"RESISTANCE IS FUTILE" – STAR TREK

Plenary Session I: Recent Case Law Updates: Part A – Consumer Cases

2016 Bench Bar Conference
Northern District of Texas
May 20, 2016

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Cases by Topic

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CASE LAW UPDATE

I. SUPREME COURT

***Harris v. Viegelahn*, 135 S.Ct. 1829, 191 L.Ed.2d 783 (2015).**
[5/18/2015]
In a case that started in the Western District of Texas, the Supreme Court decided who was entitled to receive funds held by the Chapter 13 trustee following the conversion of the case to Chapter 7. The Court pointed out that the Bankruptcy Code "does not say expressly" what should happen, however, using pragmatism the Court ruled that "the most sensible reading" was that the funds should go to the debtor.

***Bullard v. Blue Hills Bank*, 135 S.Ct. 1686, 191 L.Ed. 2d 621 (2015).**
[5/4/2015]
The Supreme Court resolved the split between the various circuits and held that a bankruptcy court's order denying confirmation of a debtor's Chapter 13 plan with leave to propose another plan was not a final order and therefore the debtor could not appeal it. The Court reasoned a plan becomes final only when a plan is confirmed or the case is dismissed for failure to propose a confirmable plan. Now a debtor upon having plan confirmation denied must let case get dismissed to have an appealable order.

***Bank of America, N.A. v. Caulkett*, 135 S.Ct. 1995, 192 L.Ed.2d 52 (2015).**
[1/6/2015]
The issue in this case was whether a debtor in a Chapter 7 bankruptcy proceeding could void a junior mortgage under 11 U.S.C.S. § 506(d) when the debt owed on a senior mortgage exceeded the present value of the property. Relying on *Dewsnup v.Timm*, 502 U.S. 410 (1992), the Court rejected the attempt at lien stripping in a Chapter 7 case and pointed out that although Dewsnup has been "the target of criticism" since its inception no one had asked the Court to overturn the precedent specially in this case.

II. APPEALS

***Bullard v. Blue Hills Bank*, 135 S.Ct. 1686, 191 L.Ed. 2d 621 (2015).**
[5/4/2015]
The Supreme Court resolved the split between the various circuits and held that a bankruptcy court's order denying confirmation of a debtor's Chapter 13 plan with leave to propose another plan was not a final order and therefore the debtor could not appeal it. The Court reasoned a plan becomes final only when a plan is confirmed or the case is dismissed for failure to propose a confirmable plan. Now a debtor upon having plan confirmation denied must let case get dismissed to have an appealable order.

***Brown v. Sommers (Matter of Brown)*, 807 f.3d 701 (5th Cir. 2015).**
[11/24/2015]
Debtor who was a surgeon separated from his wife in August 2010 and wife filed for divorce in 2011which ended up being acrimonious and protracted and a final divorce decree was never entered. Debtor moved to Miami, Florida in late 2011 and ended up filing Chapter 11 bankruptcy in January 2013. Debtor engaged in significant misconduct during his Chapter 11 and the Florida bankruptcy court conditionally dismissed Debtor's bankruptcy case and appointed a chief restructuring officer to reorganize and operate his business and personal financial affairs. Case was transferred from Florida to Southern District of Texas and the court appointed a Chapter 11 trustee. Shortly after debtor died in Florida. All involved agreed that, for all practical purposes, debtor effectively died intestate. Texas bankruptcy court

converted debtor's case to Chapter 7 and the Chapter 11 trustee was assigned as the Chapter 7 trustee. Also, because of debtor's death the Texas bankruptcy court appointed a personal representative for debtor. At the time debtor passed away, debtor and his wife were still legally married because no divorce decree had been entered. In the Chapter 7 case, Debtor's Personal Representative claimed an exemption of $45,000.00 cash in lieu of homestead under Texas Estates Code. Trustee objected and the bankruptcy court sustained the objection. Debtor's Personal Representative appealed. Also, in the Chapter 7 case, debtor's wife claimed Texas Estates Code entitles her to $56,250.00 cash in lieu of homestead and exempt property, plus a $496,080.00 family allowance and that this money should be paid to her as an administrative expense or a domestic support obligation. Trustee objected and bankruptcy court sustained the objection but under Florida law gave ex-wife $18,000.00 in allowed exemption. Debtor's wife appealed. The Fifth Circuit held Texas law determined whether state law exemptions were available to a deceased debtor under 11 U.S.C.S. § 522 where the debtor was domiciled in Texas during the 180 days preceding the 730 days preceding his bankruptcy petition and that bankruptcy court properly sustained the trustee's objection to debtor's Personal Representative's claim where the debtor was alive on the petition date and thus was not eligible for an allowance under Tex. Estates Code Ann. § 353.053, and a personal representative could not exchange a valueless homestead exemption for a valuable cash-in-lieu-of-homestead exemption . Finally, wife was not eligible for a probate allowance under Texas law where the debtor was domiciled in Florida at the time of his death, and under Texas law the decedent's domicile determined a widow's right to an allowance and not the widow's domicile.

Galasso v. Imes (In re Galasso), **2015 U.S. Dist. LEXIS 144170 (W.D. Tex. 2015).**
[10/22/2015]
Pro se appellant failed to provide record on appeal and as a result bankruptcy court's denial of his discharge was affirmed.

Colvin v. Amegy Mortg. Co., LLC, **537 B.R. 310 (W.D. Tex. 2015).**
[8/3/2015]
Bankruptcy Court dismissed five out of six claims alleged by debtor ("First Dismissal Order"). Later, Debtor voluntarily dismissed the sixth cause of action ("Second Dismissal Order"). Debtor filed a notice of appeal which referred to Second Dismissal Order and failed to attach a copy of the order. After the time to appeal had expired, Debtor amended notice to refer to the First Dismissal Order. District Court held that it lacked jurisdiction because the notice of appeal referred to the wrong order and the order being appealed was not attached to the notice of appeal.

Black v. Schmidt, **2015 U.S. Dist. LEXIS 9290 (S.D. Tex. 2015).**
[1/27/2015]
Debtor filed a Chapter 7 bankruptcy for its businesses. The stay was lifted for creditor to liquidate its claim through arbitration in the state court. The arbitrator ruled against debtor. The Chapter 7 trustee then filed an adversary proceeding against both debtor and creditor. The trustee conducted settlement negotiations with debtor while simultaneously negotiating a sale agreement with creditor and third party friend of debtor. The trustee accepted, and the bankruptcy court approved, the creditor's offer to purchase the causes of action against debtor. The district court held that debtor failed to obtain a stay pending appeal of the sale order and found that the sale between the trustee and creditor was negotiated in good faith, and the sale was therefore affirmed.

III. ATTORNEYS' FEES

***Williams v. National Farm Life Insurance Co. (Matter of Williams*), 610 Fed.Appx. 393 (5th Cir. 2015).**
[6/26/2015]
Before filing bankruptcy, debtor agreed to a final judgment by creditor which allowed recovery of attorney's fee of 10% of "all amounts due." Debtor filed bankruptcy. Creditor brought adversary proceeding for fraud and prevailed. The bankruptcy court awarded attorneys' fees based on 10% of "all amounts due." The Fifth Circuit affirmed holding that "all amounts due" included the attorney's fees included in the state court agreed final judgment and creditor could recover an additional 10% of the final judgment when the debt was enforced in bankruptcy court.

***In re Steinkuehler*, 2016 Bankr. LEXIS 738 (Bankr. S.D. Tex. 2016).**
[3/8/2016, Judge Letitia Z. Paul]
An attorney for bankruptcy debtors was entitled to compensation for some standard services such as preparing the debtors' schedules and appearing at hearings, but a reduction in the fee application was warranted since the attorney's actions and inactions resulted in the need for additional hearings, continuances, and inefficient proceedings.

***In re Woerner*, 2015 Bankr. LEXIS 2796 (Bankr. W.D. Tex. 2015).**
[8/21/2015, Judge Craig A. Gargotta]
The appeal of the original decision in this case resulted in the Fifth Circuit rejecting *Pro-Snax* standard and adopting the "reasonably likely to benefit the estate standard." On remanded the bankruptcy court was to determine whether the debtor's attorney was entitled to fees under the new standard. The bankruptcy court concluded the debtor's counsel was entitled to more fees than originally awarded. However, counsel was not entitled to most of the requested fees relating to defending a motion to convert due to the fact that there was not a reasonable likelihood of success in reaching confirmation or avoiding conversion to Chapter 7 at that point in the case, and for the same reason, nor were fees recoverable for services related to the disclosure statement and plan. Of the $130,656.50 requested the sum of $46,311.00 was awarded.

***In re Onochie*, 2015 Bankr. LEXIS 2217 (Bankr. S.D. Tex. 2015).**
[7/6/2015, Judge Letitia Z. Paul]]
Tax lien creditor pursuant to Section 32.06 of the Texas Tax Code sought reimbursement of fees and expenses pursuant to 11 U.S.C. § 506(b) and Federal Rule of Bankruptcy Procedure 2016(a). The bankruptcy court denied the creditor's request for reimbursement of fees and expenses for reviewing documents and preparing proofs of claim because the expenses were not provided for by Section 32.06 of the Texas Tax Code and were therefore disallowed under § 506(b).

***Tackett v. McCracken (In re McCracken),* 2015 Bankr. LEXIS 934 (Bankr. E.D. Tex. 2015).**
[3/25/2015, Judge Bill Parker]
In this adversary proceeding, bankruptcy court held that plaintiff was entitled to summary judgment on her claim that attorneys' fees awarded to her and against the debtor in state family court were non-dischargeable because the fee award was in connection with a custody modification action. However, since the debt at issue arose while debtor was in a Chapter 13 case but before his case was converted to Chapter 7, plaintiff could bring the adversary action under 11 U.S.C.S.§ 348(d). Finally, because there was no contract between the parties that entitled the plaintiff to a recovery of attorney's fees, or a statutory basis for recovery of fees pertaining to litigating the adversary proceeding, plaintiff was not entitled to her fees associated with the adversary proceeding.

***In re Lee*, 2015 Bankr. LEXIS 757 (Bankr. S.D. Tex. 2015).**
[3/11/2015, Judge David R. Jones]
Chapter 7 trustee filed a fee application to which the United States trustee objected because it believed that a chapter 7 trustee cannot seek payment from the estate for the actual cost of a paraprofessional used by the trustee during her administration of the case while simultaneously seeking the maximum compensation for her trustee services under 11 U.S.C. § 326. The bankruptcy court ruled that nothing in 11 U.S.C.S. §§ 326 or 330 prohibited the trustee from seeking payment of paraprofessional fees from the debtor's bankruptcy estate, and to the extent any ambiguity existed because Congress explicitly authorized compensation for paraprofessional services in § 330 but omitted any reference to paraprofessionals in the statutory cap set forth in § 326(a), the omission was intentional. The court held that Chapter 7 trustee was allowed to recover amounts she paid paraprofessionals for work they performed in helping her administer the debtor's case, in addition to the maximum fee she was entitled to receive pursuant to 11 U.S.C.S. § 326(a), but only to the extent she supported her request with evidence showing that the number of hours billed were reasonable and that the services were necessary to case administration.

***In re Vuong*, 525 B.R. 61 (Bankr. S.D. Tex. 2015).**
[2/4/2015, Judge Letitia Z. Paul]]
The bankruptcy court ruled that Chapter 7 trustee was entitled to recover expenses for her paralegal because a trustee could receive reimbursement for the cost of paraprofessional services as an expense independent of the 11 U.S.C.S. § 326(a) cap, however since the trustee had not shown that the estimated time of three hours to prepare a distribution report was reasonable the application was denied without prejudice.

***Schwertner Backhoe Service, Inc. v. Kirk (In re Kirk)*, 525 B.R. 325 (Bankr. W.D. Tex. 2015).**
[1/28/ 2015, Judge Tony M. Davis]
The issue in this case was whether attorney's fees incurred by a creditor were also non-dischargeable in a case in which the debtor had conceded the non-dischargeability of $10,200 involving a diversion of construction funds under 11 U.S.C.S. § 523(a)(4). Plaintiff brought a § 523 action for misapplication of construction trust funds and for payment for labor performed. The bankruptcy court ruled that Tex. Civ. Prac. & Rem. Code Ann. § 38.001(2) allowed a prevailing party to recover reasonable attorney's fees in an action for labor performed, and while acknowledging a split among Texas courts and a directive to construe chapter 38 of the Texas Civil Practice and Remedies Code liberally, the bankruptcy court held that § 38.001(2) did not allow fees in actions alleging a misapplication of trust funds under the Texas Construction Trust Fund Act and as a result the creditor could not recover fees for establishing liability under that Act or establishing defalcation under 11 U.S.C.S. § 523(a)(4). Of the $23,137 in fees requested, $12,420 was awarded. The bankruptcy court concluded that all of the fees incurred in establishing a claim for labor performed and in establishing defalcation under the Texas Construction Trust Fund Act — "arise from" or are "on account of" conduct that created an underlying claim that has been found non-dischargeable and could be included within the debt excepted from discharge.

IV. AUTOMATIC STAY - RELIEF FROM/ENFORCEMENT

***In re Castro*, 2016 Bankr. LEXIS 411 (Bankr S.D. Tex. 2016).**
[2/9/2016, Judge Letitia Z. Paul]
Mortgage creditor filed "Motion for Order Validating Foreclosure Sale; Or Alternatively Annulling Stay or Alternatively Annulling Stay and Dismissing Bankruptcy Case." The court found debtor was ineligible to file Chapter 13 case because he did not get credit counseling before filing date as required by 11 U.S.C.S. § 109(h). Also, debtor did not comply with his duties outlined in 11 U.S.C.S. § 521. Additionally, mortgage creditor did not get notice of debtor's bankruptcy before foreclosure sale because

debtor did not file a statement of social security number. Debtor used the bankruptcy process in order to retain a property on behalf of family members without having a possessory or equitable ownership interest in the property and without a serious need for, or attempt at, financial rehabilitation. Based on the totality of the circumstances, the court found sufficient grounds existed to annul the automatic stay retroactively to the petition date and to dismiss the case.

***In re Kao*, 2015 Bankr. LEXIS 4293 (Bankr. S.D. Tex. 2015).**
[12/21/2015, Judge Letitia Z. Paul]
Debtor filed a Chapter 13 case. Debtor's ex-spouse through his attorney sought relief from stay to continue prosecution of a case that was pending in Los Angeles, California with regard to ownership of real property in Los Angeles. Ex-spouse contended that through a lien he imposed against the property, he foreclosed on debtor's 50% interest in the property years before the petition date. Debtor contended that the lien imposed by ex-spouse was invalid. The bankruptcy court lifted the stay to allow a state court proceeding concerning real property located in another state to continue because issues of California law predominated and were remote to bankruptcy, foreclosure took place in California, and the proceeding was commenced and remained pending in California state court.

***In re Ruthven*, 2015 Bankr. LEXIS 3273 (Bankr. S.D. Tex. 2015).**
[9/28/2015, Judge Letitia Z. Paul]
The debtor purchased a property from individual lender subject to a note and a deed of trust and homesteaded the property. Debtor was unable to make the required payments under the note and filed Chapter 7 bankruptcy. The lender moved for relief from stay to conduct a judicial foreclosure. The debtor claimed the lender did not have any interest in the property because the loan violated the home equity loan provisions of the Texas Constitution. The bankruptcy court lifted the stay based on debtor's failure to make an offer of adequate protection and that lender had sufficient cause to seek a judicial foreclosure of her interest in the property in state court.

***In re Williams*, 533 B.R. 557 (Bankr. N.D. Tex. 2015).**
[7/16/2015, Judge Barbara J. Houser]
A couple filed bankruptcy even though one of them was subject to an order issued in another district prohibiting her from filing another case. Post-petition lender through its lawyers foreclosed on the property. Even though the lender was not listed or scheduled, the law firm which conducted the foreclosure was notified of the bankruptcy. Purchaser at the foreclosure sale moved for annulment of the stay, as well as for *in rem* relief under 11 U.S.C. §362(d)(4). Even though wife was ineligible to file, the stay came into effect for husband. Court found that purchaser was a party in interest and could seek annulment of the stay. Based on the equities the Court denied relief to purchaser because the law firm that conducted the foreclosure was on notice. Additionally, purchaser was not entitled to relief under section 362(d)(4) because it was not a lienholder.

***In re Wilmington*, 2015 Bankr. LEXIS 2148 (Bankr. S.D. Tex. 2015).**
[6/30/2015, Judge Letitia Z. Paul]
Before debtor filed his bankruptcy, lender foreclosed on debtor's home and sold it to purchaser. Purchaser commenced a forcible detainer action against debtor. In response debtor claimed the lender's foreclosure was wrongful and the sale to purchaser was therefore void. Debtor filed bankruptcy and purchaser fought relief from stay. The bankruptcy court granted relief from the stay because debtor's defenses were focused on the validity of lender's foreclosure and not the merits of lifting the stay, and that a relief from stay hearing was not the proper forum to litigate the merits of debtor's contention.

***In re Lavender,* 2015 Bankr. LEXIS 1600 (Bankr. S.D. Tex. 2015).**
[5/11/2015, Judge Letitial Z. Paul]
Mother agreed to convey a home to daughter upon her death provided daughter took care of mother for as long as she was alive. Daughter's husband prepared a deed immediately conveying the home to daughter and took mother to the bank to have the deed notarized. Mother was not aware deed immediately conveyed title to daughter. The deed was filed. Daughter and her husband made the property their homestead. Mother did not receive the care for which she had negotiated and sued to in state court to set the deed aside. The district court after a bench trial in the form of a letter made its ruling which was filed with the clerk of the state court. Two months later daughter and her husband filed Chapter 13 bankruptcy. Mother moved for relief from stay in order to go back to state court and have the letter ruling be entered as a judgment. The bankruptcy court, ruled that state district court's letter ruling awarding damages and imposing an equitable lien on the property was a rendition of judgment under Texas law as it officially announced the court's ruling, ordered relief, and was filed with the court clerk. Also, the Rooker-Feldman doctrine barred the debtors' attack seeking a review and reversal of the state court judgment. Finally, cause existed to lift the stay to permit mother to return to state court to seek enforcement of the state court judgment, especially where the debtors had not made an offer of adequate protection.

***In re Jones*, 2015 Bankr. LEXIS 1362 (Bankr. S.D. Tex. 2015).**
[4/20/2015, Judge Letitia Z. Paul]
Debtor purchased a car from creditor two days before filing her Chapter 13 bankruptcy and in her bankruptcy did not make an offer of adequate protection for the car. Creditor moved to lift the stay. Based on the totality of the circumstances the stay was lifted.

***McCloskey v. McCloskey (In re McCloskey),* 2015 Bankr. LEXIS 711 (Bankr. S.D. Tex. 2015).**
[3/15/2015, Judge Karen K. Brown]
A Chapter 7 debtor was entitled to reconsideration of the bankruptcy court's order denying the debtor's motion for summary judgment in an adversary proceeding that was filed by his ex-wife and the ex-wife's attorney because the bankruptcy court had cited a state court decision that was subsequently reversed. However, the fact that the state court's decision was reversed did not affect the bankruptcy court's decision finding that debtor's ex-wife and her attorney were entitled to summary judgment on their claim that a state court's order requiring debtor to pay attorney's fees his ex-wife incurred in a child custody action created a debt that was non-dischargeable. Also, debtor's ex-wife and her attorney did not violate the automatic stay when they filed a writ of garnishment against an IRA debtor owned that was not property of his bankruptcy estate.

