**Bankruptcy At The Beach - Topics In The Tropics**

By John P. Gustafson

**None Of My Business:**

*In re Moore*, 593 B.R. 655 (Bankr M.D. Ala. 2018). In a Chapter 7 case, a creditor refused to do business with the debtor. The court held this was not coercive conduct that implicated the discharge injunction. This originally came up in the context of a credit union, and they are the creditors who most commonly take this position. “As a general principle of bankruptcy law, a creditor is not required to do business with a debtor who has discharged his debt in the past. *See* *Brown v. Penn. State Employees Credit Union*, 851 F.2d 81, 85 (3rd Cir. 1988)(holding that a credit union did not violate either § 362 or § 524 when it stated that it would refuse to do business with the debtor in the future, unless she reaffirmed her debt).” The line of cases following *Brown* include some in the Sixth Circuit. *See*, *Messick v. Ascend Fed. Credit Union*, 424 B.R. 344 (E.D. Tenn. 2010)(informational letter to Chapter 13 debtor that CU’s policy of denying services to members who caused losses would mean that restrictions would be put on the account if debtor-wife’s name was not removed was not a stay violation).

**Thank You For Your Proper Rule 7004 Service:**

*In re Panek-Hortman*, 593 B.R. 400 (Bankr. W.D.N.Y. 2018). In a Chapter 13 case, debtor filed a motion to modify the lien of Wells Fargo. There was no response, and the court held that the secured claim was $50,000. Wells Fargo filed a secured proof of claim for $176, 405.08, and moved to vacate the order modifying its lien. While debtor served the motion, by certified mail, on “Wells Fargo Bank, N.A., Attn: Timothy J. Sloan, President or CEO” – the address in Coppell, Texas was that of the servicer, Nationstar Mortgage, LLC. In response, the debtor noted that Wells Fargo had stated, in its state foreclosure action, that that was its address – that it had an office at “c/o” the Coppell, Texas address, and therefore Wells Fargo should be estopped from denying the accuracy of the address.

The court stated:

The parties concede that Wells Fargo is an insured depository institution and that service by mail would have required compliance with Bankruptcy Rule 7004(h). By its language, the rule mandates that service upon a federally insured depository institution “be made by certified mail addressed to an officer of the institution.” To satisfy this requirement, a party must use certified mail to send papers to the designated party at a proper location or address. In the present instance, the attempted service fails because it was sent to the address of an entity other than Wells Fargo Bank.

But for the preface “c/o,” the debtor might have been justified in using the address that Wells Fargo provided in its foreclosure complaint. These letters are a common abbreviation that stands for the words “in care of.” Typically, they are used to identify a third party to whom mail is being sent on behalf of the intended recipient. At a minimum, this abbreviation signals here the possibility that the stated address is that of an entity other than Wells Fargo Bank itself. The foreclosure complaint may have indicated that mail could be received at the care of an address, but that option does not thereby establish an address that would satisfy the rigid requirement of certified mail to the address of the respondent. The use of this abbreviation will therefore suffice to negate any justification to rely upon the stated address for purposes of service under Bankruptcy Rule 7004.

The court can identify no basis for a waiver by Wells Fargo of its entitlement to proper service of the motion to modify its lien. Because the debtor failed to effect proper service of that motion, we are compelled to vacate the resulting order that modified the lien of Wells Fargo Bank.

*In re Panek-Hortman*, 593 B.R. at 402.

If the facts in this case do not provide sufficient service to save a default judgment modifying the lien of a federally insured depository institution, service on the attorney who obtained a judgment lien is certainly not going to be sufficient service.

**The Fifth Amendment Dimension:**

*In re Laforce*, 593 B.R.853 (Bankr. S.D. Ala. 2018). Debtor converted from Chapter 11 to Chapter 7, but did not provide complete signed conversion schedules, and did not attend the meeting of creditors despite being ordered to do so. The debtor allegedly received over $250,000 from a related entity during the Chapter 11.

