Give Me That Back! A discussion of liens, preferences, fraudulent transfers, as well as the standing of the debtor vs. the standing of the trustee.

Moderator: Robert Thomas, Chapter 13 Standing Trustee for the District of Maryland (Baltimore, MD)

Alexandra E. Dugan, Partner, Bradley Arant Boult Cummings LLP (Nashville, TN)

Honorable Elizabeth L. Gunn, United States Bankruptcy Judge, District of Columbia (Washington, D.C.)

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AVOIDANCE ISSUES IN CHAPTER 13 - Liens, preferences, fraudulent transfers and conflicts on standing of Debtor vs. Trustee

A. GIVE ME THAT BACK!!!!

I. STANDING ISSUES IN THE PROSECUTION OF AVOIDANCE ACTIONS

What happens when chapter 13 cases have potential avoidance claims? Who will prosecute the avoidance claims? Will the Chapter 13 Trustee, the Debtor or does it even matter? Trustee's routinely encounter potential avoidance issues in chapter 13 cases. Each case is different, and debtors maybe inclined to fund the value of the transfers through their chapter 13 plan. Notwithstanding, avoidance actions can bring additional value to the case and benefit creditors.

There is general agreement that the Chapter 13 trustee has standing to avoid transfers and recover property under §§ 544 (strong-arm power), 547 (preferences), 548 (fraudulent conveyance) and 549 (post-petition transfers). The same cannot be said for the Chapter 13 debtor—except to protect an exemption under § 522(h), the debtor has generally been refused avoidance and recovery powers.

In Chapter 7 cases, the avoidance rights generally have been under the exclusive control of the Chapter 7 Trustee. Debtors had rights under §522(f), because those avoidance rights are specifically given to the debtors. For exemptible property, Chapter 7 debtors also have the limited rights granted by §522(h).

Historically, many courts have limited §506 avoidance actions to the "reorganization" sections, based on the holding in *Dewsnup v. Timm*, 502 U.S. 401, 112 S.Ct. 773 (1992). The Supreme Court affirmed *Dewsnup* in *Bank of America, N.A. v. Caulkett*, 135 S. Ct. 1995, 192 L.Ed.2d 52 (2015), but noted that its holding relied, in part, on the fact that the *Caulkett* debtorshad not asked the court to overrule *Dewsnup.* Thus, the scope of §506 avoidance actions in liquidation proceedings could change should the issue come before the Supreme Court again.

In contrast, in Chapter 11 cases, the Debtor-In-Possession ("DIP") is statutorily definedas having most of the rights and duties of a "trustee". *See*, §1107(a). Thus, the DIP is able to use all of the avoidance rights that a "trustee" could use - at least until an actual trustee is appointed by the court. *See*, §1101(1); §1107(a). Similarly, in Chapter 12, Section 1203 confers avoidance powers on debtors by making aChapter 12 debtor the equivalent (except for certain investigatory duties) to a debtor-in- possession in Chapter 11.

There is less statutory clarity in Chapter 13. "[N]either the trustee nor the debtor have explicit authority under Chapter 13 to bring avoidance actions." *In re Hansen*, 332 B.R. 8, 14 (10th Cir. BAP 2005). It has been held that a Chapter 13 Trustee "is no mere disbursing agent". *Matter of Maddox*, 15 F.3d 1347, 1355 (5th Cir. 1994). But the exact relationship, and division of powers, between the Chapter 13 Trustee and the Debtor, is less clear than in Chapter 7 and Chapter 11 cases. *See*, *In re Keenan*, 364 B.R. 786, 807 (Bankr. D.N.M. 2007) (holding that *Hansen* only prohibits debtor use of the trustee's strong-arm powers under §544 and that debtorscan still bring

avoidance actions under §522).

B. STANDING

I. STANDING - PRE-PETITION CAUSES OF ACTIONS/CLAIMS

The filing of a bankruptcy petition creates a bankruptcy estate. 11 U.S.C §§ 301, 541(a). The bankruptcy estate is comprised of a broad range of both tangible and intangible property interests. *Id.* § 541(a). Such property interests include non-bankruptcy causes of action that arose out of events occurring prior to the filing of the bankruptcy petition. *See Wissman v. Pittsburgh Nat'l Bank*, 942 F.2d 867, 869 (4th Cir. 1991). While the bankruptcy code is silent as to the debtor's capacity to maintain these non-bankruptcy causes of action, the bankruptcy trustee, as representative of the estate, 11 U.S.C. § 323(a), generally "has capacity to sue and be sued." *Id.* § 323(b). As a result, in the Chapter 7 bankruptcy context — which requires liquidation and distribution of assets by the trustee — Courts have recognized, "[i]f a cause of action is part of the estate of the bankrupt then the trustee alone has standing to bring that claim." *Nat'l Am. Ins. Co. v. Ruppert Landscaping Co.*,187 F.3d 439, 441 (4th Cir. 1999). But to what extent the Chapter 13 debtor — who, unlike the Chapter 7 debtor, retains possession of the bankruptcy estate — may also possess standing to assert a cause of action, either exclusive of, or concurrent with, the authority vested in the trustee.

All of the five circuit courts to have considered the question have concluded that Chapter 13 debtors have standing to bring causes of action in their own name on behalf of the estate. *See Smith v. Rockett*, 522 F.3d 1080, 1082 (10th Cir.2008); *Crosby v. Monroe Cnty.*, 394 F.3d 1328, 1331 n.2 (11th Cir. 2004); *Cable v. Ivy Tech State College*, 200 F.3d467, 472–74 (7th Cir. 1999); *Olick v. Parker & Parsley Petroleum Co.*, 145 F.3d 513, 515–16 (2d Cir. 1998); *Mar.Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1209 n.2 (3dCir. 1992) (Opinion Sur Panel Rehearing), *reinstating Mar.Elec. Co. v. United Jersey Bank*, 959 F.2d 1194 (3d Cir.1991); *see also Love v. Tyson Foods, Inc.*, 677 F.3d 258, 269& n.6 (5th Cir. 2012) (Haynes, J., dissenting) (rejecting the majority's equitable estoppel analysis). *See also Miller v. Pac. Shore Funding*, 92 F. App'x 933, 937 (4th Cir.2004).

The nature of Chapter 13 bankruptcy when compared to Chapter 7 supports this conclusion. Chapter 7 and Chapter 13 provide two distinct methods for an individual to cure his indebtedness. Chapter 7 adopts the much more radical solution," *Cable*, 200 F.3d at 472, of requiring the debtor to relinquish possession of the estate to the trustee for liquidation and distribution to creditors. *See* 11 U.S.C. § 704. To effectuate this purpose, the trustee's management of the estate — including causes of action that are part of the estate — must necessarily be free from interference by the debtor. *Cable*, 200 F.3d at 472. Thus, under Rule 17's real-party-in-interest requirement, it is the Chapter 7 trustee, but not the Chapter 7 debtor, who may possess standing on behalf of the estate to bring a pre-petition claim. *See, e.g.,Auday v. Wet Seal Retail, Inc.*, 698 F.3d 902, 904–06 (6th Cir. 2012) (concluding Chapter 7 debtor lacked standing to maintain age discrimination suit against her former employer but remanding to district court to determine whether Rule 17 permitted the Chapter 7 trustee to join or substitute itself into the action); *Dunmore v. United States*, 358 F.3d 1107, 1111–13 (9th Cir. 2004) (concluding the Chapter 7 estate was the real party

in interest and thus Chapter 7 debtor lacked prudential standing to maintain action for refund of federal taxes, but remanding to the district court to determine whether debtor could cure his Rule 17 defect).

