



## SAVING HOMES AND STRIPPING LIENS: RECENT EXEMPTION DEVELOPMENTS

Presented By:



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Panelists:

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Panelists:

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Partner, Brown and Ahern



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## Surcharge

- *Law v. Siegel (In re Law)*, 435 Fed. Appx. 697 (9th Cir. 2011)
  - S. Ct. has granted *cert.*, at 133 S. Ct. 2824, 81 USLW 3685, 81 USLW 3689 (June 17, 2013)
- *Malley v. Agin*, 693 F.3d 28 (1st Cir. 2012)
- *Latman v. Burdette*, 366 F.3d 774 (9th Cir. 2004)
- *In re Scrivner*, 535 F.3d 1258 (10th Cir. 2008), *cert. denied*, 556 U.S. 1126 (2009)
- See Brown and Ahern, Supreme Court Grants Certiorari on Exemption Surcharge, Norton Bankruptcy Law Adviser (June 2013)



## DOMA

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- Defense of Marriage Act (DOMA), 110 Stat. 2419
- *In re Goodale*, 298 B.R. 886 (Bankr. W.D. Wash. 2003)
- *U.S. v. Windsor*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013)
- Section 522(f)(1)(A)
- Section 101(14A) - "spouse, former spouse," etc.



## Inherited IRA

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- *In re Clark*, 714 F.3d 559 (7th Cir. 2013) cert. granted (Nov. 27, 2013)
- *Diamond v. Trawick (In re Trawick)*, 497 B.R. 572 (Bankr. C.D. Cal. 2013)
- *In re Chilton*, 674 F.3d 486 (5th Cir. 2012)
- *In re Nessa*, 426 B.R. 312 (BAP 8th Cir. 2010)

## Inherited IRA

- *Mullen v. Hamlin (In re Hamlin)*, 465 B.R. 863 (BAP 9th Cir. 2012)
- *In re Seeling*, 471 B.R. 320 (Bankr. D. Mass. 2012)
- *In re Reinhart*, 267 P.3d 895 (Utah 2011)



## Other Tax-Advantaged-Fund Issues

- IRA - *Daley v. Mostoller (In re Daley)*, 717 F.3d 506 (6th Cir. 2013)
- HSA - *Leitch v. Christians (In re Leitch)*, 494 B.R. 918 (BAP 8th Cir. 2013)
- Annuity - *Running v. Miller (In re Miller)*, 500 B.R. 578 (BAP 8th Cir. 2013)



## Other Tax-Advantaged-Fund Issues – Cont'd

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- Federal child tax credit - *Cohen v. Borgman (In re Borgman)*, 698 F.3d 1255 (10th Cir. 2012)
- Non-qualified Retirement Account - *Diener v. McBeth (In re Diener)*, 483 B.R. 196 (BAP 9th Cir. 2012).
- Cash surrender values - *Tober v. Lang, et al. (In re Tober)*, 688 F.3d 1160 (9th Cir. 2012)



## Lien Stripping

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- Tenancy by entireties - *Alvarez v. Grigsby (In re Alvarez)*, 733 F.3d 136 (4th Cir. 2013)
- Chapter 20 debtor ineligible for discharge - *Branigan v. Davis (In re Davis)*, 716 F.3d 331 (4th Cir. 2013)
  - *Colbourne v. Ocwen (In re Colbourne)*, \_\_\_ Fed. Appx. \_\_\_, 2013 WL 5789159 (11th Cir. 2013)
  - *In re Wapshare*, 492 B.R. 211 (Bankr. S.D. N.Y. 2013)



## Lien Stripping – Cont'd

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- Untimely proof of claim - *Shelton v. Citimortgage, Inc. (In re Shelton)*, \_\_\_ F.3d \_\_\_, 2013 WL 5878438 (8th Cir. 2013).
- Chapter 7 debtors - *Palomar v. First American Bank*, 722 F.3d 992 (7th Cir. 2013).



## Lien Stripping – Cont'd

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- Section 506(d) in Chapter 13
  - *In re Woolsey*, 696 F.3d 1266 (10th Cir. 2012)
  - *Ryan v. United States (In re Ryan)*, 725 F.3d 623(7th Cir. 2013)
  - *Briseno v. Mutual Federal Savings and Loan Assoc. (In re Briseno)*, 496 B.R. 509 (Bankr. N.D. Ill. 2013)



## Lien Stripping – Plan Issues

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- Fraud only ground in § 1330
  - *In re Fesq*, 153 F.3d 113 (3d Cir. 1998)
  - *In re Rodriguez*, 2013 WL 1716110 (3d Cir. Apr. 22, 2013), slip copy.
- “Hybrid plan”
  - *Bullard v. Hyde Park Savings Bank (In re Bullard)*, 494 B.R. 92 (BAP 1st Cir. 2013)
  - *In Hurd*, 494 B.R. 189 (Bankr. W.D. N.Y. 2013)
- Section 1322(b)(2) vs. § 1322(c)(2)
  - *Witt v. United Companies Lending Corp. (In re Witt)*, 113 F.3d 508 (4th Cir. 1997)
  - *In re Hubbell*, 496 B.R. 784 (Bankr. E.D. N.C. 2013)
  - *Rogers v. Eastern Savings Bank (In re Rogers)*, 489 B.R. 327 (D. Conn. 2013).



