ALABAMA BANKRUPTCY BAR

BANKRUPTCY AT THE BEACH

June 2-3, 2023

Preaching to the Chapter 13 Choir

Selected Cases From:

LundinOnChapter13.com

1. SOMETHING FOR CAR LENDERS

A. Car lenders getting fat: 910-day cars, postpetition attorney's fees and interest rate differentials; cosigners.

***In re Laney*, 46 F.4th 628, 630 (7th Cir. Aug. 18, 2022) (Rovner, Kirsch, Jackson-Akiwumi)** (910-day car lender is entitled to amend its claim after confirmation of Chapter 13 plan to add postpetition attorney's fees when fees are allowed by contract, debtor was aware that car lender was seeking postpetition and postconfirmation fees, plan called for full payment of car lender and fees requested were reasonable and necessary because car lender had to respond to debtor's proposed plan and claim objections. "Although confirmed plans are generally binding on debtors and creditors under § 1327(a), compelling circumstances may warrant post-confirmation claim amendments. . . . [T]he relation back principle of Rule 15(c) of the Federal Rules of Civil Procedure applies to amended claims . . . . [T]he bankruptcy court provided compelling reasons for allowing the post-confirmation amendment, including that the parties' contract called for attorney's fees, Laney's counsel knew about the fees before the plan was confirmed, and the attorney's fees accumulated because Second Chance's counsel had a duty to respond to all the pleadings Laney's counsel filed."), *aff'g* No. 20-cv-1312-DWD, 2021 WL 4147994 (S.D. Ill. Sept. 13, 2021) (Dugan) (Postpetition attorney's fees are part of 910-day car lender's contractual entitlement and must be paid in full through confirmed Chapter 13 plan. 910-day car lender can amend its proof of claim to add postpetition attorney's fees provided for by contract and confirmed plan must pay the amended claim in full. Amendment of claim to add postpetition and postconfirmation attorney's fees is not an impermissible modification of the confirmed plan for § 1327(a) purposes because confirmation of plan was based on estimated amount of the 910-day car claim and actual amount in proof of claim as amended controls the car lender's entitlement.).

***In re Coffey*, 637 B.R. 879, 884–86 (Bankr. N.D. Ala. Jan. 25, 2022) (Jessup)** (Car lender did not violate discharge injunction when it repossessed car after discharge in Chapter 13 case in which debtor paid car lender's claim in full with *Till v. SCS Credit Corp*., 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (May 17, 2004), interest but nonfiling codebtor remained liable for unpaid contract interest; when codebtor defaulted, car lender's lien on car was still enforceable and repossession was protected by § 524(e). Plan paid car lender with interest at 5.25%. Car lender's claim had a contract interest rate of 16.45% and was cosigned by nonfiling husband of debtor. "While the Debtor's personal liability has been discharged, the Court finds that PRA Receivables' substantive rights as to the Codebtor were not affected by the Debtor's discharge. . . . [Section] 524(e) provides that 'discharge of a debt of the debtor does not affect the liability of any other entity on, or the *property of any other entity for*, such debt.' . . . [T]he discharge injunction does not prevent a creditor from taking action against a non-filing codebtor to collect a debt once the Chapter 13 case is closed or dismissed pursuant to the plain language of § 524(e). . . . [T]he lien release provision in the Debtor's Amended Chapter 13 Plan released PRA Receivables' lien upon discharge only as to the Debtor pursuant to 11 U.S.C. [§] 1325(a)(5)(B)(i)(I).").

2. SOMETHING FOR MORTGAGE LENDERS AND SERVICERS

A. *In rem* stay relief (is working)

***Harding v. Reverse Mortg. Sols., Inc.*, No. 8:22-cv-483-PX, 2022 WL 1092343 (D. Md. Apr. 12, 2022) (Xinis)** (In fourth Chapter 13 case filed to stop eviction after reverse mortgagee obtained *in rem* stay relief in third case, district court denies debtor's motion for an injunction based on Anti-Injunction Act.).

***In re Quattry-Peacock*, No. 6:22-bk-264-TPG, 2022 WL 4076948, at *3–*4 (Bankr. M.D. Fla. Sept. 1, 2022) (Geyer)** (In third Chapter 13 case since 2015—all filed to stop Wells Fargo from foreclosing based on final state court judgment—after granting *in rem* stay relief under § 362(d)(4), current case is dismissed with a two-year injunction prohibiting debtor to refile under any chapter of Title 11. "In lifting the automatic stay to permit Wells Fargo to pursue *in rem* relief against the Property, this Court previously concluded that the Debtor's three bankruptcy cases were filed as part of a scheme intended to delay, hinder, and defraud Wells Fargo. . . . But lifting the stay ultimately was not sufficient to permit Wells Fargo to conduct a sale of the Property; each time a sale was set to occur, the Debtor filed another Chapter 13 case resulting in the cancellation of the sale and renewed improper attempts to attack the underlying Judgment. . . . Nothing short of prohibiting the Debtor from filing yet another bankruptcy case would deter her.").

***In re Mori*, No. 8-22-72742-las, 2022 WL 17096644, at *4–*6 (Bankr. E.D.N.Y. Nov. 21, 2022) (Scarcella)** (In fourth bankruptcy case within 10 months filed by debtor or debtor's spouse to stop a foreclosure, *in rem* stay relief is appropriate under § 362(d)(4) and codebtor stay relief is appropriate under § 1301(c). Interest in property was quitclaimed by nonfiling spouse to debtor the day of the Chapter 13 petition. No stay came into effect in nonfiling spouse's prior case because of § 362(c)(4). Filing spouse was obviously seeking an automatic stay when no stay was available to nonfiling spouse. Filing spouse was not liable on debt to foreclosing creditor. "Pursuant to § 362(c)(4), the automatic stay did not go into effect upon the filing by Mr. Mori of the Third Bankruptcy Case because there were two prior individual bankruptcy cases filed by Mr. Mori that were pending within the previous one-year period but were dismissed. . . . On October 7, 2022, Mr. Mori transferred his interest in the Property to himself and to the Debtor [his spouse] by quit claim deed. Also on October 7, 2022, four days before the scheduled foreclosure sale, the Debtor, proceeding *pro se*, filed her chapter 13 case. . . . Subsection 362(d)(4)(A) applies to a scheme that involve [*sic*] the transfer of an ownership interest or other interest in real property without the consent of the secured creditor undertaken to hinder, delay or defraud a creditor. . . . [T]he record here compels that conclusion that the timing and number of bankruptcy filings affected the Property and were singularly designed to delay and frustrate the foreclosure process . . . . [R]elief from the co-debtor stay imposed under § 1301(a) as to Mr. Mori is warranted under § 1301(c). . . . Mr. Mori is the sole obligor under the mortgage note and received the consideration . . . . [T]he Debtor failed to file a chapter 13 plan providing for payment of [mortgagee's] claim. . . . [Mortgagee's] interest in the Property would be irreparably

harmed by continuation of the co-debtor stay to prevent the sale of the Property at foreclosure.").

B. Mortgage arrears and equal monthly installments

***In re Randell*, 638 B.R. 104, 110 (Bankr. E.D. Wis. Jan. 19, 2022) (Hanan)** (Chapter 13 plan that cures default and maintains payment on a long-term mortgage must pay the arrears in equal monthly installments consistent with § 1325(a)(5)(B)(iii)(I). "This Court agrees that nothing in § 1322(e) abrogated [*Rake v. Wade*, 508 U.S. 464, 113 S. Ct. 2187, 124 L. Ed. 2d 424 (June 7, 1993)]'s holding that mortgage arrearages paid off under the terms of the plan are 'an element of an "allowed secured claim provided for by the plan"' and must meet the requirements of section 1325(a)(5). . . . [E]xcluding mortgage arrearage claims from the equal-monthly-payment requirement of § 1325(a)(5)(B)(iii)(I) . . . is contrary to the legislative history of section 1325[.]").

C. Rule 3002.1 developments: the $1200 rip off?; successor liability; modified payments?

***Ogar v. Propel Fin. Servs.*, No. 4:21-CV-1823, 2022 WL 4543198 (S.D. Tex. Sept. 28, 2022) (Hanks)** (Bankruptcy court correctly determined that Bankruptcy Rule 3002.1 did not apply because the confirmed plan made pro rata payments to the secured creditor, not contractual installment payments; but bankruptcy court committed no error when it rejected as untimely an oversecured creditor's § 506(b) application for attorney's fees and expenses filed two and one-half years after confirmation of plan. Bankruptcy court acted within its broad equity powers to find the unexplained two and one-half year delay to be unreasonable.).

***In re Lampton*, No. 21-32459, 2023 WL 2153726 (Bankr. W.D. Ky. Feb. 21, 2023) (Merrill)** (Applying lodestar analysis at hearing on debtor's motion to determine fees and expenses of mortgagee under Bankruptcy Rule 3002.1, application for $1,075 is reduced to $1,026. Most of the fees allowed were for paralegal services to prepare and file proof of claim, review Chapter 13 plan and review loan payment history.).

***In re Maddox*, No. 22-30832, 2023 WL 1870850, at *2–*3 (Bankr. W.D. Ky. Feb. 9, 2023) (Merrill)** (In a Bankruptcy Rule 3002.1 dispute over postpetition attorney's fees, PennyMac Loan Services is allowed $1,200—$500 for preparation of proof of claim, $450 for review of Chapter 13 plan and $250 for preparation of Form 410A—notwithstanding that its $106,000 mortgage was current at the petition, the confirmed plan maintained payments and PennyMac's own evidence showed that it had "standard flat contract rates" totaling $1,100 for the services provided by its attorneys. "PennyMac's Hourly Billing Statement confirms that the lead attorney billed $450 for 1.5 hours of work, and the paralegal billed $400 for 3.2 hours of work, for a total of $850 representing 4.7 total hours of work. The Hourly Billing Statement also includes the additional $250 flat fee for preparation of Form 410A, increasing the total fees and expenses to $1,100. . . . Although that $1,100 charge in the Hourly Billing Statement is one hundred dollars less than the $1,200 requested . . . PennyMac explains that its contractual arrangements with its clients utilize the industry standard flat fees rather than relying on individual daily time records

for these tasks. . . . Debtor has provided no evidence or argument to otherwise rebut the reasonableness of PennyMac's fees.").

***In re White*, 641 B.R. 717, 723–27 (Bankr. S.D. Ga. July 19, 2022) (Coleman)** (Bankruptcy Rule 3002.1 does not apply to a debt secured by a manufactured home that is the personal residence of the Chapter 13 debtor when the debt was bifurcated by the confirmed plan and there will be no "contractual installment payments." Objection to Rule 3002.1 notice of postpetition fees is moot because Rule 3002.1 does not apply. Postpetition fees are either part of the secured claim that will be paid in full or part of the unsecured component that will be discharged at the completion of payments. "This case, therefore, turns on the meaning of the term 'contractual installment payments' in Rule 3002.1(a). . . . [T]he plain meaning of the term contractual installment payments refers to payments made pursuant to the original contract between the debtor and the secured creditor. . . . [A] secured creditor whose claim is bifurcated pursuant to §§ 1322(b)(5) and 506(a) no longer enjoys the benefit of its original contract . . . . [F]ollowing bifurcation, a debtor's plan payments to the affected secured creditor are not contractual installment payments for purposes of Bankruptcy Rule 3002.1 because the parties' original contract is no longer in force. . . . As for the Debtor's fear that Shellpoint will attempt to collect the asserted fees after discharge—the very harm that Rule 3002.1 was designed to prevent—any attempt by Shellpoint to do so with respect to the Debtor would be improper. Because Rule 3002.1 did not apply to its claim, Shellpoint's Notice of Postpetition Mortgage Fees, Expenses, and Charges had no effect. . . . [C]ourts have explained that a secured creditor who files a notice that is not required by Rule 3002.1 'gain[s] nothing' by doing so. . . . Instead, the Debtor's confirmed plan controls pursuant to § 1327(a). . . . All fees asserted by Shellpoint in the notice were incurred post-petition . . . . [B]y bifurcating Shellpoint's claim and making deferred payments during the term of the plan pursuant to § 1325(a)(5)(B), the Debtor will have 'necessarily satisfied the allowed amount of the secured claim,' and 'any balance remaining on the unsecured portion of the claim after payment in accordance with the plan [will be] discharged' under § 1328(a).").

***In re Fivecoate*, 634 B.R. 720 (Bankr. D.S.C. May 7, 2021) (Waites)** (Based on equitable estoppel and § 105(a), PHH is forbidden to collect three postpetition mortgage payments when PHH and its predecessor, Ocwen, misapplied postconfirmation payments and based on that misapplication repeatedly told the debtor she was "paid ahead" and did not need to make at least three postconfirmation mortgage payments. PHH then waited until the end of the case when, in response to trustee's notice of final cure under Bankruptcy Rule 3002.1, PHH "revealed" that the debtor was behind by three payments, with no opportunity remaining to correct the shortfall that was created by PHH. PHH's behavior was an abuse of the bankruptcy process and threatened debtor's discharge based on its own errors and misrepresentations. Mortgage is declared current as of trustee's notice of final cure and collection of three missing payments is forbidden during or after discharge in the Chapter 13 case.).