Chapter 13, however, provides a different framework. Under Chapter 13, the debtor remains in possession of the property of the estate and cures his indebtedness, under the supervision of the trustee, by way of regular payments to creditors from his earnings through a court approved payment plan. *See* 11 U.S.C. §§ 1306(b), 1322; *Olick*, 145 F.3d at 516. Chapter 13 also modifies other powers generally given to the debtor and trustee. For example, the Chapter 13 debtor retains possession of property of the estate, the Chapter 13 debtor also assumes "exclusive of the trustee, the rights and powers of a trustee [,]" 11 U.S.C. § 1303, found in many of the provisions of § 363 regarding the general administration of bankruptcy estates. In addition to the power to possess property, the Chapter 13 debtor is given the authority, exclusive of the trustee, to use, sell, or lease property of the estate in certain circumstances. As the Seventh Circuit recognized, "[i]t would frustrate the essential purpose of § 1306 to grant the debtor possession of the chose in action yet prohibit him from pursuing it for the benefit [of] the estate." *Cable*, 200 F.3d at 473. Implicit in that act of possession, as authorized by statute, is the right of the Chapter 13 debtor — unlike the Chapter 7 debtor — to sue in her own name in such actions pursuant to Rule 17(a) of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 17(a)(1)(G) (permitting "a party authorized by statute" to sue in his or her own name without joining the person for whose benefit the action is brought). Accordingly, because the Chapter 13 debtor is given the power to possess and use the property, and implicit within that use is the permissible maintenance of a cause of action that is part of the estate, the Chapter 13 debtor has standing to maintain a prepetition claim.

Federal Rule of Bankruptcy Procedure 6009 illustrates this result. Under Rule 6009 "the trustee or debtor in possession may prosecute or may enter an appearance and defend any pending action or proceeding by or against the debtor . . . ." Fed. R. Bankr. P. 6009; *see Smith*, 522 F.3d at 1082 & n.2 (recognizing that although "debtor in possession" is a term of art in the Chapter 11 context, a Chapter 13 debtor possesses the Chapter 13 estate and has thus been considered analogous to a Chapter 11 debtor due to their enhanced representative and operational capacities); *Cable*, 200 F.3d at 472 (same). In this sense, the Chapter 13 debtor "steps into the role of trustee and exercises concurrent authority to sue and be sued on behalf of the estate." *Cable*, 200 F.3d at 473 (citing Fed. R.Bankr. P. 6009).

II. STANDING – AVOIDANCE ACTIONS

While Chapter 11 and Chapter 12 debtors in possession enjoy the powers of a trustee, with one limited exception, the Bankruptcy Code contains no provision conferring avoidance powers on debtors. "There is no specific statutory provision generally authorizing Chapter 13 debtors to exercise trustees' avoidance powers." *Hamilton v. Realty Portfolio, Inc*. (*In the Matter of Hamilton*), 125 F.3d 292 (5th Cir. 1997).

The Code allows debtors to avoid transfers in limited circumstances. *In re Hamilton*, 125 F.3d at 297 ("Congress has specifically authorized narrow exceptions to the general rule that Chapter 13 debtors lack standing to exercise the strong-arm powers of Chapter 13 trustees."). U.S.C. § 522(h) permits a debtor to avoid a transfer of the debtor's property "to the extent that the debtor could

have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer. . . ." 11 U.S.C. § 522(h). *In DeMarah v. United States (In re DeMarah),* 62 F.3d 1248 (9th Cir. 1995), the Ninth Circuit articulated a five-part test to determine whether a debtor may exercise avoidance powers under § 522(h). Under the test, a debtor may avoid the transfer if: (1) the debtor's transfer of property was involuntary; (2) the debtor did not conceal the 6 property; (3) the 11 U.S.C. § 67(c) (1976) (repealed 1978). 5 7 Trustee did not attempt to avoid the transfer; (4) the debtor seeks to exercise an avoidance power enumerated under § 522(h); and (5) the transferred property could have been exempted if the trustee had avoided the transfer under the provisions of § 522(g). Id. at 1250.

Courts finding that debtor lack standing generally base their positions on the statutory language specifying that the *trustee* may stand in the shoes of a bona fide purchaser to avoid a lien and the assumption that had Congress intended to confer standing on the debtor it would have done so explicitly. *Houston v. Eiler (In re Cohen),* 305 B.R. 886 (B.A.P. 9th Cir. 2004).

Courts finding that the debtor has standing focus on "economic realities" and the "anomalies" that would result by limiting standing to avoid liens to the chapter 13 trustee. Those courts rely on the conclusion that powers conferred exclusively on debtors through section 1303 are not all-inclusive and that debtors may have additional powers concurrent with those of the trustee, such as the power to sue and be sued. The courts holding that debtors have standing to exercise the trustee's avoidance power tend to focus on a "holistic" approach that best advances the underlying purposes of chapter 13 and that harmonize with the overall picture of a chapter 13 debtor maintaining control, albeit under court supervision, over estate property. *Id.*

The *Cohen* court also noted the difficulty of requiring a debtor to propose a plan that would pay to unsecured creditors as much as they would receive under chapter 7 while not permitting the debtor to take the avoidance action that would make it possible for him or her to comply with that requirement.

C. STATUTORY PROVISIONS

A. STATUTORY AVOIDANCE PROVISIONS

Sections 544, 545, 547, 548 and 549 of the Bankruptcy Code grants "strong arm" powers to bankruptcy trustees, but not specifically to debtors. These statutes authorize Trustee's to avoid transfers of property, including preferential payments and fraudulent conveyances.

Avoiding powers are granted to a bankruptcy trustee in order to ensure equality of distribution of assets among non-priority creditors. The Bankruptcy Code grants a trustee broad avoiding powers to avoid, or otherwise set aside, certain transactions, i.e., various statutory liens, preferential transfers and/or fraudulent conveyances. These avoiding powers enable the trustee to recover property (or an interest in such property) that was transferred by the debtor in order to provide a more equitable distribution to creditors.

The powers granted pursuant to these sections enable a trustee to avoid (1) transfers and liens on the debtor's property that could have been avoided by a creditor under the applicable local law (11 U.S.C. § 544); (2) liens arising by statute (11 U.S.C. § 545); (3) certain preferential transfers within

a specified time before the bankruptcy filing (11 U.S.C. § 547); (4) certain fraudulent conveyances (11 U.S.C. § 548); and (5) and certain transfers made after the bankruptcy filing. (11 U.S.C. § 549).

B. CHAPTER 13 STATUTORY PROVISIONS

i. SECTION 1302(B) - CHAPTER 13 TRUSTEE DUTIES.

Section 1302(b) states: The trustee shall--perform the duties specified in sections 704(a)(2), 704(a)(3), 704(a)(4),704(a)(5), 704(a)(6), 704(a)(7), and 704(a)(9) of this title;

ii. SECTION 1303 - DEBTOR'SRIGHTS AND POWERS "EXCLUSIVE OF THE TRUSTEE.

Section 1303 defines the rights and powers of a Chapter 13 debtor. This section details specific provisions where debtors have exclusive rights. Section 1303 states:

> Subject to any limitations on a trustee under this chapter, the debtor shall have, exclusiveof the trustee, the rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(l), of this title.

Section 1303 lists the Debtor as having the exclusive right to "use, sell or lease…property of the estate" under Section 363(b). Courts have held that litigation, and litigation rights, are property of the estate. Section 1306(b) provides that the Chapter 13 Debtor remains in possession of all property of the estate during the case. In Chapter 13, property ofthe estate not only includes property as defined by §541, but also property acquired after the commencement of the case - like bankruptcy-specific avoidancerights. *See*, §1306(a).