## Bankruptcy-Specific Exemptions

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- *Richardson v. Schafer (In re Schafer)*, 689 F.3d 601 (6th Cir. 2012)
- *Williamson v. Westby (In re Westby)*, 2013 WL 415599 (BAP 10th Cir. Feb. 4, 2012)



**Bill Brown**



**Larry Ahern**



## Progeny of *Schwab v. Reilly*

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- *Schwab v. Reilly*, 130 S.Ct. 2652 (2010)
- *In re Orton*, 687 F.3d 612 (3d Cir. 2012).
- *Massey v. Pappalardo (In re Massey)*, 465 B.R. 720 (BAP 1st Cir. 2012)
- *Williams v. Biesiada*, 498 B.R. 746 (S.D. Tex. 2013)
- *In re Luckham*, 464 B.R. 67 (Bankr. D. Mass. 2012).
- *Messer v. Maney (In re Messer)*, 2012 WL 762828 (BAP 9th Cir. Mar. 9, 2012), slip copy.
- *In re Messina*, 687 F.3d 74 (3d Cir. 2012).



## Section 522(o)

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- *In re Cipolla I*, 476 Fed. Appx. 301 (5th Cir. 2012)
- *Cipolla v. Roberts (In re Cipolla)*, \_\_\_ Fed. Appx. \_\_\_, 2013 WL 5596848 (5th Cir. 2013) (unpublished).
- *In re Willcut*, 472 B.R. 88 (BAP 10th Cir. 2012).





## Section 522(p) – The 1215-Day Rule

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- **Interest re-conveyed**
  - *In re Stella*, 470 B.R. 1 (Bankr. D. Mass. 2012).
- **Transfer between debtors**
  - *In re Gentile*, 483 B.R. 50 (Bankr. D. Mass. 2012).
- **Homestead transfer to self-settled trust**
  - *In re Peake*, 480 B.R. 367 (Bankr. D. Kan. 2012)
  - *Aroesty v. Bankowski (In re Aroesty)*, 385 B.R. (BAP 1st Cir. 2008)



## Issue Preclusion

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- **Judicial estoppel and cause of action**
  - *Flugence v. Axis Surplus Ins. Co. (In re Flugence)*, 732 F.3d 428 (5th Cir. 2013)
  - *Bone v. Taco Bell of America, LLC*, \_\_\_ F.Supp.2d \_\_\_, 2013 WL 3848755 (W.D. Tenn. July 24, 2013)
- **Res judicata and exemption**
  - *Bryan v. Staton (In re Bryan)*, 466 B.R. 460 (BAP 8th Cir. 2012).



## Section 522(f) Avoidance

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- State exception to homestead did not prevent § 522(f) lien avoidance
  - *Owen v. Owen*, 500 U.S. 305 (1991)
  - *In re Weinstein*, 164 F.3d 677 (1st Cir. 1999)
  - *J & M Securities, LLC v. Moore (In re Moore)*, 495 B.R. 1 (BAP 8th Cir. 2013).
- Chapter 7 trustee's abandonment
  - *Ramos v. Negron (In re Ramos)*, 498 B.R. 1 (BAP 1st Cir. 2013).



## Section 522(f) Avoidance – Cont'd

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- Post-redemption period
  - *In re Chastagner*, 498 B.R. 376 (Bankr. S.D. Ga. 2013).
- Petition date controlling?
  - *In re Wilding*, 475 F.3d 428, Bankr. L. Rep. (CCH) P 80841 (1st Cir. 2007)
  - *In re Young*, 471 B.R. 715 (Bankr. E.D. Tenn. 2012)
  - *In re Hall*, 327 B.R. 424, 14 A.L.R. Fed. 2d 867 (Bankr. W.D. Mo. 2005)



## Section 522(f) Avoidance – Cont'd

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- Valid exemption required
  - *In re Anderson*, 2012 WL 1110056 (Bankr. D. Mont. 2012)
  - *In re Morgan*, 149 B.R. 147, 151, Bankr. L. Rep. (CCH) P 75092 (B.A.P. 9th Cir. 1993)
  - *In re Silveira*, 141 F.3d 34, 35, Bankr. L. Rep. (CCH) P 77673 (1st Cir. 1998)
  - *In re Young*, 471 B.R. 715 (Bankr. E.D. Tenn. 2012)
  - *In re Falvo*, 227 B.R. 662, 666, Bankr. L. Rep. (CCH) P 77857, 1998 Fed. App. 0021P (B.A.P. 6th Cir. 1998)



## Section 522(f) Avoidance – Cont'd

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- Separate cases filed by former husband and wife
  - *White v. Commercial Bank and Trust Co. (In re White)*, 470 Fed. App. 538, 2012 WL 1957864 (8th Cir. 2012)
  - *McCoy v. Kuiken (In re Kuiken)*, 484 B.R. 766, Bankr. L. Rep. P 82,365 (B.A.P. 9th Cir. 2013)

## Section 522(g) & (h) Avoidance

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- Judgment lien creditor required to return exempt funds levied upon pre-petition
  - *Collect Access LLC v. Hernandez (In re Hernandez)*, 483 B.R. 713 (B.A.P. 9th Cir. 2012)
- § 522(h) interplay with § 522 (g)
  - (h) excludes §§ 510(c)(2), 542, 543 and 551
  - *Collect Access LLC v. Hernandez (In re Hernandez)*, 483 B.R. 713 (B.A.P. 9th Cir. 2012), discussed above



## Section 522(g) & (h) – Cont'd

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- **Chapter 13 debtor - avoidance of statutory attorney's lien**
  - *McCarthy v. Law (In re McCarthy)*, \_\_\_ B.R. \_\_\_, 2013 WL 5778955 (BAP 8th Cir. Oct. 28, 2013).
- **Procedure**
  - *In re Canelos*, 212 B.R. 249, 254 (Bankr. D. Md. 1997), amended, 216 B.R. 159 (Bankr. D. Md. 1997)
- **Defenses available against trustee**
  - *In re Sandoval*, 470 B.R. 195 (Bankr. D.N.M. 2012)
  - *In re Maus*, 282 B.R. 836 (Bankr. N.D. Ohio 2002)





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