Crawford (Northern District of Alabama, Southern Division) for five years. Prior to that she clerked for two bankruptcy Judges in the Northern District of Alabama: the Honorable Tamara O. Mitchell (Southern Division) and the Honorable C. Michael Stilson (Western Division). Before clerking she was engaged in private practice that included representing consumer debtors in Chapter 7 and Chapter 13 cases. Ms. Fallaw graduated *cum laude* from Cumberland School of Law in 2002. While at Cumberland she served as the copy editor of the Cumberland Law Review. She graduated *cum laude* from Presbyterian College in 1999 (B.A. in Political Science and Business Administration minor). She is a frequent speaker at various local CLEs regarding consumer bankruptcy and has been included as a facilitator at the staff attorney sessions of the NACTT Staff Symposium. She is currently a board member of the Bankruptcy and Commercial Law Section of the Birmingham Bar.

R. Kimball Mosier: U.S. Bankruptcy Judge, District of Utah. EDUCATION: Bachelor of Arts in Economics, University of Utah (1975, *cum laude*), Juris Doctor, University of Utah (1980). PROFESSIONAL: Judge Mosier specialized in bankruptcy law from 1981 until his appointment to the bench in February 2009. As an attorney

he represented debtors, creditors, committees, and examiners but his practice emphasis was representing bankruptcy trustees and serving as a bankruptcy trustee. Judge Mosier served as a member of the standing panel of chapter 7 trustees for the District of Utah from 1983 until his appointment to the bench. He also served as chapter 11 trustee in numerous and complex chapter 11 cases. For the last fourteen years he was a partner with the law firm of Parsons Kinghorn Harris in Salt Lake City and served as president of the firm for seven of those years.

The Honorable John P. Gustafson was appointed as United States Bankruptcy Judge for the Northern District of Ohio and took the oath of office on Tuesday, April 8. He served as Chapter 13 Trustee for the Northern District of Ohio, Western Division for almost 7 years. Prior to being appointed Trustee, he served as Staff Attorney to Trustee Anthony B. DiSalle for 4 years. He has been a bankruptcy law clerk, an associate and partner in a law firm that did both debtor and creditor representation, and a solo practitioner representing debtors, banks and trustees. He is a favorite ConsiderChapter13.org author, has been an active member of the National Association of Chapter 13 Trustees and serves on the Board of Directors of The Academy.

STAFF ATTORNEY TRACK

PRACTICE POINTERS AND POTENTIAL PITFALLS

By John P. Gustafson (except for minor edit and update, this was written prior to my taking the bench – all of what follows is intended to be academic discussion, and not legal advice or advisory opinion(s))

I. ETHICS AND THE ART OF STAFF ATTORNEYING.

Q. Precisely who, or what, is my Client?

A. The Trusteeship. How do you know? If your Chapter 13 Trustee retires, quits, is removed, or dies, you still have a job.

Q. What about the Trustee?

A. The individual embodies the Trusteeship that is the client. Unless the person who is the Chapter 13 Trustee is, for whatever reason, no longer the trustee, that's your client. The Trustee, while serving, is essentially equivalent to the trusteeship. If your Trustee retires, quits, is removed, or dies you may find yourself with a different person as the same client – the Office of the U.S. Trustee may run a trusteeship after the Chapter 13 trustee, or another Chapter 13 trustee may be appointed to operate the trusteeship until a new Chapter 13 Trustee is appointed.

It is important to keep in mind that you have a client because it reminds you that you are not just an employee, like the rest of the staff at your office. You are an attorney, and the Trusteeship is your client. That means that you have ethical duties that far exceed anything imposed on the non-staff attorneys you work with.

There are two differences that are of the paramount importance to keep in mind:

1. **The Attorney-Client Privilege.** Your discussions with the Chapter 13 Trustee that relate to the Trusteeship are privileged communications. As you work with your Trustee, you will probably develop a personal relationship that may involve a certain amount of give and take. And that's a good thing. But, you will always want to err on the side of treating anything told to you by the Trustee about anything related to the Office, any case or debtor, any judge or attorney, as being a privileged communication. That means that you cannot discuss it with anyone. Period. Because, regardless of what the employee manual says, and beyond what is required of all good employees, you are an attorney. Thus, the client (the Trustee) would have to

affirmatively consent to the disclosure, and the ethical rules of your state prohibit you from disclosing that privileged information without such consent.

> **Rule 1.6 Confidentiality Of Information**
>
> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Paragraph (b) relates to various types of wrong-doing.

2. **The Duty of Loyalty.** There is no "I'm just an employee" exception to an attorney's duty to the client. There is also no exception based on the fact that you see a whole lot of schlocky attorneys who don't live up to their ethical obligations, abandoning their clients at various stages of their Chapter 13 cases – it doesn't matter. As an attorney, you have a duty to carry out the client's objectives, to be competent in whatever is necessary to carry out the client's objectives, and to be diligent.

Whether your trustee is an attorney, or a non-attorney, your trustee ultimately makes the decisions for the trusteeship.

> **Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer**
>
> (a) Subject to paragraphs (c) and (d), **a lawyer shall abide by a client's decisions concerning the objectives of representation** and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter.

The duty of diligence is found in Rule 1.3:

> **Rule 1.3 Diligence**
>
> A lawyer shall act with reasonable diligence and promptness in representing a client.

The duty of competence is found in Rule 1.1:

Rule 1.1 Competence

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Where do some of the problems arise with these duties in a typical Chapter 13 Office situation?

A new Staff Attorney may be either more technologically savvy than the Chapter 13 Trustee, or less. That may involve learning skills that are necessary to be competent in that specific Office environment – in Rule 1.1, "skill" does not appear to be limited to "legal skill".

If you are a "techie", you may see all kinds of technological shortcuts that could be used to, in your view, increase efficiency. But, if your Chapter 13 Trustee doesn't want to change the way paper is used in the Office, you need to get competent with that old Xerox and fax machines, and learn to scan paper documents into PDF format. Welcome to the 1990s!

On the other hand, if your Chapter 13 Trustee wants to move the Office into a more paperless operation, you have to become competent in the computer skills that will allow you to provide competent representation in that Office environment.

Problems sometimes arise in Offices where a new Chapter 13 Trustee comes in and does things differently that the past Chapter 13 Trustee did them. This can be a particular problem when you were also a candidate who interviewed for the position, and you didn't get it. It doesn't matter – you have to either be able to get your mind right, and be completely loyal to your client – or at the very least be able to act exactly as you would if you were completely loyal to your client or, ethically, you have to leave.

That may seem harsh, but think of what other attorneys are required, by their professional duties, to do: If you represent a murderer, you can't stand up in court and say: "Your Honor, my client wants to plead not guilty. But, I mean, damn. He's a murderer, so I'm not going to follow his instructions." Or, think of the attorney who is caught in a battle over disclosure of attorney-client communications and is waiting in jail for the court of appeals to consider an appeal of the lower court's contempt order. Bankruptcy lawyers are not lawyers of a lesser god. Nor are Staff Attorneys somehow exempt from the rules of professional conduct because they are hard to follow, or because your feelings are hurt, or leaving would be an economic hardship. You are a professional, and the rules are the rules.

Another common problem can arise from relationships that develop over time with the other employees. Those employees are managed, and at times disciplined, under the direction of your client. And, the employees who are disciplined, or denied some benefit that they wanted, may be very unhappy with your client. But, no matter how much you may like that person, and no matter how much you may personally agree that whatever is happening is not right – you need to stay out of the Office politics of whatever your client is trying to accomplish (either directly, or through your Office Manager.) You simply can't undermine your client – in any way – without violating your professional obligations.