Chapter 13 Trustee's duties donot include a duty, under Section 704)(1), to "collect and reduce to money the property of the estate." Further, courts have noted that policy concerns also support a Chapter 13 debtor's ability to utilize strong-arm avoidance powers. *See,In re Smith*, 2014 WL 1404722, 2014 Bankr. LEXIS 1538 (Bankr. W.D. Ky. April 10, 2014). "Section 1303, which defines the rights and powers of a Chapter 13 debtor, listsvery specific provisions where debtors have exclusive rights. Avoiding powersare not among them." *In re Hansen*, 332 B.R. 8, 12 (10th Cir. BAP 2005).

"In *Hartford Underwriters Ins. Co. v. Union Planters Bank*, the United States Supreme Court held that, in the context of the bankruptcy code, where a statute 'names the parties granted the right to invoke its provisions,…such parties onlymay act.' 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L.Ed.2d 1 (2000)." *In re Lee*, 432 B.R. 212, 215 (D.S.C. 2010); *see also*, *In re Wood*, 301 B.R. 558, 562 (Bankr. W.D. Mo. 2003) ("Significantly, the plain language of § 547(b) states the "trustee may avoid" preferentialtransfers—no mention is made in the statute about the debtor having similar rights.").

iii. APPLICATION OF SECTION 103(A).

> (a) Except as provided in section 1161 of this title, *chapters 1, 3, and 5 of this title apply in a case under chapter* 7, 11, 12, or *13 of this title*, and this chapter, sections 307, 362(o), 555 through 557, and 559 through 562 apply in a case under chapter 15.

Section 103(a) specifically makes the provision of Chapter 5 - such as §§544, 547 and 548 - applicable in Chapter 13 cases. For example: "Section 544(a) of the Bankruptcy Code empowers trustees with the capability to avoid liens that are unperfected as of the date of the bankruptcy petition. 11 U.S.C.§ 544(a).

CASE LAW

I. CHAPTER 13 TRUSTEES HAVE THE POWER TO AVOID TRANSFERS USING §§544-549.

"There is general agreement that the Chapter 13 trustee has standing to avoid transfers and recover property under §§ 544 (strong-arm power), 547 (preferences), 548 (fraudulent conveyance) and 549 (postpetition transfers)." Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy*, 4th Edition, §60.1, at ¶ 1, Sec. Rev. June 10, 2004, www.Ch13online.com. "[T]he omission of 11 U.S.C.A. §704(a)(1) from the Chapter 13 trustee's duties, as enumerated in 11 U.S.C.A. §1302(b)(1), cannot be read so far as to preclude the use of the Chapter 5 avoidance powers by the trustee, and it is left to the Chapter 13 trustee's judgment to determine when it is feasible and efficient to exercise the avoidance powers. The exercise of avoidance powers is consistent with a Chapter 13 trustee's duty, pursuant to statute, to advise and assist the debtor in performance under a plan.

II. COURTS HAVE GENERALLY HELD THAT A CHAPTER 13 TRUSTEE CAN EXERCISE AVOIDANCE POWERS:

There is ample case law in support of the position that Chapter 13 Trustees can prosecute avoidance actions. *See, In re McCarthy*, 501 B.R. 89, 91 (8th Cir. BAP 2013) ("Generally, a Chapter 13 trustee has standing to bring certain avoidance actions, such as actions under Bankruptcy Code §545(2)"); *In re Geraci*, 507 B.R. 224, 230 n.6 (Bankr. S.D. Ohio 2014) (Section 544(a) is "unambiguous and grants the trustee, not debtors, the powers and rights of a bona fide purchaser" to avoid a transfer of an interest in property or to defeat a mortgage.); *In re Ramsey*, 356 B.R. 217, 227 (Bankr. D. Kan. 2006) ("the Chapter 13 Trustee is empowered to exercise Chapter 5 avoiding powers"); *In re Colon*, 345 B.R. 723, 726 (Bankr. D. Kan. 2005) (Chapter 13 Trustee's powers are fixed as of the commencement of the case, and are not lost when the Chapter 13 Plan prevents the property in issue from revesting in the Debtor); *In re Ryker*, 315 B.R. 664, 670 (Bankr. D.N.J. 2004) ("Equally clear is the ability of the Chapter 13 trustee to employ the avoidance powers."); *In re Huntzinger*, 268 B.R.263, 265-266 (Bankr. D. Kan. 2000) ("only the trustee could file the complaint under § 544."); *In re Griner*, 240 B.R. 432, 438 n.3 (Bankr. S.D. Ala. 1999) ("only chapter 13 trustees may exercise the avoiding powers in 11 U.S.C. §§544, 545, 547, 548, and 549."); *In re Bonner*, 206 B.R. 387, 388 (Bankr. E.D. Va. 1997) ("That the avoidance powers of §544 extend to trustees in Chapter 13, however, has become well settled."); *Lucero v. Green Tree Fin. Serv. Corp. (In re Lucero)*, 199 B.R. 742, 744–45 (Bankr.D.N.M.1996), *rev'd on other*

grounds, 203 B.R. 322 (10th Cir. BAP 1996); *In re Bell*, 194 B.R. 192 (Bankr. S.D. Ill. 1996); *In re Driver*, 133 B.R. 476, 478 (Bankr. S.D. Ind. 1991) (standing Chapter 13 trustee, not the debtor, holds the lien avoiding powers); *In re Johnson*, 26 B.R. 381 (Bankr. Colo. 1982) (court disagreed with Chapter 13 trustee's argument that she did not have the power to avoid a transfer under §548).

There is case law holding that a Chapter 13 Trustee may use avoidance powers, even when doing so may disadvantage the Debtor: [T]he Trustee's ability to exercise her avoidance power does not hinge on the avoidance's effect on the Debtor. The Trustee's avoidance of a lien is not at odds with her § 1302(b)(4) duty to "advise ... and assist the debtor in performance under the plan." *See Ferrell v. Countryman*, 398 B.R. 857, 867 (E.D. Tex. 2009) (explaining that chapter 13 trustees are not disinterested bystanders' post-confirmation, but instead should advise the debtor about matters including payment reductions or suspensions, credit problems, collection efforts, and executory contracts). This duty does not mandate that a trustee refrain from the exercise of other powers; a trustee's primary duty is to maximize the value of the estate, not to serve as additional debtor's counsel. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352, 105 S. Ct. 1986, 85 L.Ed.2d 372 (1985). When avoiding a lien is in the best interest of the estate, a trustee may pursue the avoidance. *In re Guiles*, 580 B.R. 466, 469-470 (Bankr. W.D. Tex. 2017).

The chapter 13 Trustee can create value to the estate by avoiding a lien or transfer under the avoidance sections. Under 11 U.S.C. Section 550, of the Chapter 13 Trustee is successful in avoiding the lien or transfer, "the value of the avoided lien is automatically preserved for the benefit of the estate unlike in a chapter 7, the Chapter 13 Trustee cannot sell the property. By avoiding the lien the estate benefits by either increased equity or by additional disposable income being allocated to unsecured creditors. Accordingly, if a Chapter 13 debtor elects to retain property subject to an avoided and preserved lien now held by the Trustee, the debtor must pay into the plan the value of the lien." *In re Ramsey*, 356 B.R. 217, 227 (Bankr. D. Kan. 2006).