***Feliciano Figueroa v. Banco Popular de P.R. (In re Feliciano Figueroa)*, No. 19-00032, 2021 WL 5815641, at *4–*5 (Bankr. D.P.R. Dec. 7, 2021) (Cabán Flores)** (Successor to failed bank violated discharge injunction when it applied mortgage payments retroactively to months during

Chapter 13 case in which the failed bank did not respond to trustee's notice of final cure under Bankruptcy Rule 3002.1; mortgage was deemed current based on failed bank's failure to respond to trustee's 3002.1 notice and successor bank is precluded from presenting contrary evidence. Reallocating payments and initiating foreclosure violated discharge injunction. "Debtor believed that he finished his bankruptcy with his mortgage payments current and there was no indication otherwise from the secured creditor. . . . Doral, BPPR's predecessor, did not respond to the trustee's Notice of Final Cure Payment . . . . BPPR acquired Doral, through the FDIC, two weeks after the 21-day deadline had expired to object to the Notice of Final Cure. . . . BPPR is precluded from presenting the omitted information regarding the arrears at this juncture of the proceedings. This contested issue is precisely what Fed. R. Bankr. P. 3002.1 seeks to avoid. This rule was implemented to prevent unexpected deficiencies in residential mortgage payments when a chapter 13 case is completed and closed. . . . Doral and its successor, BPPR, could not wait until 'game over' to let the Debtor know that he was about to emerge from bankruptcy with a huge problem on his hands and a possible foreclosure of his home. This type of ambush is precisely what Fed. R. Bankr. P. 3002.1 seeks to avoid. By failing to notify the arrears during the bankruptcy on a timely basis pursuant to the rule, it could not collect any further charges pertaining to the time-period of the bankruptcy, even if the Debtor was in arrears, as BPPR alleges. In other words, the Debtor was deemed current because Doral failed to notify otherwise. Collection of 'alleged arrears' by BPPR violates the discharge order since the Debtor was current on his mortgage and all his unsecured debts were discharged. Consequently, BPPR could not pursue any alleged arrears that may have incurred during the bankruptcy case as a result of Doral's failure to object to the Notice of Final Cure.").

3. SOMETHING FOR TAXING AUTHORITIES

A. Tax foreclosure sale as fraudulent conveyance

***Hampton v. County of Ontario, N.Y.*, No. 20-3868-bk, 2022 WL 2443007 (2d Cir. July 5, 2022) (Cabranes, Parker, Lee)** (Applying *Gunsalus v. County of Ontario, New York*, 37 F.4th 859 (2d Cir. June 27, 2022) (Cabranes, Parker, Lee), Chapter 13 debtor has standing to avoid prepetition tax foreclosure as a fraudulent conveyance under § 548(a)(1)(B) and *BFP v. Resolution Trust Corp*., 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (May 23, 1994), does not provide a defense because New York tax foreclosure process is not presumptively productive of reasonably equivalent value.), *aff'g* No. 17-2009-PRW, 2020 WL 833045 (Bankr. W.D.N.Y. Feb. 19, 2020) (Warren) (Applying §§ 522(h) and 548(a)(1)(B), Chapter 13 debtor can avoid prepetition tax foreclosure sale as a fraudulent conveyance when county sold property worth $27,000 in payment of taxes of $5,157.73.).

***Gunsalus v. County of Ontario*, 37 F.4th 859, 863–66 (2d Cir. June 27, 2022) (Cabranes, Parker, Lee)** (Chapter 13 debtors have standing under § 522(h) to avoid a prepetition tax sale as a fraudulent conveyance. Section 522(c)(2)(B) does not preclude debtors' action to protect homestead exemption when tax lien will be preserved, and plan proposes to pay taxes in full with interest. "Strict foreclosure" procedure under New York law—by which county took title to Chapter 13 debtors' home based on nonpayment of $1,290 in taxes and then sold the house at

auction for $22,000—is not entitled to presumption of reasonably equivalent value under *BFP v. Resolution Trust Corp*., 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (May 23, 1994), and transfer is subject to avoidance under § 548. "Section 522(c)(2)(B) . . . merely requires that the Gunsaluses—who seek to avoid the transfer of their home and *not* to avoid paying off the tax lien on that home—remain liable for the unpaid taxes even if the fraudulent conveyance action succeeds. . . . Section 522(c)(2)(B) does not deprive the Gunsaluses of standing under Section 522(h). . . . [T]he County argues, *BFP* compels the conclusion that the transfer of the Gunsaluses' home was necessarily in exchange for 'reasonably equivalent value.' . . . *BFP* itself rejects this contention. . . . Although the County eventually sold the Gunsaluses' home, unlike the sale in *BFP*, the sale occurred *after* foreclosure. The transfer of the Gunsaluses' title, equity and all their interests in the home—the transfer that is relevant for Section 548(a)(1)(B) purposes—had already occurred by the time the County auctioned off the property. . . . [U]nder no reasonable calculus do these procedures convey to the debtor value that is substantially comparable to the worth of the transferred property. . . . [I]t would give the County a windfall at the expense of the estate, the other creditors, and the debtor—which is precisely what the Code's fraudulent conveyance provisions are intended to prevent."), *aff'g* 613 B.R. 1 (Bankr. W.D.N.Y. Feb. 19, 2020) (Warren) (Applying §§ 522(h) and 548(a)(1)(B), Chapter 13 debtor can avoid prepetition tax foreclosure sale as a fraudulent conveyance when county sold property worth $28,000 in payment of taxes of $1,290.29.).

***Lowry v. Southfield Neighborhood Revitalization Initiative (In re Lowry)*, No. 20-1712, 2021 WL 6112972, at *3–*4 (6th Cir. Dec. 27, 2021) (Rogers, Griffin, Thapar)** (Neither *Rooker-Feldman* doctrine nor *BFP v. Resolution Trust Corp*., 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (May 23, 1994), precludes Chapter 13 debtor's fraudulent conveyance attack under § 548 with respect to a prepetition tax foreclosure sale under Michigan law. "Lowry's alleged injury in this case is not the state court foreclosure judgment, but instead is the fact that he could not use § 548 to avoid the foreclosure as a fraudulent transfer. . . . We can assume that the state court reached a proper foreclosure judgment, and then independently decide whether the foreclosure could be avoided as a fraudulent transfer under § 548. . . . The Supreme Court has warned the lower courts against applying *Rooker-Feldman* too broadly. . . . Unlike *BFP*, . . . this case involves a tax foreclosure, not a mortgage foreclosure, and in *BFP* the Court explicitly declined to decide whether the rule applied to tax foreclosures. . . . [T]he Michigan foreclosure law here permitted the local government to purchase the property, without a public auction . . . . The city bought Lowry's property for . . . an amount that had no apparent relation to the value of the property and was only about ten percent of the alleged fair-market value. . . . [A] tax foreclosure sale focuses on the value of the taxes owed rather than on the value of the property. . . . [W]hether § 1322(c)(1) applies to Michigan tax foreclosures was not relied upon or addressed below . . . .").

***West v. Michigan (In re West)*, No. 21-03039-JDA, 2022 WL 1309939, at *7 (Bankr. E.D. Mich. May 2, 2022) (Applebaum)** (Distinguishing *Lowry v. Southfield Neighborhood Revitalization Initiative*, No. 20-1712, 2021 WL 6112972 (6th Cir. Dec. 27, 2021) (Rogers, Griffin, Thapar), and applying *BFP v. Resolution Trust Corp*., 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (May 23, 1994), Chapter 13 debtor's fraudulent conveyance action to unravel a prepetition tax foreclosure sale fails because recently enacted changes to Michigan tax foreclosure law included a public

auction and an opportunity for the owner to claim excess proceeds. "Unlike the tax foreclosure sale in *Lowry* which was made pursuant to Michigan's old right of first refusal law, and which did not result in a sale of the property pursuant to a public auction, the Owosso property was sold at a public auction and, therefore, was subject to market forces. The property was sold to a third party . . . for an amount well in excess of the taxes owed on the property. Applying the dictates of *BFP* and *Lowry* to the amended [statute], this Court finds that the price paid . . . at the auction was reasonably equivalent value for purposes of § 548.").

B. <u>Most property taxes aren't</u>

***In re Harris*, No. 21-23864-kmp, 2022 WL 4389318, at *5–*6 (Bankr. E.D. Wis. Sept. 22, 2022) (Perhach)** (City failed to prove that the charges for delinquent municipal services, delinquent stormwater services or delinquent water services were "property taxes" entitled to priority under § 507(a)(8)(B). "The City . . . seems to concede . . . that these amounts are intended to recover costs imposed by the City on the Debtors for services provided to the Debtors by the City (*i.e.*, a fee) . . . . The City has not come forward with evidence to show . . . that the charges . . . are a 'property tax' and not a fee. . . . [T]he City's ability to add the Debtors' arrears for utility services to the Debtors' property tax bill did not turn the charges for the delinquent municipal services, the delinquent water services, the delinquent storm water services, or the 'other special' services into a tax. The City was required to come forward with evidence to permit the Court to conduct the 'functional examination' of the charges and to determine whether the charges operated as a tax or a fee regardless of the labels imposed by state law or the methods for collecting the past due amounts.").

***In re Peete*, 642 B.R. 299, 305–12 (Bankr. E.D. Wis. June 30, 2022) (Hanan)** (Most of City of Milwaukee's claim for "property taxes" is not entitled to priority under § 507(a)(8)(B) because the components are more in the nature of fees or charges for services and are not taxes for public benefits. Components not entitled to priority include charges for "municipal services," "storm water," "water," "sewer," "health abatement," and "building reinspection." "The Bankruptcy Code does not define the terms 'tax' or 'property tax[.]' . . . How state statutes may label the water charges here, or other components of the special charges, is not controlling. . . . City of Milwaukee has failed to provide any evidence to establish the nature and purpose of the charges imposed for 'municipal services,' 'storm water,' 'water,' and 'sewer.' . . . [T]he City bears the burden of proving that its special charges are 'property taxes' entitled to priority, its failure to provide the necessary evidence requires the Court to find, based on this record, in favor of Mr. Peete. . . . The two remaining special charges are for 'health abatement' and 'building reinspection.' These charges both appear to have been assessed not for a public benefit, but to recover the City's costs in cleaning up litter at Mr. Peete's property, and for performing required inspections at his property based on his failure to remedy building code violations. These are not charges imposed on all property owners in a community, nor do they generate revenue to benefit the general public. Instead, they are meant to discourage unwanted conduct . . . as well as to defray the City's costs in providing services to specific property owners. These charges are a fee, not a tax. Consequently, the special charges imposed by the DNS likewise are not entitled to priority status, and will be treated like other general unsecured claims. . . . The City has offered

no viable argument that any of the penalty charges are entitled to priority under 11 U.S.C. § 507(a)(8)(G) . . . .").

4. SOMETHING FOR TRUSTEES (that affects everyone)

A. Continuing duty to disclose changes in income/assets: duty to amend schedules; disposable income changes during case; raises; mortgage moratorium; asset appreciation; postpetition lawsuits; inheritances; sale or refinancing; judicial estoppel; issues at conversion/dismissal.

***In re Mosley*, No. 19-15907-RAM, 2022 WL 16952441 (Bankr. S.D. Fla. Nov. 15, 2022) (Mark)** (Income verification language in confirmed plan required debtor to provide copies of tax returns to trustee each year and to provide trustee verification of disposable income if income increased by more than 3% over previous year. A $12,000 salary increase to schoolteacher triggered the verification requirement and further hearing will be necessary to determine whether modification of plan is required to satisfy § 1325(b).).

***In re Poe*, No. 19-60528, 2022 WL 3639415, at *2–*5 (Bankr. N.D. Ohio Aug. 23, 2022) (not for publication) (Kendig)** (Bankruptcy court rejects agreed order submitted by trustee and Chapter 13 debtor in settlement of trustee's motion to modify confirmed plan to increase payments to unsecured creditors based on an increase in income revealed in debtor's tax return. Debtor was under no obligation to reveal increased income and increasing payments to unsecured creditors—even by agreement—is not appropriate when the effect is to retroactively capture income that is no longer available to fund the plan. Three months before debtor was scheduled to complete payments trustee filed a motion to modify to require the debtor to pay an additional $24,488 into the plan to reflect "a very significant increase in income" shown on debtor's tax return for the previous year. Debtor agreed to pay $7,000 and an agreed order was submitted. "The court is not aware of any provision in the Bankruptcy Code, the Bankruptcy Rules, the national chapter 13 plan, or the court's form confirmation order that places an obligation on Debtor to self-report and voluntarily pay increased wage earnings to Trustee. A debtor is obligated to report § 541(a)(5) property, such as life insurance proceeds that are either paid or payable to the debtor within one hundred and eighty (180) days of filing. Fed. R. Bankr. P. 1007(h). There is no corresponding requirement related to increased income in a chapter 13 case. . . . This doesn't mean postpetition changes in income are immaterial or not subject to disclosure. 11 U.S.C. § 521(f) is calculated to inform interested parties of increased income. . . . Many courts force self-reporting through a plan provision, by separate order, or in a confirmation provision. . . . If a reporting duty existed, it would render § 521(f)(4) superfluous . . . . [T]he court finds no self-reporting obligation. Debtor complied with his duties under the plan and Code when he provided his tax return to Trustee upon her request. He was not remiss in failing to report his increased income when he earned it. . . . This court has permitted Trustee to capture postpetition income through a modification, but it is up to Trustee or another interested party to act. . . . It is not incumbent on a debtor to voluntarily provide notice of increased income or modify a plan to include it. . . . When the plan was confirmed, the payment was based on Debtor's projected disposable income. The overtime he received due to

Covid was not foreseeable. Altering his payment after-the-fact nullifies what was projected, instead forcing an 'actual' disposable income requirement on him. . . . Trustee's attempt to capture the increased earnings through an after-the-fact modification is not supported. She may seek a prospective modification that can feasibly be funded through a debtor's current and future earnings in compliance with section 1322(a)(1).").

***In re Lee*, No. 16-53256, 2022 WL 4085882, at *2–*4 (Bankr. E.D. Mich. Sept. 6, 2022) (Gretchko)** (Chapter 13 debtor's failure to comply with plan requirement to file and provide tax returns for five years was material default for purposes of dismissal under § 1307(c)(6)—without regard to whether creditors suffered financially; debtor's responsive motion to modify the plan to cure postconfirmation defaults, filed four months after expiration of the maximum 60-month term of the plan, was not a proper modification under § 1329 because there was no plan remaining that could be modified. Confirmed plan required debtor to file income tax return each year. Debtor waited until three weeks after the 60-month term expired to provide the trustee with copies of tax returns for 2016, 2017, 2018, 2019 and 2020. "Five years is a very long time for a default to persist, and the Debtor's turnover of the 2016-2020 tax returns to the Trustee only after expiration of the Plan underscores the Debtor's repeated failure to comply with the Plan. . . . The Plan expired nearly four months before the Debtor filed his proposed Plan Modification. Consequently, there was no plan in existence to be modified. . . . There is nothing in Section 1307(c)(6) that requires a default to have a financial impact in order to constitute a 'material default'. . . . Although the wording of Section 1307(c)(6) does not require a financial impact in order for a plan default to be considered material, a debtor's failure to promptly turn over tax returns to the Trustee has a financial impact. A Chapter 13 debtor's tax returns are critically important to the Chapter 13 Trustee, who uses them to determine whether a debtor has more (or less) disposable income or is entitled to tax refunds that can be used to fund the plan. Armed with that information, a Chapter 13 Trustee can pursue, 'in real time', increased plan payments, or payment of tax refunds toward funding the plan, and perhaps creditors would have been paid sooner. Conversely, if the tax returns show decreased income, the Trustee might excuse a debtor's obligation to turn over tax refunds. All of these possibilities demonstrate that a debtor's tax returns in a Chapter 13 case are inextricably intertwined with the financial aspects of the plan. . . . The Debtor's five-year failure to turn over tax returns . . . as required by . . . the Plan is inconsistent with the good faith requirement of § 1325(a)(3). Thus, even if the Debtor's Plan had not expired, the Debtor would not have been able to modify it anyway.").