***In re Wyly*, 526 B.R. 194 (Bankr. N.D. Tex. 2015).**
[1/9/2015, Judge Barbara J. Houser]
Caroline Dee Wyly, debtor in this administratively consolidated case, filed a motion to enforce the automatic stay against the SEC after SEC named her as a relief defendant in its amended complaint filed in a separate civil action pending in the Southern District of New York. SEC claimed its action to be excepted from scope of automatic stay pursuant to the police and regulatory exceptions found in 11 U.S.C. § 362(b)(4). The bankruptcy court applied "public policy" test and "pecuniary interest" test to determine whether the action by SEC fell within the police and regulatory exception. Public policy test looks to whether state is enforcing public interest as opposed to private interest. Pecuniary interest test looks to whether state is seeking to advance its own financial interest. The bankruptcy court concluded that SEC attempting to obtain a disgorgement fell within the police and regulatory powers exception.

***In re Francis,* 2015 Bankr. LEXIS 69 (Bankr. N.D. Tex. 2015).**
[1/7/2015, Judge Russell F. Nelms]
Debtor initially filed a chapter 7. In that case, she failed to reaffirm a debt secured by her truck or to redeem the truck. After receiving a discharge, debtor filed for chapter 13. In her plan, debtor proposed to

pay the debt secured by the truck over a period of 37 months. Lender objected to confirmation of the plan and sought relief from the automatic stay to exercise its rights against the truck. Lender contended that debtor has only one option and that was to surrender the truck. The bankruptcy court denied relief from stay because lender's position was against the Supreme Court's decision in *Johnson v. Home State Bank* and nothing in the revised 11 U.S.C. § 521(a)(2) suggested a congressional intent to depart from that decision. Also, neither 11 U.S.C. § 521(a) nor 11 U.S.C.S. § 362(h) specifically precluded the restructuring in Chapter 13 of a debt that was not reaffirmed in a prior Chapter 7. Finally, 11 U.S.C. § 1328(f)(1) negated congressional intent to prohibit chapter 20 filings.

V. AUTOMATIC STAY – CO-DEBTOR STAY

***Colvin v. Amegy Mortg. Co., LLC,* 2015 Bankr. LEXIS 67 (Bankr. W.D. Tex. 2015), *appeal dism'd*, 537 B.R. 310 (W.D. Tex. 2015).**
[1/15/2015, Judge Craig A. Gargotta]
This was a Chapter 12 case. Debtor despite agreeing to the termination of stay as to a secured creditor filed an adversary proceeding against the same creditor contending secured creditor had violated the co-debtor stay for foreclosing without lifting the co-debtor stay first. The court noted that the co-debtor stay was enacted primarily for the benefit of debtors by relieving them from pressures that creditors might exert on co-debtors who were friends, relatives, and fellow employees of debtor. Where the creditor is granted relief from the automatic stay—particularly if debtor did not oppose relief from stay—the purpose of the co-debtor stay no longer exists as to that creditor and relief from the co-debtor stay, if requested, is invariably granted. Therefore the court retroactively terminated the co-debtor stay, 11 U.S.C. § 1201, in order to balance the equities of the parties.

VI. AUTOMATIC STAY - EXTENSION OF STAY

***In re Williams*, 545 B.R. 917 (W.D. Tex. 2016).**
[2/18/2016, Judge Eduardo V. Rodriguez]
Debtor filed his third bankruptcy case and one of the previous cases had been filed within a year of the third and pending case. This matter required the court to evaluate two creditors' motions requesting confirmation of the termination of the stay and co-debtor stay as to debtor and his spouse. Basically, the court had to consider should it confirm that the automatic stay is not in effect or has been terminated in debtor's bankruptcy case? Creditors argued that debtor had failed to file a motion to extend the automatic stay, pursuant to § 362(c)(3)(B). A review of the docket confirmed that failure, therefore, by operation of law, the automatic stay had already expired as to all creditors. Finally, the court found that it was obliged, pursuant to § 362(j), to issue an order confirming that the automatic stay had already terminated.

***In re Wimmer*, 2015 Bankr. LEXIS 4275 (Bankr. S.D. Tex. 2015).**
[12/18/2015, Judge Letitial Z. Paul]
Debtors' first bankruptcy case was dismissed for failure to file mailing matrix, certificate of credit counseling, schedules or plan. Debtors filed a second bankruptcy case within one year of the dismissal of the first case and sought to extend the stay as to all creditors including their mortgagee who was an 86 year old man. In the second case, debtors testified that in the first bankruptcy case they were being advised by a non-lawyer who said that the imposition of the automatic stay would allow them time to find a buyer for their home. In the second case, debtors were represented by counsel and filed a plan that proposed no payments would be made on mortgage arrearages for seven months while the home was being marketed. The bankruptcy court found that employing an attorney was not a substantial change in

debtors' personal or financial affairs and the presumption of lack of good faith applied and that debtors failed to rebut the presumption when it was established that they lacked sufficient funds to pay real estate taxes that would come due soon or make payments to mortgagee on the pre-petition arrearage.

***In re Davis,* 2015 Bankr. LEXIS 4234 (Bankr. S.D. Tex. 2015).**
[12/17/2015, Judge Letitia Z. Paul]
In the first Chapter 13 case, car creditor filed a motion for relief from stay and obtained an order conditioning the stay. Debtors filed a second case within one year of the dismissal of the first case and moved to extend the automatic stay as to all creditors. Car creditor objected to the motion. The bankruptcy court found that debtors failed to rebut the presumption of lack of good faith as to car creditor because debtors showed negative monthly net income and the value of car creditor's collateral had declined substantially because of damages to the car when there was no insurance in place. However, exercising its discretion, the court found the presumption had been rebutted as to other creditors and extended the stay as to those creditors.

***In re Botello*, 2015 Bankr. LEXIS 3312 (Bankr. N.D. Tex. 2015).**
[9/30/2015, Robert L. Jones]
One day after the dismissal of his first Chapter 13 case, debtor filed his second case and moved for extension of the automatic stay. Bankruptcy court spelled out that to prevent the stay from expiring after 30 days, debtor must show that the second case was filed in good faith. The case is presumed to not to have been filed in good faith unless there has been a "substantial change" in debtor's circumstances. If presumption applies, it must be rebutted by clear and convincing evidence. A debtor must demonstrate change in circumstances, either in motion or at hearing, else the presumption will apply and the extension of stay will be denied. In this case debtor failed to meet his burden and the motion was denied because a comparison of the schedules and statement on file in the two cases revealed very little if any had changed about debtor's financial condition except for the amount of debtor's liabilities having increased.

***In re Wright*, 533 B.R. 222 (Bankr. S.D. Tex. 2015).**
[7/1/2015, Judge Jeff Bohm]
Debtor filed a Chapter 11 case less than one year after his Chapter 13 case was dismissed to prevent a secured creditor from foreclosing on two rental properties. Debtor moved to extend the stay and the secured creditor objected. The bankruptcy court denied debtor's motion and found the presumption of lack of good faith applied and was not rebutted based on the following facts: (a) the secured creditor had liens on rents tenants paid to debtor, (b) debtor kept rents he collected for at least 15 months before he filed bankruptcy, and (c) debtor tried to claim the equity he had in both rental properties as exempt when there was no basis under Texas law for making that claim.

***In re Hooey*, 2015 Bankr. LEXIS 1527 (Bankr. S.D. Tex. 2015).**
[5/5/2015, Judge Letitia Z. Paul].
This was debtors' fourth bankruptcy case and was filed within one year of the dismissal of the most recent case. The third case had been dismissed for debtors' failure to file a mailing matrix. Debtors moved to extend the stay. Mortgage creditor objected claiming that debtors failed to include pre-petition mortgage arrears in their plan. The bankruptcy court held that on the question of whether the presumption applies that the case was not filed in good faith, the opponent of the extension, the mortgage company, had the burden of proof as to whether the case was dismissed after debtors failed to file or amend the petition or other documents as required by Title 11 or the court, without substantial excuse. Since the mortgage company failed to provide sufficient evidence on that point, its objection was overruled and the stay was extended pursuant to § 362(C)(3)(B).

***In re Erevia*, 2015 Bankr. LEXIS 496 (Bankr. S.D. Tex. 2015).**
[2/17/2015, Judge Letitia Z. Paul]
Debtor had a history of filing several bankruptcy cases over eight years. Since debtor within the preceding year had a dismissed case, he moved to extend the stay in his current case. The court found that debtor did not rebut the lack of good faith presumption by clear and convincing evidence and the motion to extend the automatic stay was denied because debtor's chapter 13 plan payments exceeded his disposal income and his past history was an indication that debtor was being too optimistic about his prospective increase in income.

***In re Parker*, 2015 Bankr. LEXIS 285 (Bankr. S.D. Tex. 2015).**
[1/28/2015, Judge Letitia Z. Paul]
Credit union filed motion for relief from stay to exercise its right of set off. The court ruled that credit union was entitled to have the automatic stay lifted under 11 U.S.C. § 362(d)(2) in order to set off the funds in debtor's checking account against her debt to credit union, as the debtor had no equity in the property and there was no evidence as to the necessity of the property for debtor's reorganization. Also, credit union was entitled to have the stay lifted under § 362(d)(1), as debtor had made no offer of adequate protection and presented no evidence to demonstrate that the terms of her plan were sufficient to provide adequate protection of the lien as to the funds in the checking account.

VII. AUTOMATIC STAY – IMPOSITION OF STAY

***In re Acosta*, 2015 Bankr. LEXIS 3754 (Bankr. S.D. Tex. 2015).**
[11/2/2015, Judge Edurado V. Rodriguez]
Debtor had two cases pending in the year preceding the third case that had been dismissed. Debtor filed a motion to impose the automatic stay pursuant to 11 U.S.C. § 362(c)(4). A creditor who, pre-petition, had taken steps towards foreclosing on debtor's rental properties objected to the motion. In order to impose a stay, section 362(c)(4) requires a demonstration that the third case was filed in good faith. In making its determination the court adopted the factors outlined in *In re Charles*, 334 B.R. 207 (Bankr. S.D. Tex. 2005)(Judge Isgur); *In re Wright*, 533 B.R. 222 (Bankr. S.D. Tex. 2015)(Judge Bohm); and *In re Collins*, 335 B.R. 646 (Bankr S.D. Tex. 2005), as well as several factors of its own. In the end, the court determined that debtor did not demonstrate good faith sufficient to meet the clear and convincing evidentiary standard imposed by the rebuttable presumption in § 362(c)(3)(C)(i)(II)(aa) due to his unaccounted for spending and failure to properly file documents in the previous bankruptcy case. Debtor's motion was denied.

***In re Means*, 2015 Bankr. LEXIS 1526 (Bankr. S.D. Tex. 2015).**
[5/5/2015, Judge Letitial Z. Paul]
Debtors filed their third bankruptcy case within one year and moved to impose the automatic stay. No creditor or party in interest objected. Debtors successfully rebutted the § 362(c)(4)(A)(i) presumption of bad faith and the court imposed the stay as to all creditors because during the first case the husband was laid off from his employment and in the second case debtors did not make the plan payments because husband believed payments were to be taken out of his wages, did not monitor the payments and thus was unaware that payments were not being made. Debtors to the court's satisfaction provided sufficient information to ensure that all plan payments would be made.

VIII. AUTOMATIC STAY – VIOLATIONS OF STAY

Bruner-Halteman v. Educ. Credit Mgmt. Corp. (In re Bruner-Halteman), **2016 Bankr. LEXIS 1130 (Bankr. N.D. Tex. 2016).**
[4/8/2016, Judge Harlin DeWayne Hale]
This adversary proceeding involved a clear violation of stay. The student loan creditor (SLC), post-petition, garnished debtor's wages. This garnishment continued despite (1) SLC having received a fax from debtor's bankruptcy counsel on April 17, 2012 notifying SLC of bankruptcy filing, (2) SLC received electronic notice of the bankruptcy from the Bankruptcy Noticing Center on or about April 20, 2012, (3) SLC received ongoing notices regarding debtor's bankruptcy case, (4) SLC participated in the bankruptcy by filing a proof of claim on August 16, 2012, (5) debtor's bankruptcy counsel contacted SLC again on September 25, 2012 to stop the garnishments, and (6) SLC processed refunds of the garnishments during the bankruptcy case, acknowledging that they occurred in violation of the automatic stay. This garnishment was a cause of stress in debtor's life during the pendency of the case. The total amount of reasonable attorneys' fees incurred was $8,395.00 and it was awarded as actual damages. Punitive damages of $74,000.00 was appropriate where the creditor's systematic, knowing, and willful disregard of the automatic stay and the protections afforded a debtor by the bankruptcy system were particularly egregious and offend the integrity of the bankruptcy process. Finally, debtor took reasonable steps to mitigate damages in this case, including contacting her attorneys to alert them to the ongoing garnishment.

Ali v. Merchant (In re Ali), **2015 Bankr. LEXIS 2443 (Bankr. W.D. Tex. 2015).**
[7/23/2015, Judge Craig A. Gargotta]
Debtor accused creditor of the intentional violation of stay by filing UCC-1 financing statement post-petition and communicating with debtor's vendors and creditors to encourage them to cease supplying debtor with supplies post-petition. There are three elements for a claim under 11 U.S.C. § 362(k): "(1) the defendant must have known of the existence of the stay; (2) the defendant's acts must have been intentional; and (3) these acts must have violated the stay." In the Fifth Circuit, in order to award punitive damages under 11 U.S.C. § 362(k), the defendant's conduct must be egregious and intentional. The court found creditor's communications with debtor's vendors and creditors not to have violated the stay because it was not done for collection purposes, however, the filing of the UCC-1by creditor was ruled to be a violation of stay but not an egregious one and awarded damages of $5,000.00 to debtor.

IX. AVOIDANCE ACTIONS

In re Wilson**, 2015 Bankr. LEXIS 1971 (Bankr. N.D. Tex. 2015).**
[6/17/2015, Judge Robert L. Jones]
Debtors sold a house to debtor wife's mother for $130,000. Debtors filed bankruptcy Chapter 7 bankruptcy. Trustee valued the home at $190,000.00 and proposed a settlement in which the estate would receive $25,000.00 from wife's mother. The bankruptcy court raised questions about whether wife's mother could claim defense of being a good faith purchaser. If wife's mother was aware that debtors intended to file bankruptcy, she might not be able to claim defense. As a result, the court found that the trustee was not justified in assuming that the defense applied in context of settlement.

Wiggains v. Reed (In re Wiggains), **2015 Bankr. LEXIS 1460 (Bankr. N.D. Tex. 2015).**
[4/27/2015, Judges Stacey C. Jernigan]
Debtor and his non-filing spouse entered into a partition agreement as to their homestead just before filing for bankruptcy. The agreement re-characterized their community property as separate property. Debtor

filed Chapter 7 bankruptcy. Non-filing spouse brought an adversary proceeding against Chapter 7 trustee seeking a declaratory judgment, pursuant to 28 U.S.C. § 2201, as to the relative rights between her trustee concerning the homestead net sale proceeds by virtue of the partition agreement. Trustee responded with an answer and counterclaim for fraudulent transfer against the non-filing spouse asserting that debtor's entry into the partition agreement immediately before filing bankruptcy constituted a voidable transaction committed with an actual intent to hinder and delay creditors under section 548(a)(1)(A) of the Bankruptcy Code and section 24.005(a)(1) of the Texas Business & Commerce Code. The bankruptcy court ruled the partition agreement constituted a "transfer" under 11 U.S.C. § 548(a)(1), even where partition agreement was generated under Texas law and involved an exempt homestead. Also, since debtor's sole actual intent in entering into the partition agreement was to avoid the effect of the limitation placed on his homestead exemption by 11 U.S.C. § 522(p), and to divert from his creditors and preserve for his family the maximum amount of cash possible, the agreement was a fraudulent transfer under 11 U.S.C. § 548(a)(1)(A), which was avoidable under 11 U.S.C. § 550(a). Debtor's reliance upon attorney's advice did not refute that he acted with actual intent to hinder or delay his creditors.

X. BANKRUPTCY FRAUD

***United States v. Chaker*, 2016 U.S. App. LEXIS 6796 (5th Cir. 2016).**
[4/14/2016]

This case involved two business entities, three bankruptcies, and several residential properties owned by debtor. However, debtor's prosecution turned on a fraudulent misrepresentation that he made to a bankruptcy court in March 2007. The Fifth Circuit held that the district court's factual findings did not constructively amend defendant's indictment for bankruptcy fraud under 18 U.S.C. § 157(3), as the findings directly addressed the fraudulent scheme charged in the indictment. References to acts that predated the scheme did not result in a constructive amendment because that evidence was relevant to show defendant's intent or state of mind at the time of his allegedly false testimony. The district court did not erroneously apply the elements of making a false declaration in violation of 18 U.S.C. § 152(3) to the bankruptcy fraud offense. The district court's formulation of the misrepresentation alleged in the indictment did not constitute a constructive amendment. Sufficient evidence supported a finding that defendant's "literal truth" defense was untenable. Debtor ended up with a 15 month sentence.

***United States v. Theall*, 609 Fed. Appx. 807 (5th Cir. 2015).**
[4/21/2015]

This was a case that had been remanded to the district court and came up again. Debtor sold building and received cash and a note approximately four months before bankruptcy. He transferred $32,000 to a related party. He did not disclose the sale, the transfer or the note. He also lied about the timing of the sale at the meeting of creditors. Debtor was convicted of bankruptcy fraud. After remand, the district court had found that restitution should be $47,000 based on note plus funds transferred. Trustee had testified that had the transfer of funds been disclosed sooner, he could have sued the transferee and obtained a judgment for a fraudulent transfer. The Fifth Circuit affirmed the restitution award based on the trustee's testimony.

***United States v. De Chavez*, 2015 U.S. Dist. LEXIS 137240 (N.D. Tex. 2015).**
[10/7/2015]

United States indicted debtor for failing to disclose prior bankruptcy filings on petition and for failure to list all social security numbers used on Form 21. Debtor moved to dismiss the indictment. The court found that Form 21 requires the debtor to list all social security numbers that have not been revoked or canceled. The court rejected the government's position that all social security numbers ever used was

required as well as the debtor's argument that only the current number being used was required to be shown.

XI. CHAPTER 13 ADMINISTRATION

***In re Chapter 13 Plan Admin. in the Brownsville, Corpus Christi & McAllen Divs.*, 2016 Bankr. LEXIS 1938 (Bankr. S.D. Tex. 2016).**
[5/5/2016, Judge David R. Jones]
The bankruptcy court determined that the Chapter 13 debtors in the Brownsville, Corpus Christi and McAllen divisions of the Southern District of Texas were intentionally treated in a manner contrary to the Uniform Plan and to other debtors in the Houston, Galveston, Victoria and Laredo divisions of the Southern District of Texas. In affected cases in which the Chapter 13 trustee's failure to file a "mortgage payment change notice" resulted in the debtor making payments in excess of the amount required, the Chapter 13 trustee was ordered to (i) immediately adjust the plan payment in accordance with the terms of the plan; and (ii) within fourteen days refund the overpayment to the debtors. United States Trustee for the Southern District of Texas was directed to conduct a full review of the Chapter 13 trustee's practices and competency in her capacity as a Chapter 13 trustee.