III. CAN A CHAPTER 13 DEBTOR EXERCISE AVOIDANCE POWERS?

A. DEBTORS DO NOT HAVE STANDING TO USE AVOIDANCE POWERS UNDER SECTIONS 544 - 549: MAJORITY POSITION.

"A majority of Bankruptcy Courts hold none of the provisions of chapter 13 authorize a chapter 13 debtor to sue on a trustee's avoidance powers (under, for example, 11 U.S.C. §§544 (unperfected liens), 547 (preferences), or 548 (fraudulent conveyances)) other than pursuant to 11 U.S.C. §522(h)." *Dawson v. Thomas (In re Dawson)*, 411 B.R. 1, 24 (Bankr. D.D.C. 2008); *see also, Knapper v. Bankers Trust Co. (In re Knapper)*, 407 F.3d 573, 583 (3d Cir. 2005) (right to proceed under §544 not conferred on Chapter 13 Debtors); *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 220 (4th Cir. 1994) (§548 "cannot be enforced by a debtor"); *Stangel v. United States (In re Stangel)*, 219 F.3d 498, 501 (5th Cir. 2000), *cert. denied*, *Stangel v. United States*, 532 U.S. 910, 121 S. Ct. 1240, 149 L.Ed.2d 147 (2001) (case law strongly suggests that Debtor "does not have standing under a plain reading of §545); *Hansen v. Green Tree Servicing, LLC (In re Hansen)*, 332 B.R. 8 (10th Cir. BAP 2005); *In re Lee*, 432 B.R. 212 (D.S.C. 2010) (Chapter 13 Debtor did not have standing to exercise trustee's strong-arm avoidance powers under §544), *aff'd on other grounds*, 461 Fed. Appx. 227 (4th Cir. Jan. 6, 2012); *In re Kalesnik*, 571 B.R. 491, 496 (Bankr. D. Mass. 2017); *In re Cole*, 563 B.R. 526, 529 (Bankr. W.D.N.C. 2017); *In re Atkins*, 525

B.R. 594, 603 (Bankr. E.D. Pa. 2015); *In re Thompson*, 499 B.R. 908, 912 (Bankr. S.D. Ga. 2013); *In re Turner*, 490 B.R. 1 (Bankr. D.D.C. 2013) (Chapter 13 debtor could not exercise trustee's strong-arm powers under §544 to avoid unperfected deed of trust); *In reRyker*, 315 B.R. 664, 668 (Bankr.D.N.J.2004); *In re Binghi*, 299 B.R. 300, 302-303 (Bankr. S.D.N.Y. 2003); *Montoya v. Boyd (In re Montoya)*, 285 B.R. 490, 493 (Bankr. D.N.M. 2002) (Chapter 13 debtors lacked standing to bring §548 avoidance proceeding.);*In re Bell*, 279 B.R. 890, 898 (Bankr. N.D. Ga. 2002); *Miller v. Brotherhood Credit Union (In re Miller)*, 251 B.R. 770, 772 (Bankr. D. Mass. 2000) ("I find persuasive those cases which do not permit a Chapter 13 debtor to bring an independent avoidance action. I agree that, absent a specific grant of authority in the Bankruptcy Code, a Chapter 13 debtor cannot bring an avoidance action independent of section 522(h)."); *Hacker v. Hodges (In re Hacker)*, 252 B.R. 221, 223 (Bankr. M.D. Fla. 2000); *In re Hill*, 152 B.R. 204, 206 (Bankr. S.D. Ohio 1993) ("Congress did not intend for debtors to have authorityto avoid preferences under § 547"); *Matravers v. United States (In re Matravers)*, 149 B.R. 204, 207 (Bankr. D. Utah 1993) (Chapter 13 debtor had standing to avoid unauthorized postpetition transfer of property under §549.); *In re Redditt*, 146 B.R. 693, 696 (Bankr. S.D. Miss. 1992) (there is no specific statutory grant of power giving a chapter 13 debtor avoidance powers); *In re Driver*, 133 B.R. 476, 478 (Bankr. S.D. Ind. 1991); *In re Tillery*, 124 B.R. 127, 128 (Bankr.M.D.Fla.1991) (§1303 does not include the power of avoidance granted by §544); *In re Bruce*, 96 B.R. 717 (Bankr. W.D. Tex. 1989); *In re Mast*, 79 B.R. 981 (Bankr. W.D. Mich. 1987).

IV. DEBTORS DO HAVE STANDING TO EXERCISE THE USE AVOIDANCE POWERSUNDER SECTIONS 544 - 549: THE MINORITY POSITION.

A minority of Bankruptcy Courts have held that Debtors do have standing to pursue avoidance actions. *In re Cohen*, 305 B.R. 886 (9th Cir. BAP 2004); *In re Barbee*, 461 B.R. 711, 714-716 (6th Cir. BAP 2011); *Countrywide Home Loans v. Dickson (In re Dickson)*, 427 B.R. 399, 403-406 (6th Cir. BAP 2010) (derivative standing properly allowed), *aff'd on other grounds*, 655 F.3d 585 (6th Cir. 2011); *In re Zubenko*, 528 B.R. 784, 787 n.3 (Bankr. E.D. Cal. 2015) (following *Cohen*); *Thacker v. United Companies Lending Corp.*, 256 B.R. 724, 728–29 (W.D. Ky. 2000); *In re Bonner*, 206 B.R. 387, 387-389 (Bankr. E.D. Va. 1997) (Chapter 13 debtor or trustee may exercise the avoidance powers); *In re Tillery*,124 B.R. 127 (Bankr. M.D. Fla. 1991); *Freeman v. Eli Lilly Fed. Credit Union*, 72 B.R. 850, 853–55 (Bankr. E.D. Va. 1987); *In re Weaver*, 69 B.R. 554 (Bankr. W.D. Ky. 1987);*In re Ottaviano*, 68 B.R. 238 (Bankr. D. Conn. 1986); *In re Einoder*, 55 B.R. 319 (Bankr. N.D. Ill. 1985); *In re Boyette*, 33 B.R. 10 (Bankr. N.D. Tex. 1983); *In re Colandrea*, 17B.R. 568 (Bankr. D. Md. 1982).

A. Explicit Standing under Section 522(h).

Section 522(h)(g) provides that:

> the debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if--such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549,or 724(a) of this title or recoverable by the trustee under section 553 of this title; and the trustee does not attempt to avoid such transfer.

(g) Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if—

(1)(A) such transfer was not a voluntary transfer of such property by the debtor; and

(B) the debtor did not conceal such property; ....

A Debtor can avoid qualifying transfers if she can meet the requirements of Section 522(h), which references Section 522(g). *In re Dickson*, 655 F.3d 585, 592 (6th Cir. 2011); *Matter of Hamilton*, 125 F.3d 292, 297 (5th Cir. 1997) ("In section 522(h), Congress granted debtors the authority to exercise section 544 avoidance powers under specific and limited circumstances."); *In re DeMarah*, 62 F.3d 1248, 1250 (9th Cir. 1995) ("Section 522(h) allows the debtor to avoid certain transfers of exempt property."); *In re McCarthy*, 501 B.R. 89, 91 (8th Cir. 2013) ("Bankruptcy Code §522(h) allows debtors to avoid certain transfers of exempt property. A debtor may have standing under §522(h), to bring certain avoidance actions, such as those under §545."); *In re Giachchetti*, 584 B.R. 441, 447 (Bankr. D. Mass. 2918) (avoiding the more difficult issue of derivative standing because §522(h) clearly applied); *In re Ryker*, 315 B.R. 664, 672 (Bankr. D.N.J. 2004) ("Section 522(h) permits a debtor to avoid a transfer of property to the extent the debtor could have exempted the property under §522(g)(1).").

There are generally five (5) factors a Debtor must establish to invoke the provisions of §522(h): (1) the transfer was not a voluntary transfer of property by the debtor; (2) the debtor did not conceal the property; (3) the trustee did not attempt to avoid the transfer; (4) the transferred property is of a kind that the debtor would have been able to exempt from the estate if the trustee had avoided the transfer under §522(g); and (5) the debtor seeks to exercise one of the trustee's avoidance powers enumerated in §522(h). *See, Matter of Hamilton*, 125 F.3d 292, 297 (5th Cir.1997); *In re DeMarah*, 62 F.3d 1248, 1250 (9th Cir.1995); *In re Steck*, 298 B.R. 244, 248–249 (Bankr.D.N.J.2003)." *In re Funches*, 381 B.R. 471, 492 n.32 (Bankr. E.D. Pa. 2008). Whether or not a debtor has the right to claim an exemption will generally turn on two factors: 1) is there an exemption applicable to the property in issue; and, 2) was the transfer of the property "voluntary"?