The *Laforce* court held that blanket assertions of the 5th Amendment are insufficient for a debtor to remain silent. For application of the 5th to be proper, each assertion of it must be accompanied by a demonstration of real and appreciable danger of self-incrimination. Moreover, if a fact has been voluntarily disclosed, that waives the privilege as to the details. In addition, there is no Fifth Amendment privilege against the turnover of property of the estate:

Three bankruptcy courts have addressed the question of whether the debtor may be privileged under the Fifth Amendment from turning over tangible property to the estate. All held that he is not.... [A]n order to turnover property of the estate does not violate a debtor's Fifth Amendment rights, and therefore, immunity is not an issue.

*In re Laforce*, 593 B.R. at 861.

Finally, “a debtor may not turn the shield of the Fifth Amendment into a sword to cut his way to a discharge while carrying his property with him.  593 B.R. at 860.

**Can A Creditor Garnish A Chapter 13 Trustee?:**

*Dept. of Social Services v. Webb*, 908 F.3d 941 (4th Cir. 2018). After debtor’s Chapter 13 case was dismissed, the surplus plan payments had to go to the debtor, despite creditor’s writ of garnishment for back child support. The question of whether or not a Chapter 13 Trustee can be forced to turn over a debtor refund to a garnishing creditor has a long history – the early case law said no to garnishment. Then, the tide turned, with the majority of cases allowing the garnishment – a Chapter 13 Trustee, after dismissal of the case, being no better than any other entity. More recently, the pendulum appears to be swinging back with the *Webb* decision.

After receiving the writ of garnishment, the Chapter 13 Trustee filed a motion with the bankruptcy court seeking direction as to who he should pay, the debtor, or the Department of Social Services, Division of Child Support. The bankruptcy court sided with the debtor, and the Fourth Circuit – the first circuit court to address the issue – agreed.

Section 1326(a)(2) states that the trustee “shall return any [post-petition] payments ... to the debtor[.]” Moreover, dismissal of a case “revests the property of the estate in the entity in which such property was vested immediately before the commencement of [a bankruptcy case].” §349(b)(3). While these provision have not changed, the interpretation appears to have been influenced by the Supreme Court’s holding, in *Harris v. Viegelahn*, ––– U.S. ––––, 135 S.Ct. 1829, 1835, 191 L.Ed.2d 783 (2015), that upon conversion from Chapter 13 to Chapter 7, funds in the hands of the Chapter 13 Trustee go to the debtor, not to creditors.

**Petition For Protection Of Pet Proceeds:**

*In re Hill*, 594 B.R. 418 (Bankr. D. Ariz. 2018). Under Arizona law, the exemption for “all money arising from any claim for the destruction of, or damage to, exempt property” was broad enough to apply to the proceeds payable to the Chapter 7 debtor under a pet insurance policy. The exemption was not, by its plain terms, limited to the value of the exempt pupper-ty.

**The Tithe That Binds, Or Having Faith In Your Student Loans:**

*In re Lozada*, 594 B.R. 212, 222-224 (Bankr. S.D.N.Y. 2019). A sixty-seven year old debtor brought an adversary case for a determination as to whether or not he was entitled to an “undue hardship” discharge of his $337,980.04 student loan debt. Under the *Brunner* test, he was not.

Part of this decision deals with the debtor’s failure to sign up for an income-based repayment plan (IBRP) upon his retirement. The court held that this weighed against a finding of good faith. Debtor and his spouse had income of close to $6,000 per month (mostly his wife’s income), with the couple having disposable income of $1,400 a month. The monthly payment under the IBRP would have been 826.15 per month.

What is less frequently seen is a court citing tithing as a factor in finding that the undue hardship threshold was not met. Here, the debtor had given $100,000 to his church during the previous 5 years. One of the stipulated facts was: “Plaintiff refuses to reduce the amount of charitable contributions and religious donations he and his wife make every year, even if doing so would allow him to repay the ECMC Loan to some extent.”

There were a number of factors that weighed against the debtor under the *Brunner* test – including no payments on the loan since 2015, a year in which he received a $30,000 inheritance from his mother – but the debtor’s preference for tithing over paying the student loan was also directly addressed. The Religious Liberty and Charitable Donation Protection Act, §1325(b)(2)(A), excluding charitable contributions below 15% from many bankruptcy calculations, was held to not be *per se* exempt from consideration, rather it would be looked at on a case-by-case basis. And, here, the reality was that “when he elected to tithe rather than pay his nondischargeable debt, he is making donations using someone else’s money”.