Sometimes, things involving Office staff can be a little fuzzier. On a personal note, when I came to the Office as Staff Attorney, I had been a private solo practitioner. In working as a one man law office, I could juggle my time however I wanted, as long as I got my work done. When I got to my new job – I was the first Staff Attorney the Office had - I kept acting like I was still in solo practice, without fully considering how my getting some things done at the last minute affected the rest of the Office. One of the staff members who worked with me finally asked me if I could start getting my 341 preparations done farther in advance, because that would make her feasibility calculations easier. That opened my eyes to the fact that I had a very different position as Staff Attorney than I had as a solo practitioner, and that I needed to work to fit into the existing system, not just get my particular part of the job done in time for court.

I have also heard of situations where the Staff Attorney's unique position in the Office has created problems. Being on salary makes you different, having to be out of the Office for court at random times makes you different, and not being subject to some of the Office rules makes you different – and some staff may be jealous of the privileges or flexibility you may have. Say you have casual Fridays in the Office, but you have court on Friday, so the Trustee says you can wear jeans on Tuesdays. And some of the staff get their nose bent out of joint because of your "special treatment". Do you have an ethical obligation to not wear jeans on Tuesdays – even if your Trustee gives you permission – because you are making his or her job more difficult, because employee morale is suffering? I am NOT saying wearing jeans on Tuesday is an ethical violation – but it does illustrate the kind of ethical issues that are in play when you are a Staff Attorney.

Some general life advice I was given, back when I worked at Burger King, by a guy who is now about to retire from the FBI: "When you walk into a new situation, figure out what kind

of person is needed. And then be that person." Figure out what your Trustee Office needs you to be – and then, to the extent you can, be that person. Your Trustee has strengths, and weaknesses, interests and dislikes. The position of Chapter 13 Trustee is flexible enough to allow a Trustee to play to his or her strengths – that usually leaves a lot of other areas where the Trustee is going to be involved in a more part-time, or supervisory role. If that is an area where you can be more "hands on", you could consider taking on that role (after discussion with your Trustee).

For example, when I moved from being a Staff Attorney to being the Chapter 13 Trustee, I was still a pretty good legal researcher. While most Trustees probably go to their Staff Attorneys for legal research, as Trustee I did the legal research for my Staff Attorney. On the other hand, I found the intricacies of the office procedures – as important as they are - somewhat less . . . exciting. And I often allowed/encouraged/begged my Staff Attorney to get involved with those issues.

None of the above means that you need to be a "Yes Man" (or "Yes Woman"). There are two aspects to your communications with the Chapter 13 Trustee. There is the duty to communicate, and then there is the separate duty to advise:

> **Rule 2.1 Advisor**
>
> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

As an advisor, you have a duty to give your Chapter 13 Trustee "candid advice", based on almost any relevant factor under the sun. That means you should be telling the Chapter 13 Trustee what you think should be done, if you think you know a better way to do something, or that there are dangers in pursuing a course that the Trustee has decided to follow. Comma, HOWEVER, this duty to provide candid advice does not trump Rule 1.2 that the client makes the decisions. In other words, you should offer candid advice, not nag. When the decision has been made – even if it is directly contrary to your best advice – you have to try to implement that decision with diligence and competence, and without a hint that you weren't in complete agreement with the approach.

In terms of communication with the Chapter 13 Trustee, the ethical rules specifically provide:

Rule 1.4 Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The obligation to communicate, and keep the Chapter 13 Trustee informed, carries its own difficulties. If you make a mistake, or get buried in court, or yelled at by the judge, or miss a hearing – you have to tell your client, even if you aren't asked.

Note that there are special obligations for Staff Attorneys who represent non-attorney Chapter 13 Trustees. Staff Attorneys have an ethical obligation to explain legal matters sufficiently to allow the non-attorney Chapter 13 Trustee to make informed decisions about the approach the Office will take to important legal matters. If you are working as a Staff Attorney for a non-attorney Trustee, one of the things you will have to be diligent about, and work to be competent at, is explaining legal issues so that your Chapter 13 Trustee can participate in decision making on important legal issues to the extent the Trustee wishes to do so.

A. What Should A Chapter 13 Staff Attorney Aspire To Be?

To me – and this is a subjective question – the model for a good Staff Attorney is an old school corporate lawyer, who gave trusted advice to the President of the company about how to stay out of trouble. Getting to be a trusted advisor – someone who your Trustee is going to go to with all sorts of issues, both legal and operational, is a process. You don't walk out of law school with a lot of insight to offer a 20 year Chapter 13 Trustee – whether that Trustee is a lawyer or not, they'll still know more law than you. On the other hand, if you are a long time

Staff Attorney (why are you in my basics class????) and your Trustee is coming into the position from a non-bankruptcy field, you may be an important advisor and resource for that Trustee. In fact, your ethical obligation may be to work to help your Chapter 13 Trustee become less dependant on your knowledge and advice.

Being a Chapter 13 Staff Attorney also allows you to do a lot of good in the community – in whatever activities are permitted by your Trustee. You can help raise the profile of your Office by speak at legal training sessions and seminars, participating in bar association committees and functions, and representing the Chapter 13 Trustee with competence and professionalism at Section 341 Meetings and in court.

B. It Ain't All A Bed Of Roses – You May Have To Be The Bad Cop.

It is not an uncommon thing for Chapter 13 Trustees to want you to be the picky one, the stickler, the one who says "no", the hammer, the bad guy. And the Trustee will play the role of "good cop" – sometimes overruling you in the hardline positions that the Trustee told you to take. I'd be sympathetic, but I was brought in as Staff Attorney to be meaner than my Trustee. Subsequently, when I was appointed Chapter 13 Trustee, I hired my Staff Attorney with the understanding that she would be meaner than me. This is partly because Chapter 13 practice has moved from being a genteel, almost non-adversarial practice, conducted by a small group of longtime practitioners, to a practice with an important litigation component – you can see that change in the number of reported Chapter 13 bankruptcy decisions that come out in the Bankruptcy Reporter. The other reason for this kind of good Trustee/bad Staff Attorney set up is that just makes life easier for your client.

Don't like it? Try private practice for a while.

Your Chapter 13 Trustee may use you as a tool to deliver a message to the bar – "I'm sick of the failure to promptly turn over tax refunds, we need to send a message. File 128 motions to dismiss on these cases for failure to get those returns filed by April 15th." Or, do the above example with motions to disgorge attorneys fees based on some other issue. Or, you may be told to require every attorney who fails to list a term life insurance policy on Schedule B to file an Amended Schedule B listing the policy.

Sometimes, your work in furthering the objectives of representation may not just be examining debtors, drafting objections, and making arguments in court – it may involve

delivering a message to the debtors' bar, or to national creditors, that certain practices will no longer be tolerated.

A person should not be their job. You are not an attorney, you are a person who can do many things, including acting as a lawyer. A person is not a role, they are a capacity to play any number of roles. Acting in the role of Staff Attorney, you are going to have to play many roles – bad cop, sympathetic provider of tissues when a debtor is overwhelmed by emotion at a First Meeting, Glade sprayer after a particularly hygiene impaired §341 Meeting, peacemaker or order restorer when exchanges between sides get too heated, Wonder Woman with all the answers for the practicing bar, and sounding board for all of the ideas and problems your Chapter 13 Trustee wants to run by you.

Advice that was given to me, that has served me well – When entering any new environment, figure out what kind of a person is needed in that situation, and then be that person.

And sometimes, you also have to realize what your Trustee does **not** need. In my Office, I don't need my Staff Attorney to do legal research. If I asked my Staff Attorney to research something for me, she'd probably suggest I lie down while she checks to see if someone can drive me home. I've done legal research my entire professional life – and when my Staff Attorney needs a couple cases for a motion or brief, I almost always do the research for her. Even though legal research is a "core" part of the job for most Staff Attorneys, for us, it is just more efficient for me to hop on Lexis, and she knows I enjoy doing it.