***In re Ilyev*, No. 17-12987-KHK, 2022 WL 2965029, at *3–*6 (Bankr. E.D. Va. July 26, 2022) (Kenney)** (Rejecting *In re Boyd*, 618 B.R. 133 (Bankr. D.S.C. July 17, 2020) (Waites)—and based in large part on conclusion that Chapter 13 debtor had a duty under § 521(a)(3) and Bankruptcy Rule 4002(a)(4) to disclose "substantial and unanticipated" 18-month COVID moratorium on direct payment of mortgage—with four months left in 60-month plan, court grants trustee's motion to modify to require the debtor to pay creditors the "lion's share" of $29,000 mortgage payment deferral. "The duty of a debtor to disclose post-petition assets has been the subject of some controversy in the case law. Bankruptcy Judge Waites of the District of South Carolina has written a thoughtful opinion in which he concluded that there is no duty of disclosure in the post-petition environment under Chapter 13*. In re Boyd* . . . . Other courts, including this one, have

held that debtors do in fact have an obligation to disclose assets acquired post-petition to the Trustee. . . . [O]pinions like *Boyd*, while correct in holding that the Code and Rules do not contain an independent duty to amend the debtor's schedules post-petition, place insufficient weight on the duty of cooperation under Section 521(a)(3) and Rule 4002(a)(4). This case presents a perfect example. The Debtor obtained relief from his mortgage for eighteen months. . . . [T]hat represents a deferral totaling $29,250.00. The Debtor never informed the Chapter 13 Trustee of the deferral until the mortgagee requested that the Debtor seek an order from the Court approving the same. In the meantime, the Debtor (who was employed at his law firm the entire time) spent $17,000 of the funds on his wife's education, child care and acting lessons for his step-daughter. . . . The Fourth Circuit . . . has provided us with the benchmark in [*Murphy v. O'Donnell (In re Murphy)*, 474 F.3d 143 (4th Cir. Jan. 18, 2007) (Williams, Traxler, Hamilton)]—changes in the debtor's financial condition need to be disclosed to the Trustee when they are 'substantial and unanticipated.' Minor fluctuations need not be reported; major ones do. The duty of cooperation under Section 521(a)(3) and Rule 4002(a)(4) includes a duty of disclosure for substantial and unanticipated changes in the Debtor's financial condition. The Chapter 13 Trustee cannot perform his duties, and the Court is not in a position to decide whether a particular change in financial circumstances may be substantial and unanticipated, without disclosure. . . . [T]he Court finds that the Covid mortgage deferral constitutes a substantial and unanticipated change. . . . [T]he Debtor had a duty to disclose the Covid mortgage deferral to the Chapter 13 Trustee. . . . [Debtor] only has approximately three or four months to complete his plan. It might be unrealistic to expect the Debtor to pay the Trustee $29,250.00 in the next three or four months. . . . It is difficult for the Court to accept that the Debtor, who failed to disclose the forbearance to the Trustee for the entire eighteen-month forbearance period, can now be heard to say that a plan modification is infeasible because he has only three or four months left in his Plan. The Court will order the Debtor to file a Modified Plan. . . . The Plan does not have to recapture the entire $29,250.00, but it must be a good faith effort to repay the lion's share of the funds to the Trustee.").

***In re Williams*, No. 18-80539-PRT, 2022 WL 2445423, at *3–*4 (Bankr. E.D. Okla. July 5, 2022) (Thomas)** (In a district with a local rule that requires Chapter 13 debtors to provide yearly tax returns to the standing trustee, trustee is not also entitled to an order requiring all Chapter 13 debtors to file yearly statements of changes in income and expenses as described in § 521(f)(4). Trustee can request income and expense information and § 521(f) does not require proof of cause for that request, and trustee can request income and expense information in individual cases when the tax return suggests the need for more information—without imposing an extra burden on all Chapter 13 debtors. "In addition to providing annual tax returns, once a plan is confirmed, at the request of the court, a trustee or an interested party, § 521(f)(4)(B) requires a debtor to file with the court a statement, under penalty of perjury, of . . . income and expenditures . . . . [T]here is no doubt that the Trustee can request this information. . . . [W]hile courts have granted such requests and entered prospective orders for the remainder of a plan term, they did so where the specific circumstances of the case warranted such an order. . . . The Court recognizes that § 521 does not require the Trustee or an interested party to show cause to request and receive the information. However, it appears that other courts have relied on such facts before entering prospective orders in individual cases. . . . [T]he Court will not enter a

prospective order requiring amended schedules in these cases or a standing order directing . . . all debtors to do so in this District.").

***In re Croniser*, No. 20-00401-5-DMW, 2022 WL 3639413, at *1–*6 (Bankr. E.D.N.C. Aug. 23, 2022) (Warren)** (When property valued in schedules at $17,900 sold for $34,900 ten months after confirmation, a substantial and unanticipated change in financial circumstances supports trustee's motion to modify plan to pay difference in value to unsecured creditors. This outcome is not affected by vesting of property in debtor at confirmation—a provision of the confirmation order that the bankruptcy court rescinded and that debtor has appealed—and seems not to be dependent on whether the proceeds are considered income or liquidation of an asset. "Under the terms of the Plan, property of the estate vested in the Debtor upon confirmation. The Plan included a nonstandard provision stating that 'The Debtor shall be permitted to receive all net proceeds from the sale of vested property and/or exempt property that is sold during the pendency of the case. This provision shall not prejudice and/or impact the rights of parties pursuant to 11 U.S.C. [§] 1329.' . . . The court also entered another Order . . . amending its prior Order Confirming Chapter 13 Plan, in order to provide that property of the estate would not vest in the Debtor until discharge. . . . The Debtor has appealed . . . and that appeal is pending. . . . [T]en months after the Debtor filed his petition, he and the co-owner sold the Property for an amount 94.9 percent higher than the scheduled value. . . . Payment of the Net Proceeds to unsecured creditors corrects any harm to those creditors that may have resulted from the Debtor undervaluing the Property, either due to poor due diligence in preparing his schedules of assets, or worse, intentionally misstating the value. . . . Using the liquidation test from the initial confirmation of a plan to bar subsequent modification would place an undue burden on Chapter 13 trustees to investigate debtors' scheduled valuations . . . . Appreciation in value of a subsequently liquidated asset is not scrutinized in the form of a motion to modify a Chapter 13 plan or a comparison to the property's scheduled value, unless the change in circumstances is substantial, and debtors should not be able to use the liquidation test as a shield from post-confirmation modification. . . . Consistent with [*Murphy v. O'Donnell (In re Murphy)*, 474 F.3d 143, 149 (4th Cir. Jan. 18, 2007) (Williams, Traxler, Hamilton),] the court finds the receipt of the Net Proceeds is a permissible basis for modification, notwithstanding § 1327(c). . . . The *Murphy* court characterized the sale proceeds as income . . . . The 2005 amendments affecting income calculations do not render *Murphy* obsolete. . . . The purpose of the modification is to allow the Debtor's unsecured creditors to share in the Debtor's improved circumstances . . . .").

***In re Wright*, No. 19-21544, 2022 WL 17661135, at *5–*7 (Bankr. D. Kan. Dec. 13, 2022) (Somers)** (Distinguishing *Rodriguez v. Barrera (In re Barrera)*, 22 F.4th 1217 (10th Cir. Jan. 19, 2022) (Tymkovich, Holmes, McHugh), Chapter 13 debtor's contingent interest in a trust was property of the bankruptcy estate that did not vest in debtor at confirmation; postpetition removal of contingency in trust increased the value of debtor's interest and that appreciation also became property of the Chapter 13 estate. On trustee's motion to increase payments to unsecured creditors, debtor's interest in the trust—including postpetition increase in value—was property of estate for purposes of best-interests-of-creditors test in § 1325(a)(4) and that value, as of date of modification, is captured for unsecured creditors. Trustee's motion to modify was timely filed before debtor completed payments under confirmed plan and completion of

payments in interim before hearing on trustee's motion does not render motion untimely. At the Chapter 13 petition, debtor was beneficiary of a trust subject to life estate of a sibling. Debtor's interest in trust was not excluded from Chapter 13 estate by § 541(c)(2) because trust did not contain spendthrift provision. After confirmation, the sibling died and Chapter 13 trustee moved to modify the plan to account for increased value of debtor's interest in the trust. "[T]he death of [the sibling] removed the contingency and increased the value of the Trust interest. The interest was property of the estate when the case was filed, and the estate's interest as [*sic*] not terminated when the Chapter 13 plan was confirmed. Debtors' Chapter 13 plan, as well as the order of confirmation, delayed vesting of property of the estate in the Debtors . . . . Postpetition appreciation of estate property because of the satisfaction of a contingency is included in the estate. . . . This case is clearly distinguishable from *Barrera*. In this case, the Trust interest did not vest in the Debtors when their Chapter 13 plan was confirmed. . . . [T]he contingent interest in the Trust was property of the estate when the case was filed; it remained in the estate, with an increased value, when the Trustee moved to modify the plan. The Trust interest is included in the liquidation analysis. . . . [F]or post confirmation plan modifications, the 'effective date of the plan' is the effective date of the modification. Therefore, calculation of the hypothetical liquidation payments to unsecured creditors in § 1325(a)(4) must be the value of the assets on the date of the proposed amended plan. . . . The bankruptcy court's power to approve a modification is not destroyed by the debtor's completion of plan payments between the date of the filing of a motion to modify the plan and the date the court considers whether to approve the modification.").

***In re Klein*, No. 17-19106-JGR, 2022 WL 3902822, at *4–*7 (Bankr. D. Colo. Aug. 23, 2022) (Rosania)** (Applying estate termination approach, Chapter 13 trustee's motion for turnover and for modification of confirmed plan seeking to capture appreciation in business property sold after confirmation is denied because property value was accounted for at confirmation and the property interest vested in debtors at confirmation, including any postconfirmation appreciation; proceeds from sale of business interest are not disposable income but belong to the debtors. Debtors valued interest in an LLC at $15,000. Three years after confirmation debtors' bank statement reflected $76,405 in proceeds from the sale of the debtors' interest in an office building owned by the LLC. "The question presented . . . is whether proceeds received by the Debtors from the sale of prepetition property of the estate should be contributed to their Chapter 13 plan. . . . [*In re Baker*, 620 B.R. 655 (Bankr. D. Colo. Sept. 29, 2020) (Brown),] . . . adopted the estate termination theory as the only interpretation that respects the plain meaning of 11 U.S.C. § 1327(b), and allowed the debtor to retain the sale proceeds as they were no longer property of the estate. . . . *McDonald v. Burgie (In re Burgie)*, 239 B.R. 406 (B.A.P. 9th Cir. [Aug. 31, 1999) (Bufford, Ryan, Klein),] . . . characterized the house as a prepetition capital asset and held proceeds from the sale did not represent disposable income. . . . The value was appropriately disclosed and reconciled in the best-interest-of-creditors test. The prepetition property interest . . . revested with the Debtors upon confirmation. The estate termination theory . . . allows the Debtors to retain proceeds from the post-confirmation sale of prepetition property under the facts and circumstances of this case.").

***In re Marsh*, 647 B.R. 725, 730-39 & 736 n.21 (Bankr. W.D. Mo. Jan. 17, 2023) (Fenimore)** (Applying "estate replenishment" approach to reconciling §§ 541, 1306 and 1327(b), and holding that "proceeds" are a form of property separate from the property sold, at sale of Chapter 13 debtors' residence after confirmation proceeds became property of replenished estate and debtors must modify confirmed plan under § 1329 to account for nonexempt proceeds. Applicable commitment period in § 1325(b) is not applicable at modification after confirmation. Effective date of plan at modification after confirmation is effective date of original confirmed plan. In 2018, debtors listed $140,000 residence. In 2022, debtors filed motion to sell residence for $210,000 together with request to retain proceeds to obtain a new residence. Chapter 13 trustee objected, demanding that debtors remit an amount sufficient to pay 100% of allowed unsecured claims. "[R]econciliation of § 1306 and § 1327 may determine the scope of a debtor's entitlement to retain post-confirmation property. . . . Five approaches to reconciling § 1306 and § 1327 have emerged. . . . Eighth Circuit precedent eliminates the estate termination approach . . . . [T]he court determines the estate replenishment approach best reconciles § 1306 and § 1327. . . . Courts disagree about whether proceeds from the sale of vested property are distinct from the property sold. . . . [B]ecause the proceeds are distinct from the Marshes' former residence and because the proceeds were not property of the estate at confirmation, the proceeds could not have vested in the Marshes at confirmation under § 1327. . . . Consequently, under the estate replenishment approach, § 1306 makes the proceeds property of the replenished chapter 13 estate . . . . Though § 1329 incorporates some provisions of § 1325, it does not incorporate the applicable commitment period under § 1325(b). . . . Because the Marshes' confirmed plan requires ongoing payments on their mortgage, the Marshes' sale of their residence and proposal to retain the proceeds from that sale contravene the terms of their confirmed plan. . . . Thus, the Marshes, in effect, seek to modify their confirmed plan without filing a modified plan or otherwise specifying the terms of their proposed modification. . . . [T]he court's determination that the proceeds are property of the estate does not necessarily prevent the Marshes from retaining at least a portion of the proceeds under a modified plan. Section 1329 . . . does not necessarily require that debtors pay the value of all post-confirmation assets to the estate. . . . [Section] 1325(a)(4)'s liquidation-analysis requirement 'as of the effective date of the plan' . . . in the Eighth Circuit, is a date that precedes plan modification." In a note, "[t]hough § 541(a)(6) also includes in the estate 'proceeds . . . from property of the estate,' it does not include in the estate proceeds from property that is no longer property of the estate. Thus, because vested property is no longer property of the estate, § 541(a)(6) does not capture proceeds from vested property as property of the estate.").