XII. CHAPTER 13 CLAIM OBJECTION

***In re Solis*, 2016 Bankr. LEXIS 1708 (Bankr. W.D. Tex. 2016).**
[4/15/2016, Judge Tony M. Davis]
The issue in this case was: what was the replacement value of debtor's 2008 vehicle? In Chapter 7 or 13 case filed by an individual, 11 U.S.C. § 506(a)(2) defines the value of personal property collateral as replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. The court decided that it made sense that if the car creditor has the burden of proving the amount of its allowed secured claim, the car creditor should also have the burden of proving the value of the collateral from which that amount is determined. Debtor's evidence rebutted the *prima facie* validity of the proof of claim filed by car creditor. This dispute was tried in the context of an objection to claim, where the Code placed the ultimate burden of proving the value of collateral on secured creditors. The preponderance of evidence supported a $6,731 value for the vehicle**.**

XIII. CHAPTER 13 CONFIRMATION

***Molina v. Langehennig (In re Molina)*, 2015 U.S. Dist. LEXIS 167933 (W.D. Tex. 2015).**
[12/10/2015]
Debtor proposed a plan that paid 100% of the allowed unsecured claims. However, the monthly payments under the plan were far smaller than debtor's monthly disposable income. The bankruptcy court confirmed the plan as proposed by including a provision in the confirmation order that required future plan modifications must pay 100% too. Debtor appealed. The district court affirmed.

***In re Prewitt*, 2015 Bankr. LEXIS 4124 (Bankr. E.D. Tex. 2015).**
[12/8/2015, Judge Bill Parker]
In a Chapter 13 case, the standard for valuing a mobile home for cram down purposes is replacement value for property of similar condition using NADA and if available, comparative sales. Creditor was not

entitled to add hypothetical delivery and setup costs for the reason that debtor proposed to retain property. Also, since debtor could not deduct hypothetical expenses from the mobile home's value, it would only be fair that creditor not be allowed delivery and set up costs.

***In re Lightfoot*, 2015 Bankr. LEXIS 2056 (Bankr. S.D. Tex. 2015).**
[6/22/2015, Judge Jeff Bohm]
The bankruptcy court addressed the issue of whether a Chapter 13 plan may provide for post-petition interest on child support debt without providing for full payment to all creditors, despite § 1322(b)(10) of the Bankruptcy Code, which requires 100% payment of all allowed claims if post-petition interest is to be paid on non-dischargeable debt (such as child support). The Court addressed the apparent conflict between § 1322(b)(10) and § 1322(a)(2), which requires that all domestic support obligations (DSOs), defined to include interest in § 101(14A), be paid in full. The Court concluded that the inclusion of interest on DSOs, by definition, removes DSOs from the ambit of § 1322(b)(10), which applies to the payment of interest on allowed claims, not claims that themselves include interest. Therefore, § 1322(b)(10) did not prevent confirmation of a Chapter 13 plan that included state-mandated interest on DSOs.

***In re Gaetje*, 2015 Bankr. LEXIS 2027 (Bankr. S.D. Tex. 2015).**
[6/18/2015, Judge Jeff Bohm]
Debtors filed Chapter 13. In their plan the debtors proposed to: (1) convert an adjustable rate mortgage loan on their principal residence into a fixed rate loan; and (2) pay the mortgage loan in full before the maturity date in full through the plan. The bankruptcy court ruled that debtors' proposal to pay the loan in full during the plan period did not violate § 1322(b)(2) because the mortgage note contained a prepayment provision allowing the debtors to pay off the mortgage note prior to the maturity date. However, the bankruptcy court held that debtors' plan could not be confirmed as proposed because the plan violated 11 U.S.C. § 1322(b)(2) by impermissibly modifying the interest rate provisions of the mortgage note secured by debtors' principal residence by converting the mortgage note's adjustable interest rate to a fixed rate.

***Huriega v. Nationstar Mortg., LLC (In re Huriega)*, 2015 Bankr. LEXIS 1815 (Bankr. W.D. Tex. 2015).**
[6/1/2015, Judge Craig A. Gargotta]
It was in dispute what debtor disclosed to lender at the time the financing occurred. Debtor filed Chapter 13 bankruptcy and commenced an adversary proceeding to determine the extent and validity of lender's lien. The deed of trust financed a structure that was subsequently integrated into debtor's pre-existing principal residence. The structure to be built was intended at the time the deed of trust was executed, to be and was subsequently used as part of debtor's principal residence and therefore the deed of trust was subject to § 1322(b)(2)'s anti-modification clause, despite fact that part of the residence was not encumbered by that deed of trust.

***In re Ramirez*, 2015 Bankr. LEXIS 1426 (Bankr. S.D. Tex. 2015).**
[4/24/2015, Judge Letitia Z. Paul]
Debtor's principal residence was subject to two liens. The debtor asserted that the 2nd lien mortgagee's lien on the debtor's principal residence should be stripped because the property's value was less than the debt owed to the 1st lien mortgagee. The debtor based his argument on the fact that the value of the principal residence had substantially decreased due to a fire occurring post-petition. The bankruptcy court, after considering the evidence from both parties, found that there was some value supporting the 2nd lien mortgagee's claim and that the 2nd mortgagee's lien could not be modified because of 11 U.S.C. § 1322(b)(2).

***In re Collins*, 2015 Bankr. LEXIS 1158 (Bankr. S.D. Tex. 2015).**
[4/7/2015, David R. Jones]
Debtor owned two properties on petition date. After filing bankruptcy, debtor moved from initial principal residence into the second property. Debtor contended that the second property was not his principal residence on the petition date so the lien against the second property could be modified. Creditor objected to debtor's plan on basis that it sought to modify debt secured by principal residence since debtor lived there. The bankruptcy court held the date on which a debtor's principal residence was determined for purposes of 11 U.S.C. § 1322(b)(2) was the petition date, not, as argued by the creditor, the date its lien was created or the date of confirmation of the debtor's plan. The mortgage on the second property could be modified.

***In re Francis*, 2015 Bankr. LEXIS 69 (Bankr. N.D. Tex. 2015).**
[1/7/2015, Judge Russell F. Nelms]
Debtor initially filed a Chapter 7. In that case, she failed to reaffirm a debt secured by her truck or to redeem the truck. After receiving a discharge, debtor filed for chapter 13. In her plan, debtor proposed to pay the debt secured by the truck over a period of 37 months. Lender objected to confirmation of the plan and sought relief from the automatic stay to exercise its rights against the truck. Lender contended that debtor has only one option and that was to surrender the truck. The bankruptcy court denied relief from stay because lender's position was against the Supreme Court's decision in *Johnson v. Home State Bank* and nothing in the revised 11 U.S.C. § 521(a)(2) suggested a congressional intent to depart from that decision. Also, neither 11 U.S.C. § 521(a) nor 11 U.S.C.S. § 362(h) specifically precluded the restructuring in Chapter 13 of a debt that was not reaffirmed in a prior Chapter 7. Finally, 11 U.S.C. § 1328(f)(1) negated congressional intent to prohibit chapter 20 filings.

XIV. CHAPTER 13 DISCHARGE

***In re Klein*, 544 B.R. 587 (Bankr. W.D. Tex. 2016).**
[1/29/2016, Judge Craig A. Gargotta]
Under the doctrine of the last antecedent, a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows. Applying this doctrine to 11 U.S.C. § 1328(f)(2), the court found that the phrase "during the 2-year period preceding the date of such order" modifies the immediately preceding phrase "filed under" rather than the more distant phrase "received a discharge". The court found the appropriate reading of § 1328(f)(2) is to prohibit debtors from receiving a second Chapter 13 discharge in a case filed within two years of the filing date of a Chapter 13 case in which the debtor received a discharge. Applying this decision to the facts of this case, the court denied Chapter 13 trustee's motion to declare debtor ineligible for discharge.

***In re Dennett*, 2016 Bankr. LEXIS 1019 (Bankr. N.D. Tex. 2016).**
[3/31/2016, Judge Robert L. Jones]
Debtors filed Chapter 13 plan and confirmed a plan that allowed them to keep their principal residence, stay current on the post-petition mortgage payments that came due, and pay the pre-petition arrearage through their plan. Debtors completed their plan payments but did not make every mortgage payment that came due post-petition. Debtors then sought to modify their plan and surrender their principal residence. Court held that debtors were not precluded from modifying their confirmed plan to provide for surrender of their principal residence in full satisfaction of a debt to mortgagee since the surrender was effectively a payment of the debt, the residence had sufficient value to satisfy the debt, and creditor did not object to the modification. However, it remained to determine whether debtors' certification that debtors were current on all payments to be made directly to the mortgagee was inadvertent or demonstrated a lack of candor and honesty. The grant or denial of Debtors' discharge was left open.

***In re Ramos,* 540 B.R. 580 (Bankr. N.D. Tex. 2015).**
[12/28/2015, Judge Stacy Jernigan]
Debtors filed Chapter 13 and confirmed a plan that allowed them to keep their principal residence, stay current on the post-petition mortgage payments that came due, and pay the pre-petition arrearage through their plan. Debtors completed their plan payments but did not make every mortgage payment that came due post-petition. Post-plan completion debtors sought to modify their plan and surrender their principal residence. The court held that modification as an end-of-case fix was futile and denied the plan modification since debtors had already completed their regular plan payments and in court's opinion debtors generally cannot modify their plan pursuant to 11 U.S.C.S. § 1329(a) post-confirmation but before plan completion in order to surrender their principal residence. Because the plan could not be modified and debtors had failed to pay their post-petition mortgage payments, they were not entitled to a discharge.

***In re Ferguson*, 2015 Bankr LEXIS 560 (Bankr. W.D. Tex. 2015).**
[2/24/2015, Judge Craig A. Gargotta]
Where Chapter 13 debtor died before completing all payments on his confirmed plan, under Fed. R. Bankr. P. 1016, debtor could be granted a hardship discharge, if the requirements of 11 U.S.C. § 1328(b) were met. In this case debtor met the requirements of a hardship discharge because the failure to complete payments was caused by debtor's death and debtor should not have been held accountable for such circumstances, plan modification was not practicable because the source for payments, the income of the debtor, was no longer available, and, after taking into account administrative expenses, the value of property actually distributed under the plan to unsecured claims was not less than the amount that would have been paid on such claim if debtor's estate had been liquidated under Chapter 7.

XV. CAPTER 13 MORTAGE ISSUES

***In re Tavares,* 2016 Bankr. LEXIS 785 (Bankr. S.D. Tex. 2016).**
[3/11/2016, Judge Eduardo V. Rodriguez]
Where lender applied Chapter 13 debtor's plan payments to tax escrow instead of how the plan required payments to apply, and then claimed additional payments were due after the date in which final payments were to be complete under the plan, lender's claim was disallowed. Pursuant to 11 U.S.C. § 503 and Fed. R. Bankr. P. 2016(a), lender was barred from claiming administrative expenses due to its failure to properly notice its expenses. In this case lender failed to submit a detailed accounting of escrow under either Fed. R. Bankr. P. 3002.1, or the Real Estate Settlement Procedures Act of 1974 (RESPA), and as a result waived any right to recover of post-petition claim for uncollected taxes, accrued interest or the like.

***In re Herman,* 2016 Bankr. LEXIS 410 (Bankr . S.D. Tex. 2016).**
[2/9/2016, Judge Letitia Z. Paul]
Although Chapter 13 debtors were current on their payments to an oversecured creditor, which was being paid outside of the confirmed plan, it was not unreasonable for creditor to have filed a proof of claim. In order to determine if creditor's fees for filing the proof of claim were reasonable under 11 U.S.C. § 506(b), creditor had to establish that the fees were for services rendered that were necessary, that the fees were actually incurred, and that the amounts charged for the services rendered were reasonable. In this case mortgage creditor did not offer any testimony or evidence and as result failed to sustain its burden of proving that the fees were reasonable.

XVI. CHAPTER 13 PLAN

***In re Pennington*, 2015 Bankr. LEXIS 4032 (Bankr. S.D. Tex. 2015).**
[11/30/2015, Judge Letitia Z. Paul]
Debtor confirmed a plan which paid the car creditor its allowed secured claim with interest at the rate of 5.25%. After the allowed secured claim had been paid in full, the car was totaled. Debtor sought to use insurance proceeds to buy a new car. Car creditor objected and claimed the right to apply the insurance to pay off the balance of its contractual debt which would have been owing had bankruptcy not been filed. Court found that car creditor had the option of not participating in the bankruptcy case and looking to its lien for satisfaction of its debt. In this case, car creditor had participated in the bankruptcy case by filing a claim and accepting payments. As a result, car creditor was bound by the plan and had no claim to the insurance proceeds.

XVII. CHAPTER 13 PLAN MODIFICATION

***In re Dennett*, 2016 Bankr. LEXIS 1019 (Bankr. N.D. Tex. 2016).**
[3/31/2016, Judge Robert L. Jones]
Debtors filed Chapter 13 plan and confirmed a plan that allowed them to keep their principal residence, stay current on the post-petition mortgage payments that came due, and pay the pre-petition arrearage through their plan. Debtors completed their plan payments but did not make every mortgage payment that came due post-petition. Debtors then sought to modify their plan and surrender their principal residence. Court held that debtors were not precluded from modifying their confirmed plan to provide for surrender of their principal residence in full satisfaction of a debt to mortgagee since the surrender was effectively a payment of the debt, the residence had sufficient value to satisfy the debt, and creditor did not object to the modification. However, it remained to determine whether debtors' certification that debtors were current on all payments to be made directly to the mortgagee was inadvertent or demonstrated a lack of candor and honesty. The grant or denial of Debtors' discharge was left open.

***In re Childers*, 2015 Bankr. LEXIS 259 (Bankr. N.D. Tex. 2015).**
[1/27/2015, Judge Robert L. Jones]
Debtor's husband died 4 years into a 5 year plan. Debtor moved to use insurance proceeds which were exempt to pay off her plan base and receive an early discharge. Trustee opposed. The court decided that a prepayment of a plan base qualified as a modification and that § 1325(a) only—and not subsection (b)—applies to a modification. Debtors' plan was originally confirmed as an above-median income plan that triggered the five-year requirement under § 1325(b)(4), but after her husband's death, her income was below the median income and thus, her plan as modified only had to be a three-year plan, which she had already exceeded. Plan modification was approved and trustee's objection was overruled.

***In re Ramos*, 540 B.R. 580 (Bankr. N.D. Tex. 2015).**
[12/28/2015, Judge Stacy Jernigan]
Debtors filed Chapter 13 and confirmed a plan that allowed them to keep their principal residence, stay current on the post-petition mortgage payments that came due, and pay the pre-petition arrearage through their plan. Debtors completed their plan payments but did not make every mortgage payment that came due post-petition. Post-plan completion debtors sought to modify their plan and surrender their principal residence. The court held that modification as an end-of-case fix was futile and denied the plan modification since debtors had already completed their regular plan payments and in court's opinion debtors generally cannot modify their plan pursuant to 11 U.S.C.S. § 1329(a) post-confirmation but before plan completion in order to surrender their principal residence. Because the plan could not be

modified and debtors had failed to pay their post-petition mortgage payments, they were not entitled to a discharge.

XVIII. CHAPTER 13 POST-PETITION BORROWING

***In re Ward,* 2016 Bankr. LEXIS 786 (Bankr. N.D. Tex. 2016).**
[3/14/2016, Judge Stacey G. Jernigan]
Debtor purchased a vehicle eight months before filing bankruptcy. She filed Chapter 13 and confirmed a plan that paid the debt through the plan at 5% interest. Debtor failed to maintain insurance on the vehicle, the stay eventually lifted on the vehicle and the creditor repossessed it. Debtor filed a motion to incur debt of up to $18,000.00 to purchase a vehicle at 20.25% interest. The motion was denied. Debtor asked for reconsideration. The court found no basis to reconsider its ruling because nothing in the new evidence and additional arguments warranted setting aside the order denying the motion to incur debt. Also, the court stated since incurrence of significant post-petition debt is an action that could affect performance under a confirmed plan, court approval was required using the legal standard outlined in 11 U.S.C. § 364. Finally, in addition to unfavorable financing the fact that the vehicle dealer was paying debtor's attorney fees for the motion was troubling.

XIX. COMPROMISE AND SETTLEMENT

***In re Wright,* 545 B.R. 541 (Bankr S.D. Tex. 2016).**
[2/11/2016, Judge Edurado V. Rodriguez]
This case involved a duel between pre-petition and post-petition interests. The bankruptcy court was to consider two mutually exclusive motions from separate and sequential, yet simultaneously open, bankruptcy estates involving the same debtor. Debtor first filed a Chapter 7 case and the Chapter 7 trustee sought to approve a settlement agreement associated with a pre-petition property of the Chapter 7 estate and a related post-petition lawsuit in state court. While the Chapter 7 case was still open post-discharge, debtor filed a Chapter 13 case. Debtor in her Chapter 13 case requested the court approve her proposed settlement that was conditioned on the rejection of the Chapter 7 trustee's claim to a portion of the settlement proceeds. The court found stock interest was property of the Chapter 7 estate, subject only to the wildcard exemption. It was not part of the Chapter 13 estate at the time the parties entered into the Chapter 13 compromise, except to the extent of the de minimus non-exempt portion carried over from the Chapter 7 case into the Chapter 13. Debtor's claims in the state court lawsuit were not a proceed, product, offspring, rent or profit of or from the Chapter 7 estate, but rather of the Chapter 13 estate. Chapter 13 Compromise was of a mixed nature--partially proceeds of the Chapter 7 estate and partially debtor's separate interests which inured to the Chapter 13 estate. Based on Bankruptcy Rule 9019, court concluded that Chapter 13 compromise sought to deny the Chapter 7 estate of its rightful property and denied its approval.

***In re Wilson,* 2015 Bankr. LEXIS 1971 (Bankr. N.D. Tex. 2015).**
[6/17/2015, Judge Robert L. Jones]
Debtors sold a house to debtor wife's mother for $130,000. Debtors filed bankruptcy Chapter 7 bankruptcy. Trustee valued the home at $190,000.00 and proposed a settlement in which the estate would receive $25,000.00 from wife's mother. The bankruptcy court raised questions about whether wife's mother could claim defense of being a good faith purchaser. If wife's mother was aware that debtors intended to file bankruptcy, she might not be able to claim defense. As a result, the court found that the trustee was not justified in assuming that the defense applied in context of settlement.

XX. CONTEMPT AND SANCTIONS

***Wheeler v. Collier (Matter of Wheeler*), 596 Fed. Appx. 323 (5th Cir. 2015).**
[3/4/2015]

Collier and McBride were partners. Collier advertised and performed "No Money Down" bankruptcies. Collier represented Wheeler in a Chapter 7 bankruptcy. Wheeler sued Collier for debiting her bank account after the filing of the Chapter 7 case in violation of 11 U.S.C. § 362 and § 524. Wheeler also alleged violations of 11 U.S.C. §§ 526(c) and 528(a) by failing to provide Wheeler with clear fee agreement. McBride & Collier filed a motion to dismiss which the Bankruptcy court denied. They then filed a request for a jury trial and the case went to the district court. At a hearing scheduled for the parties to present evidence and argue: (1) whether McBride & Collier violated § 528, and (2) whether McBride & Collier should be held in contempt under § 105 for violating the discharge injunction of § 524(a)(2), the district court went heavy and found McBride & Collier in violation of §§ 526 and 528 and found them in contempt under § 105 for violating § 524(a)(2). The district court awarded to Wheeler $1,300 in disgorgement, $10,000 in damages "under the equity power of Section 105," $30,000 in punitive damages, and attorney's fees. Also, the district court awarded "$10,000 as sanctions for contempt, payable to the Clerk of the Court." Finally, "as part of the sanctions imposed," the court ordered McBride & Collier (i) "to cease and desist all Chapter 7 consumer 'No Money Down' bankruptcies" and (ii) to "remove or cancel all advertising in all media of 'No Money Down' Chapter 7 consumer bankruptcies." The court stated the advertisements "shall not resume without prior written orders of this court." McBride & Collier appealed the $10,000 sanction and the injunctions. The Fifth Circuit vacated the $10,000 sanction imposed because it was for criminal-contempt and not compensatory or remedial and it was unconditional and punitive. Since contempt notice only referenced contempt under § 105 for violations of § 524(a)(2), and that § 105 provides grounds for civil contempt, the notice did not provide sufficient notice of a criminal-contempt matter under Fed. R. Crim. P. 42(a). Also, the order that the firm cease and desist all Chapter 7 consumer No Money Down bankruptcies, and remove or cancel all relating advertising was vacated as the notice did not suggest that the court was considering enjoining the firm's no money down bankruptcy practice under Fed. R. Civ. P. 65(a). It only gave notice of an inquiry into whether the firm violated § 528, and whether it should be held in contempt under § 105 for violating § 524(a)(2).