C. Professionalism With The Debtor And Creditor Bars.

In most Chapter 13 Offices, you are going to see a lot of the same faces, over and over again. And while you may strive to be ethical with a capital E, a paragon of professionalism, and as even handed as Solomon himself – you are going to dealing, day after day, with some pretty crappy lawyers. That's just a fact of life for most Staff Attorneys.

You can't lose your temper, you can't act punitively without consulting your Trustee, and you can't start snapping off lines like: "Why don't we just skip the Stipulation for you to amend your Schedules and go straight to the show cause, shall we?" Decisions on how to deal with problem attorneys have to be made with the Trustee, and the approach is probably going to be incremental, at least at first.

There is danger on the other side of the coin – attorneys who are competent, mostly do things right, and are personable, may start to get treated differently from other attorneys. Think

of how it looks to a debtor if the attorney representing the debtor ahead of her is "Hey Alice, how are Bob and the kids?" and her attorney is "Are you ready to proceed Mr. Smith?" The Trusteeship should strive to maintain the appearance of evenhandedness, with no prejudice or favor shown to anyone. Staff Attorneys are on the front lines in those efforts.

From another perspective – if you look at the Chapter 13 Office as a business, who are the clients of that business? The answer – to the extent there is true customer analog – is debtors' counsel. They are the ones who decide whether their clients are going to use our services.

D. The Morality Of Treating Everyone The Same.

All debtors who come before the Chapter 13 Trustee for the first time should be treated equally. We shouldn't play favorites. We shouldn't play favorites based on who the debtor's attorney is, we shouldn't play favorites because the debtors seemed nice, and we shouldn't play favorites because we identify with the situation the debtor is in.

One way to deal with the tendency to treat debtors differently is to have an established set of guidelines and procedures that a generally applied to all cases. Remember, all your Office's actions are part of a public record – available on PACER. You never want to have something happen like an attorney putting together an argument – supported by docket entries - that your Office is treating his clients more harshly, under the same facts, as another attorney.

The Chapter 13 Trustee's reputation for fairness is something that needs to be zealously guarded. That doesn't require you to be a pushover – you just have to be equally mean (or equally nice) to all.

E. The Morality Of Making Exceptions Based On The Equities Of The Case.

While everyone should be treated equally, not all situations that debtors are facing are the same. The equities of some cases are vastly different than others. While some debtors want to fight to have unsecured creditors pay for their bass boat, other debtors are trying to live on a $200 a month food budget so that they can stretch their social security fit their Plan payments.

When the different treatment is based upon the equities of the case, you can – and should – treat debtors proposed Plans differently based on their circumstances.

For example, where $40 a month is all a low income debtor can pay, I don't make the argument that the minimum Plan payment should be $50 a month. Where a high income creditor

is trying to – in my view – game the system, and is not really attempting to repay creditors, I make the argument that a $40 a month payment isn't permitted.

F. To Care, Or Not To Care. That Is (Often) The Question.

What are creditor issues, and what are issues the Chapter 13 Trustee should get involved in litigating? Does it depend on what your Judge and your Trustee thinks? (Of course it does.)

G. Balancing Advising/Assisting Debtors And Not Giving Legal Advice.

Section 1302(b)(4) states:

(b) The trustee shall –

> (4) advise, other than on legal matters, and assist the debtor in performance under the plan;

The debtors – usually – have their own attorney. You are prohibited from giving them good legal advice, but the Code says the trustee is to advise and assist the debtor. How do you do that?

One explanation that I thought was pretty good was – the trusteeship operates as an accounting office, and a law office. The accounting firm is helpful and can talk to the debtors, the law office can't.

Sometimes you can illuminate a legal issue for debtor's counsel by just talking about it – as a hypothetical, or as a question that incorporates some legal information. For example: "I see Schedule D shows the second mortgage is underwater, and the first and second mortgage are the same company, and the first mortgage proof of claim shows that the value of the property is less than the amount of the first mortgage – have you decided whether you want to strip the second mortgage under [your appellate court decision allowing wholly unsecured mortgages to be stripped here]?" You didn't give legal advice, you just asked a question about an issue the lawyer may not have thought of.

II. CONDUCTING AN EFFECTIVE 341 MEETING.

A. Areas To Think About For 341 Meetings

(***By the late Dean Wyman, Esq., Trial Attorney, Office of the U.S. Trustee, Cleveland.** *These comments were provided by Mr. Wyman at my request, and this Section includes many comments that are solely the pre-judicial personal*

opinions of John Gustafson. Nothing in this section should be taken as official policy statements of, or direction from, the Office of the United States Trustee, or indications of how now Judge Gustafson would rule on any particular issue.)

The 341 meeting presents many issues that should be considered:

Petition

1. The trustee who begins the examination by asking whether all the information in the petition is correct? The difficulty is that the information in the petition may be correct but that the information in the schedules and statement of financial affairs may be completely false.

Papers

2. The trustee who does not identify which document he is asking about. Such as "Is all of the information in your bankruptcy papers correct." In any subsequent action, such as a 727 action, there is absolutely no record of which documents the trustee or debtor was talking about. Did the trustee referred to the publicly filed documents, the documents in his file, or the original documents signed by the debtor? And what is a bankruptcy paper?

Lawyer As Examiner

3. The trustee who lets debtor's counsel, in fact, conduct the meeting. This occurs when the debtor does not respond to questions and debtor's counsel, instead, begins to answer all questions. This is a signal that something is not correct with the bankruptcy case. The best solution may be to ask the debtor if everything his or her lawyer just said was true.

Silent Spouse

4. The joint debtors where the spouse answers questions for both of the debtors. Allied with this is the debtor who barely speaks. Unless the trustee is paying attention, the testimony is so faint that you cannot determine what was said. It is all a mumble.

Indianapolis 500

5. The trustee who races through the questions and therefore doesn't hear the answers to his or her questions. When questions are asked so quickly, the answers become meaningless. Remember, criminal actions require intent. If the trustee is asking the questions very quickly, it is difficult to say that the debtor lied even if he or she did.

Money From Dear Uncle

6. The trustee who does not pinpoint the questions about inheritances. The question may be "do you have a right to an inheritance?" But that question may ignore some timing issues. This is a more common issue that any of us would think. The question really should be: "When you

filed your bankruptcy case did you have a right to an inheritance?" Or. "after you filed your case up until today, did you become entitled to an inheritance?"

You Are On Candid Camera!

7. The talkative trustee. Some trustees start the recording devices before the meeting of creditors. I recall a few years ago, I listed to a recording. Before the debtor appeared the trustee was talking to debtors counsel. This conversation is now recorded. It is a conversation that trustee, if he knew, would not want recorded.

Fees

8. The question about fees. Trustees usually ask about fees. The question is posed to the debtor but then counsel answers the question.

Second Disclaimer: These are my (Dean Wyman's) personal comments and observations and are not to be cited, copied, or distributed. There are not a statement of policy or otherwise of the United States Trustee, the U.S. Department of Justice or any other person or entity.

(The following are pre-judicial John Gustafson comments, and <u>only</u> his comments.)

1. The Oath.

This is the oath that I was taught as a law clerk, many, many years ago:

"Raise your right hand."

"Do you swear, or affirm, that the testimony you are about to give in this proceeding shall be the truth, the whole truth, and nothing but the truth, as you shall answer to the laws of perjury."

There are two advantages to this form of oath -

1. By giving the option to "swear, or affirm" you give people the option to affirm. Some people, usually for religious reasons, will not "swear". When that objection is raised, I usually just ask them to listen carefully, and repeat the oath, with some emphasis on "or affirm". If they don't get it, I suggest that they can respond to the oath by saying: "I so affirm".

2. Oaths that use traditional language like "so help me God" will be a problem for some religious, and non-religious people. Everyone is subject to the laws of perjury, and that is not a controversial concept.