***In re Powell*, No. 20-80154, 2022 WL 1043502, at *2–*7 (Bankr. C.D. Ill. Apr. 7, 2022) (Perkins)** (Trustee's motion to modify confirmed plan to increase distribution to unsecured creditors to 100% based on inheritance received more than 180 days after the petition is granted; confirmed plan vested property of the estate in the debtor but preserved trustee's right to claim property acquired postpetition pursuant to § 1306. "Since § 1306 itself provides a temporal extension, the phrase 'of the kind' used in § 1306(a)(1) is best construed to incorporate the types of property described in § 541, including a bequest, devise or inheritance under § 541(a)(5), but not the180-day temporal restriction that would apply in Chapter 7. . . . [I]n [*In re*] *Lybrook*, 951 F.2d 136 (7th Cir. [Dec. 18,] 1991) [(Bauer, Posner, Flaum)], . . . the Seventh Circuit . . . reasoned that the plain

meaning of § 1306(a)(1) was to remove the 180-day limitation for property inherited by Chapter 13 debtors that was otherwise applicable in Chapter 7 cases under § 541(a)(5). . . . A careful reading of the [*Black v. United States Postal Service (In re Heath)*, 115 F.3d 521 (7th Cir. June 10, 1997) (Posner, Flaum, Rovner),] opinion leads to the conclusion that the Seventh Circuit did not adopt the estate transformation approach or any of the competing approaches. . . . This Court agrees with what now appears to be the majority position, that the estate replenishment approach correctly reconciles § 1306(a) with § 1327(b). . . . [N]on-wage property interests acquired after confirmation become part of the estate by operation of § 1306(a)(1), notwithstanding § 1327(b). . . . [T]hose property interests are a proper basis for plan modification under § 1329. . . . [*Germeraad v. Powers*, 826 F.3d 962 (7th Cir. June 23, 2016) (Bauer, Williams, Adelman),] clarified that a plan modification is not required to be based on any of the provisions listed in § 1329(b)(1). Rather, it is only necessary that the modification not be inconsistent with those provisions. . . . [T]he inheritance received by Mr. Powell is a significant improvement in the Debtors' financial condition that warrants increasing the distribution to unsecured creditors to 100%.").

***In re Stanke*, 638 B.R. 571, 574–78 (Bankr. N.D. Tex. Jan. 10, 2022) (Jones)** (Citing *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (Mar. 23, 2010), and acting "of its own accord," bankruptcy court rejects agreed order between Chapter 13 debtors and trustee modifying confirmed plan to pay unsecured creditors in full from proceeds of sale of inherited property. Trustee's motion to modify is prohibited by § 1329(a) because it was filed after completion of 60 monthly payments—notwithstanding that trustee did not know about inheritance until after the 60th payment was made. Court notes that debtors had no statutory obligation to reveal inheritance more than 180 days after the petition but probably acted correctly to give the trustee notice under local general orders. Agreed-upon modification violates 60-month limitation in § 1329(c) because the inheritance proceeds would be paid to the trustee in the 68th month. The court left unresolved the question whether the inheritance was property of the Chapter 13 estate. "The Trustee's plan modification is unopposed; the Stankes approve and no creditor has objected. The lack of objection by unsecured creditors is unsurprising; the modification raises their payout from approximately fifteen percent to one hundred percent. That all interested parties support the plan modification does not, however, end the Court's review—bankruptcy courts have an independent duty to ensure that plan modifications comply with the requirements of the Bankruptcy Code regardless that no objections are filed. . . . The Trustee filed the plan modification . . . after the Stankes made their final payment under the plan. . . . While only in dicta, the Fifth Circuit has said that § 1329(a) prohibits a trustee from amending a plan to account for newly acquired funds *after he has received all plan payments from the debtor*. *Meza v. Truman (In re Meza)*, 467 F.3d 874, 878 (5th Cir. [Oct. 16, 2006) (Jones, Barksdale, Benavides)]. . . . Because the Trustee did not file his motion to modify before the Stankes made all their payments to him, the Court is time-barred from approving the modification under § 1329(a). . . . Some courts have allowed 'reasonable grace period[s] for debtors to cure an arrearage' that arose at the tail end of a bankruptcy plan, after the plan's sixty-month term elapsed. *In re Klaas*, 858 F.3d 820, 828 (3d Cir. [June 1, 2017) (Fisher, Vanaskie, Krause)] . . . . But that is not the case here. The Stankes have completed all their plan payments within sixty months with no pending arrearages. The Trustee's proposed plan modification

therefore violates the sixty-month time limit requirement of § 1329(c), and the Court is thus barred from approving it. . . . A debtor . . . is only obligated to report certain changes in circumstance to the trustee. Under Federal Rule of Bankruptcy Procedure 1007(h), only inheritances received within the § 541 180-day timeframe trigger a requirement to file new bankruptcy schedules, which would give notice to the trustee. . . . Because the inheritance upon Jack Stanke's mother's death was received more than 180 days after the petition date, the Stankes were not required under the Bankruptcy Code to provide notice to the Trustee. The Stankes may have been required to report the inheritances, however, under the Standing Order . . . for the Northern District of Texas . . . . [T]he General Order only requires that newly acquired 'property of the estate' be reported to the trustee. . . . [I]t is an open question whether the inheritances are property of the estate and had to be reported to the Trustee at all. . . . The Court denies the Trustee's modification and finds that the Stankes, having completed their plan payments, are entitled to receive their chapter 13 discharges. . . . [T]his decision does not prevent them from paying their creditors on their own volition outside of the plan, which they stated is their desire.").

***In re Mosley*, No. 19-15907-RAM, 2022 WL 16952441, at *1–*2 (Bankr. S.D. Fla. Nov. 15, 2022) (Mark)** (At modification after confirmation under § 1329, projected disposable income test in § 1325(b) applies. Over-median Chapter 13 debtor who experienced increase in income is entitled to deduct actual expenses and to apply IRS standards applicable as of date of modification. "To confirm (or later modify) a plan, § 1325(b)(1)(B) obligates a debtor to devote his or her 'projected disposable income' to unsecured creditors. . . . The Trustee has not cited, and the Court is unaware of, any statutory provision or applicable case law mandating use of the IRS Standards in effect on the petition date. Logic and fairness (not always a choice under BAPCA) compel the opposite conclusion. If the Debtor's increased current income may obligate her to increase her payments to unsecured creditors, the Debtor must be allowed to calculate her disposable income using current expenses. This may include an increase in actual current expenses, which may be used in some categories, and an increase in the IRS Standards that must be used in other categories.").

***In re Pratt*, No. 19-40401-JMM, 2023 WL 363511 (Bankr. D. Idaho Jan. 23, 2023) (Meier)** (On trustee's motion to increase plan payments by $843 per month to reflect increased income showing on pay stubs two years after confirmation, after microscopic examination of amended budget, court allows modification to increase payments by $350 per month. IRS expense guidelines are useful but not binding at modification after confirmation. Home maintenance expenses are properly accounted for as part of the Local Standards Housing Allowance. Some cell phone and internet expenses are part of the Local Standards Housing Allowance and part are a miscellaneous personal expense. $250-per-month increase in food expense in three years since filing was explained by health and other issues and is allowed, though court preferred proof of actual receipts for food. Increase in health expenses has to be offset by increase in employer's contribution to health savings account. Extracurricular school activities such as cheerleading and choir are reasonable educational expenses for minor children, but not travel expenses for a choir concert. Transportation expenses for four cars are allowed for family with two parents and four

children, two of whom are minors. Trustee cannot capture 75% of what looks like a $5,000 bonus received by one of the debtors for lack of evidence.).

***In re Poe*, No. 19-60528, 2022 WL 3639415, at *2–*5 (Bankr. N.D. Ohio Aug. 23, 2022) (not for publication) (Kendig)** (Bankruptcy court rejects agreed order submitted by trustee and Chapter 13 debtor in settlement of trustee's motion to modify confirmed plan to increase payments to unsecured creditors based on an increase in income revealed in debtor's tax return. Debtor was under no obligation to reveal increased income and increasing payments to unsecured creditors—even by agreement—is not appropriate when the effect is to retroactively capture income that is no longer available to fund the plan. Three months before debtor was scheduled to complete payments trustee filed a motion to modify to require the debtor to pay an additional $24,488 into the plan to reflect "a very significant increase in income" shown on debtor's tax return for the previous year. Debtor agreed to pay $7,000 and an agreed order was submitted. "The court is not aware of any provision in the Bankruptcy Code, the Bankruptcy Rules, the national chapter 13 plan, or the court's form confirmation order that places an obligation on Debtor to self-report and voluntarily pay increased wage earnings to Trustee. A debtor is obligated to report § 541(a)(5) property, such as life insurance proceeds that are either paid or payable to the debtor within one hundred and eighty (180) days of filing. Fed. R. Bankr. P. 1007(h). There is no corresponding requirement related to increased income in a chapter 13 case. . . . This doesn't mean postpetition changes in income are immaterial or not subject to disclosure. 11 U.S.C. § 521(f) is calculated to inform interested parties of increased income. . . . Many courts force self-reporting through a plan provision, by separate order, or in a confirmation provision. . . . If a reporting duty existed, it would render § 521(f)(4) superfluous . . . . [T]he court finds no self-reporting obligation. Debtor complied with his duties under the plan and Code when he provided his tax return to Trustee upon her request. He was not remiss in failing to report his increased income when he earned it. . . . This court has permitted Trustee to capture postpetition income through a modification, but it is up to Trustee or another interested party to act. . . . It is not incumbent on a debtor to voluntarily provide notice of increased income or modify a plan to include it. . . . When the plan was confirmed, the payment was based on Debtor's projected disposable income. The overtime he received due to Covid was not foreseeable. Altering his payment after-the-fact nullifies what was projected, instead forcing an 'actual' disposable income requirement on him. . . . Trustee's attempt to capture the increased earnings through an after-the-fact modification is not supported. She may seek a prospective modification that can feasibly be funded through a debtor's current and future earnings in compliance with section 1322(a)(1).").

***Martinez v. Gorman*, No. 1:21-cv-1077, 2022 WL 2165994, at *2–*4 (E.D. Va. June 16, 2022) (Ellis)** (Applying Fourth Circuit rule that res judicata bars modification of a confirmed Chapter 13 plan absent "substantial, unanticipated changed circumstances," refinancing of home mortgage that would save $300 per month is not a substantial change for a debtor with gross monthly income of $12,809; on remand, bankruptcy court is instructed to determine whether debtor's retention of an interest in former marital residence is a substantial change in circumstances when confirmed plan required debtor to surrender residence. "[T]he Trustee filed a motion to modify the Confirmed Plan under 11 U.S.C. § 1329(a), seeking to increase Debtor's plan payments by

$300 per month. . . . [T]he Trustee noted that the mortgage refinancing approved by the Bankruptcy Court reduced Debtor's monthly expenses by $300, and accordingly the Trustee sought to increase the Debtor's monthly plan payments to unsecured creditors from $1,700 to $2,000 in order to account for the refinancing savings. The Bankruptcy Court . . . granted the Trustee's motion to modify . . . . Debtor appealed . . . . [T]he Bankruptcy Court concluded that the $300 monthly savings was a substantial change in Debtor's financial situation . . . . [T]his conclusion rested on erroneous legal principles. In reaching this conclusion, the Bankruptcy Court remarked that '300 dollars is 300 dollars. 300 dollars over the next four years times, what—four years times 3,600, that's 12,000 dollars plus. I think that's substantial. That's substantial in my book.' . . . This explanation is no more than an *ipse dixit* and is insufficient to explain why a $300 monthly savings constituted a substantial change in Debtor's financial circumstances that warranted modification of the Confirmed Plan. . . . [T]he $300 savings, considered in isolation, is not a substantial change to the Debtor's financial condition. Thus, the Bankruptcy Court abused its discretion in concluding otherwise. . . . Debtor had gross monthly earnings of $12,809. . . . A monthly savings of $300 a month amounts to less than a three percent increase in Debtor's monthly income; this is a modest increase, not a substantial change. The doctrine of res judicata prevents modifications of the Confirmed Plan unless the Debtor has experienced an unexpected and substantial change to his finances after the plan was confirmed. Here, the $300 monthly savings that the Debtor experienced, when considered alone, did not amount to a substantial change in the Debtor's finances, and thus res judicata bars modification of the Confirmed Plan.").