***Garrett v. Coventry II DDR/Trademark Montgomery Farm, LP (In re White-Robinson),* 777 F.3d 792 (5th Cir. 2015).**
[2/16/2015]

Attorney represented debtor in her bankruptcy. She also represented the Debtor in a suit against DDR. Bankruptcy court ordered that Garrett and her firm pay sanctions totaling $25,000 for discovery abuse and for filing a frivolous motion for contempt. Attorney appealed the sanctions orders and lost. Attorney did not obtain a stay pending appeal nor did she pay the sanctions. As a result, DDR brought a motion for contempt against Attorney and her firm. Bankruptcy court ordered Attorney to pay an additional $6,454.50 in expenses to DDR and ordered that Attorney pay an additional $100.00 per day for each additional day that she did not pay the sanctions. Attorney appealed. The Fifth Circuit found that bankruptcy court had authority to issue a civil contempt order. It found that it was a core proceeding for the bankruptcy court to enforce its own orders and that the pendency of an appeal did not deprive the bankruptcy court of jurisdiction. It also rejected the argument that the contempt order was an abuse of discretion. The Fifth Circuit also rejected the Attorney's argument that the contempt order improperly allowed imprisonment for failure to pay a debt because a civil contempt did not impose imprisonment. The imposition of an additional fine per day of nonpayment was reasonably calculated to coerce compliance and was not excessive or overly harsh.

***Lopez v. Portfolio Recovery Assocs., LLC (In re Lopez),* 2015 Bankr. LEXIS 4017 (Bankr. S.D. Tex. 2015).**
[11/24/2105, Judge Eduardo V. Rodriguez]
Debtor filed suit for violation of automatic stay and for violation of Fair Debt Collection Practices Act and Texas Debt Collection Act. Debtor sought sanctions for discovery abuse. The court found that the corporate representative produced for deposition did not demonstrate a "fatal lack of competence." As a result, defendant was not precluded from offering evidence on policies. The court found that defendant failed to produce a witness with knowledge of communications with plaintiff without a valid excuse. As a result, defendant was precluded from offering fact witnesses to testify as to personal knowledge of communications with plaintiff. Defendant committed "flagrant abuse" in its failure to produce recordings of communications with plaintiff, including a "smoking gun" recording. Defendant was precluded from offering any evidence to contradict plaintiff's version of phone calls for which recordings were not timely produced. The court also deemed several facts as requested by plaintiff. The court denied a request for default judgment finding that the sanctions issued were sufficient. Finally, the court awarded attorney's fees.

***In re Baker,* 2015 Bankr. LEXIS 987 (Bankr. S. D. Tex. 2015).**
[3/30/2015, Judge Letitia Z. Paul]
Debtors had filed at least six prior bankruptcy cases, which resulted in a pattern of dismissals and re-filing in unchanged circumstances. The court found debtors' failure to properly prosecute their latest case was willful and debtors were not eligible to be debtors pursuant to 11 U.S.C. § 109(g)(1). Also, debtors were not eligible because they failed to receive credit counseling required by 11 U.S.C. § 109(h)(1) within the 180-day period preceding the date of filing of the petition. Additionally, debtors failed to timely file schedules and other paperwork prompting dismissal under 11 U.S.C. § 521(i)(1). Finally, because counsel for debtors continued to file deficient cases on their behalf, counsel was sanctioned under 11 U.S.C. § 9011(c) and barred from further filings until completion of training in consumer bankruptcy law.

***US Trustee, Region 7 v. Williams (In re Steptoe),* 2015 Bankr. LEXIS 855 (Bankr. S.D. Tex. 2015).**
[3/18/2015, Judge Marvin Isgur]
An attorney contracted with an individual for Chapter 7 bankruptcy and foreclosure services. Attorney filed Chapter 7 paperwork for the debtor, however, the petition did not disclose attorney's involvement in the case, but listed attorney's telephone number as the debtor's telephone number. The bankruptcy court found attorney violated 11 U.S.C. § 329 and Fed. R. Bankr. P. 2016 by failing to file required information regarding fees he charged the debtor, violated 11 U.S.C. § 526 by filing documents that contained untrue and misleading statements, violated 11 U.S.C.S. § 527 by failing to advise the debtor on how to value her assets, calculate amounts required on her schedules, complete her list of creditors, and determine the value of her exempt property, violated 11 U.S.C.S. § 528 by utilizing a fee agreement that failed to clearly and conspicuously explain the services he was to provide, and aggravated his conduct by instructing the debtor to lie about the nature of their professional relationship. The relief granted were: (1) permanently enjoined attorney from engaging in further violations of §§ 329, 526, 527 and 528 of the Bankruptcy Code, (2) attorney was ordered to pay the United States Trustee $3,888.11 in attorney's fees and expenses, (3) attorney was ordered to pay to the debtor $3,000.00, (4) injunctive relief was granted, (5) the $6,888.11 had to be paid promptly or on a monthly basis.

***Lopez v. Portfolio Recovery Assocs., LLC (In re Lopez),* 2015 Bankr. LEXIS 802 (Bankr. S.D. Tex. 2015).**
[3/12/2015, Judge Marvin Isgur]
In support of his Motion for Sanctions against Defendant, Plaintiff offered as evidence a state court judgment in which Defendant had been harshly sanctioned for behavior similar to the alleged behavior

in this case. Plaintiff also offered several documents relating to the state court judgment, including most of the pleadings on the record in that case, the jury award of damages, and a news article covering the case. Defendant contested on the grounds that it would effectively be punished for behavior conducted elsewhere and for which it had been punished. The Court accepted the evidence, in part, finding that the state court judgment would be instructive as to Defendant's state of mind and the least level of sanctions that would be appropriate to compel Defendant into compliance. Finding the court case admissible, the Court also admitted most items from the state court docket, concluding that such documents would assist in understanding the relevant facts and timeline in the case. The Court chose not to admit any documents relating to the jury award, which were relevant only to the underlying merits of the case. The Court also chose not to admit a news article covering the state court judgment, it having little relevance.

***George West 59 Investments, Inc. v. Williams (In re George West 59 Investments, Inc.),* 526 B.R. 651 (N.D. Tex. 2015).**
[2/11/2015]
It is mandatory, under Tex. Prop. Code Ann. §§ 51.002, 51.0075(e), that a notice of foreclosure sale ("FS"), identifying the name and address of the trustees/substitute trustee, be served by mail on all debtors, and posted and recorded at least 21 days before the FS. Therefore, Strict compliance is required to conduct a valid, non-judicial foreclosure sale under Texas law. While appointments of substitute trustees are always possible, new FS notices with the name and address of the newly appointed trustee should be mailed and re-posted so as to give the borrower and the public at least 21 days' notice of the newly appointed trustee. In this case, initial creditor posted property for foreclosure and named substitute trustees who might conduct sale together with their addresses. Four days prior to FS, note was sold to a third party. The third party appointed a new substitute trustee but did not inform the debtor of the new substitute trustee's address and did not post the information about the new substitute trustee publicly. New substitute trustee conducted FS to a buyer. Debtor filed bankruptcy and initiated adversary proceeding. Reference was withdrawn to District Court which found the failure to name the correct substitute trustee in a FS served on the debtor and failure to publicly provide that information at least 21 days before FS rendered the FS void and of no effect. The error made in the case could not be negated by an equitable estoppel defense.

XXI. CONVERSION

***Foster v. Holder (In re Foster),* 530 B.R. 650 (N.D. Tex. 2015).**
[4/29/2015]
The district court held that *Marrama* remained good law to allow bankruptcy court to exercise discretion under § 105(a) to deny debtor's motion to convert chapter 7 case to chapter 11 where debtor had no means to fund a chapter 11 plan and no intention of paying creditors.

***In re Smith*, 544 B.R. 126 (Bankr. W.D. Tex 2016).**
[1/21/2016, Judge Tony M. Davis]
Conversion of debtors' Chapter 7 case to a Chapter 11 case pursuant to 11 U.S.C.S. § 706(b) was within the discretion of the court based on what would inure to the benefit of all parties, *including the debtor.* Conversion was not warranted here because, under the facts of this case, conversion would yield no benefit to the debtors, merely transfer value from the debtors to their creditors, at a cost, and not inure to the collective benefit of all parties in interest. Weighing ability to pay against the likely expenses of Chapter 11 litigation, there was no requisite benefit to conversion.

***Tackett v. McCracken (In re McCracken),* 2015 Bankr. LEXIS 934 (Bankr. E.D. Tex. 2015). [3/25/2015, Judge Bill Parker]**

In this adversary proceeding, bankruptcy court held that plaintiff was entitled to summary judgment on her claim that attorneys' fees awarded to her and against the debtor in state family court were non-dischargeable because the fee award was in connection with a custody modification action. However, since the debt at issue arose while debtor was in a Chapter 13 case but before his case was converted to Chapter 7, plaintiff could bring the adversary action under 11 U.S.C. § 348(d). Finally, because there was no contract between the parties that entitled the plaintiff to a recovery of attorney's fees, or a statutory basis for recovery of fees pertaining to litigating the adversary proceeding, plaintiff was not entitled to her fees associated with the adversary proceeding.

***In re Troppy*, 2015 Bankr. LEXIS 739 (Bankr. S.D. Tex. 2015).**
[3/9/2015, Judge Richard S. Schmidt]

Debtor filed Chapter 13 and a creditor filed an emergency motion to either convert the case to Chapter 7 or have it dismissed with prejudice. There was cause under 11 U.S.C. § 1307(c) for converting debtor's Chapter 13 case to Chapter 7 because debtor filed schedules and a statement of financial affairs that did not list all his assets, debts, and transfers he made, he had not filed a confirmable plan, and he filed and prosecuted his case in bad faith. Additionally, although the court had the option of dismissing the debtor's case with prejudice, conversion was in the best interest of creditors and the debtor's bankruptcy estate because a Chapter 7 trustee could file adversary proceedings to recover property the debtor transferred to others, including 19.46 acres with a house and barn that was valued at $275,000 in 2013, and mineral rights in approximately 90 acres of land he transferred to his parents for no consideration.

XXII. DISCHARGE GRANT/DENIAL

***Judgment Factors, L.L.C. v. Packer (In re Packer),* 816 F.3d 87 (5th Cir. 2016).**
[3/10/2016]

Creditor filed an adversary proceeding against debtor to prevent the entry of a Chapter 7 discharge order by objecting under various subsections of 11 U.S.C. § 727(a). Creditor also asserted that various entities owned by debtor were his alter egos and requested that the corporate veils of these entities be reverse pierced. The bankruptcy court granted summary judgment to debtor, holding that he did not act in any way that merited the denial of a discharge under § 727(a) and dismissed the alter ego claims. The district court affirmed. The Fifth Circuit held that since creditor did not obtain leave from the bankruptcy court to purse alter ego and reverse veil piercing claims on behalf of the estate, it could not pursue these claims. As to the denial of a discharge under § 727(a), creditor failed to establish that debtor concealed or transferred any assets, destroyed or failed to keep financial records, or made any false oaths, therefore, the judgment was affirmed.

***Buescher v. First United Bank and Trust (Matter of Buescher*), 783 F.3d 302 (5th Cir. 2015).**
[4/13/2015]

Debtor owned a construction company which had borrowed a lot of money from lender. Debtor's wife was an attorney. The Fifth Circuit stated that district court properly affirmed the judgment of the bankruptcy court denying discharge to the debtors because the bankruptcy court did not err by holding that the lender had standing to object to both the debtor and his wife's discharge, under § 727(a)(2), (a)(3) and (a)(4)(A), even though wife never personally guaranteed the loans the lender made to husband's company because the lender was the wife's creditor under 11 U.S.C. § 727(c)(1) where Tex. Fam. Code Ann. § 3.202(c) made all jointly-held community property liable for the debts of either spouse. Also, debtors never turned over relevant financial records to the trustee or to the lender, the lender was not

required to personally seek discovery from the debtors, and the trustee's affidavit was sufficient to support the lender's motion for summary judgment.

***Galasso v. Imes (In re Galasso),* 2015 U.S. Dist. LEXIS 144170 (W.D. Tex. 2015).**
[10/22/105]
District court affirmed bankruptcy court's denial of discharge to an attorney. Debtor agreed to provide authorization to creditor to obtain debtor's bank records but never did so. Creditor filed an adversary proceeding under 11 U.S.C. §§ 727(a)(3) and (a)(5). Debtor continued to play game. After discovery cutoff date, debtor produced a bunch of responsive documents right before trial. On motion by creditors the bankruptcy court ruled that any document not provided before the discovery cutoff date would be inadmissible, this meant debtor could only get one exhibit into evidence. Discharge was denied pursuant to 11 U.S.C. §§ 727(a)(3) and (a)(5).

***Hill v. Bearden (In re Bearden),* 2015 Bankr. LEXIS 3056 (Bankr. S.D. Tex. 2015).**
[10/15/2015, Judge Marvin Isgur]
Debtor was entitled to an incentive fee of $44,451from her employer. She advised her bankruptcy lawyer of this fact and the lawyer told her to file Chapter 7 ASAP because if she filed and then received the incentive it would not be property of the estate. The bankruptcy court ruled that the incentive fee received post-petition had to be turned over to the Chapter 7 trustee because it was payment for work debtor performed pre-petition and was property of the bankruptcy estate under 11 U.S.C. § 541. Even though the debtor had relied on advice of counsel and acted reasonably when she did not inform the trustee of the incentive fee and spent part of the money, she still acted with fraudulent intent when she refused to turn over the balance on hand to trustee on demand and instead transferred the remaining $12,000 to her son. Discharge was denied under 11 U.S.C. § 727(a)(2) for transfer with the intent to hinder or delay her creditors.

***Heron Lakes Estates v. Herring (In re Herring*), 2015 Bankr. LEXIS 2841 (Bankr. S.D. Tex. 2015).**
[8/26/2015, Judge Letitia Z. Paul]
Debtors filed Chapter 7 and creditor objected to their duscharge under Sections 11 U.S.C. §§ 727(a)(2), 727(a)(3), 727(a)(4), and 727(a)(5) of the Bankruptcy Code. The court has dismissed crdeditor's claim under Section 727(a)(5). Court did not deny debtors' discharge under §727(a)(2) because debtors did not intend to defraud creditors in presenting the information in their schedules and statement of financial affairs (SOFA) regarding their property. Discharge was not denied under § 727(a)(3) because even though debtors' records were poor, they were not sophisticated in financial matters and there was no evidence that they destroyed or concealed records. Their poor record-keeping alone was not an infraction so severe as to be sufficient to deny discharge. Although Debtor's schedules and SOFA contained numerous inaccurate and incomplete statements, discharge was not denied under § 727(a)(4), as they did not make the statements with fraudulent intent in light of the complexity of their finances and what appeared to be errors made by their former counsel in assisting them in preparing the documents.

***Western Surety Co. v. Swanks (In re Swanks),* 2015 Bankr. LEXIS 2596 (Bankr. N.D. Tex. 2015).**
[8/4/2015, Judge Stacey G. Jernigan]
Debtors purchased a used BMW that was financed by creditor. Later wife applied for a bonded title to a vehicle and purposely misrepresented to the state that there were no lienholders so that the state would issue a title free of any liens. Surety was the bonding company in that transaction. Debtors sold the BMW even though this could not be verified. Surety brought adversary proceeding against debtors. Bankruptcy court ruled the debt owed to the surety was excepted from discharge under 11 U.S.C. § 523(a)(2)(A) because it was obtained by false pretenses, a false representation, or actual fraud. Also, the court found that the conduct of debtors constituted embezzlement within the meaning of § 523(a)(4) because they sold the vehicle and kept the proceeds. Finally, the court denied debtors their discharge

pursuant to 11 U.S.C.S. § 727(a)(3) because they concealed details regarding the sale of the vehicle and did not disclose receipt of the sale proceeds until after the surety filed its adversary proceeding.

***Comu v. King Louie Mining, LLC (In re Comu),* 534 B.R. 689 (N.D. Tex. 2015).**
[7/24/2015]
Debtor appealed claiming bankruptcy court erred in (1) revoking his bankruptcy discharge pursuant to 11 U.S.C. § 727(d), and (2) incorrectly calculated the monetary award entered against him. District court affirmed. Debtor filed bankruptcy and received a discharge. Less than a half year later a creditor filed an adversary proceeding under 11 U.S.C. §§ 727(d)(1) and (2) to revoke the discharge. Later Chapter 7 trustee intervened in the adversary proceeding. Bankruptcy court revoked discharge based on a substantial number of false oaths made with fraudulent intent (which continued through trial), and due to substantial undisclosed assets and valuable interests. District court also affirmed award of 5.8 million in damages.

***Res-TX One, LLC v. Hawk (In re Hawk),* 534 B.R. 697 (Bankr. S.D. Tex. 2015).**
[7/23/2015, Judge Jeff Bohm]
Husband and wife filed Chapter 7. Creditor objected to debtors' discharge. Husband pre-petition transferred funds from exempt accounts to a corporate account and did not disclose the transfer nor the fact that he used the corporate account like a personal account. This act constituted a violation of § 727(a)(2) and the fact that the funds were transferred from exempt accounts did not change this result. Husband's omission of two significant transfers within 90 days of the petition date, and his failure to properly disclose the company's account in the Schedules constituted a violation of § 727(a)(4). Court ruled that husband's intent could not be imputed against wife, therefore she received a discharge.

***United States Trustee v. Chapman (In re Chapman),* 2015 Bankr. LEXIS 2119 (Bankr. S.D. Tex. 2015).**
[6/29/2015, Judge Marvin Isgur]
Revocation of a bankruptcy debtor's discharge was warranted since the debtor failed to disclose substantial assets and filed false statements with the bankruptcy court concerning the nondisclosures, and the debtor's failure to disclose, combined with the false testimony and use of the undisclosed assets after the bankruptcy petition date, demonstrated the debtor's bad faith and fraudulent intent.

***Neary v. Harding (In re Harding),* 2015 Bankr. LEXIS 145 (Bankr. N.D. Tex. 2015).**
[1/14/2015, Judge Harlin DeWayne Hale]
U.S. Trustee sought to deny discharge based on failure to maintain sufficient records under 11 U.S.C. §727(a)(3) and false oaths under 11 U.S.C. §727(a)(4). Evidence showed that a husband and wife failed to note the fact that they sold a car, a tractor, and a trailer they owned less than two years before they declared bankruptcy. Also, when they filed their original schedules, they failed to list three checks totaling $227,100 they issued to a business they owned and undervalued an expensive watch the wife owned. The court ruled these facts under the totality of the circumstances was insufficient to deny the debtors' discharge pursuant to 11 U.S.C. § 727(a)(4)(A) for making a false oath. Also, debtors' discharge would not be denied pursuant to 11 U.S.C. § 727(a)(3), even though they did not have records which supported substantial purchases they made because the debtors had traditionally dealt in cash rather than checks, debit cards, or credit cards for those types of expenditures.