The purpose of the oath is to put the oath-giver in a solemn frame of mind in giving testimony. The oath should be given to each debtor individually. Debtors should not be sworn in as a group before the Section 341 Meeting. <u>See</u>, Handbook for Standing Chapter 13 Trustees, Chapter 5, page 5-2 (1998).

2. The Way You Phrase Questions Can Be Important.

In asking your standard questions of debtors, let me point out a couple of areas to be careful with.

1. When you have a stay at home spouse, never say "You don't work?" Stay at home Moms, husbands who are caring for disabled wives, etc. are not going to react well to the assertion that they don't work just because they don't get paid for what they do. Safer ways to ask the question are: "Do you work outside the home?" Or, more accurate but more time consuming, "do you have any source of income?" followed by "what are they?" if the answer is "yes". Of course, you should already have a pretty good idea what the answers to these questions are going to be based on Schedule I, if they are accurate.

2. An eligibility requirements for a joint Chapter 13 case is that the debtors are married. This is sometimes an awkward question to ask - "are you married?" leaves are out an important component - that they are married to each other. (Debtors will often make nervous jokes in response to this question if it is asked that way. You can ask "are you married to each other?" - but again, that is going to sound odd to the debtors, and it leaves out part of the legal requirement: that the debtors were married at the time of filing. There is also a problem regarding what is a "marriage" - some states recognize common law marriage, and both spouses may have a different idea as to whether they are "common law" married. We have adopted this form of the question: "Were you legally married to each other at the time of filing?" Not perfect, but it works pretty well for me.

3. My Opening 341 Meeting Questions.

After the oath is administered, I go through the following questions at the beginning of every 341 Meeting -

"Please state your name and address for the record." [This is checked against the address listed on the Notice – that is the mailing address used by the Court and our Office.]

I slide the Notice that contains the debtor(s) social security number(s) across the table stating that: “I am showing you a copy of the 341 Notice. Highlighted [usually with an orange highlighter] on that document are/is social security numbers. Please do not state the number out loud, but please testify if that is your correct social security number.”

I have a paper copy of the Petition, Schedules and Statement of Financial Affairs for each case (obviously this would be a problem for a paperless office). I hold up this document and state: "I'm showing you a copy of the Petition, Schedules, and Statement of Financial Affairs that started your Chapter 13 proceeding. Do you recognize these documents?"

Hopefully, they answer “yes”.... If they don't recognize the documents, we try to find out why -

sometimes it is because the attorney didn't spend much time meeting with the client(s). The important thing is: the documents – the Petition, Schedules, and Statement of Financial Affairs - have been specifically identified. It isn't just the 'Petition'.

"Did you provide your attorney with the information used to prepare these documents?"

"Did you review these documents before you signed them?"

"And when you signed them, were they true and correct to the best of your knowledge?"

"Did you list all your debts?" (Often, debtors will want to add "to the best of my knowledge - and I am OK with that.)

"Did you list all of your assets?"

"Are there any changes that need to be made to these documents today to make them accurate today, because of changed circumstances, a mistake, or any other reason?"

[Note that this question requires a "no", not a "yes". So, debtors can't say "I was just mindlessly answering yes to all the questions."]

When the debtors are answering your questions, be sure to immediately jump in and ask for a "yes" or a "no" if the debtors are answering "uh-huh", "yeah" or are just nodding their heads. "This proceeding is being recorded and I need yes or no answers. The tape can't pick up you nodding your head." Sometimes, you need to remind the debtor more than once.

We then move to the identification of original "wet signatures" or the debtors. Debtors' attorneys are required to bring to the 341 Meeting the original documents that the debtors signed. I ask for those documents and use them to ask the following questions:

"I'm showing you the Petition page, is that your signature?" [Or, "are those your signatures?"]

"And you signed it on [date - "February 22nd, 2010?"

"Turning to the declaration at the end of the Schedules, are those your signatures?"

"And you signed the declaration on February 22nd as well?"

"Finally, at the end of the Statement of Financial Affairs, is that your signature?"

I don't ask for debtors to identify their signatures on other documents. I don't ask about the signature on the Means Test because, frankly, I don't expect the debtors to understand it.

[*** In pro se cases, you will probably not have access to the original signatures (unless they made extras) because the original paper copies are on filed with the Court. So, I modify the above-questions by asking if the pro se debtor signed the document they filed with the Bankruptcy Court Clerk. ***]

When a case has been converted from Chapter 7 to Chapter 13, in many – if not most – cases it will be because the Office of the United States Trustee filed a Section 707(b) Motion to Dismiss. While you are preparing for the First Meeting of Creditors: READ THE 707(b) MOTION. See what was alleged. Ask questions about whether what the UST alleged is true. **You never want to miss an issue that you should have picked up on based on what the U.S. Trustee has previously filed in the case.**

4. Don't Forget To Go Back And Get Answers!

Q. "What did you do with the $20,000 in proceeds from the life insurance policy."

A. "I went shopping."

Q. "What did you buy?"

A. "Stuff."

You have to get back to this type of response and ask: "What stuff?" Do not allow yourself to be blown off!

5. Family Size, Dependents, And Who Lives In The House.

Family size issue – the reality can be different from what is listed on the Schedules! Maintain your sense of curiosity!

Q. "Are you married?"

A. "No."

Q. "Do you have any dependants?"

A. "No."

If you stopped there, you might not be getting a true picture of the debtor's situation.

Q. "How many people live in your house?"

A. "Six".

Q. "But none of them are dependants?"

A. "No. My boy is 31, he and his girlfriend and her 3 kids moved back in with me."

Q. "Is your son or his wife employed?"

A. "Yes, Marty has a job."

Q. "Is he paying you anything for rent, utilities, and groceries?"

A. "No."

6. When The Debtor Responds By Pleading The 5th Amendment.

Filing bankruptcy does not waive a debtor's privilege against self-incrimination.

"The Fifth Amendment provides in part that: "no person . . . shall be compelled in any criminal case to be a witness against himself." Hoffman v. United States, 341 U.S. 479, 485, 71 S. Ct. 814, 95 L. Ed. 1118 (1951). A court must afford this privilege against self-incrimination a liberal construction in favor of the right it was intended to secure. Id. The Fifth Amendment applies in civil and administrative cases as well as criminal cases. Kastigar v. United States, 406 U.S. 441, 444, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972); In re DG Acquisition Corp., 151 F.3d 75, 79 (9th Cir. 1998). And, in particular, the Fifth Amendment privilege may be asserted in a bankruptcy proceeding. McCarthy v. Arndstein, 266 U.S. 34, 41, 45 S. Ct. 16, 69 L. Ed. 158 (1924); In re Boughton, 243 B.R. 830, 835-836 (Bankr. M.D. Fla. 2000); In re Mudd, 95 B.R. 426, 429 (Bankr. N.D. Tex. 1989). Indeed, the Fifth Amendment privilege may be correctly asserted any time a party is asked to give testimony that is incriminating or could lead to incriminating evidence. Hoffman, 341 U.S. at 486; DG Acquisition, 151 F.3d at 79." In re Yates, 2008 Bankr. LEXIS 4406 (Bankr. S.D. Cal. June 17, 2008); see also, In re Marble, 2008 Bankr. LEXIS 1487 (Bankr. N.D. Tex. May 9, 2008)(discussing waiver of the Fifth Amendment privilege in the context of a 2004 examination).

The Fifth Amendment privilege belongs to the debtor – not the attorney.

Ask whatever questions you think it is important to ask – even if you know the debtor is going to plead the Fifth. There are many decisions that hold that a court may draw a negative inference from the debtor's invocation of the Fifth Amendment. See, Baxter v. Palmigiano, 425 U.S. 308, 318, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976); In re Marrama, 445 F.3d 518, 522 (1st Cir. 2006); In re Carp, 340 F.3d 15, 23 (1st Cir. 2003); In re Norwood, 2013 Bankr. LEXIS 3232 at *35 (Bankr. D. Colo. Aug. 8, 2013). Make your record without regard to the debtor's assertion of the Fifth Amendment privilege. Do NOT conclude the §341 Meeting – either adjourn it or continue it.