B. Trustee compensation at dismissal before confirmation: a force for good?

***Goodman v. Doll (In re Doll)*, 57 F.4th 1129, 1139–45 (10th Cir. Jan. 18, 2023) (Holmes, Ebel, Eid)** (At dismissal before confirmation, 11 U.S.C. § 1326(a)(2) and 28 U.S.C. § 586(e) "unambiguously" require trustee to return all preconfirmation payments without deduction for trustee expenses and compensation collected under 28 U.S.C. § 586(e). "Doll had made pre-confirmation payments to the standing trustee totaling $29,900. From those pre-confirmation payments, the standing trustee paid $19,800 to Doll's bankruptcy attorney for attorney's fees; paid, with Doll's consent, over $7,500 to the Colorado Department of Revenue to cover some of Doll's taxes; and retained $2,596.70 as the trustee's fee. Doll then filed a 'Motion to Disgorge Trustee's Fees' . . . . Both parties agree that the standing trustee's fee is not an 'unpaid claim allowed under section 503(b)[ ]' . . . . While Congress . . . in §§ 1194(a)(3) and 1226(a)(2), specifically directed the standing trustees appointed in Chapter 12 and Chapter 11 (Subchapter V) cases to deduct their fees before returning any remaining pre-confirmation payments to the debtor when a plan is not confirmed, Congress did not so provide in § 1326(a)(2) addressing Chapter 13 cases. . . . [A]lthough Congress also amended § 1326(b) in 1986, the same year it enacted Chapter 12, Congress did not at that time amend § 1326(a) and, in particular, did <u>not</u> add language directing the Chapter 13 trustee to deduct his fee before returning pre-confirmation payments to the debtor when no plan is confirmed. . . . While the Trustee asserts several policy arguments for why requiring him to return his fee to a Chapter 13 debtor when no plan is confirmed is a bad idea, Congress has unambiguously already made that policy decision for Chapter 13 debtors. . . . Moreover, 'collect' in 28 U.S.C. § 586(e)(2) cannot mean, as the Trustee urges, that the act of 'collection' of funds irrevocably constitutes a payment to the Trustee of his

fees. . . . [T]he Trustee argues that 'collect' means to obtain payment for his fee . . . . This argument fails, however, because it conflates the initial 'collection' of funds from which subsequent payments may be made, and the subsequent act by the trustee of the disbursement of those funds to various creditors or claimants. . . . When § 1326(b) is read as a whole, however, it is clear that this statutory provision does not address pre-confirmation payments but instead addresses only payments made after a plan has been confirmed. . . . ' . . . Because the trustee will never pay creditors if no plan is confirmed, and § 1326(b) provides for payment of trustee fees before or at the time the trustee pays creditors, it follows that, if confirmation never happens, § 1326(b) does not contemplate payment of the trustee's percentage fee. . . . '"), *aff'g* No. 21-cv-00731-RBJ, 2021 WL 5768991 (D. Colo. Dec. 6, 2021) (Jackson) (Acknowledging conflicting authority, § 1326(a)(2) unambiguously overcomes 28 U.S.C. § 586(e) and § 1226(a)(1) proves the point: standing Chapter 13 trustee must return to the debtor the percentage fee deducted from payments in a case dismissed before confirmation of a plan.).

***McCallister v. Evans*, 637 B.R. 144, 147–52 (D. Idaho Feb. 8, 2022) (Nye)** (Embracing *McCallister v. Harmon (In re Harmon)*, No. ID-20-1168-LSG, 2021 WL 3087744 (B.A.P. 9th Cir. July 20, 2021) (not for publication) (Lafferty, Spraker, Gan), under 28 U.S.C. § 586(e), Chapter 13 trustee collects and retains percentage fee upon receipt of payments, before and after confirmation, and trustee does not refund percentage fee to the debtor if case is dismissed before confirmation. "[S]ome courts have decided that the trustees should refund the fee. . . . [O]ther courts, including the Ninth Circuit BAP, have affirmed the practice of standing trustees keeping the percentage fee. . . . This Court joins those courts that have held that chapter 13 standing trustees may keep the percentage fee pursuant to the plain language of § 586(e)(2) even if the plan is not confirmed. . . . Collectors are not in the business of returning payments. And Congress knows this. Thus, when Congress has wanted collection to be conditional or reversible, it has specified. . . . Payments are due to the Trustee before and after confirmation, and the Trustee takes the percentage fee from all the payments. The statute does not limit the percentage fees to those taken from payments received after confirmation. Section 586(e)(2), by itself, does not express any exception to collecting the percentage fee. . . . Nowhere does § 586(e)(2) direct the Trustee to hold the fee until confirmation or denial of confirmation. It only directs the Trustee to collect the fee—not to hold it and then return it if the plan is not confirmed. . . . [Section] 1326(a)(2) does not specify that the percentage fee must also be returned. Thus, there is no necessary conflict with § 586(e)(2). . . . [Section] 1326(b)(2) differentiates between payments and the percentage fee, and that same subsection also explains that the Trustee may take the fee *before* the payment to creditors. This is in harmony, not conflict, with § 586(e)(2) . . . . [Section] 1226 does not require pre-confirmation payments unlike § 1326. . . . [I]t is inappropriate to apply the rule against surplusage to alter the plain language of § 586(e)(2).").

5. SOMETHING FOR DEBTORS' ATTORNEYS

A. Getting around *Harris v. Viegelahn*: plan provision; assignment; attorney as agent; joint check.

***In re Fam*, 645 B.R. 1, 3, 6–10 (Bankr. D.D.C. Aug. 31, 2022) (Gunn)** (Overruling *In re Parrish*, 275 B.R. 424 (Bankr. D.D.C. Mar. 4, 2002) (Teel), in a Chapter 13 case dismissed after confirmation, debtor's motion to require trustee to turn over funds that were disbursed to creditors after dismissal should ordinarily be granted based on *Harris v. Viegelahn*, 575 U.S. 510, 133 S. Ct. 1829, 191 L. Ed. 2d 783 (May 18, 2015), but here is denied because confirmation order provided for post-dismissal distribution to creditors "in accordance with" the confirmed plan and dismissal vacated plan but not confirmation order. Confirmation order provided, "' . . . funds received and deposited prior to midnight of the date of entry of a dismissal order shall be distributed in accordance with the terms of the confirmed plan . . . .'" On the date of entry of dismissal order trustee held $18,340.80, which was disbursed to unsecured creditors pursuant to the dismissal language in the confirmation order. "[T]he Bankruptcy Code contains no clear directive as to what a chapter 13 trustee shall do with funds received post-confirmation and held at the time of dismissal. . . . The Supreme Court addressed a similar, albeit slightly different issue in *Harris*. . . . The Supreme Court concluded that allowing a terminated chapter 13 trustee to distribute post-petition payments to creditors after conversion would be 'incompatible with [the] statutory design' . . . . [T]he dicta in *Harris* should be given 'considerable persuasive value' . . . . The courts that have opined on the issue presented herein post-*Harris* have held that the Bankruptcy Code requires funds on hand with a chapter 13 trustee at the time of a post-confirmation dismissal should be distributed to debtors absent 'cause' under § 349(b) for the court to order otherwise. . . . This Court agrees . . . . Post-petition payments and property held by the chapter 13 trustee upon dismissal of a post-confirmation case vest in the debtor under § 349(b)(3) and, absent an order under § 349(b) or otherwise, must be returned to the debtor by the trustee. . . . [T]he Confirmation Order in this case contained specific language that any funds on hand as of midnight the date of dismissal were to be distributed to creditors in accordance with the terms of the confirmed plan. . . . [T]he effect of dismissal is essentially to negate the chapter 13 plan . . . . [T]he confirmation order is separate and distinct from the chapter 13 plan itself. A chapter 13 confirmation order is not among or similar to the enumerated orders or judgments in § 349(b) that are vacated upon dismissal of a chapter 13 case. Nothing in the Bankruptcy Code vacates the terms of a final confirmation order upon the dismissal of the case. . . . [T]he Confirmation Order remained enforceable and binding post-dismissal, and the Confirmation Order required the Trustee to distributed [*sic*] funds on hand as of the date of dismissal in accordance with the confirmed plan.").

***In re Moore*, No. DK 21-02066, 2022 WL 585756, at *1–*2 (Bankr. W.D. Mich. Feb. 24, 2022) (Dales)** (At good-faith conversion from Chapter 13 to Chapter 7 before confirmation of a plan, when debtors' counsel has an allowed claim for fees, the "former" Chapter 13 trustee is directed to pay the funds on hand to debtors' attorney as agent for the debtors. Funds can then be paid to debtors' counsel by agreement of the debtors or as allowed under nonbankruptcy law. Section 1326(a)(2) does not authorize the former trustee to pay the allowed administrative expense of

debtors' counsel; it only allows the former trustee to deduct allowed administrative expenses from the funds on hand. "[T]he Debtors converted their case in good faith. This means that, under § 348(f), the post-petition property the chapter 13 trustee collected and is retaining under § 1326 is not included in the Debtors' chapter 7 estate. The court is unwilling to require application of non-estate property to the payment of an administrative expense, which is effectively the relief [debtors' counsel] requested . . . . [T]he text of the statute does not require a post-conversion trustee to *pay allowable* administrative claims, but only to *deduct* from the payment to the debtors any unpaid claims that have been 'allowed' as administrative claims. Strictly speaking, deducting is not equivalent to paying, and until a court rules on a request for allowance of an administrative expense . . . , such a claim is not 'allowed.' . . . [*Harris v. Viegelahn*, 575 U.S. 510, 135 S. Ct. 1829, 191 L. Ed. 2d 783 (May 18, 2015),] makes clear that in returning funds to the debtor under § 1326(a)(2) a former trustee is not to pay creditors. . . . The most we can say about § 1326(a)(2) is that it works better in cases that have not been converted to chapter 7, but that in cases of conversion, judicial direction may be required. . . . The solution that the court announced on the record—requiring the former chapter 13 trustee to remit the funds to [debtors' counsel] as the Debtors' agent to be held in his client trust account subject to further, consensual distribution under applicable non-bankruptcy law—will permit them to do so.").

***In re McCune*, No. 20-12326-j7, 2021 WL 5285773, at *3 (Bankr. D.N.M. Nov. 12, 2021) (Jacobvitz)** (At conversion from Chapter 13 to Chapter 7 before confirmation, funds held by trustee must be paid to debtors, but debtors' attorney can first be paid an allowed administrative expense for fees if there is an assignment authorizing disbursement to the attorney. If assignment is not part of original engagement agreement between debtors and counsel, a later assignment can be executed if the debtors also execute a certificate of voluntariness prescribed by the court. "An assignment by the debtor to the debtor's bankruptcy counsel of the debtor's right to payment of undisbursed funds from the chapter 13 trustee upon conversion to chapter 7 is consistent with [*Harris v. Viegelahn*, 575 U.S. 510, 135 S. Ct. 1829, 191 L. Ed. 2d 783 (May 18, 2015)], because it does not require the Court to give effect to any chapter 13 provision, or require the chapter 13 trustee to carry out a trustee 'service,' post-conversion. Rather, it simply authorizes and directs the chapter 13 trustee to honor the private agreement between the debtor's counsel and the debtor, who otherwise would be entitled to a return of the funds held by the chapter 13 trustee upon conversion.").

B. Unsolicited mortgage forbearance litigation; also, HUD silent liens?

***Harlow v. Wells Fargo & Co. (In re Harlow)*, No. 20-07028, 2022 WL 17586716 (Bankr. W.D. Va. Dec. 12, 2022) (Black)** (On remand from district court, in putative class action challenging unrequested mortgage forbearances by Wells Fargo in Chapter 13 cases: Claim that notices of forbearance violated Bankruptcy Rule 3022.1 survives motion to dismiss; claim that unrequested forbearances violated automatic stay survives motion to dismiss; claim that unrequested forbearances violated confirmation orders and were contemptuous survives motion to dismiss; claim that unrequested forbearances were an abuse of process survives motion to dismiss but claim of fraud on the bankruptcy court does not; veil-piercing claim against Wells Fargo Bank, N.A. does not survive motion to dismiss.), *on remand from* No. 7:22-cv-00267, 2022 WL 2231601

(W.D. Va. June 21, 2022) (Urbanski) (Putative class action alleging that Wells Fargo violated RICO by filing forbearance notices in approximately 1,000 pending Chapter 13 cases is dismissed because allegations failed the continuity requirement for a pattern of racketeering activity; claims with respect to violations of the automatic stay, violations of Bankruptcy Rule 3002.1 and violations of various other Bankruptcy Code provisions and rules are returned to the bankruptcy court for resolution.).

6. SOMETHING FOR DEBTORS

A. *Fulton* fallout

***Vasser v. Thomas Autobody & Repairs (In re Vasser)*, No. 22-01013-JDW, 2023 WL 1768367 (Bankr. N.D. Miss. Feb. 3, 2023) (Woodard)** (Chapter 13 debtor is entitled to turnover of car repossessed before the petition when title remains in the debtor, repossessing creditor has not sold the car or accepted the car in full satisfaction of its debt, the car is insured and the debtor has substantial equity in the car.).

***In re Rakestraw*, No. 22-40960-PWB, 2022 WL 4085881, at *1 (Bankr. N.D. Ga. Sept. 6, 2022) (Bonapfel)** (Car repossessed before the petition remains property of the Chapter 13 estate; car lender can retain possession without violating the automatic stay in § 362(a)(3)—consistent with *City of Chicago v. Fulton*, ___ U.S. ___, 141 S. Ct. 585, 208 L. Ed. 2d 384 (Jan. 14, 2021)—but car lender violated the stay in § 362(a)(4) when it sold the car postpetition to a captive entity after notice of the Chapter 13 case. "Debtor had a legal and equitable interest in the Vehicle as of the commencement of the case, even if it was repossessed the day before she filed bankruptcy. . . . Although a creditor's retention of a vehicle repossessed prepetition does not violate the provisions of the automatic stay in 11 U.S.C. § 362(a)(3), . . . the automatic stay in § 362(a)(4) prohibits the enforcement of a lien against property of the estate. Accordingly, the alleged postpetition sale of the Vehicle to enforce the lien violated the automatic stay.").

***In re Corder*, No. 21 B 10189, 2021 WL 6124234, at *2 (Bankr. N.D. Ill. Sept. 15, 2021) (Cleary)** (Turnover of car repossessed prepetition is mandatory under § 542 and *City of Chicago v. Fulton*, ___ U.S. ___, 141 S. Ct. 585, 208 L. Ed. 2d 384 (Jan. 14, 2021), when Chapter 13 debtor has provided for full payment of car lender's debt with interest through plan, debtor has casualty insurance and plan provides for adequate protection payments pending confirmation. "The Supreme Court has acknowledged that the question of 'how bankruptcy courts should go about enforcing creditors' separate obligation to "deliver" estate property to the trustee or debtor under § 542(a)' is not settled. . . . The obligation to turn over property under § 542 is mandatory . . . . The Altima provides a means for [debtor] to earn a living, transport her children and fund a chapter 13 plan, so Future Finance did not establish that it is of inconsequential value and benefit to the estate. As a result, section 542 requires turnover of the Altima.").