**The No Count Student Loans Are Probably Dead:**

*In re Alonzo*, 594 B.R. 693 (Bankr. D. Colo. 2018). The decision in *In re Pratola*, 578 B.R. 414 (Bankr. N.D. Ill. 2017) sparked a great deal of interest in the concept of not counting student loan debt in determining whether the Chapter 13 unsecured debt limits were exceeded. One other court followed *Pratola*. *See*, *In re Fishel*, 583 B.R. 474 (Bankr. W.D. Wis. 2018). While there is certainly a good argument that the holdings in *Pratola* and *Fishel* should be the law, the majority of the more recent cases that have addressed the issue have held that it is not the law.

*Alonzo* is one of those cases, which holds that there is no statutory basis for ignoring student loans when calculating whether the debtor is over the debt threshold for a Chapter 13. Even more damaging to the nascent “don’t count” idea was the reversal of the holding in *Pratola* by the District Court. *See*, *In re Pratola*, 589 B.R. 779 (N.D. Ill. 2018). At this point, it appears that the *Pratola* analysis is dead – any relief on Chapter 13 debt limits will have to come from Congress.

**First Meeting Transcripts And Motions For Summary Judgment:**

*In re Avery*, 594 B.R. 655 (Bankr. S.D. Miss. 2018). There is some uncertainty lurking out there regarding the use of 341 Meeting and 2004 Exam transcripts. In difficult bankruptcy cases, this uncertainty may weigh in favor of taking depositions instead.

In *Avery*, the creditor filed a complaint asserting that over $150,000 owed on a commercial guarantee was a debt obtained by fraud. In moving for summary judgment, the creditor asserted that the debtor had admitted to the material facts at the first meeting of creditors. The court denied the motion for summary judgment, holding that the transcript did not qualify as a “deposition” that could be used as evidence in an adversary proceeding. The transcript was of a proceeding – the first meeting – that was broad in nature and lacked the safeguards and protections of the discovery rules. Any agreement between the parties to the use of the transcript was not evident from the record, and the court was unable to determine from the record whether use of the transcript would result in any prejudice to debtor.

**Altogether Now: All We Need Is Core.**

*Giese v. Lexington Coal Co. (In re HNRC Dissolution Co.)*, 585 B.R. 837 (6th Cir. BAP 2018).

Debtor file an action in state court, and two of the defendants removed the case to the district court, which referred the case to the bankruptcy court. On appeal, debtor argued that the bankruptcy court lacked jurisdiction over some of the claims, which were non-core. Therefore, debtor argued, mandatory abstention and remand to state court was required under Section 1334(c).

The Bankruptcy Appellate Panel affirmed the bankruptcy court’s decision to retain the referred causes of action. The decision held that the definition of “proceeding” meant the whole adversary proceeding, and not the individual, discreet claims raised in it. The fact that a few of the claims, if pursued alone, would be non-core, and subject to abstention, does not require the same treatment when those non-court claims are part of a larger adversary case involving numerous other claims.

**The Spreading Influence Of *Law v. Siegel*.**

**Section 1307(b) – The Increasingly “Absolute” Right To Dismiss?**

In analyzing a Chapter 13 debtor’s right to dismiss an unconverted case, courts are questioning whether *Law v. Siegel*’s limitations on the equitable powers of a bankruptcy court are limiting case law that relies upon the Supreme Court’s holding in *Marrama* that the right to convert a Chapter 7 case to a Chapter 13 is not “absolute”. *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007). *Marrama* held that there is no right to convert when a debtor’s bad faith has been established, because § 706(a) is subject to § 706(d), which only permits conversion if the debtor qualifies as a debtor under the chapter to which conversion is sought. 549 U.S. at 370-74, 127 S.Ct. 1105.

But what about a Chapter 13 debtor’s right to dismiss? Courts are struggling with what role *Law v. Siegel*’s holding should play. *Law v. Siegel*, 571 U.S. 415, 134 S.Ct. 1188, 1194, 188 L.Ed.2d 146 (2014).