XXIII. DISCHARGE VIOLATION

Diaz v. Heavy Action Recovery (In re Diaz), **526 B.R. 685 (Bankr. S.D. Tex. 2015).**
[3/5/2015, Judge Marvin Isgur]
Contempt order was not warranted against initial debt collector because, while that collector assigned ownership of the debt in question despite actual knowledge that the debt had been discharged in bankruptcy, the mere assignment of the debt was not an attempt to collect upon that debt and was not in itself an unlawful collection practice. By contrast, the assignee clearly engaged in willful violations of the discharge injunction under 11 U.S.C. § 524 by making multiple threatening and harassing calls to the debtors after receiving actual knowledge of the discharge injunction. Debtors were entitled to recovery of attorneys' fees and costs, but no emotional distress damages because such damages were not supported by specific enough evidence. Injunctive relief was necessary to prevent further violations of the discharge injunction.

MWF Investors v. Green Tree Servicing, LLC (In re Fauser), **2015 Bankr. LEXIS 594 (Bankr. S.D. Tex. 2015).**
[2/26/2015, Judge Marvin Isgur]
Debtor and creditor each filed motion for summary judgment. Debtor sought a summary judgment that the creditor willfully violated the discharge injunction by its collections activity. The creditor sought summary judgment on elements of the debtor's damages. The bankruptcy court concluded that a creditor sending a letter to the debtor post-discharge, delineating the debtor's default on payments and threatening to report the defaults to any credit agency if the payments were not made, was enough to constitute an attempted collection on a discharged debt, regardless of any boilerplate language included in the letter stating the creditor is not seeking to collect or recover the debt. Summary judgment was granted against creditor for liability on violation of discharge injunction. Creditor's motion for summary judgment was denied because genuine disputes of material fact exited on damages.

In re Alexander, **2015 Bankr. LEXIS 2947 (Bankr. W.D. Tex. 2015).**
[1/9/2015, Judge Craig A. Gargotta]
Husband and wife filed Chapter bankruptcy. several creditors filed adversary proceedings against the Husband objecting to dischargeability of their claims against him based on § 523(a)(2) and (a)(19) for false pretenses, false representation, actual fraud, and violation of state securities law. Meanwhile discharge orders were entered for both Husband and Wife. Husband passed away. The creditors and Husband's representatives agreed that the adversary proceeding would be dismissed, the parties would litigate issues in dispute post-discharge in state court and stipulated that Husband did not receive a discharge and it would not be raised as a defense in front of the jury in the state court. Subsequently, two of the Wife's attorneys passed away in succession. The new attorney wanted the post-discharge state court action dismissed based on the discharge that Husband and Wife had received. The bankruptcy court held that although Husband and Wife filed their Chapter 7 case as joint debtors, 11 U.S.C. § 302 did not create a single joint debtor, and each debtor's discharge was distinct. The post-discharge state court suit only asserted claims against Husband and thus, could only violate his discharge. Because Wife's discharge was distinct from her husband's, the post discharge state court suit did not violate her discharge under 11 U.S.C. § 524(a).

XXIV. DISCHARGEABILITY

A. Section 523(a)(1)

United States v. Blaine (In re Kemendo), **2015 U.S. Dist. LEXIS 110687 (S.D. Tex. 2015). [8/21/2015]**

Debtor did not timely file his tax returns for 1995 and 1996. The IRS prepared substitute for returns, assessed the taxes due and filed liens. When the debtor filed chapter 13, the IRS filed a secured proof of claim. Following completion of the plan, the IRS released its tax liens. However, it filed Notices of Intent to Levy with regard to what it claimed was the remaining balance owed. The debtor re-opened his case and sought a determination that the taxes had been discharged. The bankruptcy court granted summary judgment in favor of the debtor. On appeal, the district court reversed and remanded, finding that there were genuine issues of material fact. The case turned on whether the returns were prepared by the IRS under 26 U.S.C. §6020(a), which required the debtor's cooperation, or whether they were prepared under 26 U.S.C. §6020(b). Under the Fifth Circuit's *McCoy* decision, a late filed return constituted a non-return unless it was prepared under §6020(a). The debtor's summary judgment motion contended that the IRS could not establish that the return was filed under §6020(b). However, it was debtor's burden of proof to show that it was a §6020(a) return. Therefore, the court remanded to determine what type of return was prepared by the IRS.

B. Section 523(a)(2)

Husky International Electronics, Inc. v. Ritz (Matter of Ritz), **787 F.3d 312 (5th Cir. 2015),** ***cert. granted,*** **2015 U.S. LEXIS 7036 (2015).**

This is a very important case because it holds a representation was a necessary prerequisite for a showing of "actual fraud" under § 523(a)(2)(A). From 2003 to 2007 Husky International Electronics, Inc. ("Husky"), sold electronic device components to Chrysalis Manufacturing Corp. ("Chrysalis") pursuant to a written contract. It was undisputed that Chrysalis failed to pay for all of the goods it purchased from Husky, and that Chrysalis owed a debt to Husky in the amount of $163,999.38. At all relevant times, Daniel Lee Ritz, Jr. ("Ritz"), was in financial control of Chrysalis. Moreover, Ritz was a director of Chrysalis and owned at least 30% of Chrysalis's common stock. Between November 2006 and May 2007, Ritz transferred a substantial amount of Chrysalis's funds to various entities controlled by Ritz. Husky sued Ritz. Ritz filed Chapter 7 bankruptcy. Husky filed an adversary proceeding relying on Sections 523(a)(2), (a)(4) and (a)(6). The bankruptcy court held a trial and issued its opinion. The court found that the transfers Ritz orchestrated were not made for reasonably equivalent value. The court also found that Husky suffered damages due to these transfers in the amount of $163,999.38 which represents the amount owed to Husky by Chrysalis for the goods which Husky delivered to Chrysalis. In addition, the court determined that Ritz was "not a credible witness" due to his contradictory and evasive testimony, and due to his "selective" inability to recall certain information. The court determined that, under Texas law, Husky had not established that Ritz perpetuated an "actual fraud" on Husky—a prerequisite for piercing the veil under Texas Business Organizations Code Section 21.223(b)—because Husky failed to show that Ritz made a false representation to Husky. In fact It was undisputed that the record did not contain any evidence of a misrepresentation by Ritz to Husky. Both district court and the Fifth Circuit affirmed.

Stevens v. Chapman (In re Chapman), **2016 Bankr. LEXIS 1951 (Bankr. N.D. Tex. 2016). [5/6/2016, Judge Mark X. Mullin]**

Debtors filed Chapter 7 bankruptcy. Plaintiff was the daughter of a decedent who had business dealings with debtors on property rehabilitation. Plaintiff filed an adversary proceeding under 11 U.S.C. § 523(a)(2)(A) and (a)(4) claiming that debtor husband made false representations to induce the decedent to enter into a contract for the renovation of two houses and kept money that belonged to the decedent.

After a very fact specific discussion of each allegation asserted by plaintiff the bankruptcy court determined that plaintiff failed to prove that debtor husband obtained money, property, or services through false pretenses, false representation, or actual fraud. Also, court found that the alleged debt was not dischargeable under 11 U.S.C. § 523(a)(4) because plaintiff was not a beneficiary under the Texas trust funds, Tex. Prop. Code § 162.001(b), plaintiff failed to show the affirmative defense in Tex. Prop. Code § 162.031(b) did not apply, and plaintiff failed to show husband debtor had any fraudulent intent. Plaintiff's claims for embezzlement and larceny were denied too.

***Kahkeshani v. Hann (In re Hann),* 544 B.R. 326 (Bankr. S.D. Tex. 2016).**
[1/12/2016, Judge Karen K. Brown]
As debtor's liability to the creditor for fraudulent misrepresentations was based solely on the imposition of the corporation's liability via the theory of alter ego, and the arbitrator found that the creditor failed to prove any misrepresentations by debtor, the court concluded that the creditor failed to prove debtor's debt was nondischargeable under 11 U.S.C. § 523(a)(2)(A). Because the arbitrator found that the creditor failed to prove that debtor made any misrepresentations to him, further litigation of this issue was precluded. Debtor was entitled to judgment that the debt was not non-dischargeable under § 523(a)(2) based on actual fraud, false pretenses, or false representations. Also, debtor was entitled to summary judgment on creditor's § 523(a)(6) claim because under § 523(a)(6), it is the debtor who must act in causing the willful and malicious injury to another or the property of another entity. It has been universally held that a person's willful and malicious actions cannot be imputed to another person or entity for the purpose of holding that debt non-dischargeable under § 523(a)(6).

***Commonwealth Land Title Ins. Co. v. Koosyial (In re Koosyial),* 2016 Bankr. LEXIS 69 (Bankr. E.D. Tex., 2016).**
[1/8/2016, Judge Bill Parker]
Defendant debtor met his initial burden to demonstrate an absence of any disputed material facts and his entitlement to judgment as a matter of law because he tendered admissible summary judgment evidence to negate more than one essential element of the 11 U.S.C. § 523(a)(2)(A) claim asserted by plaintiff and plaintiff failed to respond. Debtor was entitled to summary judgment regarding non-dischargeability claim under § 523(a)(2)(A) because there was no evidence supporting plaintiff's claim that debtor knew that representations he signed in closing document regarding encumbrances were false or that such statements were intentionally made by debtor for the purpose of deceiving purchasers. Instead, the evidence supported that debtor was unaware that there was an error in the closing documents and that the error resulted from a lack of diligence by the title examiner.

***Demonbreun v. Devoll (In re Devoll),* 2015 Bankr. LEXIS 4340 (Bankr. W.D. Tex. 2015).**
[12/23/2015, Judge Craig A. Gargotta]
Jury finding based upon unconscionable conduct did not establish non-dischargeability under 11 U.S.C. §523(a)(2) because jury was not required to find intent to deceive. However, seller's statement that there was nothing wrong with the house was sufficient to establish a fraudulent representation.

***Gilbert v. Anh Van Dang (In re Anh Van Dang),* 2015 Bankr. LEXIS 3717 (Bankr. S.D. Tex. 2015).**
[10/30/2015, Judge Jeff Bohm]
Purchasers who were awarded $1,384,000 in damages and $205,000 in attorney's fees, in an action they filed in a Texas court against two sellers who subsequently filed Chapter 7, were entitled to summary judgment on their claim that the state court's judgment was non-dischargeable under 11 U.S.C. § 523(a)(2)(A) because the state court found that the sellers/debtors knowingly and intentionally violated the Texas Deceptive Trade Practices Act by concealing information from the purchasers about water damage that had occurred to the sold house. Although the jury in the state court action returned a mixed verdict, its findings that the debtors/sellers committed fraud in violation of the DTPA was subject to

collateral estoppel and was sufficient to show that the debt in question was non-dischargeable under § 523(a)(2)(A).

***Western Surety Co. v. Swanks (In re Swanks)*, 2015 Bankr. LEXIS 2596 (Bankr. N.D. Tex. 2015).**
[8/4/2015, Judge Stacey G. Jernigan]
Debtors purchased a used BMW that was financed by creditor. Later wife applied for a bonded title to a vehicle and purposely misrepresented to the state that there were no lienholders so that the state would issue a title free of any liens. Surety was the bonding company in that transaction. Debtors sold the BMW even though this could not be verified. Surety brought adversary proceeding against debtors. Bankruptcy court ruled the debt owed to the surety was excepted from discharge under 11 U.S.C. § 523(a)(2)(A) because it was obtained by false pretenses, a false representation, or actual fraud. Also, the court found that the conduct of debtors constituted embezzlement within the meaning of § 523(a)(4) because they sold the vehicle and kept the proceeds. Finally, the court denied debtors their discharge pursuant to 11 U.S.C. § 727(a)(3) because they concealed details regarding the sale of the vehicle and did not disclose receipt of the sale proceeds until after the surety filed its adversary proceeding.

***Metz v. Bentley (In re Bentley)*, 531 B.R. 671 (Bankr. S. D. Tex. 2015).**
[6/3/2015, Judge Karen K. Brown]
Plaintiff brough an adversary proceeding alleging that debtors' misrepresentations induced him to invest in a company and that he gave $100,000 to debtors based on debtors' false representations and material omissions. The court found that plaintiff did not contend that any of the written historical financial information presented to plaintiff concerning the overall financial health of the company was inaccurate and therefore the debt was not excepted from discharge under 11 U.S.C.S. § 523(a)(2). Also, the debt was not excepted from discharge under § 523(a)(19), as a result of a violation of Tex. Rev. Civ. Stat. Ann. art. 581-33(A)(1) and (A)(2), because plaintiff did not have a debt for money damages under the statutes since he failed to prove that he no longer owned the promissory note.

***Thomas v. Cundiff (In re Cundiff)*, 2015 Bankr. LEXIS 3272 (Bankr. S.D. Tex. 2015).**
[9/28/2015, Judge Letitia Z. Brown]
Relief requested under 11 U.S.C. § 523(a)(2)(A) was not warranted because plaintiffs did not present sufficient evidence for the court to conclude that debtor made an affirmative representation regarding his company's financial condition, or that any such representation was false. Also, relief requested under § 523(a)(2)(B) was also not warranted because plaintiffs' evidence was that the only statements in writing on which one plaintiff relied in making his investment were those contained in the business plan, and there were no statements in the business plan respecting debtor's financial condition or that of his company.

***Gomez v. Saenz (In re Saenz)*, 534 B.R. 276 (Bankr. S.D. Tex. 2015).**
[7/27/2015, Judge Marvin Isgur]
Plaintiff proved the elements of fraud under Texas law where debtor made two misrepresentations to plaintiff before selling his restaurant. Debtor knew at least one of those representations was false and made the other with reckless disregard, the representations were made to induce the plaintiff to complete the transaction, the plaintiff's reliance was both reasonable and justified, and the plaintiff suffered an injury that was proximately caused by debtor's misrepresentations. The court also found that factors in Tex. Civ. Prac. & Rem. Code Ann. § 41.011(a) weighed in favor of an award of exemplary damages. The total amount excepted from discharge under § 523(a)(2)(A) was $412,500.00, and included actual damages of $330,000.00 plus exemplary damages of$82,500.00.

C. Section 523(a)(4)

***Ratliff Ready-Mix, Inc. v. Pledger (Matter of Pledger),* 592 Fed. Appx. 296 (5th Cir. 2015).**
The parties agreed that debtor intentionally diverted trust funds that should have gone to the creditor, a subcontractor, therefore, the scienter element of the Texas Construction Trust Fund Statute, Tex. Prop. Code Ann. § 162.031(a), was not at issue in this case. However, with respect to the affirmative defense, § 162.031(b), debtor alleged that all of the diverted money went to paying the bills of the company resulting from overhead and general business expenses, and the creditor failed to contradict that contention. As a result debtor qualified for the affirmative defense under the statute even if the debtor borrowed from healthy projects to support failing ones in order to keep the business going.

***Whitaker v. Moroney Farms Homeowners' Ass'n (In re Whitaker*), 2016 U.S. App. LEXIS 5018 (5th Cir. 2016).**
[3/18/2016]
Fifth Circuit held that district court properly affirmed bankruptcy court's conclusion that a state-court judgment in favor of a homeowners association (HOA) was non-dischargeable under 11 U.S.C. § 523(a)(4) because the bankruptcy court correctly found that the state court judgment had preclusive effect, the debtor, as a director and officer of the HOA, was a fiduciary under federal law, and the debtor committed acts of defalcation by knowingly neglecting his fiduciary duties.

***Whitaker v. Moroney Farms Homeowners' Ass'n,*, 2015 U.S. Dist. LEXIS 73386 (E.D. Tex. 2015).**
[6/5/2015]
President of homeowners' association improperly attempted to keep a homeowner from receiving documents to which he was entitled. This caused the HOA to incur attorneys' fees. Also, President received small amounts of improper reimbursements and personal benefits from HOA. As a result HOA sued the President. State court entered judgment for breach of fiduciary duty. District court affirmed bankruptcy court's finding that debt was non-dischargeable as defalcation in a fiduciary capacity under Section 523(a)(4).

***Stevens v. Chapman (In re Chapman),* 2016 Bankr. LEXIS 1951 (Bankr. N.D. Tex. 2016).**
[5/6/2016, Judge Mark X. Mullin]
Debtors filed Chapter 7 bankruptcy. Plaintiff was the daughter of a decedent who had business dealings with debtors on property rehabilitation. Plaintiff filed an adversary proceeding under 11 U.S.C. § 523(a)(2)(A) and (a)(4) claiming that debtor husband made false representations to induce the decedent to enter into a contract for the renovation of two houses and kept money that belonged to the decedent. After a very fact specific discussion of each allegation asserted by plaintiff the bankruptcy court determined that plaintiff failed to prove that debtor husband obtained money, property, or services through false pretenses, false representation, or actual fraud. Also, court found that the alleged debt was not dischargeable under 11 U.S.C. § 523(a)(4) because plaintiff was not a beneficiary under the Texas trust funds, Tex. Prop. Code § 162.001(b), plaintiff failed to show the affirmative defense in Tex. Prop. Code § 162.031(b) did not apply, and plaintiff failed to show husband debtor had any fraudulent intent. Plaintiff's claims for embezzlement and larceny were denied too.

***Douglass v. Douglass (In re Douglass)*, 2015Bankr. LEXIS 3596 (Bankr. E.D. Tex. 2015).**
[10/23/2015, Judge Bill Parker]
Mother brought adversary proceeding against son and daughter in law. Son was found to owe a fiduciary duty to mother due to her advanced age and the fact that he managed her assets. Damages against son for breach of fiduciary duty and for violation of Texas Theft Liability Act were non-dischargeable. However, daughter-in-law did not knowingly participate in breach of fiduciary duty so the claims against her were dischargeable. Mother's objection to debtors' claim of a homestead exemption under Tex. Prop. Code Ann. § 41.001(a) and Tex. Const. art. XVI, § 51 was overruled because she had the burden of proof

and she did not prove any of the elements in 11 U.S.C. § 522(o) which are: (1) the debtor disposed of property within 10 years preceding the bankruptcy filing; (2) the disposed property was non-exempt; (3) some or all of the proceeds from the disposition of this nonexempt property were used to buy a new homestead, to improve an existing homestead, or reduce the debt associated with an existing homestead; and (4) the debtor disposed of the nonexempt property with the intent to hinder, delay, or defraud a creditor.

Wright v. Minardi (In re Minardi), **536 B.R. 171 (Bankr. E.D. Tex. 2015).**
[8/27/2015, Judge Bill Parker]
Debtor successfully defended against plaintiffs' claim under 11 U.S.C. § 523(a)(2)(A) and 11 U.S.C.S. § 523(a)(4). However, because the indebtedness the debtor owed to plaintiffs was based upon violation of federal securities laws and common law fraud in connection with the purchase of a security, and because the indebtedness was previously memorialized through the entry of a judgment in a federal judicial proceeding, the judgment in plaintiffs' favor was non-dischargeable pursuant to 11 U.S.C. § 523(a)(19).

Western Surety Co. v. Swanks (In re Swanks), **2015 Bankr. LEXIS 2596 (Bankr. N.D. Tex. 2015).**
[8/4/2015, Judge Stacey G. Jernigan]
Debtors purchased a used BMW that was financed by creditor. Later wife applied for a bonded title to a vehicle and purposely misrepresented to the state that there were no lienholders so that the state would issue a title free of any liens. Surety was the bonding company in that transaction. Debtors sold the BMW even though this could not be verified. Surety brought adversary proceeding against debtors. Bankruptcy court ruled the debt owed to the surety was excepted from discharge under 11 U.S.C. § 523(a)(2)(A) because it was obtained by false pretenses, a false representation, or actual fraud. Also, the court found that the conduct of debtors constituted embezzlement within the meaning of § 523(a)(4) because they sold the vehicle and kept the proceeds. Finally, the court denied debtors their discharge pursuant to 11 U.S.C.S. § 727(a)(3) because they concealed details regarding the sale of the vehicle and did not disclose receipt of the sale proceeds until after the surety filed its adversary proceeding.