Whenever a debtor pleads the Fifth Amendment privilege, you need to inform the Office of the U.S. Trustee of that fact. "The United States Trustee will, if appropriate, advise the United States Attorney who may take appropriate action to seek a grant of immunity." Handbook for Chapter 13 Standing Trustees, Chapter 5, page 5-3 (12/1/1998)

If the claim of privilege is not well founded, the standing trustee should seek an order from the court compelling testimony or granting such other relief as may be appropriate, such as dismissal of the case or denial of discharge.

7. When The Debtor Refuses To Answer Based On Attorney-Client Privilege.

The privilege belongs to the debtor, not the attorney. The debtor should be required to claim it.

Remember, there are limits to the attorney-client privilege. WHEN the client met with his attorney is NOT privileged.

8. When Debtor's Counsel Instructs The Client Not To Answer

The 341 Meeting is a legally authorized fishing expedition. "A §341 meeting is conducted in much the same way one conducts a fishing expedition -- throwing out baited lines numerous times in the hope of reeling in something of substance. No formal rules of evidence are employed." In re Ward, 92 B.R. 644, 646 (Bankr. W.D. Pa. 1988); see also, In re Russell, 392 B.R. 315, 358-59 (Bankr. E.D. Tenn. 2008)(The meeting of creditors "is a fishing expedition allowed, even encouraged, by the statutes and the rules so long as the subject of the questioning relates to the bankruptcy case.) A copy of an unpublished decision, In re Cinseree Johnson,

provides a good overview of how most bankruptcy courts are going to treat debtors, or debtors' counsel, who refuse to answer questions at a 341 meeting.

If counsel can't articulate why he or she is instructing the debtor not to answer, explore the area where the debtor is being non-responsive – establishing a clear record – then bring it before your judge.

Saying something isn't relevant, probative, "beyond legitimate inquiry", or none of the trustee's business just isn't going to fly with the bankruptcy court.

9. Dealing With Specific Issues.

A. 401(k) Loans.

My questions on 401(k) loans almost always start with "When did you take out the 401(k) loan?" The reason is, most retirement loans are for a five year period. If you know when the loan was taken out, you pretty much know when it is paid off. But, by asking when it as taken out, the debtor(s) are less likely to "forget" or not be sure – which tends to happen when you ask them "when is your 401(k) loan paid off?" They know what's coming when you ask that question, and they clam up.

My second 401(k) question is "how much did you borrow?" Third, is: "What did you use the money for?" And last, I ask when the loan will be paid off. The next step is to see if the debtor(s) will enter into a stipulation to step up the Plan payments when the 401(k) loan payment ends.

B. Inheritances, Lottery Winnings, Personal Injury Suits.

So called "windfalls" are a difficult area in Chapter 13. If you look at the Code sections, and how they interact, difficult questions arise as to whether or not post-petition inheritances, lottery winnings, and personal injury actions based on post-petition injuries, are disposable income or even property of the estate. Fortunately, much of the case law gets to the result Chapter 13 Trustees generally want – 1) there is a duty to disclose; 2) a post-petition windfall is part of the estate, even after Confirmation re-vests (in most instances) property with the debtor; 3) the debtor(s) have an obligation to disclose the windfall to the Chapter 13 Trustee; and 4) the existence of a windfall is grounds for modification under Section 1329.

Of course, there is not uniformity among the courts. The issue of whether a windfall is 'income' is a difficult one, particularly with the backward looking Means Test. The "best

interest of creditors/liquidation test" is generally figured as of the date of filing. What all courts appear to agree on is – if a Chapter 7 trustee could get the windfall, the inheritance is included in the best interest/liquidation test.

I don't ask about inheritances in every case. Note that any present interest in an inheritance, life insurance policy, or trust is required to be disclosed on Schedule B, Q. 20. See also, In re Waldron, 536 F.3d 1239 (11th Cir. 2008); In re Easley, 205 B.R. 334, 335-336 (Bankr. M.D. Fla. 1996). If there is an possibility of an inheritance, I will also inform the debtor(s) that they have a duty to inform the Chapter 13 trustee should be become entitled to an inheritance. Of course, this is a delicate area, because the tip-off about a possible inheritance is usually information about expenses for a sick parent, or a continuance of a 341 meeting because of a death in the family.

The right to bring a personal injury action is also required to be disclosed on Schedule B, Q. 21 (could be clearer) and any pending lawsuit should be listed on the Statement of Financial Affairs, Q. 4. A the 341 meeting: "Do you have a right to sue anyone for any reason?" is broad enough, but I usually add: "such as for a traffic accident or other personal injury?" If there is a lawsuit pending, we get the attorney's information and provide notice of the Chapter 13.

A more detailed discussion of these issues, written for the Academy before my appointment, is in the next Section.

10. It Doesn't Hurt To Offer A Bit Of Encouragement At The End.

The debtors are facing a daunting task in making payments to your Office for 36 to 60 months. As I have heard Chapter 13 Trustee Frank Pease say: It doesn't hurt to tell the debtors: "You can do this." Or, "Don't sell yourself short."

III. POST-PETITION CAUSES OF ACTION, INHERITANCES AND WINDFALLS ARE PROPERTY OF THE ESTATE AND MUST BE REPORTED TO THE TRUSTEE.

A. Property Acquired After The Filing Of The Chapter 13 Case: The Different Approaches.

What becomes property of the Chapter 13 estate involves an interpretation of two Bankruptcy Code sections, §1306(a) and §1327(b). There are three basic approaches to how to

reconcile the concept of property "vesting" in the debtor under §1327(b) and the fact that assets acquired post-petition become property of the Chapter 13 estate pursuant to §1306(a).

Under the first approach, the "vesting" at confirmation extinguishes the estate and all property not accounted for in the confirmation plan vests in the debtor. See, e.g., Oliver v. Toth (In re Toth), 193 B.R. 992 (Bankr.N.D.Ga.1996); In re Petruccelli, 113 B.R. 5 (Bankr. S.D. Cal. 1990); In re Mason, 45 B.R. 498 (Bankr. D. Or. 1984), *aff'd*, 51 B.R. 548 (D. Or. 1985). The problem with this approach is that it completely ignores the definition of §1306(a), continuing the estate until closing, dismissal or conversion of the case. This line of cases has essentially been . . . extinguished.

The second interpretation is that in the absence of a confirmation plan, any property (including property acquired post confirmation) not necessary for payments to the chapter 13 trustee vests in the debtor upon confirmation of the plan. See, e.g., Telfair v. First Union Mortgage Corp., 216 F.3d 1333, 1339-1340 (11th Cir. 2000); In re Farmer, 324 B.R. 918 (Bankr. M.D. Ga. 2005); In re Price, 130 B.R. 259 (N.D. Ill. 1991); In re Ziegler, 136 B.R. 497 (Bankr. N.D. Ill. 1992); Black v. United States Postal Serv. (In re Heath), 115 F.3d 521, 524 (7th Cir. 1997)(probably *dicta*, but followed by Telfair). One problem with this minority approach is that it is difficult to determine what post-Confirmation property is necessary to fund the Chapter 13 Plan. Annese v. Kolenda (In re Kolenda), 212 B.R. 851, 854 (W.D. Mich. 1997). Plus, no textual basis exists in the Code for distinguishing between post-confirmation property that is "necessary" and that which is "not necessary" to funding the plan.