Section 522(g) is applicable to all Chapters of the Bankruptcy Code. Thus, this is a critical distinction between an involuntary transfer (where a Debtor may have exemption rights) and a voluntary transfer (which deprives the Debtor of exemption rights under Section 522(g)(1)(A)). This is critical because the hypothetical liquidation analysis looks at the potential recovery and the debtor's claim of exemption (See generally, In re McCarthy, 501 B.R. 89 (8th Cir. BAP 2014). Chapter 13 Debtor had standing to pursue avoidance claim in aid of exemption rights.

V. LIEN AVOIDANCE

Judicial liens that impair an exemption [§522(f)(1)(a)]. The lien avoidance power provided by Section 522(f)(1) "enables the debtor to extinguish or partially avoid the judicial lien of a creditor in property that would otherwise be exempt but for the creditor's lien." *In re Steck*, 298 B.R. 244, 248-249 (Bankr. D.N.J. 2003).

Section 522(f) lien avoidance applies in Chapter 13 cases. *In re Hall*, 752 F.2d 582, 589-90 (11th Cir.1985); *In re Steck*, 298 B.R. 244, 249-250 (Bankr. D.N.J. 2003). Other circuits addressing lien avoidance in Chapter 13 have simply assumed that a chapter 13 debtor may avoid liens under § 522(f). *See*, *In re McKay*, 732 F.2d 44, 48 (3rd Cir.1984); *Mead v. Mead*, 974 F.2d 990, 991-92 (8th Cir.1992); *In re Billings*, 838 F.2d 405, 406 (10th Cir.1988).

When a debtor seeks to avoid a lien to the extent that it impairs his permitted exemptions, he does not utilize any avoidance powers derived from the trustee. *In re Tash*, 80 B.R. 304, 306 (Bankr. D .N.J.1987).

VI. CASE LAW IS DEVELOPING AROUND "DERIVATIVE STANDING"

Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery, 330 F.3d 548, 559 (3d Cir. 2003) (Chapter 11 case permitting "derivative standing"). *Cybergenics* points out that, in footnote number 5, *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 120 S. Ct. 1942, 147 L.Ed.2d 1 (2000) explicitly stated that the decision did not address the issue of derivative standing. In addressing derivative standing in the context of a creditor seeking to exercise avoidance rights in a Chapter 11 case, the Sixth Circuit Court of Appeals stated: "perhaps the most important prerequisite to derivative standing is that [the party with authority to act under the Bankruptcy Code] has abused its discretion in failing to avoid a preferential or fraudulent transfer." *In re Gibson Grp., Inc.*, 66 F.3d 1436, 1442 (6th Cir. 1995). *See e.g.*, *In re Demeza*, 582 B.R. 868 (Bankr. M.D. Pa. 2018).

"[T]he bankruptcy court properly granted the Debtor derivative standing to pursue lien avoidance under 11 U.S.C. §§ 544 and 547." *Countrywide Home Loans v. Dickson (In re Dickson)*, 427 B.R. 399 (B.A.P. 6th Cir.2010), *aff'd on other grounds*, 655 F.3d 585, 593(6th Cir.2011); *see also*, *In re Barbee*, 461 B.R. 711, 714-715 (6th Cir. BAP 2011); *In re Rothenbush*, 2017 WL 933019, 2017 Bankr. LEXIS 622 at *3 (Bankr. M.D. Fla. Feb. 28, 2017) ("*Hartford Underwriters* does not rule out derivative standing"); *In re Simmons*, 560 B.R. 308 (Bankr. S.D. Ohio 2016); *In re Smith*, 2014 WL 1404722 at **2-3, 2014 Bankr. LEXIS 1538 at **4-9 (Bankr. W.D. Ky. April 10, 2014) (no standing if derivative standing is not requested).

In re Rosenblum, 14-19756 (E.D. Pa. Feb. 29, 2016) The case involved an individual in chapter 13 whose estate held potential fraudulent transfer claims against third parties. Because the trustee would not file suit, Bankruptcy Judge Ashely M. Chan authorized a creditor to sue, given that the creditor agreed that any recovery would go to the estate. Citing circuit authority, Judge Chan said in her Feb. 29 opinion that while a trustee alone has standing to file an avoidance action under Section 544(b), the Third and other circuits grant derivative standing allowing creditors' committees to sue on behalf of a chapter 11 estate, employing the court's equitable powers. The same rule applies in chapter 13, the judge said, if the system "breaks down" when a trustee cannot or will not pursue a meritorious suit. In that instance, Judge Chan said, the bankruptcy judge becomes the "gatekeeper" to decide whether creditors can sue for the benefit of the estate. Like in chapter 11, Judge Chan did not impose a requirement that the creditor make a formal demand on the trustee to sue if it would be futile.

*****_In re Blume_, Case No. 17-49602. Bankr E.D. Mich.(January 29, 2021).

In this case, a creditor moved for derivative standing to prosecute a malpractice action. The Chapter 13 Trustee refused to bring the action and moved to abandon. The Debtor opposed the creditors motion for derivative standing. Normally, a creditor in a bankruptcy case does not have authority or standing to file and prosecute claims that belong to the bankruptcy estate. But courts sometimes grant such authority to a creditor, often to prosecute an action to avoid a preferential or fraudulent transfer, and this is commonly referred to as derivative standing. The Sixth Circuit has held that bankruptcy courts may grant derivative standing to a creditor in Chapter 11 cases and in Chapter 7 cases, if certain requirements are met. *See In re Dzierzawski,* 518 B.R. 415, 417-19 (Bankr. E.D. Mich. 2014) (discussing Sixth Circuit cases).

There is no good reason not to grant similar derivative standing in Chapter 13 cases, and courts have done so. *See, e.g., In re Demeza,* 582 B.R. 868, 876-77 (Bankr. M.D. Pa. 2018) (citing cases); *see also Countrywide Home Loans v. Dickson* (*In re Dickson*), 427 B.R. 399, 403-06 (B.A.P. 6th Cir. 2010) (bankruptcy court had authority to grant derivative standing to Chapter 13 debtor to pursue a lien avoidance action under Bankruptcy Code §§ 544 and 547, which sections authorize such actions by "the trustee").

In this case, the creditor has met each of the Sixth Circuit requirements for granting derivative standing, as those requirements are properly adapted and applied to this Chapter 13 case.

The Trustee may well be correct in arguing that she has no statutory or fiduciary duty to pursue the claims, and that it is the Debtor who has such duty.[9] *But see Barron v. Countryman,* 432 F.3d 590, 594 (5th Cir. 2005) ("The trustee in Chapter 13 exists to preserve the bankruptcy estate for creditors."). It may well be that, as between the Chapter 13 Trustee and the Debtor Nicole Blume, the authority to file and prosecute Nicole Blume's malpractice claims against Mannino belongs only to the Debtor, so that the Trustee lacks such authority. *See, e.g.,* 8 *Collier on Bankruptcy* ¶ 1303.04 (Richard Levin & Henry J. Sommer eds., 16th ed. 2021) (footnotes omitted) ("[C]ourts have granted chapter 13 debtors the right to bring lawsuits that are property of the estate.. . . Certain rights, such as the right to bring a lawsuit . . ., are implicit in section 1306(b), which allows the debtor to retain possession of all property of the estate, except as provided in a confirmed plan or order confirming a plan.").

But regardless of whether the Trustee has the authority and a duty to pursue the malpractice claims, the Debtor Nicole Blume clearly has a fiduciary duty to the bankruptcy estate and to creditors. That includes a fiduciary duty to protect and conserve estate property for the benefit of creditors, and to avoid damaging the bankruptcy estate. The Court agrees with, and finds applicable to a Chapter 13 debtor, the following description of the fiduciary duties of a Chapter 11 debtor-in-possession:

VII. RANDOM CASES OF INTEREST

In re Aiwohi, 13-90038 (Bankr. Haw. Jan. 31, 2014).