***Stuart v. City of Scottsdale (In re Stuart)*, 632 B.R. 531, 538–44 (B.A.P. 9th Cir. Nov. 10, 2021) (Faris, Lafferty, Spraker)** (Applying *City of Chicago v. Fulton*, ___ U.S. ___, 141 S. Ct. 585, 208 L. Ed. 2d 384 (Jan. 14, 2021), and explaining that *Fulton* overruled *Best Service Co. v. Bayley (In re*

Bayley), 678 F. App'x 593 (9th Cir. Feb. 27, 2017) (not for publication) (Nelson, Tallman, Smith), City did not violate § 362(a)(3) or any other provision of § 362(a) when it refused to immediately release its prepetition garnishment of funds in an account at BOA; City instead asked the state court to stay the garnishment proceeding and City did not oppose efforts by debtor and BOA to release the garnished funds. "Prior to *Fulton*, this circuit interpreted § 362(a)(3) to require the creditor to take affirmative steps to turn over property of the estate, even if it is held by a third party. . . . *Fulton* overruled . . . *Bayley*. . . . *Fulton* dictates that the City had no affirmative duty to ensure the return of estate property to Mr. Stuart. . . . [T]he City did not violate any other subsection of § 362(a). . . . Leaving the action and the garnishment in place did not disturb the status quo. . . . The City fulfilled its duty by taking prompt steps to stay the case. . . . The failure to affirmatively release the frozen bank account funds . . . is not a violation of § 362(a)(1). . . . On the petition date, the City had already obtained the writ of garnishment, and BOA had frozen the three bank accounts. There was no further 'act to obtain possession.' The City's acts (or omissions) merely preserved the status quo. . . . The City did not take any act to 'collect, assess, or recover' a claim against Mr. Stuart, because everything was stayed. Further, it stated multiple times that it did not oppose the release of the frozen funds. . . . Because the City immediately asked the state court to stay the case and did nothing to change the status quo that existed when Mr. Stuart filed his bankruptcy petition, it did not violate the automatic stay.").

***Kipps v. Stincavage-Kipps (In re Kipps)*, No. 5:19-00064-MJC, 2022 WL 997795 (Bankr. M.D. Pa. Apr. 1, 2022) (Conway)** (Citing *City of Chicago, Illinois v. Fulton*, ___ U.S. ___, 141 S. Ct. 585, 208 L. Ed. 2d 384 (Jan. 14, 2021), former spouse did not violate automatic stay by refusing to act with respect to prepetition levy on Chapter 13 debtor's bank account; former spouse could maintain the status quo by doing nothing and was under no obligation to release the prepetition levy. State court had concurrent jurisdiction to determine whether automatic stay applied to prepetition judgment that required debtor to execute deeds transferring ownership of real property to former spouse. State court correctly determined that directing court clerk to execute deeds that debtor refused to sign was a ministerial act that was not subject to the stay. Criminal contempt proceeding by state domestic relations court that resulted in money judgment against Chapter 13 debtor did not violate automatic stay.).

B. Fixing Judicial estoppel

***Stanley v. FCA US, LLC*, 51 F.4th 215 (6th Cir. Oct. 18, 2022) (McKeague, Thapar, Readler)** (Perversely, after confirmation of 100% plan that could not be modified to pay less than 100% of allowed claims, Chapter 13 debtor is judicially estopped to maintain postpetition FMLA action based on "possibility" that nondisclosure gained some advantage for the debtor. Good-faith evidence was considered too weak because debtor amended schedules to reveal the action after being questioned about bankruptcy at a deposition.), *aff'g* No. 3:19 CV 640, 2021 WL 5760546 (N.D. Ohio Dec. 3, 2021) (Knepp) (Judicial estoppel bars Chapter 13 debtor's wrongful termination lawsuit notwithstanding confirmation of 100% plan. In Sixth Circuit presumption of bad motive arises and shifts burden to debtor to prove lack of bad faith even in 100% payment cases. Factors bearing against debtor included a delay of three months in amendment of

schedules after omission was raised by former employer and lack of detail in amended schedules.).

***McKinley v. Everest Receivable Servs., Inc.*, No. 19-CV-1289S, 2022 WL 446407, at *8–*9 (W.D.N.Y. Feb. 14, 2022) (Skretny)** (Chapter 13 debtors' FDCPA complaint is dismissed on the merits but not because of judicial estoppel. Debtors amended schedules to disclose postpetition FDCPA claim after motion for summary judgment by creditor but while the Chapter 13 case was still open. District court notes that debtors had obligation to reveal the asset as a changed circumstance in the Chapter 13 case, but neither the Code nor Rules fix a particular time by which a new asset must be added to the schedules. There was no evidence of hiding assets or other misconduct by the debtors. "While courts note a debtor's continuing obligation to amend her schedule of assets and her duty to prepare schedules completely and accurately, . . . the Bankruptcy Code, Rules, and cases do not state when the debtor must update her schedule as circumstances change. . . . Plaintiffs fulfilled their duty to update the Bankruptcy Court (albeit belatedly) of their assets by filing the amended schedules listing this case as an asset . . . . They can amend their schedule at any time before their bankruptcy is closed . . . . Ideally, they should have amended their schedules upon filing this action but there is no deadline for amending schedules. With the bankruptcy still open and the confirmed plan in operation, Plaintiffs' belated filing is not inconsistent with omitting the claim and implying the absence of the claim.").

***McAdams v. Nationstar Mortg. LLC*, No. 3:20-cv-2202-L-BLM, 2022 WL 3691653 (S.D. Cal. Aug. 25, 2022) (Lorenz)** (District court declines to invoke judicial estoppel to bar Chapter 13 debtor's action against Nationstar under the California Homeowners Bill of Rights and other theories when action arose approximately five years after confirmation and debtor believed the vesting of property in debtor at confirmation relieved debtor of obligation to amend schedules to reveal the postconfirmation action against Nationstar. Also, it was not clear how Nationstar was disadvantaged by the debtor's failure to reveal the postconfirmation action to the bankruptcy court.).

***Harris v. Anthem Cos.*, No. 1:22-cv-00002-JMS-MJD, 2022 WL 17488516, at *7 (S.D. Ind. Dec. 7, 2022) (Magnus-Stinson)** (Chapter 13 debtor—named plaintiff in a putative class action against The Anthem Companies for violations of the Fair Labor Standards Act and various state wage and hours laws—is granted a stay of proceedings in the district court to permit the debtor to amend bankruptcy schedules to account for claims against Anthem. Debtor acknowledged that lawsuit can only be maintained on behalf of the Chapter 13 estate and not for the benefit of the debtor personally. Chapter 13 petition was filed in 2019 and employment complaint was filed in 2022. District court reserves judgment on Anthem's judicial estoppel argument until after the bankruptcy court determines whether the Chapter 13 schedules can be amended, the effect of any amendment on the district court action and whether that interaction is fully accounted for in the Chapter 13 case. "[T]he Seventh Circuit has made clear that '[j]udicial estoppel is an equitable doctrine, and it is not equitable to employ it to injure creditors who are themselves victims of the debtor's deceit.' . . . [T]he Court in its discretion finds that a stay of this litigation is appropriate to provide Ms. Harris an opportunity to amend her bankruptcy filings. . . . [T]he Court will reserve ruling on Anthem's Motion for Judgment on the Pleadings until after the stay is lifted,

to ensure that all of the impacts of the bankruptcy proceeding on this lawsuit are properly accounted for.").

***Boneta v. American Med. Sys., Inc.*, No. 20-CV-60409-RUIZ/STRAUSS, 2021 WL 4876121 (S.D. Fla. Oct. 11, 2021) (Strauss)** (Judicial estoppel does not bar Chapter 13 debtor's unscheduled postpetition pelvic mesh action because, applying Florida judicial estoppel principles, there is no mutuality between the debtor and the defendant hospital and the defendant has not demonstrated any prejudice or unfair advantage from the nondisclosure.).

C. Bad trend: state courts and dischargeability of torts and DSOs

***In re Carmichael*, No. 22-30282-KKS, 2022 WL 17490525 (Bankr. N.D. Fla. Dec. 7, 2022) (Specie)** (Stay relief is granted to allow state court plaintiffs in a faulty construction lawsuit to continue to trial and judgment against Chapter 13 debtor to liquidate claims; oddly, bankruptcy court "requests" that state court make findings with respect to the elements of nondischargeability under § 523(a)(2), (a)(4) and (a)(6). No discussion whether § 523(a)(6) applies in this Chapter 13 case.).

***In re Rose*, No. 21-10094, 2022 WL 107333 (Bankr. D. Kan. Jan. 10, 2022) (Herren)** (Declining to determine whether hold-harmless provision in five-year-old divorce decree was a domestic support obligation, bankruptcy court instead grants stay relief to allow former spouse to return to state court to seek modification of the divorce decree to reflect that debtor breached obligation to hold former spouse harmless. State court can also determine whether it intended to create a lien on debtor's retirement account or homestead property to secure the hold-harmless obligation. Court states that the dischargeability and priority questions are "premature" until the state court determines whether the divorce decree should be modified.).

D. Absolute right to dismiss: death penalty and § 349; discharge v. dismissal when debtor is bad actor

***TICO Constr. Co. v. Van Meter (In re Powell)*, 644 B.R. 181, 184–86 (B.A.P. 9th Cir. Oct. 21, 2022) (Faris, Lafferty, Brand)** (Addressing competing motions—one by the debtor to voluntarily dismiss the Chapter 13 case and one by a creditor to convert the case to Chapter 7—that the debtor may be ineligible for Chapter 13 relief is not an exception to the debtor's absolute right to dismiss under § 1307(b). Citing *Nichols v. Marana Stockyard & Livestock Market, Inc. (In re Nichols*), 10 F.4th 956 (9th Cir. Sept. 1, 2021) (O'Scannlain, Paez, Bennett), "*Nichols* makes clear that a chapter 13 debtor's absolute right to dismiss the case is subject only to the limitation set forth in § 1307(b); the statute does not limit that right based on chapter 13 eligibility. . . . TICO argues that the bankruptcy court should not have allowed Mr. Powell to voluntarily dismiss his chapter 13 case because he exceeded the unsecured debt limit and was not eligible to be a chapter 13 debtor . . . . TICO contends that the court should have treated Mr. Powell as a chapter 7 debtor and considered the best interests of the estate and creditors before it dismissed his case. If accepted, TICO's arguments would create a new limitation, not found in § 1307(b), on

the debtor's absolute right to dismiss a chapter 13 case. This is exactly what [*Law v. Siegel*, 571 U.S. 415, 134 S. Ct. 1188, 188 L. Ed. 2d 146 (2014),] forbids.").

***In re Sugar*, No. 19-04279-5-DMW, 2023 WL 1931078, at *3–*11 (Bankr. E.D.N.C. Feb. 10, 2023) (Warren)** (Chapter 13 case is dismissed for bad faith with five-year bar to refiling when debtor sold appreciated real property without court approval, kept proceeds in excess of exemption and tendered payoff of plan in 34th month in effort to preclude trustee's motion to modify to increase payments to unsecured creditors. In 2019 debtor valued real property at $150,000 and claimed equity exempt in the amount of $32,348.81. Confirmation order stated that the debtor could not transfer property without prior approval of bankruptcy court. In June 2022 debtor moved to sell property for $222,000 after bankruptcy administrator learned that debtor was planning sale. Debtor sold property without court approval and then withdrew motion to sell. Trustee moved to modify plan to capture net sale proceeds of $94,408.10. Three-year applicable commitment period applied without regard to whether trustee or an allowed unsecured creditor objected to confirmation. Accordingly, the debtor could not tender payoff of plan in 34th month to avoid trustee's motion to modify. Debtor was not entitled to discharge even if tender of amount due in 34th month was completion of payments because debtor acted in bad faith by selling appreciated property without court approval. Vesting of property in debtor at confirmation did not convert dollar amount exemption into an exemption of entire property. Nonexempt portion of sale proceeds remained property of Chapter 13 estate subject to trustee's motion to modify. Debtor acted in bad faith by attempting to defeat trustee's claims by tendering payment of balance of plan. Proper remedy was dismissal with prejudice to refiling for five years. "Despite the limiting language of § 1325(b)(4) . . . , it would be nonsensical for the applicable commitment period to apply only in cases in which an objection to confirmation is lodged. The court is aware that some courts disagree . . . . [A]n objection at confirmation is not a prerequisite to a debtor having a mandatory applicable commitment period. . . . The Debtor was not yet entitled to a discharge under § 1328 when she paid the balance of the Plan Base, because she made the payment prior to completion of her applicable commitment period and thus had not yet completed the term of the Plan. . . . [M]odification of the Plan or conversion or dismissal of the Debtor's case is permissible and does not violate § 1328. . . . Even if the Debtor were considered to have completed payments under the Plan when she paid the balance of the Plan Base, the court should not be precluded from ruling on the Motion [to modify, and/or motion to convert or dismiss] in light of the Debtor's behavior. . . . Even though the Debtor apparently had no non-exempt equity in the Property based on the value of the Property at confirmation, confirmation did not somehow recharacterize the entire Property as exempt . . . . [T]he Debtor failed to abide by [local rules and orders] . . . which prohibited the transfer of real property except as provided in the Local Rule. . . . Debtor may have been seeking to avoid a court order protecting a portion of the Sale Proceeds until the Trustee had an opportunity to consider modification of the Plan. . . . The Debtor's behavior is indicative of bad faith and an unwillingness to abide by the restrictions that accompany the benefits of a Chapter 13 reorganization. . . . [S]he could have dismissed her case at any time. Instead, she sought to pay the Plan Base early, reap the benefits of a discharge and skirt the rules of this court. . . . [T]he court finds cause to dismiss this case with prejudice to the Debtor filing a subsequent petition for a period of five years. . . . [T]he Debtor

had no objectively reasonable basis to think that the sale of the Property without court approval and without complying with the Local Rule was appropriate.").