The third interpretation, and the majority view, is that confirmation vests the property of the estate in the debtor at the time of confirmation (if the Chapter 13 Plan is silent, or if the Plan provides for vesting upon Confirmation), but not for property acquired by the estate under section 1306 after confirmation:

> While the case is pending, the post-petition property ... [is] added to the estate until confirmation, the event that triggers [section] 1327(b) and "vests" the property of the estate in the debtor. That is, the property interests comprising the pre-confirmation estate property are transferred to the debtor at confirmation, and this "vesting" is free and clear of the claims or interests of creditors provided for by the plan, [section] 1327(b), (c). Finally, the property of the estate once again accumulates property by operation of [section] 1306(a) until the case is "closed, dismissed, or converted."

In re Rodriguez, 432 B.R. 671, 680 (S.D. Tex. 2010)(citing, In re Waldron, 536 F.3d 1239, 1243 (11th Cir.2008); see also, Barbosa v. Soloman, 235 F.3d 31, 35 (1st Cir. 2000); Rainey v. United Parcel Serv., Inc., 466 F. App'x 542, (7th Cir. 2012)("A Chapter 13 estate encompasses all property, including legal claims, acquired after the petition is filed and before the case is closed."); United States v. Harchar, 371 B.R. 254 (N.D. Ohio 2007); In re Bratcher, 2013 Bankr. LEXIS 3904 at *7 - *8 (Bankr. S.D. Tex. Sept. 19, 2013)(equating car accident and stay violation cases – citing bankruptcy stay violation cases held to be property of the Chapter 13 estate); Moser v. Mullican (In re Mullican), 417 B.R. 389, 400 (Bankr. E.D. Tex. 2009); In re Jackson, 403 B.R. 95 (Bankr. D. Idaho 2009); In re Wetzel, 381 B.R. 247 (Bankr. E.D. Wis. 2008); In re Nott, 269 B.R. 250, 257 (Bankr. M.D. Fla. 2000); In re Rangel, 233 B.R. 191, 198 (Bankr. D. Mass. 1999); In re Fisher, 203 B.R. 958 (N.D. Ill. 1997).

B. The Duty To Disclose Post-Petition Causes Of Action.

1. The Waldron Decision.

The 11th Circuit Court of Appeals considered the issue of whether or not a post-petition cause of action is part of the bankruptcy estate in a Chapter 13 case. The decision, In re Waldron, 536 F.3d 1239 (11th Cir. 2008), held that claims acquired after the commencement of the bankruptcy case but before the case was dismissed were property of the estate under the plain language of §1306(a). New assets that the debtors acquired unexpectedly after confirmation by definition did not exist at confirmation and could not be returned to the debtor under §1327(b). Accordingly, the underinsured motorist claims of the debtor from a post-petition accident were property of the Chapter 13 bankruptcy estate.

The appellate court further held that the bankruptcy court properly required the debtors to amend their schedules to disclose the claims under Rule 1009. See also, Mullican v. Moser, 417 B.R. 408 (E.D. Tex. 2009). Payments under the Chapter 13 Plan were based on the debtors' disposable income when the plan was confirmed under 11 U.S.C.S. §1325(b). Although the debtors did not have a duty to disclose every acquisition of property or an interest in property after plan confirmation, the decision seems to suggest that the major ones, like this, were required to be disclosed to the Chapter 13 Trustee. Finally, the Chapter 13 Trustee had the right to request the debtors to modify their plan pursuant to §1329 and Federal Rule of Bankruptcy Procedure 1009.

The 11th Circuit has reaffirmed the Waldron holding in Robinson v. Tyson Foods, Inc., 595 F.3d 1269, 1274-1275 (11th Cir. 2010)("[W]hen Robinson filed her claim against Tyson while her bankruptcy was still pending, the claim vested in the bankruptcy estate and Robinson had a duty to notice the suit to all creditors. See 11 U.S.C. §303").

2. Cases Following Waldron On The Duty To Notify Or Amend.

Some courts have followed Waldron and held that in Chapter 13 there is a duty to either provide notice of the acquisition of a post-petition asset, or to amend the schedules (or to provide notice of the existence of the asset by amending the Schedules). See, Flugence v. Axis Surplus Ins. Co. (In re Flugence), 738 F.3d 126, 128 (5th Cir. 2013)("We agree with the personal-injury defendants that there is a continuing duty to disclose in a Chapter 13 proceeding"); Kimberlin v. Dollar Gen. Corp., 520 Fed. Appx. 312, 314 - 315, 2013 App. LEXIS 5797 at *7 (6th Cir. March 20, 2013)(unpublished)("Applying judicial estoppel under these circumstances recognizes the importance of the bankruptcy debtor's affirmative and ongoing duty to disclose assets, including unliquidated litigation interests."); Coles v. Carlini, 2013 U.S. Dist. LEXIS 101873, at * (D.N.J. July 22, 2013)("debtors have an ongoing, affirmative duty to disclose contingent assets to the bankruptcy court"); Harris v. hhgregg, Inc., 2013 U.S. Dist. LEXIS 45394, at 817-*18 (M.D.N.C. March 29, 2013); DePasquale v. Morgan Stanley Smith Barney, 2011 U.S. Dist. LEXIS 94058 at *6 - *7, 2011 WL 3703110, at *3 ("If the debtor is unaware of contingent claims at the time when she discloses her assets, the debtor has an obligation to amend the bankruptcy schedule and disclose claims once aware of them."); Gilbreath v. Averitt Exp., Inc., 2010 U.S. Dist. LEXIS 117706 at *19, 2010 WL 4554090, at *11 (W.D. La. Nov. 3, 2010)("at the commencement of a chapter 13 proceeding, an estate is created that continues to exist until the proceeding is closed, dismissed, or converted. Any assets the chapter 13 debtor acquires after commencement but prior to discharge must be disclosed to the bankruptcy court.").

3. Consequences For The Debtor Where A Cause Of Action Is Not Disclosed.

Debtors should disclose post-petition causes of action because the failure to do so may prevent the debtor-plaintiff from pursuing the claim based upon the concept of "judicial estoppel".

Judicial estoppel seeks "to preserve 'the integrity of the courts by generally preventing a party from prevailing in one phase of a case on an argument and then relying on a contradictory

argument to prevail in another phase. See, Kimberlin v. Dollar Gen. Corp., 520 Fed. Appx. 312, 314, 2013 App. LEXIS 5797 at *6 - *7 (6th Cir. March 20, 2013).

Put another way:

> The purpose of judicial estoppel is "to protect the integrity of the judicial process by prohibiting parties from changing positions according to the exigencies of the moment. New Hampshire v. Maine, 532 U.S. 742, 749, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)). Specifically, judicial estoppel is designed to "prevent a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by the party in a previous preceding." 18 Moore's Federal Practice § 134.30 (3d ed. 2008).

Robinson v. Tyson Foods, Inc., 595 F.3d 1269, 1273 (11th Cir. 2010).

The Fulgence court stated that judicial estoppel has three elements: (1) The party against whom it is sought has asserted a legal position that is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently. Fulgence v. Axis Surplus Ins. Co. (In re Fulgence), 738 F.3d 126, 129 (5th Cir. 2013). A somewhat different definition is cited in Robinson: "First, it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding. Second, such inconsistencies must be shown to have been calculated to make a mockery of the judicial system." Robinson v. Tyson Foods, Inc., 595 F.3d 1269, 1273 (11th Cir. 2010).

The issue becomes whether or not the failure to disclose a cause of action that either came into existence post-petition, or that the debtor did not see as an asset until after filing, prevent the debtor from going forward with the claim based on judicial estoppel. Robinson demonstrates some of the difficulties with the defenses a debtor might assert: "By failing to update her bankruptcy schedule to reflect her pending claim, Robinson represented that she had no legal claims to the bankruptcy court while simultaneously pursuing her legal claim against Tyson in the district court. These actions, both taken under oath, are clearly inconsistent. Therefore, in accordance with Ajaka, Robinson took inconsistent positions under oath and the issue of judicial estoppel centers on her intent." Robinson v. Tyson Foods, Inc., 595 F.3d 1269, 1275 (11th Cir. 2010). So, the failure to update schedules that were submitted under penalty of perjury has been held sufficient to satisfy the "under oath" requirement. And, also in Robinson, the debtor had proposed a 100% Plan, and completed it with full repayment to creditors. See, Robinson, 595 F.3d at 1272. The debtor's failure to disclose the cause of action was held to satisfy the "mockery of the judicial system"

element because she brought the claim before her Chapter 13 Plan was paid off, and the fact that it was paid off was an argument made in hindsight.