A chapter 13 debtor may exercise the trustee's avoidance powers under section 544 if doing so

will benefit the bankruptcy estate. In this case, the debtor sought to avoid an unrecorded mortgage lien and the bank objected on the basis that the debtor could not stand in the shoes of a bona fide purchaser as required by section 544(a)(3). The court found that even though the debtor had actual knowledge of the lien, the hypothetical bona fide purchaser would not have had such knowledge. Therefore, the lien was avoidable.

The bankruptcy Court reviewed cases dealing with ___ is whether the avoidance power of section 544(a)(3) is exclusively in the hands of the trustee. Many courts have held that because section 544 refers only to the trustee's avoidance powers, the debtor may not exercise those powers in lieu of the trustee except to protect an exemption as permitted by section 522(h). *See Knapper v. Bankers Trust Co. (In re Knapper)* , 407 F.3d 573, 583 (3d Cir.2005); *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 220 (4th Cir.1994); *Stangel v. United States (In re Stangel)*, 219 F.3d 498, 501 (5th Cir.2000); *Hansen v. Green Tree Servicing, LLC (In re Hansen)*, 332 B.R. 8 (10th Cir. BAP 2005); *In re Huskey*, 479 B.R. 829 (Bankr. E.D. Ark. 2012) (debtor may not exercise trustee's power under section 544(a)(3)); *Mouton v. Toyota Motor Credit Corp.*, 479 B.R. 55 (Bankr. E.D. Ark. 2012) (because debtor failed to satisfy requirements of section 522(g)(1) and (h) that the property be exemptible by the debtor and were not involuntary liens, debtor had no standing to exercise trustee's avoidance power).

U.S. Bank Nat'l Ass'n v. Barbee, No. 10-8074 (B.A.P. 6th Cir., Dec. 12, 2011)

The Sixth Circuit BAP has likewise found that ambiguity in statutory language and chapter 13 practicalities favor a finding that debtors have derivative standing to exercise the trustee's strong-arm power beyond what is conferred under section 522(h). The Sixth Circuit BAP found that the debtor has derivative standing to exercise the trustee's strong-arm powers under section 542 by seeking avoidance under section 544 of an unperfected lien on his manufactured home. The court identified certain realities that supported its finding: the trustee's lack of resources to pursue every legitimate avoidance claim, the requirement that the plan conform to section 1325(a)(4), and the possibility of the debtor's being accused of bad faith if he proposes a plan that does include avoidance of a clearly avoidable lien. In so deciding, the court agreed with the holding in *Countrywide Home Loans v. Dickson*, 427 B.R. 399 (B.A.P. 6th Cir.), *aff'd on other grounds*, 655 F.3d 585 (6th Cir. 2011).

Hillen v. City of Many Trees, LLC (In re CVAH, Inc.), 570 B.R. 816 (Bankr. D. Id. 2017).

Trustee may use FDCPA and IRC for longer reach-back periods. More than four years before bankruptcy, the debtor made transfers that the trustee alleged were fraudulent transfers. The applicable state fraudulent transfer law provided a four-year reach-back period. One of the debtor's major creditors was the IRS, who had a substantial allowed unsecured claim. Section 544(b) permits the trustee to avoid a transfer that is avoidable under applicable law by a creditor holding an allowed unsecured claim. The Federal Debt Collection Procedures Act, in 28 U.S.C. § 3306(b)(2), gives the federal government, as creditor, a six-year reach-back period to avoid a fraudulent transfer. "Applicable non-bankruptcy law" as used in section 544(b) is broader than state law and includes applicable federal law. Congress intended section 544(b) to be expansive. Although the FDCPA provides that it "shall not be construed to supersede or modify the operation of … title 11," using it under section 544(b) does not modify the Bankruptcy Code's operation, because section 544(b) expressly contemplates using applicable law. Section 6901 of the Internal

Revenue Code permits the IRS to assess and collect liability of a transferee of the taxpayer. Assessment amounts only to recording the liability and does not authorize an action against the transferee. But the IRS may rely on state fraudulent transfer law to pursue a transferee, and unless Congress provides otherwise, the statute of limitations does not run against the sovereign. Therefore, the IRS's reach-back period is unlimited. The trustee's reliance on the IRS as the triggering creditor does not involve the trustee's exercise of sovereign powers, so the trustee may use the IRS's claim under section 544(b).

"*In re Engle*, 496 B.R. 456, 464 (Bankr. S.D. Ohio 2013) ("By conditioning the distribution of the net proceeds of the Preference Action on the Trustee's election to commence litigation that he has no obligation to bring—and almost certainly will not prosecute—the Debtors have not provided for the actual avoidance of the Transfer. Quite simply, the Debtor cannot satisfy §1325(a)(4) by conditioning the required distribution of property on an event that almost certainly will not happen.").

In re Hansen, 332 B.R. 8, 14 (10th Cir. BAP 2005) ("Section 1302, which governs the trustee's duties, does not list avoidance powers among them. In fact, §1302, which incorporates Chapter 7 trustee duties under §704 by reference, does not refer to §704(1)—the Chapter 7 trustee duty to "collect and reduce to money the property of the estate.").

In re Cohen, 305 B.R. 886, 896 (9th Cir. BAP 2004)("The one chapter 7 trustee duty that is omitted from the duties of the chapter 13 trustee or debtor is the §704(1) duty to 'collect and reduce to money the property of the estate.' This is the duty that obliges chapter 7 trustees to pursue avoiding actions.").

In re Straight, 200 B.R. 923, 928 (Bankr. D. Wyo. 1996) ("The power to avoid a lien or transfer under §§544, 545, or 547 is granted to the "trustee." In chapter 13, the trustee's specific duties do not include using the lien avoiding powers of chapter 5.").

Gilliam v. Bank of Am. Mortgage, L.L.C. (In re Gilliam), 2004 WL 3622646 at *7, 2004 Bankr. LEXIS 1653 at *25 (Bankr. D. Kan. Oct. 28, 2004) ("The Court believes the difference in Chapter 7 and Chapter 13 trustee duties simply gives Chapter 13 trustees more discretion not to use the avoiding powers; it does not eliminate their standing to use them.")

In re Johnson, 279 B.R. 218, 225 (Bankr. M.D. Tenn. 2002) ("Chapter 13 trustees have a fiduciary obligation to object to claims, to examine the validity of security interests and to prosecute avoidance actions during the Chapter 13 case. See 11 U.S.C. § 1302(b).").

In re Driver, 133 B.R. 476, 480 (Bankr. S.D. Ind. 1991) ("it would then be in the Chapter 13 trustee's interest (and is arguably among the trustee's duties, *see* 11 U.S.C. section 1302(b)(4)) to use the transfer avoidance powers to enable the debtor to propose and perform a feasible plan.").

In re Redditt, 146 B.R. 693, 696-697 (Bankr. S.D. Miss. 1992) ("Where use of the avoiding powers will achieve a more equitable distribution among creditors or where it will aid in a more appropriate classification of claims, the trustee should proceed with such action pursuant to the trustee's duty to advise and assist the debtor in performance under the plan.").

In re Funches, 381 B.R. 471, 489 (Bankr. E.D. Pa. 2008) ("Because the Trustee has no duty to permit the Debtor to exercise his avoidance powers in his name, the Debtor maynot maintain this action in the name of the Trustee by invoking Rule 19.").
Nonpossessory, nonpurchase money security interests in household goods, "tools of the trade" and professionally prescribed health aids [§522(f)(1)(B)].