Cases that struggle with resolving the holdings in these two Supreme Court decisions include: *In re Marinari*, 596 B.R. 809 (Bankr. E.D. Pa. 2019); *In re Bartlett*, 2018 WL 3468832, 2018 Bankr. LEXIS 2120 (9th Cir. BAP July 18, 2018); *In re Sinischo*, 561 B.R. 176, 186, 191 (Bankr. D. Colo. 2016).

“In *Law*, the Supreme Court distinguished *Marrama* because in *Marrama*, the court reasoned that § 706(d) expressly conditioned conversion on a debtor's qualifications for relief under chapter 13. The disqualifying conduct of a debtor in the chapter 7 case could prevent him from qualifying as a debtor under chapter 13. *See* *Law*, 134 S. Ct. at 1197; *Marrama*, 549 U.S. at 372-75.” *In re Bartlett*, 2018 WL 3468832 at \*5, 2018 Bankr. LEXIS 2120 at \*11. It may be that more courts are going to hold that Chapter 13 debtors have a right to dismiss their cases voluntarily, even after a motion to convert has been filed, and even when there is bad faith. *See* *e.g*., *In re Sinischo*, 561 B.R. 176 (Bankr. D. Colo. 2016). However, the “absolute right to dismiss” does not mean that the court cannot impose the sanction of barring a subsequent re-filing for some period of time. *Id*.

**There Are Two Legal Battles Going On That May End Up Being Dysfunctionally Related….**

1. **What Happens If The Automatic Stay Is Not Extended In A “Second Case Pending Within One Year”?**

A split of authority has been percolating since 2005, involving the all too common case, where a debtor with a second bankruptcy case pending within one year has failed to seek an extension of the automatic stay within the 30 day statutory time period. Under Section 362(c)(3), after 30 days the automatic stay is terminated as to what? Some courts hold that the automatic stay is terminated as to the debtor’s property, but not property of the bankruptcy estate. Some courts hold that there is no stay after the 30 days ends, terminating it fully (just as it is terminated under Section 362(c)(4)). There is also a “third approach”.

The decision in In re Wood describes these approaches as follows:

Courts have, for the most part, followed one of two approaches to implementing section 362(c)(3) of the Code. The majority approach adopts a plain meaning reading of the statute, interpreting the words “with respect to the debtor” to indicate a limited termination of the automatic stay. *See*, *e.g*., *Jumpp v. Chase Home Fin., LLC (In re Jumpp)*, 356 B.R. 789 (1st Cir. BAP 2006). Specifically, the majority approach holds that the stay terminates only as to the debtor and property of the debtor under section 362(c)(3). The minority approach views this result as an anomaly given the general legislative purpose underlying sections 362(c)(3) and (c)(4), namely to deter serial bankruptcy filings. *See*, *e.g*., *[In re ] Goodrich*, 587 B.R. [829,] 844 [ (Bankr. D. Vt. 2018) ]. Accordingly, the minority approach holds that the stay terminates in ... all respects under section 362(c)(3). Finally, some courts endorse a third approach that terminates the stay only “as to the continuation of judicial, administrative or other proceedings commenced prior to the bankruptcy filing” involving property of the debtor or property of the estate. *See*, *e.g*., *In re Bender*, 562 B.R. 578, 583 (Bankr. E.D.N.Y. 2016).

*In re Wood*, 590 B.R. 120, 124 (Bankr. D. Md. 2018); *see* *also*, *In re Smith*, 596 B.R. 872, 877-878 (Bankr. E.D. Tenn. 2019).

While this was a long standing, and relatively stable split of authority, that appears to have changed with the First Circuit Court of Appeals being the first appellate court to weigh in on the issue, holding that there is a complete termination of the automatic stay if it is not extended. *In re Smith*, 910 F.3d 576 (1st Cir. 2018).