***In re Reppert*, 643 B.R. 828, 836–48 (Bankr. W.D. Pa. Sept. 30, 2022) (Taddonio)** (Completion of payments does not bar sua sponte dismissal with prejudice to refiling for two years when Chapter 13 debtor failed to disclose receipt of postpetition "gift" of unencumbered BMW and failed to list unsecured creditors in matrix or schedules. Dismissal avoids absurd result that debtor could engineer discharge by disclosure of bad faith after completion of payments but before entry of discharge. Postpetition gift of expensive unencumbered automobile became property of the Chapter 13 estate and creditors were substantially prejudiced by nondisclosure. Tender of final payment was untimely and court exercises discretion under *In re Klaas*, 858 F.3d 820 (3d Cir. June 1, 2017) (Fisher, Vanaskie, Krause), to decline to allow debtor to complete payments when to do so would severely prejudice creditors by allowing debtor to benefit from bad faith during Chapter 13 case. "[T]he Court is aware of several cases which hold that a court loses discretion to dismiss a case for bad faith and must enter a discharge after the completion of plan payments. Ultimately, the Court disagrees because these courts underestimate the magnitude of absurd results wrought by a too literal interpretation. . . . There are four published decisions that expressly hold that a motion to dismiss for bad faith is rendered moot by the completion of payments under a confirmed chapter 13 plan. . . . [T]he Court concedes that section 1328(a) plainly commands the entry of a discharge as soon as is practicable after a debtor's completion of payments under the plan. . . . [A] general preference for 'finality' seems a weak reason to reward bad faith debtors with a discharge . . . . Congress made manifest its intent to curtail abusive filings and limit bankruptcy relief to the 'honest but unfortunate debtor.' That is the lens through which the Court must assess the rationality of a literal interpretation of section 1328(a) under these circumstances. . . . [W]hile it may be reasonable for Congress to insist that known fraud or misconduct be addressed prior to the discharge or not at all, treating the completion of payments as the final buzzer signaling an abrupt default victory for a bad faith debtor is plainly an unfair and irrational outcome. . . . The 'opportunity for mischief,' as apparently downplayed by [*In re Frank*, 638 B.R. 463 (Bankr. D. Colo. Mar. 30, 2022) (Brown)], actually empowers a dishonest debtor to immunize their discharge by disclosing misconduct prior to its entry. A well-timed confession means that the trustee or a party in interest could neither block entry of the discharge by moving for dismissal, nor later seek its revocation because knowledge of the fraud came too early. Section 1328(e)(2) would be rendered a nullity. . . . [T]his result would not only condone the avowed misconduct, but finalize the manipulation by rewarding the bad faith debtor with an undeserved discharge on the cheap. It is inconceivable that Congress . . . would countenance an interpretation of the Code that regularly discharges the deceitful but strategically unscrupulous debtor. . . . [T]he Court holds that section 1328(a) does not bar dismissal under section 1307(c) once plan payments have been completed. . . . Alternatively, . . . [i]n *In re Klaas*, the Third Circuit affirmed this Court's conclusion that 'bankruptcy courts have discretion to grant a brief grace period and discharge debtors who cure an arrearage in their payment plan shortly after the expiration of the plan term.' . . . [T]he equities do not militate in favor of granting a grace period. . . . [A] debtor's responsibility to disclose assets does not end at plan confirmation. Nor is that continuing duty an empty gesture or mere procedural technicality. . . . [T]he idea that a luxury vehicle was purchased for the use of

a 14-year-old who cannot drive is inherently suspect. . . . [T]he Debtor did not carry her burden to demonstrate that her interest in the BMW was solely legal and not equitable. . . . [A]ny general unsecured claims would have been entitled to a pro rata share of the BMW's value. . . . Thus, the failure to disclose the BMW was at least theoretically prejudicial. . . . [I]t is undisputed that no unsecured creditors were given notice or an opportunity to file proofs of clam [*sic*] since none were listed on the creditor's matrix. . . . [T]here is ample cause to dismiss this case for bad faith under section 1307(c). But dismissal alone is not an adequate remedy in this case because the concealment of a substantial unencumbered asset warrants a consequence befitting the gravity of the issue . . . . To that end, section 349(a) permits the Court to dismiss a case with prejudice to the filing of a subsequent petition. . . . [T]he Court will impose a two-year filing bar on future bankruptcy filings.").

***In re Frank*, 638 B.R. 463, 465–71 (Bankr. D. Colo. Mar. 30, 2022) (Brown)** (Trustee's motion to dismiss for bad faith is denied and debtors are entitled to discharge when debtors failed to reveal a prepetition car accident and trustee found out about $67,000 in settlement proceeds a month before debtors tendered last payment under confirmed plan. Section § 1328(a) requires entry of discharge without regard to probable bad faith by debtors and § 1328(e) is not applicable to revoke that discharge because trustee learned of misconduct before entry of discharge. "Debtors did not list a potential claim related to the car accident and they did not disclose the accident to the Trustee . . . . [T]he plan paid nothing to . . . unsecured creditors. . . . [T]he plan made no mention of the wife's personal injury claim. . . . [T]he Debtors disclosed to the Trustee—for the first time, and perhaps inadvertently—that they had received $67,000 in proceeds from the settlement of the personal injury claim . . . . *[A]fter* the Debtors made their final plan payment earlier in the month, the Trustee filed a motion to dismiss due to the Debtors non-disclosure of this asset. . . . It is well established that a debtor's failure to fully disclose assets is a sufficient ground for 'cause' to dismiss despite the lack of any express statutory reference. . . . [Section] 1307 does not impose any time deadline on the filing of a dismissal motion. . . . Section 1330 revokes the confirmation order if the fraud is discovered within six months after the confirmation order. And § 1328(e) revokes the discharge order but only if the fraud is discovered within a window of time that begins with the entry of discharge and ends by the one-year anniversary of the discharge. As illustrated by the present case, the combination of these two revocation statutes leaves a pretty wide loophole for the dishonest debtor. If the chapter 13 trustee or other interested party learns of a debtor's fraud during the gap that is more than six months after the confirmation order but before the entry of the discharge order . . . , then neither form of revocation is possible. . . . Whether or not this gap was intentional, these two statures signal that Congress has determined that, after a certain period of time, the principle of finality must outweigh the policy of rooting out abusers of the bankruptcy system. . . . [T]his Court finds that it cannot ignore the clear mandate laid out in § 1328(a). . . . [W]hat the Debtors did was wrong and . . . the Trustee acted diligently as soon as he discovered the true facts. . . . Sections 1330(a) and 1328(e) demonstrate that a party may seek revocation based on the debtor's fraud, but only if the requesting party acts within the narrow time periods permitted.").

E. Latest student loan trick: separate classification for long-term treatment under § 1322(b)(5)

***In re Durand-Day*, No. 22-40089-MXM-13, 2022 WL 14938726, at *3 (Bankr. N.D. Tex. Oct. 26, 2022) (Mullin)** (Over trustee's objection, not unfair discrimination for § 1322(b)(1) purposes that plan separately classifies student loan for continuing contract payments under § 1322(b)(5) notwithstanding that other unsecured claims will be paid in full during the applicable commitment period. "The Trustee contends that the separate classification of the Student Loan Creditors discriminates *unfairly* against the Student Loan Creditors because—unlike the General Unsecured Creditors—the Student Loan Creditors are not being paid their claims in full during the Commitment Period in the Amended Plans. . . . [B]y separately classifying and providing the Student Loan Creditors with the very treatment specifically authorized in § 1322(b)(5), the Amended Plans' treatment of the Student Loan Creditors constitutes fair discrimination. . . . [E]ven though the Debtors have additional monthly disposable income available to make larger monthly payments to their Student Loan Creditors during the Commitment Period in the Amended Plans, the Trustee cannot demand that the Debtors devote all of their projected disposable income each month to pay off claims in full more quickly. . . . [Section] 1322(b)(5) allows the Debtors to maintain their contractual payment obligations directly to the Student Loan Creditors during the Commitment Period *and* for the periods that extend beyond the Commitment Period in the Amended Plans.").

F. Strange § 523(a)(6) issues: deadline for complaints; applicability in full-payment cases; "personal injury" means what?; no payments during chapter 13 case; § 523(a)(6) trap at full payment discharge under § 1328(a)?

***Medeiros v. Firth (In re Firth)*, No. 21-10022-ELG, 2023 WL 162140 (Bankr. D.D.C. Jan. 11, 2023) (Gunn)** (Bankruptcy Rule 1019 protects creditor with claim of nondischargeability under § 523(a)(6) when case was converted from Chapter 7 to Chapter 13 and debtor has not requested a hardship discharge under § 1328(b). Rule 1019 should be construed to allow the creditor a new time period in which to refile or amend its nondischargeability complaint in the event the debtor seeks a hardship discharge. The timely filing of the creditor's § 523(a)(6) complaint before conversion to Chapter 13 should not be interpreted to prejudice the creditor in the event of reconversion.).

***Winters v. Metric Roofing Inc.*, No. CV-21-00515-TUC-JGZ, 2022 WL 2751647, at *1–*4 (D. Ariz. July 14, 2022) (Zipps)** (Stipulation that state court judgment against Chapter 13 debtor would be nondischargeable "under 11 U.S.C. § 523(a)(6)" did not prevent discharge of judgment when debtor completed payments under confirmed plan and received discharge under § 1328(a); bankruptcy court should not have rewritten stipulation to save creditor's counsel from not knowing that § 523(a)(6) was not applicable at full-payment discharge in a Chapter 13 case. "The Order confirming the Plan . . . stated that Metric's Civil Judgment was 'excepted from discharge *pursuant to 11 U.S.C. § 523(a)(6)* . . . .' [C]ounsel did not understand that the § 523(a)(6) debts could be discharged in the Chapter 13 case. . . . Metric suggested that Debtors' counsel was at fault for this misunderstanding . . . . [C]ounsel for Metric acknowledged that it should have

known that the debt would be partially dischargeable under § 523(a)(6) in a Chapter 13 proceeding; however counsel also suggested that Debtors' counsel was 'clearly potentially hiding the ball in some degree.' . . . The bankruptcy court faulted Debtors' counsel for not explicitly stating its 'secret intent' to have the debt discharged upon completion of Plan payments, concluding Debtors' counsel had an ethical duty to advise Metric's counsel of the effect of the stipulation. . . . The stipulation's language is plain and unambiguous. . . . Metric's counsel's lack of understanding of the full significance of designating the debt nondischargeable under § 523(a)(6), does not . . . create an ambiguity . . . . [C]ounsel is charged with knowing the law and therefore knowing that the agreement to discharge the debt pursuant to § 523(a)(6) meant that the claim could be discharged under § 1328's super discharge provision if the conditions of that section were satisfied. . . . [T]he court re-wrote the terms of the parties' agreement to provide a waiver of the super discharge. There is no language in the four corners of the agreement which supports the conclusion that the parties intended to waive the application of the § 1328 super discharge.").

***Medeiros v. Firth (In re Firth)*, No. 21-10022-ELG, 2023 WL 162140, at *4 (Bankr. D.D.C. Jan. 11, 2023) (Gunn)** (Adopting majority view of "personal injury" in § 1328(a)(4)—that personal injury "includes torts involving both bodily and reputational harm"—judgment for conspiracy to commit malicious prosecution can be the basis for nondischargeability in a Chapter 13 case under § 1328(a)(4). Section 523(a)(6) is not an exception to dischargeability in a Chapter 13 case in which the debtor has not requested a hardship discharge under § 1328(b).).

***Camp Inn Lodge, LLC v. Kirvan (In re Kirvan)*, No. 21-1250, 2021 WL 4963363, at *4 n.3 (6th Cir. Oct. 26, 2021) (Gilman, Thapar, Nalbandian)** (Bankruptcy court committed no error in its findings that Chapter 13 debtor embezzled more than $50,000 by diverting cash receipts from restaurant/motel business and committed willful and malicious injury—rendering the debt nondischargeable under § 523(a)(4) and (a)(6). In a footnote: "No one contests that the exception for willful or malicious injury to another, including monetary injury, applies to Kirvan under Chapter 13. *See* 11 U.S.C. §§ 1328(c)(2), 523(a)(6). So we do not consider any limitation on nondischargeability that might be raised based on § 1328(a)(4)."), *aff'g* No. 20-CV-12491, 2021 WL 650947 (E.D. Mich. Feb. 19, 2021) (Ludington) (Bankruptcy court committed no error in its determination that debtor embezzled $55,857 and that treble damages of $167,542 were nondischargeable under § 523(a)(4) and § 523(a)(6). No discussion that § 523(a)(6) only applies at hardship discharge in a Chapter 13 case.), *aff'g* No. 17-2120-dob, 2020 WL 4873571 (Bankr. E.D. Mich. Aug. 19, 2020) (Opperman) (By embezzlement or larceny, Chapter 13 debtor took $55,000 from business and treble that amount is nondischargeable under § 523(a)(4) and § 523(a)(6). No discussion of § 1328(a)(4) and no discussion whether § 523(a)(6) applies in what seems to be a Chapter 13 case.).

***Richardson v. Douglass (In re Douglass)*, No. 21-01097-PDR, 2021 WL 5071995 (Bankr. S.D. Fla. Nov. 1, 2021) (Russin)** (Section 523(a)(6) complaint against Chapter 13 debtor/attorney for mismanagement of a lawsuit fails because debtor has not sought a hardship discharge and § 523(a)(6) is not applicable.).