Helvetia Asset Recovery, Inc. v. Kahn (In reKahn), **533 B.R. 576 (Bankr. W.D. Tex. 2015).**
[3/27/2015, Judge Craig A. Gargotta]
Plaintiff prevailed in two state court lawsuits against debtor who as a corporate officer misappropriated corporate funds. Debtor filed bankruptcy. Creditor filed adversary proceeding under section 523(a)(4) and (a)(6). The court found that collateral estoppel precluded relitigation of the facts tried in state court. All issues underlying dischargeability had been fully litigated in the state court suits. The state court judgment established a non-dischargeable debt under 11 U.S.C. § 523(a)(4) for breach of fiduciary duty and exemplary damages and attorney's fees were also non-dischargeable under § 523(a)(4). Also, both state court judgments were non-dischargeable under 11 U.S.C. § 523(a)(6) because by knowingly and deliberately engaging in an unauthorized diversion of plaintiff's funds, the debtor acted in a manner substantially certain to cause financial loss and injury to the plaintiff, and, therefore inflicted a willful and malicious injury upon plaintiff.

D. Section 523(a)(5)

Tackett v. McCracken (In re McCracken), **2015 Bankr. LEXIS 934 (Bankr. E.D. Tex. 2015).**
[3/25/2015, Judge Bill Parker]
In this adversary proceeding, bankruptcy court held that plaintiff was entitled to summary judgment on her claim that attorneys' fees awarded to her and against the debtor in state family court were non-dischargeable because the fee award was in connection with a custody modification action. However, since the debt at issue arose while debtor was in a Chapter 13 case but before his case was converted to Chapter 7, plaintiff could bring the adversary action under 11 U.S.C.§ 348(d). Finally, because there was no contract between the parties that entitled the plaintiff to a recovery of attorney's fees, or a statutory

basis for recovery of fees pertaining to litigating the adversary proceeding, plaintiff was not entitled to her fees associated with the adversary proceeding.

McCloskey v. McCloskey (In re McCloskey), **2015 Bankr. LEXIS 711 (Bankr. S.D. Tex. 2015). [3/15/2015, Judge Karen K. Brown]**

A Chapter 7 debtor was entitled to reconsideration of the bankruptcy court's order denying the debtor's motion for summary judgment in an adversary proceeding that was filed by his ex-wife and the ex-wife's attorney because the bankruptcy court had cited a state court decision that was subsequently reversed. However, the fact that the state court's decision was reversed did not affect the bankruptcy court's decision finding that the debtor's ex-wife and her attorney were entitled to summary judgment on their claim that a state court's order requiring the debtor to pay attorney's fees his ex-wife incurred in a child custody action created a debt that was non-dischargeable. Also, the debtor's ex-wife and her attorney did not violate the automatic stay when they filed a writ of garnishment against an IRA the debtor owned that was not property of his bankruptcy estate.

Steele v. Wyly (In re Wyly), **525 B.R. 644 (Bankr. N.D. Tex. 2015).**
[2/19/2015, Judge Barbara J. Houser]

A provision in a California court's order amending a judgment of divorce, which required a Chapter 11 debtor to invest $5 million he received from his ex-wife and to pay his ex-wife a guaranteed minimum of $500,000 per year, created a debt that was non-dischargeable under 11 U.S.C. § 523(a)(5) because it was a "domestic support obligation," as that term was defined in 11 U.S.C. § 101(14A). The court found the debtor agreed to the terms of the investment provision to avoid a judicial award of spousal support, substantially all of the terms of the agreement in the state court's order amending its judgment reflected ongoing support obligations from the debtor to his ex-wife, and the terms of the investment provision clearly established the parties' intent to create an obligation in the nature of "support" within the meaning of § 101(14A).

E. Section 523(a)(6)

Smith v. Saden (In re Saden), **2016 Bankr. LEXIS 877 (Bankr. S.D. Tex. 2016).**
[3/7/2016, Judge Marvin Isgur]

The debtor acted with willfulness and maliciousness in his dealings with the creditor and the card processing company where (1) the debtor created a fraudulent check he used when establishing a direct deposit procedure in order to induce the bank to directly deposit funds properly payable to the company into the debtor's personal bank account, and (2) the debtor supplied the creditor with false accounting records to hide his fraudulent conduct. The trial court's award for attorney's fees and prejudgment interest were excepted from discharge under 11 U.S.C. § 523(a)(6). A material issue of fact existed as to whether the debt the debtor owed the creditor was obtained through actual fraud or fraud or defalcation while serving in a fiduciary capacity.

Kahkeshani v. Hann (In re Hann), **544 B.R. 326 (Bankr. S.D. Tex. 2016).**
[1/12/2016, Judge Karen K. Brown]

As debtor's liability to the creditor for fraudulent misrepresentations was based solely on the imposition of the corporation's liability via the theory of alter ego, and the arbitrator found that the creditor failed to prove any misrepresentations by debtor, the court concluded that the creditor failed to prove debtor's debt was nondischargeable under 11 U.S.C. § 523(a)(2)(A). Because the arbitrator found that the creditor failed to prove that debtor made any misrepresentations to him, further litigation of this issue was precluded. Debtor was entitled to judgment that the debt was not non-dischargeable under § 523(a)(2) based on actual fraud, false pretenses, or false representations. Also, debtor was entitled to summary judgment on creditor's § 523(a)(6) claim because under § 523(a)(6), it is the debtor who must act in causing the willful and malicious injury to another or the property of another entity. It has been

universally held that a person's willful and malicious actions cannot be imputed to another person or entity for the purpose of holding that debt non-dischargeable under § 523(a)(6).

***Babatu v. Dallas Veterans Affairs Medical Center*, 2015 U.S. Dist. LEXIS 173388 (N.D. Tex. Dec. 13, 2015).**
[12/31/2015]
Originally, plaintiff sued a medical center and an individual for invasion of privacy. The case was removed to the federal district court. Plaintiff amended her complaint and added federal causes of action. Two days before trial, the individual filed Chapter 7. Plaintiff filed an adversary proceeding contending her claim against the individual was non-dischargeable. The district court withdrew reference and lifted the stay for trial to take place. Meanwhile, the individual's Chapter 7 case was closed without a discharge due to failure to complete financial management course. Based on jury verdict, the district court awarded $35,000 in damages for invasion of privacy. Plaintiff moved for claim to be ruled non-dischargeable. The district court found dischargeability was not a justiciable issue and it lacked authority to determine dischargeability because the bankruptcy case had been closed without a discharge.

***Helvetia Asset Recovery, Inc. v. Kahn (In reKahn),* 533 B.R. 576 (Bankr. W.D. Tex. 2015).**
[3/27/2015, Judge Craig A. Gargotta]
Plaintiff prevailed in two state court lawsuits against debtor who as a corporate officer misappropriated corporate funds. Debtor filed bankruptcy. Creditor filed adversary proceeding under section 523(a)(4) and (a)(6). The court found that collateral estoppel precluded relitigation of the facts tried in state court. All issues underlying dischargeability had been fully litigated in the state court suits. The state court judgment established a non-dischargeable debt under 11 U.S.C. § 523(a)(4) for breach of fiduciary duty and exemplary damages and attorney's fees were also non-dischargeable under § 523(a)(4). Also, both state court judgments were non-dischargeable under 11 U.S.C. § 523(a)(6) because by knowingly and deliberately engaging in an unauthorized diversion of plaintiff's funds, the debtor acted in a manner substantially certain to cause financial loss and injury to the plaintiff, and, therefore inflicted a willful and malicious injury upon plaintiff.

***Future World Electronics, Inc. v. Schnell (In re Schnell),* 2015 Bankr. LEXIS 2461 (Bankr. E.D. Tex. 2015).**
[7/27/2015, Judge Bill Parker].
Although a default judgment was entered against debtor on a copyright infringement matter, issue preclusion still applied because the federal district court actually conducted an evidentiary hearing where it admitted evidence, heard argument, and made factual findings, and debtor was provided a full and fair opportunity to litigate any contested issue but elected not to attend despite proper notice and a directive to appear. Established facts from the copyright infringement hearing were sufficient to prove a willful and malicious injury under 11 U.S.C. § 523(a)(6), as an act of willful copyright infringement necessarily qualified as an act committed with the intent to cause injury. Statutory damages and attorneys' fees and costs awarded to plaintiff under 17 U.S.C. §§ 504(c)(2) and 505 were non-dischargeable.

F. Section 523(a)(8)

***Gnahoua v. Dep't of Educ. (In re Gnahoua),* 2016 Bankr. LEXIS 974 (Bankr. N.D. Tex. 2016).**
[3/28/2016, Judge Robert L. Jones]
Debtor filed for bankruptcy the same month he was dismissed from school--without making a single payment, without any attempt at negotiating forbearance or a deferral, and without applying for an income-contingent repayment plan, of which he would almost certainly qualify (reference 34 C.F.R. §§ 682.215(b)(1), 685.209(c)(3)). He had made no effort to repay the debt and thus failed to establish his good faith efforts to repay the loans, the third prong of the Brunner test. Since the Brunner test is conjunctive, a debtor's failure to satisfy any of the prongs means the debtor cannot, with regard to 11

U.S.C. § 523(a)(8), establish that the student loans caused an undue hardship. Debtor failed to create a genuine issue of material fact and the Department of Education met its burden by proving the absence of an essential element of debtor's claim and therefore was entitled to summary judgment.

***Corletta v. Tex Higher Educ. Coordinating Bd.*, 531 B.R. 647 (W.D. Tex. 2015).**
[5/19/205]
Debtor had guaranteed her friend's student loans. She filed Chapter 7 bankruptcy in 1997 and received a discharge. In 2011 Texas Higher Education Coordinating Board ("THECB") sued her on her guarantee in state court. Debtor reopened her case to determine dischargeability. Bankruptcy court granted summary judgment against her. The district court affirmed the bankruptcy court by ruling that THECB was a "governmental unit," and that 523(a)(8) dischargeability standard applied to the loans guaranteed by debtor.

***Shaw v. EduCap, Inc. (In re Shaw),* 2015 Bankr. LEXIS 658 (Bankr. S.D. Tex. 2015).**
[3/3/2015, Judge Letitia Z. Paul]
The debtor's loan qualified as a student loan (a) under 11 U.S.C. § 523(a)(8)(A)(i) because it was an educational loan through a program funded in part by a nonprofit institution, (b) under § 523(a)(8)(A)(ii) because it was an obligation to repay funds received as an educational benefit, and (c) under § 523(a)(8)(B) as it was a qualified education loan as defined by 26 U.S.C. § 221(d)(1). The debtor did not satisfy her burden of proof that repayment of the loan would impose an undue hardship on her, or her dependants because no evidence was submitted by the debtor to establish she could not maintain, based on current income and expenses, a minimal standard of living if forced to repay the student loan or that her inability to pay was likely to persist for a significant portion of the repayment period.

G. Section 523(a)(15)

***Melchiorre v. Melchiorre (In re Melchiorre),* 2016 Bankr. LEXIS 1800 (Bankr. E.D. Tex. 2016).**
[4/20/2016, Judge Bill Parker]
Plaintiff filed a complaint seeks a determination a judgment debt owed to her by the Debtor was excepted from discharge under 11 U.S.C. §§ 523(a)(5) and/or 523(a)(15). Based on summary judgment evidence submitted by the parties, the determined there was no genuine issue as to any material fact and that plaintiff was entitled to judgment as a matter of law and the debt was non-dischargeable under § 523(a)(15) of the Bankruptcy Code.

H. Section 523(a)(19)

***Wright v. Minardi (In re Minardi),* 536 B.R. 171 (Bankr. E.D. Tex. 2015).**
[8/27/2015, Judge Bill Parker]
To have a debt excepted from discharge pursuant to 11 U.S.C. § 523(a)(19), once a determination of a securities violation or related fraud has been made, and proof of the entry of that order or the existence of a settlement of such charges is tendered to the bankruptcy court, the debt is rendered nondischargeable under § 523(a)(19) without proof of any additional element. In other words, § 523(a)(19) provides for an underlying determination of liability that, in itself, serves as the basis for rendering a debt non-dischargeable. This unusual approach to the dischargeability of a particular debt as triggered by § 523(a)(19), and which is also utilized by similar statutes such as 11 U.S.C. § 523(a)(11), preempts and effectively extends the common law principles of issue preclusion, by giving preclusive effect to memorialized judicial decisions or settlements which have not been actually litigated.

XXV. DISMISSAL

***Krueger v. Torres (In re Krueger),* 812 F.3d 365 (5th Cir. 2016).**
[1/19/2016]
The bankruptcy court did not abuse its discretion in dismissing Chapter 7 debtor's case pursuant to 11 U.S.C. § 707(a) for debtor's bad faith conduct because the record was replete with evidence that debtor filed bankruptcy for illegitimate purposes, misled the court and other parties, and engaged in bare-knuckle litigation practices, including lying under oath and threatening witnesses. Bankruptcy Rules permitted the motion to dismiss debtor's bankruptcy case to be pursued as a contested motion, not as an adversary proceeding, because dismissal of a bankruptcy case was not listed in Fed. R. Bankr. P. 7001.

***Kelley v. Cypress Fin. Trading Co., LP (Matter of Cypress Fin. Trading Co., LP),* 2015 U.S. App. LEXIS 14347 (5th Cir. 2015).**
[8/12/2015]
A corporate Chapter 7 bankruptcy has one purpose: to allow an entity breathing space to marshal assets for orderly distribution to creditors. In this corporate Chapter 7 debtor has no assets, no viable claims or causes of action and no means of generating any money. With no benefit conferred but considerable harm inflicted by the debtor's Chapter 7 case, the district court properly concluded that the bankruptcy court abused its discretion in not finding cause to dismiss under 11 U.S.C. § 707(a).

***Viegelahn v. Garcia (In re Garcia),* 535 B.R. 721 (W.D. Tex. 2015).**
[7/30/3015]
Debtors filed Chapter 13 case and valued an LLC that was owned by husband and his partner at a value of $0.00. Trustee objected to confirmation and valuation of LLC. Bankruptcy court overruled trustee's objection and confirmed the plan. Debtors filed a motion to sell husband's interest in the LLC for $44,625.00 to a 3rd party. Trustee objected. Debtors withdrew the motion to sell and filed a motion to dismiss Chapter 13 case. Trustee objected to debtors' motion to dismiss and filed a plan modification. Bankruptcy court granted the motion to dismiss and rendered trustee's modification moot. Trustee appealed. District court agreed that debtors had an absolute right to voluntarily dismiss their case under § 1307(b) because prior to the filing of that motion, a motion to convert was not pending.

***In re Hiep Lam,* 2016 Bankr. LEXIS 90 (Bankr. S.D. Tex. 2016).**
[1/11/2016, Judge Letitia Z. Paul]
Court granted Chapter 13 trustee's motion to dismiss debtor's case, as she was not eligible for Chapter 13 under 11 U.S.C. § 109(e) based on the amount of debt that was actually owed by her on the petition date even though she did not list those amounts on her original statements and schedules. The unsecured debts totaled between $660,006.93 to $760,006.93.

***In re Wilcox,* 2015 Bankr. LEXIS 3520 (Bankr. S.D. Tex. 2015).**
[10/15/2015, Judge Jeff Bohm]
Although courts are split on what constitutes "cause" under 11 U.S.C. § 707(a) for dismissing a Chapter 7 bankruptcy case involving an individual debtor whose debts were primarily non-consumer debts, the better approach was that "cause" could exist if a debtor's conduct, either pre-petition or post-petition, was questionable, even if the debtor filed his schedules and Statement of Financial Affairs on time, paid his filing fees, and cooperated with the Chapter 7 trustee. In this case debtor earned $250,000 per year and owed $16,920,102 in unsecured debts due to a failed business. He stopped paying his debts and used a $204,576 tax refund to make extravagant purchases such a $2,000 spa expense, and take trips with his wife. Therefore, there was sufficient evidence to establish "cause" for dismissing the debtor's case under § 707(a).

***In re Croft,* 539 B.R. 122 (Bankr. W.D. Tex. 2015).**
[10/14/2015, Judge Tony M. Davis]
The bankruptcy court is not precluded from considering a United States Trustee's motion for an order dismissing debtors' Chapter 7 case under 11 U.S.C. § 707(b) as an abuse of Chapter 7 juts because the debtors filed their case initially under Chapter 13 and converted it pursuant to 11 U.S.C. § 1307. In this case the facts required a finding of abuse under 707(b) because debtors made exorbitant house and car purchases while they owed unpaid taxes to the IRS, failed to pay current taxes while they were in Chapter 13 despite their six-figure income, and could not account for expenditures they made during their Chapter 13 case.

***In re Goodwill*, 2015 Bankr. LEXIS 3311 (Bankr. S.D. Tex. 2015).**
[9/30/2015, Judge Letitial Z. Paul]
Chapter 13 trustee sought dismissal of debtors' case because the plan failed to provide for payment in full of secured and priority creditors , did not meet the disposable income test, and debtor had filed three previous unsecuccful bankruptcy cases. Court dismissed the case under 11 U.S.C. § 1307(c) because debtors had failed to propose a confirmable plan and this constituted unreasonable delay that was prejudicial to creditors.

***In re Guerrero,* 2015 Bankr. LEXIS 3033 (Bankr. S.D. Tex. 2015).**
[9/9/2015, Judge Eduardo V. Rodriguez]
The debtors sought dismissal of their case after a creditor had filed a motion for relief from stay. The court dismissed the case with prejudice pursuant to 11 U.S.C. § 109(g)(2). Debtor asked the court to reconsider the dismissal to be with prejudice. Th e court held that dismissal with prejudice was proper because a chronological reading of § 109(g)(2) was correct and declined to read a good faith exception into § 109(g)(2) because there was no evidence that Congress meant for an implicit exception to exist beyond the text of the statute.

***In re Hayes,* 2015 Bankr. LEXIS 161 (Bankr. S.D. Tex. 2015).**
[1/16/2015, Judge Letitial Z. Paul]
Based on totality of the circumstances there were grounds for dismissing a debtor's Chapter 7 bankruptcy case pursuant to 11 U.S.C. § 707(b)(1) and (3) because it would have been an abuse of Chapter 7 to discharge unsecured debts the debtor owed while allowing him to keep a luxury home he owned, and because the debtor had not conducted his case in good faith. Although the debtor claimed that his financial problems were due to a recent divorce, his request that the court discharge his unsecured debts so he could use approximately 55% of his monthly take home pay of $8,587 to pay secured debts he owed and maintenance on a house he purchased with his ex-wife for $ 378,000 was unreasonable, he had not reduced his expenses, and he had made sizable gifts to his son and a woman he was dating and had also repaid a loan from his mother after he declared bankruptcy.

XXVI. EXEMPTIONS

A. Section 522(b)(3)

***Brown v. Sommers (Matter of Brown),* 807 f.3d 701 (5th Cir. 2015).**
[11/24/2015]
Debtor who was a surgeon separated from his wife in August 2010 and wife filed for divorce in 2011which ended up being acrimonious and protracted and a final divorce decree was never entered. Debtor moved to Miami, Florida in late 2011 and ended up filing Chapter 11 bankruptcy in January 2013.