See, *In re Bland*, 793 F.2d 1172 (11th Cir. 1986) (en banc); *Matter of Ambrose*, 179 B.R. 982 (Bankr. S.D. Ga. 1995).

Does a Chapter 13 Trustee also have standing to avoid liens under §522(f)?

Yes. *Matter of Maddox*, 15 F.3d 1347, 1355-56 (5th Cir. 1994); *In re Kennedy*, 139 B.R. 389, 390-392 (Bankr. N.D. Miss.1992). However, a Chapter 13 Trusteedoes not generally take actions that will only benefit the Debtor - and, in most cases, Section 522(f) avoidance does not benefit the unsecured creditors in a Chapter 13 case.

1. CHANGES UNDER THE SMALL BUSINESS RE-ORGANIZATION ACT (SBRA).

The SBRA impacts potential preference actions by requiring, effective as of February 19, 2020, that the plaintiff account for the recipient's defenses before asserting the preference claim and by requiring that certain bankruptcy actions with less than $25,000 at issue be commenced in the district where the defendant resides.

First, the SBRA amends section 547(b) of the Bankruptcy Code to explicitly condition the assertion of a preference claim by the plaintiff "on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses" under section 547(c) of the Bankruptcy Code.

Second, the SBRA amends section 1409(b) of Title 28 to require that any proceeding arising in or related to a bankruptcy case against a non-insider to recover a non-consumer debt of less than $25,000 (an increase from $13,650 currently) be commenced in the district where the defendant resides. While there is some dispute among bankruptcy courts (and no binding authority in any jurisdiction) whether section 1409(b) applies to preference actions, the SBRA legislative history is clear that the section 1409(b) amendment was specifically intended to apply to preference actions. If so applied, this would shift the venue and cost advantages from the plaintiff to the defendant for the subject preference actions, and would also procedurally benefit defendants by preventing such actions from being subject to any mandatory case management procedures imposed by the debtor's bankruptcy court.

2. PROPOSED CHAPTER 13 PLAN LANGUAGE.

A. ALTERNATIVE TO THE TRUSTEE'S PURSUIT OF A PREFERENTIAL OR FRAUDULENT TRANSFER

i. Example of proposed language

"The Trustee will not pursue the preferential or fraudulent (choose appropriate) transfer to _____ if debtor(s) pay an additional $ _____ to the Trustee for distribution through the Plan to unsecured creditors. This amount shall be in addition to any paragraph _____distributions projected for the unsecured creditors pursuant to the confirmed plan and shall be in addition to any tax refunds due. Additionally, the transferee must sign and return a tolling agreement extending the statute of limitations period for recovery of the preference. As a condition to confirmation, the debtor will assist the Trustee in obtaining the tolling agreement."

If the debtor(s) are willing to reduce a budget already deemed "reasonable" by the Trustee, and will increase their plan payment to account for the preference or fraudulent transfer over the life of the plan, substitute the following language:

ii. Example of proposed language

"The Trustee and debtor(s) agree that in exchange for the Trustee not pursuing the preferential or fraudulent (choose appropriate) transfer to _____ the debtor(s) will increase their plan payment by $_____ to pay the amount of the transfer over the life of the plan. In doing so, the amount of the transfer will not be included in the plan base."

If the main concern is protecting creditors from the possibility of conversion after the bardate for bringing an avoidance action, one of the most common ways to address that concern is by obtaining a waiver. "Obtaining a waiver or tolling agreement" to avoid litigating the avoidance action. A waiver saves the Chapter 13 trusteeship the time and expense of litigation, while stillpreserving the cause of action if it should need to be brought at a later date.

The most important consideration in obtaining a waiver is making sure that it is effectivein waiving the statute of limitations defense. That means: NOT getting a waiver from the Debtor - getting it, instead, from the potential preference/fraudulent transfer DEFENDANT. The Debtoris generally not going to be able to provide an effective waiver on behalf of a future defendant in an adversary proceeding.

3. RECENT AVOIDANCE CASES OF INTEREST

Third Circuit: A Tax Sale May Be Avoided as a Preference

Hackler v. Arianna Holdings, Inc. (In re Hackler & Stelzle-Hackler), 938 F.3d 473 (3d Cir. 2019).

The United States Court of Appeals for the Third Circuit held, that a Chapter 13 debtor may avoid

a transfer of the debtor's property to a tax sale purchaser made during the 90-day period prior to bankruptcy as a preference. The property, which was valued at $335,000, was transferred to the holder of a $45,000 tax lien, who had moved to foreclose the debtor's right of redemption under New Jersey law.

In general, under §547(b) of the Bankruptcy Code, a transfer of a debtor's property to a non-insider creditor within 90 days prior to the debtor's bankruptcy filing may be avoided as a preference if (i) the transfer was made on account of an antecedent debt while the debtor was insolvent, and (ii) the effect of the transfer was to give the creditor more than the creditor would have received, before any transfer, in a Chapter 7 case pending at that time. Based on facts showing that the tax lienholder received property worth $345,000 to satisfy a $45,000 debt, which was substantially more than what the creditor would have been paid in a Chapter 7 bankruptcy case, the Third Circuit concluded that the tax lienholder received a preference.

The tax lienholder's principal argument was that a 1994 decision of the Supreme Court should be applied to bar the preference claim. In the case of *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994), the Supreme Court held, in a 5-4 decision, that a transfer of property from a properly conducted foreclosure sale could not be avoided as a fraudulent transfer under §548 of the Bankruptcy Code. In its *BFP* decision the Supreme Court held that "reasonably equivalent value" under §548(a) of the Bankruptcy Code was the equivalent of foreclosure sale value where the property was sold at a foreclosure sale that was valid under state law.

The Third Circuit distinguished *BFP*. To begin with, the court observed that *BFP* dealt with a different issue, namely, whether property sold at a properly conducted foreclosure sale could be avoided as a fraudulent transfer. The Supreme Court's focus in *BFP* was on the "reasonably equivalent value" element of the claim. By comparison, in a preference action, a trustee (or Chapter 13 debtor) need only show that a creditor received more on its claim than would have been the case in a Chapter 7 case. In addition, the Third Circuit noted that the Supreme Court inserted a footnote in its *BFP* decision in which it emphasized that its decision only covered foreclosures of real property and that "considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different."

New York bankruptcy court finds that a prepetition property tax sale should be set aside as constructively fraudulent in chapter 13.

See Gunsalus v. Ontario Cty., 572 B.R. 302 (Bankr. W.D.N.Y. 2017), *rev'd sub nom. Hampton v. Ontario Cty.*, 588 B.R. 671 (W.D.N.Y. 2018), *on remand two separate decisions issued, Gunsalus v. Ontario Cty.*, 613 B.R. 1 (Bankr. W.D.N.Y. 2020); *Hampton v. Ontario Cty.*, Case No. 17-2009, 2020 Bankr. LEXIS 447 (Bankr. W.D.N.Y. Feb. 19, 2020). And the District Court flatly rejected the County's argument. *See Hampon v. Ontario Cty.*, 588 B.R. 671, 674 (W.D.N.Y. 2018) (Geraci, C.J.).

The Bankruptcy Court for the Western District of New York issued two decisions on 19 February 2020 setting aside real property tax foreclosure sales on the homes of chapter 13 debtors. Both debtors filed adversary proceedings under 11 U.S.C. 550(a) to set aside the prepetition tax sales.

The Hamptons, who filed chapter 13 on 2 May 2017 stipulated that the unpaid taxes totaled $5,157.73 vs. a fair market value of the property between $60,000 and $87,000 as of the date the county was awarded title to the home, 7 March 2017. The county subsequently conducted a post-foreclosure auction sale of the property, netting the county over $21,000 after payment of all taxes, which the country was entitled to keep under state law. The Gunsaluses filed chapter on 28 April 2017. The taxes owed on their property was $1,290.29, and the county obtained a final judgment of foreclosure on 9 June 2016. The value of the Gunsaluses' home was between $28,000 and $30,000 on that date. The county conducted a post-foreclosure auction sale on this property on 17 May, 2017.