Similarly, in Kimberlin, the debtor's cause of action came into existence 41 days before her 60 month Chapter 13 case was completed according to its terms. The Sixth Circuit Court of Appeals still held that the failure to disclose judicially estopped the former debtor from pursuing her claim. Kimberlin v. Dollar Gen. Corp., 520 Fed. Appx. 312, 2013 App. LEXIS 5797 (6th Cir. March 20, 2013).

In Fulgence, the Court of Appeals reversed the District Court, and held that the debtor's "I didn't know I had to disclose, and I relied on the advice of counsel" defense was unavailing. . Fulgence v. Axis Surplus Ins. Co. (In re Fulgence), 738 F.3d 126, 131 (5th Cir. 2013)(" Flugence knew of the facts underlying her personal-injury claim. The bankruptcy court also found that she had motive to conceal, because her claim, if disclosed, would be available to the creditors. That she did not know that bankruptcy law required disclosure—even if true—is, according to our precedents, irrelevant.").

This is not to say that debtors have not succeeded in asserting that judicial estoppel should not apply. Courts have accepted the debtor's explanation of an "honest mistake", holding that it would be inequitable to apply judicial estoppel to bar plaintiff's claim. See, Byrd v. Wyeth, Inc., 907 F.Supp.2d 803 (S.D. Miss. 2012)(discussing cases); Cargo v. Kansas City Southern Railway. Co., 408 B.R. 631 (W.D. La. 2009)(discussing several cases with different fact patterns). One problem for debtors is that the "honest mistake/the law was not clear" explanations are going to be hard to sell to the courts as the case law outlining the duty to amend to disclose post-petition assets becomes stronger.

4. If The Debtor Is Judicially Estopped – Is The Chapter 13 Trustee?

The court in Fulgence allowed the Chapter 13 Trustee to pursue the claim, even though the debtor was judicially estopped. Reed v. City of Arlington, 650 F.3d 571, 573 (5th Cir. 2011)(*en banc*) "holds generally that, where a debtor is individually estopped from pursuing an undisclosed claim, "absent unusual circumstances, an innocent trustee can pursue [the claim] for the benefit of creditors." The remedy affirmed in Reed provided that, though the debtor was personally estopped, the trustee "would be free to [pursue the claim for recovery] for distribution to [the debtor's] creditors," and "[a]ny remaining funds after distribution would be refunded to the [defendants], and

not to [the debtor]." Id. That holding was intended both to "deter dishonest debtors, whose failure to fully and honestly disclose all their assets undermines the integrity of the bankruptcy system," and to "protect the rights of creditors to an equitable distribution of the assets of the debtor's estate." Id. at 574." Fulgence v. Axis Surplus Ins. Co. (In re Fulgence), 738 F.3d 126, 131 (5th Cir. 2013).

Most courts view both the debtor and the Chapter 13 trustee can represent the estate in litigation. See, Boddie v. PNC Bank, NA, 2013 U.S. Dist. LEXIS 15575 (S.D. Ohio Feb. 5, 2013)(This Court has held that "a chapter 13 debtor is the proper representative of the estate for litigation purposes, although it would appear to be more accurate to state that a debtor may exercise his power to sue and be sued concurrently with the Trustee." In re Wirmel, 134 B.R. at 260 (Bankr. S.D. Ohio 1991); Smith v. ABN AMBRO Mortg. Grp., Inc., No. 1:06-cv-45, 2007 U.S. Dist. LEXIS 26585, 2007 WL 950334, *6 (S.D. Ohio Mar. 27, 2007).").

5. What About Other Substantial Assets Acquired Post-Petition?

Inheritances Outside The 180 Day Window:

Are part of the Chapter 13 estate: Carroll v. Logan, 735 F.3d 147 (4th Cir. 2013)(modification granted); Matter of Lybrook, 951 F.2d 136 (7th Cir. 1991)(postconfirmation inheritance was part of the Chapter 13 estate); In re Ormiston, 501 B.R. 303 (Bankr. E.D.N.C. 2013)(modification warranted); In re Mullican, 417 B.R. 389, 399-400 (Bankr. E.D. Tex. 2008); In re Jackson, 403 B.R. 95, 98 (Bankr. D. Idaho 2009)(real property inherited more than 180 days post-petition would be estate property); In re Vannordstrand, 356 B.R. 788 (B.A.P. 10th Cir. 2007) (collecting cases); In re Nott, 269 B.R. 250 (Bankr. M.D. Fla. 2000); see also, In re Tinney, 2012 Bankr. LEXIS 3092, 2012 WL 2742457, at *1 (Bankr. N.D. Ala. July 9, 2012).

Are not part of the Chapter 13 estate: In re Key, 465 B.R. 709, 712 (Bankr. S.D. Ga. 2012); In re Schlottman, 319 B.R. 23, 24-25 (Bankr. M.D. Fla. 2004).

But, where there has been a stipulation that the inheritance is NOT part of the Chapter 13 estate, modification has been denied. See, In re Peebles, 500 B.R. 270 (Bankr. S.D. Ga. 2013).

Inherited 401(k):

Are part of the Chapter 13 estate: In re Hargis, 2013 Bankr. LEXIS 3406 (Bankr. N.D. Ohio August 15, 2013).

Life Insurance Proceeds:

Are part of the Chapter 13 estate: In re Hargis, 2013 Bankr. LEXIS 3406 (Bankr. N.D. Ohio August 15, 2013); In re Morrison, 403 B.R. 895 (Bankr. M.D. Fla. 2009) (life insurance proceeds accruing to wife more than 180 days after chapter 13 case was filed were property of her chapter 13 estate pursuant to § 1306); In re Pitts, 2005 Bankr. LEXIS 490, at *27 (Bankr. C.D. Ill. Mar. 30, 2005).

Were not part of the Chapter 13 estate: In re Richardson, 283 B.r. 783 (Bankr. D. Kan. 2002)(Life insurance beneficiary proceeds received by Chapter 13 debtors 10 months after the plan was confirmed was not property of the estate. Because debtors completed the plan payments, the trustee's objection to the debtors' discharge was denied.).

Lottery Winnings:

Adams v. Bostick (In re Bostick), 400 B.R. 348, 359 n.9 (Bankr.)("The postpetition Lottery Winnings became part of the chapter 13 estate."): In re Cook, 148 B.R. 273 (Bankr. W.D. Mich. 1992)(debtors' postconfirmation winnings of $6,000,000 in Michigan State Lottery, with annual payments of $226,000, became property of the estate); In re Koonce, 54 B.R. 643, 645 (Bankr. D.S.C. 1985). Note that many courts use the example of lottery winnings as the kind of post-petition "windfall" that comes into the Chapter 13 estate. See e.g., In re Wetzel, 381 B.R. 247, 251 (Bankr. E.D. Wis. 2008); In re Nott, 269 B.R. 250, 252 (Bankr. M.D. Fla. 2000); In re Trumbas, 245 B.R. 764, 767 (Bankr. D. Mass. 2000).