Debtor engaged in significant misconduct during his Chapter 11 and the Florida bankruptcy court conditionally dismissed Debtor's bankruptcy case and appointed a chief restructuring officer to reorganize and operate his business and personal financial affairs. Case was transferred from Florida to Southern District of Texas and the court appointed a Chapter 11 trustee. Shortly after debtor died in Florida. All involved agreed that, for all practical purposes, debtor effectively died intestate. Texas bankruptcy court converted debtor's case to Chapter 7 and the Chapter 11 trustee was assigned as the Chapter 7 trustee. Also, because of debtor's death the Texas bankruptcy court appointed a personal representative for debtor. At the time debtor passed away, debtor and his wife were still legally married because no divorce decree had been entered. In the Chapter 7 case, Debtor's Personal Representative claimed an exemption of $45,000.00 cash in lieu of homestead under Texas Estates Code. Trustee objected and the bankruptcy court sustained the objection. Debtor's Personal Representative appealed. Also, in the Chapter 7 case, debtor's wife claimed Texas Estates Code entitles her to $56,250.00 cash in lieu of homestead and exempt property, plus a $496,080.00 family allowance and that this money should be paid to her as an administrative expense or a domestic support obligation. Trustee objected and bankruptcy court sustained the objection but under Florida law gave ex-wife $18,000.00 in allowed exemption. Debtor's wife appealed. The Fifth Circuit held Texas law determined whether state law exemptions were available to a deceased debtor under 11 U.S.C. § 522 where the debtor was domiciled in Texas during the 180 days preceding the 730 days preceding his bankruptcy petition and that bankruptcy court properly sustained the trustee's objection to debtor's Personal Representative's claim where the debtor was alive on the petition date and thus was not eligible for an allowance under Tex. Estates Code Ann. § 353.053, and a personal representative could not exchange a valueless homestead exemption for a valuable cash-in-lieu-of-homestead exemption . Finally, wife was not eligible for a probate allowance under Texas law where the debtor was domiciled in Florida at the time of his death, and under Texas law the decedent's domicile determined a widow's right to an allowance and not the widow's domicile.

B. Section 522(d)

***In re Ayobami,* 2016 Bankr. LEXIS 645 (Bankr. S.D. Tex. 2016).**
[3/1/2016, Judge Marvin Isgur]

Debtor used the new official form 106C (Schedule C) to exempt assets. Chapter 13 trustee objected. The court concluded based on statute and in *Schwab v. Reilly*, 560 U.S. 770, 130 S. Ct. 2652, 177 L. Ed. 2d 234 (2010) that: (a) If a debtor claims an interest in an asset that is measured in dollar value any increase in value goes to the bankruptcy estate, and (b) If a debtor claims an interest that is measured in a percentage ownership of an asset any increase in value goes to the debtor. Also, the court ruled based on case law that an exempted asset leaves the bankruptcy estate. Because exempted interests leave the bankruptcy estate, the court concluded the Trustee must analyze current value and not future value of the assets. The court clarified that the phrase "100% of fair market value, up to any applicable statutory limit" does not mean that the selection of that option on Form 106C creates a floating exemption that is "capped" by the statutory limit. On the contrary, once 100% of the property is exempted, it is withdrawn from the estate. After withdrawal from the estate, there is no longer a ceiling on the value of the asset. Instead, the language "up to any applicable statutory limit" means that a debtor may claim 100% of the fair market value only if the fair market value at the time that the exemptions are allowed is less than the applicable statutory limit. Value estimates may be incorrect, but they will nevertheless bind the outcome.
The statutory limit in a 100% of fair market value scenario is not a limit on distributions that may be received years in the future. Rather, it is a limit on whether 100% of the fair market value of an asset may be exempted at all. With exceptions debtor properly completed Schedule C in accordance with the requirements of Schedule C. For the incorrectly completed portions of Schedule C, debtor had to amend her scheduled exemptions. Debtor could not claim exemptions that exceeded the statutory maximum fair market value of the allowed exemptions under 11 U.S.C. § 522. Debtor's schedules had to clearly claim an exemption, and the claim had to be consistent with the statute. When the Chapter 13 Trustee cannot meaningfully analyze a properly completed Schedule C, discovery may be appropriate.

C. Section 522(o)

***In re Enloe,* 2015 Bankr. LEXIS 4067 (Bankr. S.D. Tex. 2015).**
[12/3/2015, Judge Marvin Isgur]
Courts evaluating intent to defraud under 11 U.S.C.. § 522(o) have looked to the badges of fraud under the Texas Uniform Fraudulent Transfer Act. Debtor inherited property from his father. He used $195,000 in non-exempt property and $110,000
of exempt property to buy a lot and construct a home.

> In sum, Enloe began a transfer of non-exempt assets into an exempt homestead almost immediately after he inherited a large sum of money and while he was aware of extensive pre-existing debts. The evidence demonstrates that Enloe generally was not paying debts as they came due at the time of the transfers and further that he attempted to conceal assets. Finally, it appears that Enloe may have been consciously avoiding his creditors' attempts at service.
>
> This case is unusual, however, in that not only have several badges of fraud been met, but Enloe himself has testified that he was attempting to hinder, delay, or defraud his creditors.

The court found that alcohol impairment was not sufficient to defeat fraudulent intent. The court ordered that the property be sold and that 63.9% of the proceeds would be non-exempt while 36.1% would be exempt based upon the exempt and non-exempt funds invested in the homestead.

***Douglass v. Douglass (In re Douglass),* 2015 Bankr. LEXIS 3596 (Bankr. E.D. Tex. 2015).**
[10/23/2015, Judge Bill Parker]
Mother brought adversary proceeding against son and daughter in law. Son was found to owe a fiduciary duty to mother due to her advanced age and the fact that he managed her assets. Damages against son for breach of fiduciary duty and for violation of Texas Theft Liability Act were non-dischargeable. However, daughter-in-law did not knowingly participate in breach of fiduciary duty so the claims against her were dischargeable. To prevail under 11 U.S.C. § 522(o), four elements must be proven: (1) the debtor disposed of property within 10 years preceding the bankruptcy filing; (2) the disposed property was non-exempt; (3) some or all of the proceeds from the disposition of this nonexempt property were used to buy a new homestead, to improve an existing homestead, or reduce the debt associated with an existing homestead; and (4) the debtor disposed of the nonexempt property with the intent to hinder, delay, or defraud a creditor. To prevail under § 522(o), the objecting party bears the burden of proving these four elements by a preponderance of the evidence. Fed. R. Bankr. P. 4003(c). Here, mother's objection to debtor's claim of a homestead exemption under Tex. Prop. Code Ann. § 41.001(a) and Tex. Const. art. XVI, § 51 was overruled because she did not prove any of the elements in 11 U.S.C. § 522(o). Finally, to prevent unjust enrichment, an equitable lien in favor of mother was imposed upon a 2011 Honda Pilot owned by debtors to secure the recovery of the $21,500 wrongfully taken from mother to purchase the car and the lien was superior to any exemption right claimed by debtors.

***In re Erem,* 2015 Bankr. LEXIS 876 (Bankr. S.D. Tex. 2015).**
[3/18/2015, Judge Marvin Isgur]
Husband received a signing bonus of $400,000 from employer in exchange for a three year job commitment. But husband quit within 53 weeks and refused to pay back the bonus to employee. While husband an employee argued over the bonus return, husband and wife (“debtors) sold their home and moved to Texas where husband found a new job. In Texas, the debtors purchased a more expensive
Home used the bonus to pay for 20% of the purchase price. Chapter 7 trustee objected to the homestead exemption claim under 11 U.S.C. § 522(o). The court applied the badges of fraud analysis and determined debtors did not engage in excessive spending with the intent to delay, hinder, or defraud their

creditors. However, the court stated if the exemption was to be limited under 522(o), it would be reduced by the difference between the price of their previous home and the new, more expensive home in Texas.

D. Section 522(p)

Wiggains v. Reed (In re Wiggains), **2015 Bankr. LEXIS 1460 (Bankr. N.D. Tex. 2015).**
[4/27/2015, Judges Stacey C. Jernigan]
Debtor and his non-filing spouse entered into a partition agreement as to their homestead just before filing for bankruptcy. The agreement re-characterized their community property as separate property. Debtor filed Chapter 7 bankruptcy. Non-filing spouse brought an adversary proceeding against Chapter 7 trustee seeking a declaratory judgment, pursuant to 28 U.S.C. § 2201, as to the relative rights between her trustee concerning the homestead net sale proceeds by virtue of the partition agreement. Trustee responded with an answer and counterclaim for fraudulent transfer against the non-filing spouse asserting that debtor's entry into the partition agreement immediately before filing bankruptcy constituted a voidable transaction committed with an actual intent to hinder and delay creditors under section 548(a)(1)(A) of the Bankruptcy Code and section 24.005(a)(1) of the Texas Business & Commerce Code. The bankruptcy court ruled the partition agreement constituted a "transfer" under 11 U.S.C. § 548(a)(1), even where partition agreement was generated under Texas law and involved an exempt homestead. Also, since debtor's sole actual intent in entering into the partition agreement was to avoid the effect of the limitation placed on his homestead exemption by 11 U.S.C. § 522(p), and to divert from his creditors and preserve for his family the maximum amount of cash possible, the agreement was a fraudulent transfer under 11 U.S.C. § 548(a)(1)(A), which was avoidable under 11 U.S.C. § 550(a). Debtor's reliance upon attorney's advice did not refute that he acted with actual intent to hinder or delay his creditors.

E. Texas Homestead Exemption

Romo v. Montemayor (In re Montemayor), **2016 Bankr. LEXIS 736 (Bankr. S.D. Tex. 2016).**
[3/9/2016, Judge Eduardo V. Rodriguez]
Debtor filed Chapter 7 and claimed his homestead as exempt under Texas law. The meeting of creditors was continued a few times. Before the meeting of creditors was concluded the debtor filed a motion to sell the homestead to which no party in interest objected. He closed on the sale on 6/5/2014 and netted $107,627.25. The meeting of creditors was concluded on 8/6/2014 and trustee issued a notice of assets. Debtor received a discharge on 3/3/2015. On May 26, 2015 (355 days after the closing), trustee initiated a freeze on debtor's bank account freezing in place $58,731.70 of the unspent proceeds and sought turnover. As a matter of first impression the court considered two issues: (1) What happens to the proceeds from the sale of a properly exempted Texas homestead if not timely reinvested into a new Texas homestead within the statutory six-month period where the proceeds would lose their exemption under Texas law? (2) Does the Fifth Circuit's Opinion in *In re Frost* apply in this chapter 7 proceeding rendering the sale proceeds non-exempt and subject to pre-petition creditor's claims? As to the second issue, the court found that in *In re Frost* does not apply in Chapter 7 cases. As to the first issue, despite debtor violating the 6 months rule, he was allowed to keep the proceeds because he exempted an interest in a homestead as of the filing date and not an interest in a homestead proceeds.

Lowe v. DeBerry (In re Deberry), **2015 Bankr. LEXIS 3694 (Bankr. W.D. Tex. 2015).**
[10/28/2015, Judge Craig A. Gargotta]
Debtor filed Chapter 7 on February 10, 2014. As of petition date, debtor scheduled and exempted his homestead which was owned free and clear of any lien or debt. Debtor's exemption claim of $430,690.00 for home became final. On September 12, 2014, debtor filed a motion to sell his homestead for $390,000.00 and on order approving the sale was entered on September 23, 2014. After the sale was completed the proceeds from the sale were not reinvested in a Texas homestead within the six month time period contemplated by Tex. Prop. Code Ann. § 41.001(c). Trustee sought return of the funds for

distribution to creditors. The court found *In re D'Avila*, 498 B.R. 150, 153 (Bankr. W.D. Tex. 2013) to be persuasive and not *Cage v. Smith (In re Smith),* 514 B.R. 838 (Bankr. S.D. Tex. 2014).

***In re See*, 2015 Bankr. LEXIS 2323 (Bankr. W.D. Tex. 2015).**
[7/14/2015, Judge Tony M. Davis]
Does Texas homestead law permit a debtor to exempt option to purchase a property? Whether a contract can be severed depends primarily on the parties' intention, the agreement's subject matter, and parties' conduct. In this case the lease and option were expressly integrated, cross-defaulted (as to two tracts), and had back-to-back terms, strongly implied that the parties' intent was to make them integrated and non-severable. In this case the agreement's subject matter could only be accomplished if the leases and options were treated as one non-severable agreement and the leases and options were integral to the final dispute resolution. Since the leases and options were integrated and could not be severed, the present possessory interests in the properties were effectively merged with the future interests and debtor could exempt both (under Tex. Prop. Code Ann. § 41.001(a)).

***In re Edwards*, 2015 Bankr. LEXIS 132 (Bankr. N.D. Tex. 2015).**
[1/13/2015, Judge Barbara J. Houser]
A Chapter 7 debtor met his burden of proving that real property he owned in Dallas, Texas, was his homestead because he resided at the property when he was not living at his girlfriend's house, kept his personal property at the Dallas property, and intended to claim the Dallas property as his homestead under Texas law. The parties who filed objections to the debtor's claim of exemption, by way of evidence showed that debtor received his mail at his girlfriend's address, used his girlfriend's address when he obtained a driver's license, did not file documents with Dallas County, Texas, prepetition claiming that the property in question was his homestead, and failed to list the property as exempt on the first Schedule C he filed with the bankruptcy court, however, this was not sufficient to overcome the debtor's proof.

***In re Crump*, 533 B.R. 567 (Bankr. N.D. Tex. 2015).**
[7/14/2015, Judge Robert L. Jones]
Chapter 7 debtors were allowed to claim a homestead exemption under Tex. Const. art. XVI, § 51 and Tex. Prop. Code Ann. § 41.002 in most of 160 acres of rural property they owned that was not contiguous to a 4.28-acre tract where they resided, even though they had leased the property to another person on a crop share basis and had transferred title to the property to their children for a short period of time. The debtors were not allowed to claim a homestead exemption in rental payments they received from an oil company that was using a portion of the 160 acres to operate a well for disposal of saltwater because they had abandoned that portion of the property as their homestead. The debtors were allowed under Tex. Prop. Code. Ann. §§ 42.001 and 42.002 to exempt up to $60,000 in farming vehicles and implements they kept on their property from creditors' claims.

F. Texas Personal Property Exemptions

***Douglass v. Douglass (In re Douglass)*, 2015 Bankr. LEXIS 3596 (Bankr. E.D. Tex. 2015).**
[10/23/2015, Judge Bill Parker]
Mother brought adversary proceeding against son and daughter in law. Son was found to owe a fiduciary duty to mother due to her advanced age and the fact that he managed her assets. Damages against son for breach of fiduciary duty and for violation of Texas Theft Liability Act were non-dischargeable. However, daughter-in-law did not knowingly participate in breach of fiduciary duty so the claims against her were dischargeable. To prevail under 11 U.S.C.. § 522(o), four elements must be proven: (1) the debtor disposed of property within 10 years preceding the bankruptcy filing; (2) the disposed property was non-exempt; (3) some or all of the proceeds from the disposition of this nonexempt property were used to buy a new homestead, to improve an existing homestead, or reduce the debt associated with an existing homestead; and (4) the debtor disposed of the nonexempt property with the intent to hinder, delay, or

defraud a creditor. To prevail under § 522(o), the objecting party bears the burden of proving these four elements by a preponderance of the evidence. Fed. R. Bankr. P. 4003(c). Here, mother's objection to debtor's claim of a homestead exemption under Tex. Prop. Code Ann. § 41.001(a) and Tex. Const. art. XVI, § 51 was overruled because she did not prove any of the elements in 11 U.S.C. § 522(o). Finally, to prevent unjust enrichment, an equitable lien in favor of mother was imposed upon a 2011 Honda Pilot owned by debtors to secure the recovery of the $21,500 wrongfully taken from mother to purchase the car and the lien was superior to any exemption right claimed by debtors.

***In re Hawk*, 524 B.R. 706 (Bankr. S.D. Tex. 2015).**
[1/30/2015, Judge Jeff Bohm]
Because debtors' liquidated IRA funds lost their exempt status under Tex. Prop. Code Ann. § 42.0021(c) when the debtors did not reinvest them during the statutory time period, and the exemption was lost while the bankruptcy case was open, the funds automatically became property of the estate and trustee was immediately entitled to them. The Fifth Circuit's holding in *Viegelahn v. Frost (In re Frost*), 744 F.3d 384 (5th Cir. 2014), pertaining to homestead exemptions extends to IRA exemptions and neither the expiration of the deadline to object to the debtors' claimed exemptions nor the Trustee's no asset report precluded application of the rule from *Frost*.

XXVII. INVOLUNTARY BANKRUPTCY

***In re Bates*, 545 B.R. 183 (Bankr. W.D. Tex. 2016).**
[1/26/2016, Judge Craig A. Gargotta]
An order for relief under an involuntary bankruptcy petition was warranted since the putative bankruptcy debtor was generally not paying his debts as they became due as evidenced by the debtor's failure to pay significant debts, selective payment of debts, troubling conduct of financial affairs, financial misconduct, and repeated invocation of the privilege against self-incrimination.

***McMillan v. Maestri (In re McMillan),* 543 B.R. 808 (Bankr. N.D. Tex. 2016).**
[1/8/2016, Judge Mark. X. Mullin]
The Court dismissed an involuntary petition against debtor because the creditor who filed it was not a qualified petitioner. Debtor then sued defendant and two other parties under 11 U.S.C. § 303(i), which provides that after a contested dismissal of an involuntary petition, a bankruptcy court may grant judgment for fees and costs against "the petitioners," and a judgment for actual and punitive damages against "any petitioner" that filed the petition in bad faith. Defendant filed a motion to dismiss the complaint under Federal Civil Rule 12(b)(6). Defendant argued dismissal should be granted because he did not sign and file the involuntary petition and thus could not be liable as a "petitioner" under § 303(i). The Court agree and granted the motion to dismiss. Plain language of 11 U.S.C. § 303(i) allowed relief, following the contested dismissal of an involuntary petition, only against the actual petitioning parties who signed and filed or joined in the involuntary petition against the alleged debtor. State law concepts of liability, such as agency and joint venture, were irrelevant to the determination of whether to award relief under § 303(i), and as a result, court could not grant relief against a defendant who was not a petitioner within the meaning of § 303.

XXVIII. JUDICIAL ESTOPPEL

***Gold Star Constr., Inc. v. Cavu/Rock Props. Project I, L.L.C. (In re Cavu/Rock Props. Project I, L.L.C.),* 2016 U.S. App. LEXIS 103 (5th Cir. 2016).**
[1/4/2016]
Debtor and the creditor both appealed the bankruptcy court's ruling. Creditor asserted the bankruptcy court erred (1) by failing to apply the doctrines of judicial estoppel and res judicata to the property valuation; (2) by finding its mechanic's lien to be invalid; and (3) by denying its motion to transfer venue. Debtor asserted the bankruptcy court erred (1) by finding that creditor had an unsecured claim against debtor for $743,382.29; and (2) by assessing costs against each party. The Fifth Circuit held that (1) the bankruptcy court did not err by failing to use the same property valuation for both the bankruptcy proceeding and the adversary proceeding, because the doctrines of judicial estoppel and res judicata were not applicable and valuations under 11 U.S.C. §§ 1129 and 506 were two distinct and separate valuations required for different purposes, (2) in conformance with California law, the mechanic's lien was premature and therefore invalid because the creditor had neither completed its obligations nor been discharged at the time of its filing, (3) it was not an abuse of discretion to deny a motion to transfer venue, (4) it was not clear error to determine that the creditor held an allowable, unsecured claim, and (5) the bankruptcy court acted within its discretion in its assessment of costs.