It is important to note that while many decisions seem to assume that this provision only applies to repeat Chapter 13 filers, there is nothing in the statute, or the case law, limiting its effects to Chapter 13 cases. Section 362(c)(3) is applicable to all Chapters. *See*, 11 U.S.C. Section 103(a). Moreover, the language of Section 362(c)(3) specifically applies to “an individual in a case under chapter 7, 11, or 13”. While there is a specific exception where a Chapter 7 case is dismissed under Section 707(b), generally, a Chapter 7 case filed within one year after a Chapter 13 case is dismissed, is subject to the termination of the automatic stay after 30 days, if an extension is not granted before the 30 days ends. *See*, *In re Fisher*, 2018 WL 6075611, 2018 Bankr. LEXIS 3623 (Bankr. D. Vt. Nov. 28, 2018)(denying an extension of the stay in a Chapter 7 case); *In re Taylor*, 2007 WL 1234932, 2007 Bankr. LEXIS 1505 (Bankr. E.D. Va. April 26, 2007)(noting that Section 362(c)(3) applies to Chapter 7 cases); *see* *also*, *In re Sciortino*, 561 B.R. 245, 255 (Bankr. N.D. Ga. 2016)(stay does not arise when second Chapter 13 case filed within one year is converted to Chapter 7).

As *Taylor* stated: “It is even more important to protect property of the estate in Chapter 7 cases, to which § 362(c)(3)(A) also applies.” *Taylor*, 2018 WL 1234932 at \*5, 2007 Bankr. LEXIS 1505 at \*17. If the automatic stay terminates as to estate property, what would prevent a creditor from, say, peacefully repo-ing a debtor’s vehicle post-petition before the trustee can get it? Or even removing the same vehicle from the trustee’s open lot after it has been turned over?

Well, there is the protection of 11 U.S.C. Section 542(a), which requires turnover of “property that the trustee may use, sell, or lease.” But, what if that provision only applies if the Chapter 7 trustee files a motion for turnover?

1. **What Happens If There Is No Stay And Section 542(a) Is Not Self Executing?**

The main holdings in the Tenth and District of Columbia Circuit Court of Appeals decisions in *Inslaw* and *Cowens* are that there is no violation of the automatic stay as long as the creditor merely maintains the *status quo* in effect at the time of the automatic stay. *WD Equip., LLC v. Cowen (In re Cowen)*, 849 F.3d 943 (10th Cir. 2017); *United States v. Inslaw, Inc*., 932 F.2d 1467 (D.C. Cir. 1991). However, there is an additional interpretation that is lurking in the background of both opinions.

[T]he best argument for the majority rule is that § 362 should be read in conjunction with another part of the bankruptcy code - § 542, the turnover provision, which provides that any entity “in possession, custody, or control, during the case of property that the trustee may use, sell, or lease under section 363 of this title ... shall deliver” such property to the trustee “unless such property is of inconsequential value or benefit to the estate.” 11 U.S.C. § 542 (emphasis added). According to the majority, “Section 542 requires that any entity in possession of property of the estate deliver it to the trustees, without condition or any further action: the provision is self-executing.” *Weber*, 719 F.3d at 79 (internal quotation marks omitted); *but* *see* *Hall*, 502 B.R. at 654–665. Reading these two sections together ostensibly furthers “[t]he primary goal of ... bankruptcy,” *Thompson*, 566 F.3d at 702, *i.e*. “to group all of the debtor's property together,” *id*. because “[a]s a practical matter, there is little difference between a creditor who obtains property of the estate before bankruptcy is filed, or after bankruptcy is filed,” *Yates*, 332 B.R. at 5. “The ultimate result is the same—the estate will be deprived of possession of that property,” which is “precisely the result § 362 seeks to avoid.” *Id.* And so, the argument goes, “§ 542 provides the right to the return of estate property, while [§ 362] provides the remedy for the failure to do so.” *Abrams v. Sw. Leasing & Rental, Inc. (In re Abrams)*, 127 B.R. 239, 242–43 (9th Cir. BAP 1991).

But this policy argument, too, is simply not supported by the statute's text or its legislative history. Even if the turnover provision were “self-executing” (which we do not decide), there is still no textual link between § 542 and § 362.

*Cowen*, 849 F.3d at 950.