Gifts:

In re Leung, 356 B.R. 317, 322 (Bankr.D.Mass.2006)("To the extent that 'acquired by the debtor' requires an affirmative action, I find that the Debtor acquired an interest because he accepted delivery of the deed and then made the affirmative step to declare a homestead."). Courts have made general statements about gifts being income and coming into the Chapter 13 estate: see e.g., In re Stretcher, 466 B.R. 891, 897 n.7 (Bankr. W.D. Tex. 2011); In re Wetzel, 381 B.R. 247, 252 (Bankr. E.D. Wis. 2008)("Many courts have held that a Chapter 13 estate can include gifts, inheritances and causes of action that are acquired by a debtor post-confirmation.").

Mortgage Refinancing:

In re Drew, 325 B.R. 765, 770 (Bankr. N.D. Ill. 2005); In re Kieta, 315 B.R. 192 (Bankr. D. Mass. 2004)(appreciation of property belonged to the estate).

Refinancing not the basis for Chapter 13 Plan modification. Murphy v. O'Donnell (In re Murphy), 474 F.3d 143 (4th Cir. 2007)("case one").

Sale Of Real Estate:

Barbosa v. Soloman, 235 F.3d 31, 35 (1st Cir. 2000); Murphy v. O'Donnell (In re Murphy), 474 F.3d 143 (4th Cir. 2007)(sale of condominium in "case two").

Post-Confirmation Tax Refund:

United States v. Harchar, 371 B.R. 254, 268 (N.D. Ohio 2007). See also, Freeman v. Schulman (In re Freeman), 86 F.3d 478, 481 (6th Cir. 1996)(tax refund, even though exempt under state law, qualifies as disposable income).

Cause Of Action For Violation Of The Automatic Stay:

Price v. United States, 42 F.3d 1068, 1072 (7th Cir.1994); United States v. McPeck, 910 F.2d 509, 513 (8th Cir.1990); Koehler v. Iowa College Student Aid Comm'n (In re Koehler), 204 B.R. 210, 219 (Bankr. D.Minn.1997); Flynn v. Internal Revenue Serv. (In re Flynn), 169 B.R. 1007, 1016 (Bankr. S.D.Ga.1994); In re Solis, 137 B.R. 121, 126 (Bankr.S.D.N.Y.1992); In re Cox, 214 B.R. 635, 649 (Bankr. N.D. Ala. 1997); In re Brown, 159 B.R. 1014, 1019 (Bankr. S.D. Ga. 1993)(holding that a cause of action for violation of the stay during the bankruptcy case was property of the estate whereas a cause of action for violation of the discharge injunction was not property of the estate as it accrued after the case closed).

Other Windfalls:

In re Fitak, 121 B.R. 224 (S.D. Ohio 1990)(withdrawal of retirement funds).

6. Talking Turkey About The Chapter 13 Trustee's Dilemma With Post-Petition Windfalls – Conversion, Dismissal, Early Payoffs, Etc.

a. The risk of conversion.

While it may be tempting to take a very aggressive stance in moving to modify Chapter 13 Plans upon learning of an inheritance, lottery winning, PI case, or the like, there are reasons for a Chapter 13 trustee to seek compromise in these situations.

First, the debtor may choose to convert the case to a Chapter 7. Why would that help the debtor? Because property acquired after the filing of a Chapter 13 doesn't becomes property of the Chapter 7 estate . . . even if it became property of the Chapter 13 estate under Section 1306(a). See, Section 348(f)(1)(A).

So, for many debtors, threatening to convert to a Chapter 7 is a very viable litigation strategy. However, it is not a risk free strategy for windfall-receiving Chapter 13 debtors, particularly after the Supreme Court's decision in Marrama v. Citizens Bank of Mass., 549 U.S. 365, 374, 127 S. Ct. 1105, 166 L. Ed. 2d 956 (2007) and §348(f)(2).

Under §348(f)(2), if it is determined that a debtor has converted a case under Chapter 13 to a case under another chapter under Title 11 in bad faith, the property in the converted case shall consist of the property of the estate as of the date of conversion.

In a general "windfall" case, the issue is going to be whether the debtor's conversion to Chapter 7 is filed in good faith. There are some cases where the Chapter 13 trustee (or the U.S. Trustee) has prevailed on an argument that the motion to convert the case to a Chapter 7 was not filed in good faith. See, In re Easley-Brooks, 487 B.R. 400 (Bankr. S.D.N.Y. 2013)(bad faith where debtor never disclosed medical malpractice action – Chapter 7 trustee would administer the malpractice claim); Moser v. Mullican (In re Mullcan), 417 B.R. 389 (Bankr. E.D. Tex. 2008)(discharge denied); In re Wiggins, 2012 Bankr. LEXIS 4128 (Bankr. E.D. Tenn. Sept. 7, 2012)(debtor had to turn over the inheritance to the Chapter 7 trustee). However, the mere existence of a post-petition asset does not necessarily mean that the conversion is filed in "bad faith". See, Farmer v. Taco Bell Corp., 242 B.R. 435, 440 (E.D. Tenn. 1999)("An inquiry into bad faith is fact specific." – court found no bad faith in conversion after personal injury claim arose.).

It is also possible that the U.S. Truste could file a motion to dismiss the Chapter 7 case could be filed under Section 707(b)(3), the "totality of the circumstances" test.

b. The risk of dismissal.

Post-filing litigation assets are different than other kinds of property acquired after the filing of a Chapter 13 case. Because of the risk of dismissal of the action, based on judicial estoppel, well counseled Chapter 13 debtors will know that seeking voluntary dismissal (or simply stopping the monthly Chapter 13 payments) is probably a bad choice. The debtor may get nothing, because of the failure to properly disclose the litigation in the Chapter 13.

On the other hand, an inheritance, a lottery win, or a large gift does not depend on disclosure – there isn't going to be a clever defense attorney combing the bankruptcy records where the windfall doesn't involved litigation.

So, the choice may be made to just let the Chapter 13 go. . . . Quietly.

The downside for the debtor in that situation is that he or she won't receive a discharge – and all those unfiled claims, that would have been discharged, can now come after the debtor for full payment. And this can happen years in the future, where a debt buyer will commence collection attempts based on paper bought for pennies on the dollar.

Of course, the debtor may be willing to take that chance if the trustee's reputation is that there can be no compromise on the amount to be paid. It is a very delicate balancing act that a Chapter 13 trustee must do in seeking to maximize the amount paid to unsecured creditors, not just in an individual case, but over the long term.

c. The risk of an early payoff.

Again, there is a definite downside to this tactic if the "windfall" is a litigation asset – but for something like an inheritance (or even an expectancy of an inheritance) paying off a Chapter 13 case early, before disclosure requirements kick in, may prevent a trustee's motion to modify under Section 1329.

Depending on the procedures used in your Office, a debtor may be able to pay off a case with a lump sum payment for the balance (particularly if the debtor is below median and has completed the applicable commitment period). Often, Chapter 13 trustees will inquire as to the source of the funds to pay off the case – but where money is expected, family members may help the debtor get out of the Chapter 13 before the windfall is received.

It is something to think about when you are dealing with early payoffs. See generally, In re Forte, 341 B.R. 859 (Bankr. N.D. Ill. 2005).

d. Problems with windfalls from property that vested in the debtor.

Where the windfall is something acquired AFTER the filing of the Chapter 13 case, Section 1306(a) brings it into the estate. But what about property that was part of the Chapter 13 estate at the beginning – like real estate – which goes up in value and then is sold after Confirmation but prior to the completion of the Plan?

The problem is, if the property vested in the debtor upon Confirmation, by operation of law [§1327(b)] or through a Plan provision or the Confirmation Order, how does the "gain" in the vested property come back into the estate? And why isn't the vested property free and clear of creditors' claims, as stated in §1327(c)? See, In re Hardin, 375 B.R. 506, 514 (Bankr. E.D. Wis.

2007)(excess insurance proceeds from vehicle that vested in the debtor, belong to the debtor). Particularly when an exemption in that property has been properly claimed . . . . See generally, In re Rangel, 233 B.R. 191 (Bankr. D. Mass. 1999).