***Allen v. C & H Distributors, LLC*, 2015 U.S. App. LEXIS 22567 (5th Cir. 2015).**
[12/23/2015]
Debtors filed chapter 13 in 2009 and did not list a personal injury claim ("PIC") in their paperwork. Debtors' plan was confirmed. Approximately a year and a half into their chapter 13 case, the debtors filed a PIC suit. Meanwhile debtors' case was closed without a discharge due to failure to complete a financial management course. In September 2014, the defendants in the PIC suit filed motions for summary judgment based on judicial estoppel. The district court granted this motion. The Fifth Circuit held that because debtors had an affirmative duty to disclose their PIC to the bankruptcy court and did not do so, they impliedly represented that they had no such claim, and such blatant inconsistency readily satisfied the first prong of the judicial estoppel inquiry. Also, debtors' failure to disclose their PIC led to the bankruptcy court accepting the inconsistent position that there was no such claim. Additionally, debtors could not have shown that their failure to disclose their PIC was inadvertent because they knew of the facts underlying the PIC during the pendency of their Chapter 13 case, as a result debtors' motivation for concealment was self-evident because of the potential financial benefit resulting from the nondisclosure.

***United States ex rel. Long v. GSDMIdea City, LLC,* 798 F.3d 265 (5th Cir. 2015).**
[8/13/2015]
Debtor filed chapter 13 in 2009 and confirmed a plan which paid creditors 100% of their claims. In 2011, while his case was pending, he filed a False Claims Act case against GSD&M with regard to negotiations over a contract with the Air Force. In 2013, he completed his plan and received a discharge. He did not disclose the claims under the False Claims Act. Shortly before trial, GSD&M discovered the bankruptcy and moved to dismiss based on judicial estoppel. The District Court gave the Chapter 13 trustee seven days to decide whether to pursue the claims but the trustee declined. District court dismissed and the Fifth Circuit affirmed. The courts both found that the failure to disclose was not inadvertent and that even though the Debtor paid his unsecured creditors their principal, he did not pay interest on the claims. As a result, he benefited from concealing the lawsuit and judicial estoppel applied.

***Sherman v. Wal-Mart Assocs., Inc.*, 2016 U.S. Dist. LEXIS 59616 (N.D. Tex. 2016).**
[4/25/2016]

On June 30, 2013 Debtor filed Chapter 13. On January 14, 2014 Walmart terminated her. At the time of her termination from Walmart, she thought she might have a claim against Walmart for discrimination. On January 15, 2014 debtor talked to her bankruptcy attorney regarding her potentially discriminatory termination. He advised her to find an attorney. Debtor spoke with three attorneys and all of whom told her they could not help her, that Wal-Mart was too tough, or that she would not get anything. By an order entered on Feb 5, 2014 debtor's case was converted from Chapter 13 to Chapter 7. Debtor filed amended schedules. The claim against Walmart was not disclosed in th amended schedules. On April 10, 2014, debtor contacted Equal Employment Opportunity Commission ("EEOC") which told her, her circumstances did not support an allegation of discrimination. On May 1, 2014 debtor located her current counsel, who agreed to represent her, and they filed a Charge of Discrimination with the EEOC. On May 23, 2014 debtor's discharge order was entered. On October 24, 2014, debtor filed suit against Walmart alleging discrimination and wrongful termination. While this suit was proceeding, on November 3, 2015 debtor moved to reopen her case. On December 9, 2015 the bankruptcy court reopened debtor's case and on December 14, 2015 debtor amended her schedules that included the lawsuit against Walmart. Soon Walmart moved to dismiss the lawsuit under Rule 12(b)(1) for lack of standing. Debtor opposed the Walmart's motion, or in the alternative, asked the Court to require the Chapter 7 trustee to be substituted as the real party in interest. The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding. To determine whether judicial estoppel applies, courts look for three elements: (1) the party against whom judicial estoppel 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. In the bankruptcy context, judicial estoppel must be applied in such a way as to deter dishonest debtors, whose failure to fully and honestly disclose all their assets undermines the integrity of the bankruptcy system, while protecting the rights of creditors to an equitable distribution of the assets of the debtor's estate. District court held that judicial estoppels was unwarranted in this case because debtor did not take any inconsistent position which was accepted by the bankruptcy court. Once debtor converted her case from Chapter 13 to Chapter 7, her post-petition claim no longer belonged to the estate. Converting a case from Chapter 13 to Chapter 7 "does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief." 11 U.S.C. § 348(a). After conversion, "property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion." 11 U.S.C. § 348(f)(1)(A). As a result in a case converted from Chapter 13, a debtor's post-petition earnings and acquisitions do not become part of the new Chapter 7 estate. Under these provisions, debtor's post-petition claim against Walmart was not property of the estate for purposes of her Chapter 7 bankruptcy.

***Andrade v. Countrywide KB Home Loans*, 2016 U.S. Dist. LEXIS 48661 (N.D. Tex. 2016).**
[4/6/2016]
***Andrade v. Countrywide KB Home Loans*, 2016 U.S. Dist. LEXIS 32310 (N.D. Tex. 2016).**
[2/22/2016]
***Andrade v. Countrywide KB Home Loans*, 2015 U.S. Dist. LEXIS 117373 (N.D. Tex. 2015).**
[9/1/2015]
***Andrade v. Countrywide KB Home Loans*, 2015 U.S. Dist. LEXIS 116967 (N.D. Tex. 2015).**
[7/13/2015]

Based on judicial estoppels a plaintiff who had filed Chapter 7 and had failed to disclose a cause of action against lender was barred from pursuing the claims which had arisen before filing Chapter 7. Also, plaintiff was found to lack standing to pursue the claims.

***Brewer v. Lavoi Corp.*, 2016 U.S. Dist. LEXIS 23600 (N.D. Tex. 2016).**
[2/26/2016]
***Brewer v. Lavoi Corp.*, 2016 U.S. Dist. LEXIS 24355 (N.D. Tex. 2016).**
[1/22/2016]
Plaintiff sued defendant under Age Discrimination in Employment Act ("ADEA") as well as the Americans with Disabilities Act ("ADA"). Defendant filed summary judgment based on judicial estoppels arguing plaintiff failed to notify this Court that he had a pending bankruptcy case and failed to disclose his lawsuit against defendant in his schedules. Magistrate recommended that summary judgment be granted based on judicial estoppel. District court accepted findings of fact, conclusion of law and recommendation of the Magistrate.

***Brewer v. PNC Mortgage,* 2015 U.S. Dist. LEXIS 133708 (N.D. Tex. 2015).**
[10/1/2015]
Plaintiff filed suit to prevent mortgagee from foreclosing on his home and argued that mortgagee did not have authority to foreclose. Defendant filed motion for summary judgment and pointed out that in plaintiff's bankruptcy case, plaintiff had listed mortgagee as a secured creditor and had entered into an agreed order conditioning stay which acknowledged that he was in default and that mortgagee was the mortgage holder. Court granted summary judgment based on judicial estoppel.

***Stepan v. PNC Bank, N.A.*, 2015 U.S. Dist. LEXIS 59586 (E.D. Tex. 2015).**
[5/7/2015]
The debtor listed mortgagee as an undisputed secured claim in his Chapter 13. Later the case was dismissed. Debtor sued claiming that the mortgagee did not have a valid claim because the debt had not been properly assigned to it. Magistrate granted summary judgment because debtor's scheduling of the mortgagee as a creditor with undisputed barred debtor from asserting that mortgagee does not have a valid claim. This may be a case where judicial estoppel was incorrectly applied. Judicial estoppel should not have been applied because the bankruptcy court did not necessarily accept the debtor's representation that mortgagee had an undisputed debt. Also, debtor had the right to amend the schedule and make mortgagee's claim was disputed. As a result a necessary element of judicial estoppels was not satisfied.

***In re DeRosa-Grund,* 544 B.R. 339 (Bankr. S.D. Tex. 2016).**
[1/22/2016, Judge Jeff Bohm]
Debtor filed a Chapter 7 case and it turned out to be an asset case and was administered and closed. After closing debtor tried to reopen his case to list a "treatment" that he had forgotten to list. A "treatment" is an abridged script; longer than a synopsis. It consists of a summary of each major scene of a proposed movie, and may even include snippets of dialogue. A party in interested ("PII") opposed the reopening and contended (1) it acquired the Treatment several years ago from one of the debtor's wholly-owned entities; (2) debtor himself has never owned the Treatment; (3) debtor has fabricated the story that he personally owned the Treatment on the petition date; and (4) the debtor, angry that PII has been unwilling to pay him a dime to settle the various lawsuits that he and his privately-held entities have brought against PII, is now attempting to bring in the Chapter 7 trustee to do his bidding for him. The bankruptcy court ruled that there were grounds under 11 U.S.C. § 350(b) for reopening of debtor's case so the trustee could administer the treatment because the debtor had not listed the treatment in his bankruptcy schedules, the treatment appeared to have value, and contracts the debtor entered that produced movies after he declared bankruptcy were not valid under 11 U.S.C. § 363 because they were not approved by the court. Also, based on debtor's dishonest conduct under 11 U.S.C. § 105 the court issued an order which prohibited the debtor from receiving any benefit from any success the trustee had in administering the treatment including returning the treatment to debtor if it was abandoned.

XXIX. JURISDICTION & AUTHORITY

***Cowin v. Countrywide Home Loans, Inc. (In re Cowin),* 538 B.R. 721 (S.D. Tex. 2015).**
[9/29/2015]
Bankruptcy court after a six day trial determined that debtor, a real-estate developer, had developed a scheme to benefit from the priority status Texas law gives tax-transfer liens. Debtor appealed based on following errors: (1) based on *Stern v. Marshall*, bankruptcy court violated Article III of the United States Constitution when it entered judgment against debtor based on state-law causes of action, (2) the bankruptcy court violated the automatic stay by allowing the adversary proceeding against debtor to take place, (3) bankruptcy court erred in holding that the adversary plaintiffs had standing to pursue their claims against debtor, (4) bankruptcy court clearly erred in finding that: (a) debtor could be held liable for acts of a corporation he controlled, (b) debtor instructed a third party to start foreclosure proceedings; and (c) debtor participated in a civil conspiracy with two other individuals, and (5) bankruptcy court erred in holding that the acts of an alleged coconspirator could be imputed to debtor for the purpose of dischargeability under 11 U.S.C. §§ 523(a)(4) and (a)(6). District rejected every point of error and affirmed bankruptcy court.

XXX. PROCEDURE

***In re Garner*, 2015 Bankr. LEXIS 1984 (Bankr. N.D. Tex. 2015).**
[6/18/2015, Judge D. Michael Lynn]
Even if a party deposits a filing with the postal service for delivery prior to the deadline, if the clerk does not receive the filing before the deadline passes, the filing is not timely. Therefore the complaint was not filed timely. Bankruptcy Rules 9006(b) and 4007(c) did not provide bankruptcy courts the ability to extend the deadline to file dischargeability complaints except under narrow circumstances not applicable here and court declined to toll the deadline for plaintiff to file a complaint to determine dischargeability of debtor's debt. Even if the complaint had been timely failed, plaintiff's allegations of debtor's vicarious liability as cause for relief under 11 U.S.C. § 523(a)(6) failed to state claim upon which relief could be granted.
Where complaint was required to be filed by a specific date, it was not sufficient to deposit filing with the post office by this date. Filing had to be actually received by the clerk to be timely.

XXXI. PROPERTY OF THE ESTATE

***Cantu v. Schmidt (Matter of Cantu),* 784 F.3d 253 (5th Cir. 2015).**
[4/16/2015]
Individual debtors filed chapter 11. After their case was converted to Chapter 7 and their discharge was denied, they sued their former counsel for malpractice. The Fifth Circuit found that the question of whether the cause of action belonged to the estate depended upon when the claim accrued. If it accrued prior to conversion, it belonged to the estate. In order for there to be a cause of action, there must be breach of a duty plus legal injury. In this case, counsel's actions reduced the estate prior to conversion. As a result, some harm occurred preconversion and the entire claim belonged to the trustee.

XXXII. REAFFIRMATIONS

***In re Gordon,* 2015 Bankr. LEXIS 2219 (Bankr. S.D. Tex. 2015).**
[7/6/2015, Judge Letitia Z. Paul]
Debtor requested to reopen her case to set aside her already entered discharge order in order to enter into three reaffirmation agreements. Bankruptcy court found that debtor did not enter into a written agreement before the discharge was entered, did not timely file either a motion to defer entry of discharge, or a motion to extend the time to object to discharge. Also, court determined that it lacked the power to extend the time to file a reaffirmation agreement and that the relief sought by debtor was futile and should be denied.

XXXIII. SALE FREE AND CLEAR OF LIENS

***Viegelahn v. Garcia (In re Garcia),* 535 B.R. 721 (W.D. Tex. 2015).**
[7/30/2015]
Debtors filed Chapter 13 case and valued an LLC that was owned by husband and his partner at a value of $0.00. Trustee objected to confirmation and valuation of LLC. Bankruptcy court overruled trustee's objection and confirmed the plan. Debtors filed a motion to sell husband's interest in the LLC for $44,625.00 to a 3rd party. Trustee objected. Debtors withdrew the motion to sell and filed a motion to dismiss Chapter 13 case. Trustee objected to debtors' motion to dismiss and filed a plan modification. Bankruptcy court granted the motion to dismiss and rendered trustee's modification moot. Trustee appealed. District court agreed that debtors had an absolute right to voluntarily dismiss their case under § 1307(b) because prior to the filing of that motion, a motion to convert was not pending.

XXXIV. STANDING

***Foster v. Holder (In re Foster),* 2016 U.S. App. LEXIS 5857 (5th Cir. 2016).**
***Foster v. Holder (In re Foster),* 2016 U.S. App. LEXIS 5859 (5th Cir. 2016).**
[3/30/2016]
Debtor filed Chapter 7 bankruptcy in 2012. In 2013, she filed a claim against her estate as next friend of her children and sought to remove the Chapter 7 Trustee under 11 U.S.C. § 324(a). The bankruptcy court denied the motion. Debtor and her children moved in the bankruptcy court to appeal that order in *forma pauperis* and bankruptcy court denied the debtor's children's motion because the court had disallowed their claim. The bankruptcy court granted debtor's motion to appeal in *forma pauperis*. On appeal in the district court, the Chapter 7 Trustee moved to dismiss because debtor and her children lacked standing to appeal the bankruptcy court's order. The district court dismissed the appeal and denied motions by debtor and her children to proceed in *forma pauperis*. The Fifth Circuit held that debtor's children lacked standing to challenge the bankruptcy court's order denying a request to remove the Chapter 7 trustee because the children were not creditors of the estate, (2) the debtor was assumed to have standing because she claimed that the estate was solvent, (3) bankruptcy court did not abuse its discretion by refusing to remove the trustee because debtor did not point to any clearly erroneous factual finding or any misapplication of law, (4) the trustee was not entitled to damages and costs under Fed. R. App. P. 38 because she did not separately file a motion for that purpose but the court of appeals was authorized to dismiss an appeal as frivolous *sua sponte* and did so in this case. As a result, debtor was to bear all court costs but damages were not awarded.

***Mandel v. Mastrogiovanni Schorsch & Mersky (In re Mandel),* 2016 U.S. App. LEXIS 4274 (5th Cir. 2016).**
[3/7/2016]
Chapter 7 debtor had standing to appeal an order by the bankruptcy court allowing claims against his bankruptcy estate because he was a "person aggrieved" by the bankruptcy court's order, as he faced the prospect of personal liability if the debt were declared non-dischargeable.

XXXV. TAXES

***In re Fielding,* 2015 Bankr. LEXIS 1205 (Bankr N.D. Tex. 2015).**
[4/9/2015, Judge D. Michael Lynn]
The issue in this case was whether a debtor may apply, at his or her own discretion, proceeds from the sale of an exempt asset to tax debt owed to the IRS. The bankruptcy court held that the Supreme Court's decision in *Energy Resources* applied to debtors' Chapter 13 case and therefore the court could direct the IRS to allocate payments at the court's discretion, and as permitted under 11 U.S.C. § 105(a) and § 1322(b)(11). In this case the debtors met their burden in showing that the debtors' designation of the homestead sale proceeds was necessary to their effective reorganization. Even if *Energy Resources* was not applicable to the case, debtors' payment of the proceeds was voluntary. Therefore, in accordance with IRS policies and procedures, debtors were allowed to designate the voluntary proceed payments as provided.

XXXVI. VALUATION

***Gold Star Constr., Inc. v. Cavu/Rock Props. Project I, L.L.C. (In re Cavu/Rock Props. Project I, L.L.C.),* 2016 U.S. App. LEXIS 103 (5th Cir. 2016).**
[1/4/2016]
Debtor and the creditor both appealed the bankruptcy court's ruling. Creditor asserted the bankruptcy court erred (1) by failing to apply the doctrines of judicial estoppel and res judicata to the property valuation; (2) by finding its mechanic's lien to be invalid; and (3) by denying its motion to transfer venue. Debtor asserted the bankruptcy court erred (1) by finding that creditor had an unsecured claim against debtor for $743,382.29; and (2) by assessing costs against each party. The Fifth Circuit held that (1) the bankruptcy court did not err by failing to use the same property valuation for both the bankruptcy proceeding and the adversary proceeding, because the doctrines of judicial estoppel and res judicata were not applicable and valuations under 11 U.S.C. §§ 1129 and 506 were two distinct and separate valuations required for different purposes, (2) in conformance with California law, the mechanic's lien was premature and therefore invalid because the creditor had neither completed its obligations nor been discharged at the time of its filing, (3) it was not an abuse of discretion to deny a motion to transfer venue, (4) it was not clear error to determine that the creditor held an allowable, unsecured claim, and (5) the bankruptcy court acted within its discretion in its assessment of costs.

XXXVII. MISCELANEOUS

Wiggins v. Northrup (In re Kelly), **2016 U.S. App. LEXIS 6660 (5th Cir. 2016).**
[4/12/2016]

The chapter 7 trustee as representative of a debtor's bankruptcy estate was properly awarded damages for trespass based on the operation by the debtor's partner of a bed-and-breakfast in a house that the debtor owned. The partner waived his defense of *res judicata* under Fed. R. Bankr. P. 8009(a)(1)(A), because the first time that he raised the *res judicata* effect of a state court judgment on his trespass damages was in the designation of issues on appeal to the district court. The partner was entitled to offset the trespass damages by his insurance payments and note payments on the property. After deducting the relevant expenses -- taxes, insurance, and note payments -- the bed-and-breakfast operated at a loss. As a result making trustee whole meant awarding her nothing.

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Behrooz P. Vida is an attorney specializing in the area of bankruptcy, and he practices primarily in the Fort Worth Division of the Northern District of Texas. Behrooz graduated from the University of Texas at Austin and received his law degree from Texas Tech University School of Law in 1990. At Texas Tech, Behrooz was a member of the Law Review and the Board of Barristers.

Behrooz is Board Certified by Texas Board of Legal Specialization in the areas of Consumer Bankruptcy Law and Business Bankruptcy Law. The Vida Law Firm, PLLC, which exclusively practices bankruptcy law, is a small firm with three attorneys primarily representing debtors. Behrooz has also been an adjunct professor at Texas A&M University School of Law (f/k/a Texas Wesleyan University School of Law) since 1998, where he teaches bankruptcy law.

Behrooz is married to Carla Vida, a principal in The Vida Law Firm, PLLC. They have one child, Coby.