The decision in *In re Hall* goes further, plainly stating that: “A careful analysis, however, demonstrates that § 542(a) is *not* self-executing.” *In re Hall*, 502 B.R. 650, 654 (Bankr. D. Dist. Col. 2014).

If the obligation to turnover property to the trustee under Section 542 is not “self-executing”, until a creditor in a second Chapter 7 case is served with a motion for turnover (if said creditor can be found and served) the repossessing creditor would appear to be able to gain an advantage over other creditors, if the First Circuit’s decision in *Smith*, and the “Section 542 is not self-executing” lines of cases become the law of the land.

**A (Kind Of) Mistake Working Its Way Into Section 523(a)(8) Decisions.**

While many courts acknowledge the tax law limitation, student loan cases sometimes make statements in support of allowing the discharge like this:

“The cancellation of this debt could result in Ms. Metz realizing up to $152,277.88 in cancellation of indebtedness income in the tax year the debt is forgiven. That could generate considerable tax liability for a retired 84-year-old living on social security.”

*In re Metz*, 589 B.R. 750, 758-759 (Bankr. D. Kan. 2018)(Please note that Kansas is in the 10th Circuit – with the most debtor friendly precedent in the country.); *Martin v. Great Lakes Higher Educ. Grp. (In re Martin)*, 584 B.R. 886, 894 (Bankr. N.D. Iowa 2018)(“ The tax consequences of Debtor entering an IBRP are likely to be severe. Debt discharged in bankruptcy is not taxable, but debt canceled at the end of a 20 to 25 year IBRP is considered taxable income.”).

While the discharge of a student loan in a bankruptcy case does not create any taxable income to a debtor [26 U.S.C. §108(a)(1)(A)], these cases do not accurately reflect the non-bankruptcy tax law. A more accurate statement would be: the debtor would have discharge of indebtedness income of $152,277.88, *but only to the extent the discharge of the debt rendered the debtor balance-sheet solvent*. See, 26 U.S.C. §108(a)(1)(B) & (a)(3).

Taking the *Metz* facts into the Sixth Circuit, how can a court find a “certainty of hopelessness” for the debtor repaying their student loans on the one hand, but find a risk that the debtor will – while not paying down their student loans – accumulate assets, like a retirement account, that exceeds her debts by over $152,000? In most of the cases where student loans are being discharged, and meeting the “certainty of hopelessness” standard, there is little or no chance that the debtor is going to be “balance sheet solvent” at any time in their entire lifetime.

While there is certainly strong sentiment for relaxation of the rules regarding the discharge of student loans, bankruptcy courts are still bound to follow the binding precedent of published decisions of the circuit court. The term “certainty of hopelessness” is used in three published Sixth Circuit student loan decisions: *Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler)*, 397 F.3d 382, 386 (6th Cir. 2005)(“Applying the *Brunner* test, we conclude that Oyler fails its second prong, because he has shown no ‘additional circumstances ... indicating that this state of affairs is likely to persist for a significant portion of the repayment period.’ Such circumstances must be indicative of a ‘certainty of hopelessness, not merely a present inability to fulfill financial commitment.’ ”); *In re Tirch*, 409 F.3d 677, 681 (6th Cir. 2005)(“The dischargeability of loans should be based upon ‘a certainty of hopelessness, not merely a present inability to fulfill financial commitment.’”); *Barrett v. Educ. Credit Mgmt. Corp. (In re Barrett)*, 487 F.3d 353, 359 (6th Cir. 2007)(“To satisfy the second prong, Barrett must show that circumstances indicate a ‘certainty of hopelessness, not merely a present inability to fulfill financial commitment.’ ”).

So, there does not appear to be a clear path to blaming the tax laws regarding the discharge of indebtedness for creating an actual tax debt for truly indigent debtors who are on income-based repayment programs.

So, why is this tax analysis only “kinda” wrong?

Because the reality is, for unsophisticated debtors who have no money, they are not likely to respond to the Form 1099-C [26 C.F.R. § 1.6050P-1] they get from the IRS when their student loans are forgiven 20 or 25 years in the future. While they have the legal right to rebut the imputed income from a 1099-C when their student loans are forgiven, unless we live in a very different free-legal-aid world, they probably will not remember they have to do so and/or won’t be able to do so.