The court found both debtors were insolvent on the date of the transfer of the property (the date of the final judgment of foreclosure). Under 11 U.S.C. 548(a)(1)(B) a trustee may set aside a constructively fraudulent conveyance if: 1) the debtor had an interest in property; 2) a transfer of the property occurred within two years of the filing of the bankruptcy; 3) the debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer, and 4) the debtor received less than reasonably equivalent value in exchange for the property transfer. Under §522(g)(1) and (h) the debtor may avoid such transfer if ;1) the transfer was not voluntary; 2) the property was not concealed by the debtor; and 3) the trustee did not attempt to avoid the transfer. While the party seeking to avoid the transfer has the burden of proving each element by a preponderance of the evidence, there is no dispute in these cases that all the elements of §522(h) are met.

The debtors in the cases at bar do have the right to avoid the transfer because 1) they claimed the federal homestead exemption; 2) the transfer of the property was not voluntary; 3) the property was not concealed; 4) the transfer is avoidable by the trustee under §548; and 5) the trustee did not attempt to avoid the transfer. The fraudulent transfer provisions are intended not only to ensure a fair distribution to creditors but also a fresh start to debtors.

In re DuVall, Case No. 19-20179-PRW, Adversary Proceeding No. 19-2011-PRW.Bankr., W.D. New York. (February 18, 2021).

The Debtor properly claimed the federal homestead exemption under § 522(d)(1) of the Code. As the District Court held: Under the plain language of Section 522(h), debtors who can exempt property have standing to bring avoidance actions. . . . [T]he County interprets Section 522(c)(2)(B) as barring the Appellants from claiming the federal homestead exemption, when it merely provides that exempt property remains liable for a tax lien. *See* 11 U.S.C. § 522(c)(2)(B). [The Debtors are] not attempting to avoid paying the tax liens on their respective properties; they are attempting to avoid a transfer of the property.

The District Court held that, where a debtor does not seek to avoid a tax lien under § 545, but instead is challenging the tax sale as constructively fraudulent under § 548, § 522(c)(2)(B) does not negate their standing under § 522(h). *Id.* "Here, Ms. DuVall is seeking to avoid the tax sale as a constructively fraudulent transfer under § 548 of the Code. The situation here is identical to that

presented to the District Court in *Hampton.* Under the binding precedent established by *Hampton*, Ms. DuVall does have standing to bring this action".

Speaker Biographies

Robert S. Thomas, II, currently serves as a Chapter 12 and Chapter 13 Bankruptcy Trustee in Baltimore, Maryland. His term began on October 1, 2016. Mr. Thomas currently is an adjunct professor at The American University, Washington College Law, teaching a course in Consumer Bankruptcy and Secured Transactions. He was previously the Managing Partner of Thomas, Trattner, & Malone, LLC in Akron, Ohio – specializing in bankruptcy and commercial law. Mr. Thomas served as a Panel Chapter 7 Trustee in Akron, Ohio from 2003-16. In addition to his work as a Chapter 7 Trustee, Mr. Thomas represented clients in Chapter 7, Chapter 13, and Chapter 11 bankruptcy proceedings. Mr. Thomas has served as an adjunct professor at The University of Akron School of Law from 2006 to 2016, teaching the Bankruptcy and Creditors' Rights course. He received his B.A. Degree (Cum Laude and with Distinction) from George Mason University, Fairfax, Virginia in 1992, and his J.D. Degree in 1996 from The American University, Washington College of Law, Washington, D.C. Attorney Thomas is admitted to the Ohio Bar, Federal District Court and the United States Court of Appeals Sixth Circuit. Mr. Thomas is frequent lecturer and presenter at many local and national seminars.

Honors & Publications

- 2012 Awarded the John R. Quine Outstanding Adjunct Faculty Award by the University of Akron College of Law.
- Publication -American Bankruptcy Institute (ABI) – Consumer News Letter –2015 *"It's a Commission: Chapter 7 Trustee Fees."*
- Publication -National Association of Chapter Thirteen Trustees (NACTT) Quarterly Journal, Summer 2018- "*Student Loan Repayment Treatment: Issues, Claims Classification, Discrimination and Solutions"*
- Publication – American Bankruptcy Institute (ABI) Journal, October, 2019 – "*Increasing Access to Chapter 13: The Statutory Debt Limitations"*
- Research and Prepared – 2019 -2021 "*Chapter 13 National Reasonable Fee Summary 2019 Update*." A national report of presumptively reasonable Chapter 13 fees for each District and Division.

Professional Associations

- American Bankruptcy Institute
- Akron Bar Foundation – Fellow
- Maryland Bankruptcy Bar Association
- Maryland Consumer Bankruptcy Bar Association (Council member)
- National Association of Chapter Thirteen Trustees (Chair, Student Loan Committee, 2019-2021)
- National Association of Chapter Thirteen Trustees (NACTT Foundation, Board Member 2020)

Alexandra Dugan regularly represents financial services and mortgage company clients with compliance matters, including risk management and remediation, state investigations, regulatory compliance, and operational implementation of legal guidelines. Alex's practice focuses on the bankruptcy compliance and regulatory concerns that her clients face. She is also a member of the firm's Auto Finance and Payment Systems industry teams. With this experience and perspective, Alex provides daily guidance to clients on bankruptcy-related regulatory and compliance matters, supervises large-scale remediation projects, designs and presents bankruptcy training programs, implements changes to business practices that are required as a result of new statutes and regulations, and works through operational matters that arise daily in a client's bankruptcy department. She works directly with her clients' internal legal department and business leaders to identify the most efficient and effective measures to ensure compliance with federal, state, and local requirements and mitigate risk. Alex also routinely responds to inquiries from government entities, including the Department of Justice (DOJ), on behalf of her clients. In addition to her compliance work, Alex represents mortgage companies in litigation matters across the country—including advising clients and local counsel concerning best practices. Alex's practice also

includes representation of debtors and secured creditors in Chapter 11 cases, out-of-court workouts, reorganizations, restructurings and liquidations. Her practice spans a wide range of industries, including bank and non-bank lenders, investors in distressed assets, legal, automotive and commercial real estate. Alex received her undergraduate degree from Vanderbilt University, *cum laude*. In 2011, with honors and Order of the Coif, she received her Juris Doctorate from Emory University School of Law.

The Honorable Elizabeth L. Gunn was appointed to serve as bankruptcy judge for the District of Columbia on September 4, 2020. A COVID-era selection and appointment, she was sworn in by Zoom from her living room and has yet to rule from an actual bench. Before her appointment, Judge Gunn served as an Assistant Attorney General for the Commonwealth of Virginia as the bankruptcy specialist for the Division of Child Support Enforcement. Prior to joining the Office of the Attorney General, Judge Gunn was in private practice in Richmond, Virginia. In 2017, Elizabeth was recognized by the American Bankruptcy Institute as a member of its inaugural class of 40 Under 40. Elizabeth serves on the board of the Federal Bar Association Bankruptcy Section, is a former board member of the International Women's Insolvency and Restructuring Confederation, a former committee chair of the Consumer and Litigation Committees American Bankruptcy Institute, and is an Associate Editor of the American Bankruptcy Institute Law Journal. She is a member of the Walter Chandler Bankruptcy Inn of Court and is Board Certified in Consumer Law by the American Board of Certification. Elizabeth received her BA, *cum laude*, from Willamette University in Salem, Oregon and her law degree, *cum laude*, from Boston College Law School. Despite all these accolades, her greatest accomplishments remain her daughter Ainsley (10) and her son Corbin (8).