As discussed generally in *In re Higgins*, 2008 WL 471684 at \*5, 2008 Bankr. LEXIS 690 at \*14 (Bankr. E.D. Tenn. Feb. 19, 2008): “there is little question that the debtors were insolvent at the time of the foreclosure, but it was incumbent upon them to show the extent of the insolvency.”

In short, the focus should not be on the debtor’s legal liability for income attributable to the discharge of their tax debt, but a finding that they lack the sophistication and resources to fight to clarify their actual tax obligation, based upon the statutory “to the extent rendered solvent” exception.

**Assuming A Lease vs. Reaffirming On A Lease.**

What about if the lessor fails to execute the reaffirmation agreement before the discharge is granted, is there anything the debtor can do to keep the vehicle? If a lease is assumed in a Chapter 7 case, and the debtor defaults, can the lessor collect the balance due from the debtor? If a Chapter 7 debtor’s reaffirmation agreement on a lease is denied by the bankruptcy judge as an “undue hardship”, can the debtor just turn around and assume the lease?

*In re Abdemur*, 587 B.R. 167 (Bankr. S.D. Fla. 2018) addresses the statutory reasons why lease assumption should be permitted in Chapter 7 cases, and enforced as valid post-petition obligations, even without a reaffirmation agreement. The case came up in the context of a written lease assumption entered into by a Chapter 7 debtor, with nothing put on the docket. After falling behind on the lease, the debtor filed a “notice of rescission” of the lease, arguing that his personal liability on the lease was discharged, either because he did not reaffirm, or because of the rescission of the assumption of the lease.

The *Abdemur* court held that reaffirmation and assumption are separate procedures and are not interdependent. The court noted that if reaffirmation agreements were required to create personal liability under an assumed lease, why would post-discharge assumption be allowed, as it is, under Section 365(p)(2)(C)?

In addition, Section 362(h)(1)(A), also enacted as part of BAPCPA, provides that the stay terminates if an individual fails to timely enter into a reaffirmation agreement, “or assume such unexpired lease pursuant to section 365(p) if the trustee does not do so”. The court also noted that the BAPCPA amendment of Section 365(p) was what allowed assumption of a lease of personal property prior to discharge.

Further, under Section 103(a), Section 365(p) applies to Chapter 7, 11, 12 and 13 cases, and by its terms, Section 365(p)(2) applies in Chapter 7 cases. Why would personal liability on an assumed lease only be discharged in a Chapter 7 if there was no reaffirmation agreement? Moreover, Section 365(p)(2)(B) specifically states that “the liability under the lease will be assumed by the debtor and not by the estate.” Accordingly, *Abdemur* holds that “*in personam* liability under an assumed lease is not dependent on adherence to the reaffirmation provisions of Section 524(c).” The court approval process for reaffirmation agreements – usually “not disapproved” - was not required, or “even contemplate[d]”.

The law has always been clear that assumption of a lease “*cum onere*”, meaning that an assumed please is assumed subject to all provisions, including *in personam* liabilities flowing from assumption. 587 B.R. at 172. Because Section 365(g) provides that when an assumed lease that is subsequently rejected, the date of the breach is deemed the date of rejection, debtor’s attempt to rescind the agreement did not make a dischargeable pre-petition debt.

There may be practical reasons for “reaffirming on a lease” – and *Abdemur* specifically states: “I am not ruling today that a lessor is precluded from seeking reaffirmation of liabilities under a car lease, but I do not believe such relief is necessary for the reasons set forth in this opinion.” However, there may also be more flexibility with leases than with other debts in Chapter 7 cases, particularly in connection with assumption after discharge – assuming the debtor notifies the lessor in writing, before the discharge, of debtor’s interest in reaffirming on the vehicle (or other personal property) lease. Of course, there are also the dangers, illustrated by this case, that debtors’ counsel should pay close attention to. Particularly the absence of the safeguard of a debtor’s ability to rescind a reaffirmation agreement under Section 524(c)(4).

**Rule 3002(c) And Excusable Neglect.**

The fact that the deadline for Chapter 13 creditors filing non-governmental proofs of claim are under Rule 3002(c) is important because the “excusable neglect” standard endorsed by the U.S. Supreme Court, in *Pioneer* - for late filed claims in Chapter 11 cases - cannot help a creditor with a late filed claim in a Chapter 13. *See*, Federal Rules of Bankruptcy Procedure 9006(b)(3); *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 393, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993).

Bankruptcy Rule 9006(b) has three subsections. Rule 9006(b)(1) sets forth the general rule: enlargements of time are generally permitted based up excusable neglect, except for certain listed bankruptcy rules listed in subsections (b)(2) and (b)(3). Subsection (b)(2) provides that enlargements of time are not permitted for deadlines set under Rules 1007(d), 2003(a) and (d), 7052, 9023, and 9024. Finally, subsection (b)(3) lists Rules where an enlargement of time is only permitted to the extent such extensions are specifically allowed in the language of the Rule itself.

Courts have held that because Bankruptcy Rule 3002(c) is one of the Bankruptcy Rules that is listed in 9006(b)(3), that means that the general rule allowing enlargement based upon excusable neglect does NOT apply to the Rule 3002(c) deadline. Instead, an enlargement of time is only allowed to the extent and under the conditions stated in Bankruptcy Rule 3002(c) itself. Moreover, the language of Bankruptcy Rule 3002(c) is unambiguous. Thus, the "ordinary, contemporary, common meaning" of its language must be applied, unless there is an irreconcilable conflict with the enabling legislation or the Constitution.  *See*, *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388, 113 S. Ct. 1489, 1495, 123 L. Ed. 2d 74, 85 (1993). Therefore, in Chapter 13 cases, there is no excusable neglect exception to the non-governmental creditor bar date for filing proofs of claim. The deadline is 70 days after the order for relief, or date of the order of conversion to Chapter 13, subject only to the exceptions listed in Rule 3002(c)(1)-(6).

Circling back to Chapter 11 cases that apply the Supreme Court’s *Pioneer* standard, allowing late filed claims where there is excusable neglect. As discussed above, the reason for the difference is that claims in Chapter 11 cases are not governed by Rule 3002, deadlines for Chapter 9 and 11 cases come from Rule 3003.

There is one type of Chapter 13 claim that is NOT governed by Rule 3002. That is when a debtor files a proof of claim for a creditor after the expiration of the Rule 3002 claims bar date. *See generally*, *Matteson v. Bank of Am., N.A. (In re Matteson)*, 535 B.R. 156 (6th Cir. BAP 2015)(discussing the fact that a debtor can file a claim for a creditor, during the 30 day window after the relevant claims bar date expires. Fed.R.Bankr.P. 3004, 3002(c), 3003(c).).

The right of a debtor (or much more rarely, a trustee) to file a claim is governed by Rule 3004, not Rule 3002. Rule 3004, governing debtor-filed post-bar date claims, is not mentioned in Rule 9006(b)(3) - which specifically lists Rule 3002(c). So, are debtor’s claims, filed after the Rule 3002(c) claims bar date, and after the 30 days debtors have to file proofs of claim for a creditor under Rule 3004, subject to being allowed as timely based upon “excusable neglect”? A recent case, *In re Norton*, says: Yes.

The court in *In re Norton*, 2017 Bankr. LEXIS 197 (Bankr. N.D. Tex. Jan. 24, 2017) held that a Chapter 13 debtor's motion to allow a late-filed proof of claim should be allowed. Unlike proofs of claim filed by creditors under Fed. R. Bankr. P. 3002, a proof of claim filed by a debtor under Fed. R. Bankr. P. 3004 on behalf of a non-filing creditor was eligible for an enlargement of time due to excusable neglect under Fed. R. Bankr. P. 9006(b). Under *Pioneer*, “excusable neglect” is not a very stringent standard, although it would be debtor’s burden to show it.

If *Norton* is followed by other courts, it could change the power dynamic when a secured creditor fails to file a timely proof of claim, and therefore can’t participate in distributions under the Plan. But, a cooperative debtor would at least have a shot - or might not even draw an objection - to a claim filed by the debtor on behalf of the secured creditor.