7. SOMETHING FOR ALL CREDITORS

A. Stay violations and § 362(k) overreach

***Defeo v. Winyah Surgical Specialists, P.A. (In re Defeo)*, 644 B.R. 323, 331 (D.S.C. Aug. 25, 2022) (Lydon)** (Bankruptcy court committed no error when it assessed $10,000 sanction under Bankruptcy Rule 9011 on Chapter 13 debtor's counsel for "exaggerated, extreme, and inflammatory" allegations with respect to violations of the automatic stay when counsel undertook no investigation and displayed a pattern of unreasonable allegations in stay litigation in Chapter 13 cases in the district. District court added $3,000 sanction for frivolous appeal.), *aff'g* 632 B.R. 44, 56-60 (Bankr. D.S.C. Sept. 27, 2021) (Waites) (Creditor awarded $10,000 as sanction under Bankruptcy Rule 9011(b)(3) when Chapter 13 debtor's counsel filed complaint seeking $50,000 in damages for violation of the stay based on a single "mildly worded" collection letter sent by mistake. Counsel failed to adequately investigate before filing the complaint, made allegations of egregious misconduct that were not supported by facts, failed to correct or withdraw offending allegations when offered the opportunity and failed to contact opposing counsel or the creditor before filing the complaint. "The Complaint alleges as facts that Defendant engaged in 'overly aggressive, devious, deceptive, manipulative, oppressive, abusive and illegal collection,' but the information available to Debtor's Counsel prior to filing the Complaint showed only that Defendant mailed one letter to Debtor after receiving actual notice of the bankruptcy case. It further alleges that Defendant's mailing of the invoice was 'done with the *express* intent to annoy, threaten, cause harm, abuse, intimidate or harass [Debtor].' Considering the mild language of the invoice, the absence of other contact by Defendant, and absence of any evidence of malevolent intent of Defendant, Debtor's Counsel's inclusion of this allegation goes beyond aggressive advocacy or hyperbole—it is frankly disingenuous. . . . While there is no express or implied requirement in 11 U.S.C. § 362(k) to contact a defendant in advance of filing a Complaint asserting a § 362(k) claim, Debtor's Counsel's obligations under Rule 9011 to conduct a reasonable investigation of the factual allegations in a complaint may in some circumstances require such contact to ensure that counsel has sufficient evidentiary support to include those allegations where such evidence is not otherwise available. . . . There are multiple, deliberate factual allegations included in the Complaint for which Debtor's Counsel had no factual basis to allege. . . . Debtor's Counsel have filed multiple similar lawsuits in this Court . . . . [T]he inclusion of the Disputed Allegations and demand for $50,000 in actual and punitive damages . . . placed Defendant at a high risk and heavily contributed to its commitment of significant attorney time and costs to its defense. . . . [A] sanction of the reasonable attorney's fees incurred by Defendant directly and unavoidably as a result of the Rule 11 violation is appropriate to deter Debtor's Counsel from future similar misconduct.").

B. *Barton* evaporation: make the trustee dance

***In re Bednar*, No. 19-14021-SAH, 2021 WL 4483473, at *4–*8 (Bankr. W.D. Okla. Sept. 30, 2021) (Hall)** (On remand from BAP, applying Ninth Circuit *Barton* analysis, judgment creditors are granted leave to garnish funds held by trustee at dismissal of Chapter 13 case by proceeding in state court—subject to stipulation that no party seeks to hold the trustee personally liable for

any conduct or misconduct. "The BAP has already determined the Funds and Trustee, as the holder of the Funds, are subject to garnishment proceedings. Thus, on remand the only matter left for this Court is not *if*, but *where*, Oklahoma County and J Bednar can pursue their garnishment claims against Trustee. . . . The claims raised by Oklahoma County and J Bednar do not attack or question Trustee's actions in administering the estate. Rather, the only issue is who should receive the Funds, with Trustee having no dog in that particular fight. . . . Trustee concedes, and this Court agrees, the administrative burden of answering garnishment summonses from Oklahoma County and J Bednar is not great. . . . Trustee was invited to present evidence to quantify these claimed burdens at an evidentiary hearing but declined to do so. . . . [T]his Court has little choice but to view the claims of administrative burden as being speculative and unsupported by any evidence. . . . The Oklahoma County District Court, rather than this Court, has the expertise to handle the issues arising in garnishment proceedings . . . . Oklahoma County and J Bednar are granted leave under the *Barton* doctrine to file garnishment actions against Trustee in the Oklahoma County District Court to obtain the Funds. Provided, however, . . . Trustee shall not be subject to any personal liability relating to any garnishment proceeding seeking to recover the Funds. Further, this decision should not be viewed as a green light for creditors to seek leave under the *Barton* doctrine to pursue garnishment of funds remaining in Trustee's hands upon pre-confirmation dismissal of a chapter 13 case. The Court's determination is based specifically on the compelling circumstances set forth herein and the absence of evidence of the burdens Trustee will suffer as a result thereof."), *on remand from* No. WO-20-041, 2021 WL 1625399, at *4–*10 (B.A.P. 10th Cir. Apr. 27, 2021) (not for publication) (Romero, Somers, Parker) (At dismissal before confirmation, § 1326(a)(2) does not categorically preclude garnishment of funds held by the trustee. *Barton* doctrine applies to garnishment of funds at dismissal. Garnishing creditor must ask the bankruptcy court for permission to garnish. Bankruptcy court must analyze Barton doctrine factors and determine whether bankruptcy court or some other forum is best positioned to determine conflicting claims to money held by the trustee at dismissal. Administrative inconvenience to the trustee is not alone sufficient to decide that issue. "Because the *Barton* doctrine is focused on protecting the receiver from impediments to administration, as well as ensuring equality among competing claimants, the Tenth Circuit applies the *Barton* doctrine to bankruptcy trustees . . . . [T]he *Barton* doctrine continues to apply after dismissal of a bankruptcy case . . . . [T]he proposed garnishment directly implicates the Trustee's fiduciary duties to Bednar with respect to property that was formerly part of the estate. The garnishment would also affect the Trustee's final administration of the estate by determining to whom the residual funds should be paid. . . . Importantly, however, this holding speaks only to whether pre-suit leave is required, not whether such leave should or should not be granted. . . . [A] bankruptcy court's exercise of discretion on a Barton question is much broader in scope and encompasses much wider factors than potential inconvenience or burden to the Trustee. . . . [T]here is a split of authority in the application of § 1326(a)(2). Some courts apply a plain meaning analysis to conclude § 1326(a)(2) and § 349(b)(3) unambiguously require the return of all plan payments to the debtor following pre-confirmation dismissal. Other courts find ambiguity in § 1326(a)(2) within the context of § 349(b)(3), and instead focus on the technical functionality of the competing Code provisions. . . . Because of the termination of the automatic stay and the non-existence of the prior bankruptcy estate upon entry of a dismissal order, the Trustee is effectively no longer

operating as court-appointed fiduciary. . . . Instead, the legal relationship between the debtor and a trustee following dismissal is akin to a traditional bailment. . . . [A] similarly situated custodian, such as a bank, is not excused from complying with a levy or garnishment . . . . The Panel sees no reason why a different rule should apply to trustees merely because they were formerly an estate representative and the property used to be in custodia legis through an estate which no longer exists.").

8. SLEEPING MONSTERS THREATENING EVERYONE

A. Cases coming up short: whose problem? whose solution?

***In re Saker*, No. 16-01046, 2022 WL 867170, at *4 (Bankr. D. Haw. Mar. 22, 2022) (Faris)** (When Chapter 13 debtor completed payments under plan but payments made were insufficient to pay "must pay" administrative and arrearage claims, trustee's motion to dismiss is denied because the professionals involved in the case should have caught the underfunding and made appropriate corrections. Debtor's former counsel is ordered to disgorge a portion of fees to cover the shortfall. "Mr. Saker has done everything that his plan requires. Some of the professionals in this case are more to blame than him for the fact that about $2,700.00 of his nondischargeable federal taxes have not been paid. Dismissal of the case would deprive Mr. Saker of a discharge of his *other* debts, even though Mr. Saker has paid his plan in full. Holding that the feasibility problem justifies dismissal of this case would require Mr. Saker to pay, not just the $2,700.00 of taxes, but also the trustee's fee on that amount, as a condition to receiving a discharge of his other debts. Requiring Mr. Saker to pay the percentage fee would be unfair considering that the bankruptcy system has partly failed him.").

***In re Carter*, 638 B.R. 379, 384–402 (Bankr. N.D. Ill. Mar. 30, 2022) (Barnes)** (Trustee's motion to dismiss in 56th month of Chapter 13 plan based on debtor's failure to turn over tax refunds is denied based on laches; trustee failed to enforce tax refund turnover provision in confirmed plan—perhaps because the debtor lived on Social Security and received a tax refund only because of Earned Income and Child Tax Credits—until it became impossible for the debtor to perform. Exercising equitable remedy under Federal Rule of Civil Procedure 60(b)(5) and allowing modification to excuse nonperformance of the tax turnover provision, appropriate remedy is to vacate the confirmation order to the extent it requires further performance by the debtor and to grant the debtor a discharge. "Both the debtor's defense to the trustee's motion and the debtor's motion addresses [*sic*] the understandable confusion that arises when a chapter 13 trustee neglects over an extended period of time to act in a way consistent with a debtor's plan obligations. . . . [T]he Debtor was required to turn over to the Trustee a copy of the Debtor's 2017 tax return and all of his tax refund for 2017 . . . . The Debtor failed to do either . . . . [T]he Debtor had received a refund of $7,259.00. The Debtor alleges that the entirety of the tax refund was tax credits (the earned income and child tax credits). . . . [T]he Trustee withdrew the First Motion to Dismiss. . . . The following year, the Debtor again failed to satisfy the Tax Turnover commitment . . . . [T]he Trustee therefore moved to dismiss . . . . The Debtor alleges that the entirety of the tax refund was tax credits . . . . [T]he Trustee withdrew the Second Motion to Dismiss. . . . [I]n 2021, the Trustee again brings a motion to dismiss . . . . [I]t was filed in the 56th

month of the Plan. It alleges a payment default of $15,800.58 . . . . The Debtor here argues that the Trustee's enforcement of the Tax Turnover commitment in this case has been inequitable. . . . [T]he Trustee withdrew the motion to dismiss upon receiving the tax return, even though the return indicated a refund to the Debtor that would arguably have been due to the Trustee under the Tax Turnover commitment. . . . The Debtor . . . argues that he was lulled into believing that the Tax Turnover provision required tax returns only, not returns and refunds. . . . The Trustee . . . asserts that the Debtor must correct the alleged underpayments or lose his chance at a discharge . . . . Her only explanation for her actions and inactions in the Debtor's case was that the Plan was mistakenly coded in her system. . . . Chapter 13 trustees exert enormous power over the administration of confirmed chapter 13 plans . . . . While the Trustee tends to be unforgiving of errors by debtors' counsel, she nonetheless acts with a degree of impunity regarding her own missteps. . . . Here there is little question that the Trustee mis-administered this case . . . . Her oversight in waiting to enforce [the tax turnover provision] until the end of the Plan was both unreasonable and inexcusable . . . . [R]ather than admit that she has made a mistake and leave it to the court to determine the appropriate outcome, the Trustee's filings appear to deemphasize her error and to seek, rather than an equitable solution, to block the Debtor from any outcome that might balance the parties' respective culpability. Trustees in such circumstances would be mindful to remember that their jobs are not to act as goalkeepers, finding as many ways as is possible to prevent debtors from obtaining bankruptcy relief, but rather to dispassionately enforce the requirements of each debtor's case and leave it to the court to decide what is fair. . . . [B]oth the Debtor and the Debtor's counsel bear some responsibility . . . . [B]oth because chapter 13 trustees are not government actors and because the actions of chapter 13 trustees are subject to the oversight of the court, it follows that chapter 13 trustees may be subjected to *laches* defenses. . . . [D]espite it being the basis of a number of motions to dismiss from chapter 13 trustees, that a plan is running or may run longer than 60 months is *not* grounds for dismissal of a chapter 13 case. This practice is simply misplaced. The 60-month requirement is in the Bankruptcy Code provisions regarding plan contents and modifications, not in the ones regarding dismissal of cases. . . . [C]ourts in this Circuit have not required dismissal when a plan runs longer than 60 months. . . . [T]he Seventh Circuit itself has implicitly approved of allowing payments beyond the 60th month of a confirmed plan when considering the propriety of a trustee motion to modify. *Germeraad v. Powers*, 826 F.3d 962, 967–68 (7th Cir. [June 23, 2016) (Bauer, Williams, Adelman)] . . . . Even after the 60th month of a plan, a court may modify a plan—even if the resulting plan will result by definition in a plan longer than 60 months—so long as the court does not extend the plan term itself beyond 60 months. . . . [T]he Motion to Modify may be brought, heard and determined after the 60th month of the Plan. The express preconditions in section 1329(a) are met and the modification sought, though it might require the Plan to run longer than 60 months, does not invalidate the request. . . . Bankruptcy courts routinely grant modifications that forgive or defer defaults, modifications that do not appear to be expressly within sections 1329(a)(1)-(4). . . . Here, the modification proposed by the Debtor—forgiving what the Debtor assumes to be a Plan provision—is not expressly one of enumerated items in sections 1329(a)(1)-(4) and the court cannot see how, even in the broadest sense, it could be interpreted to be one. . . . Forgiveness is what the Debtor requests here and the Debtor has demonstrated a set of circumstances unique to this case that equitably demands it. As a result, the court will exercise its authority under

section 105(a) to forgive the Debtor's nonperformance of the Tax Turnover provision. . . . [T]he Tax Turnover provision is a requirement in the Confirmation Order, not the Plan itself. . . . If it is a Plan modification, the court's ruling under section 105(a) remedies its performance. If it is not, a separate provision is available to afford the Debtor relief—Rule 60(b)(5). . . . As dismissal is inequitable and forgiveness is not, the court must conclude that the requirements of Rule 60(b)(5) have been met. . . . [T]he Motion to Dismiss is barred by the doctrine of *laches* . . . . [T]he Motion to Modify is appropriate, both under section 105(a) of the Bankruptcy Code and under Rule 60(b)(5).").

B. The invisible waterfall and distribution priorities

***In re Stamps*, 644 B.R. 760, 768–80 (Bankr. N.D. Ill. Sept. 30, 2022) (Cleary)** (Interpreting local form for Chapter 13 plan, when stay relief was granted postconfirmation to mortgage holder, Chapter 13 trustee appropriately ceased making payments to City of Chicago with respect to its lien on same property that secured prepetition property tax arrears being paid through the plan. City could have but didn't negotiate for a nonstandard provision of the plan that would have continued payment of the tax arrears in the event of stay relief to mortgage holder. City still has its lien on the property and can pursue that remedy instead of payments through the plan. "The U.S. Bankruptcy Court for the Northern District of Illinois elected to require debtors to use Form 113 in all cases . . . . [T]he City did not negotiate a nonstandard provision with the Debtor. Consistent with the Plan, the City will not receive payments now that the court granted relief from stay as to its collateral; however, it retains its lien and can take steps to protect its interest. . . . The language of Form 113 regarding the effect of stay relief is different than the narrower language in Rule 3002.1. . . . Debtor served the City with the Plan. It had the opportunity to review the Plan and to object to its treatment, including the provision affecting all secured claims' treatment under the plan when relief from stay is granted as to the collateral securing their claims.").

***In re Hillman*, No. 21-60559, 2022 WL 2195468 (Bankr. N.D. Ohio June 17, 2022) (not for publication) (Kendig)** (When Chapter 13 debtor tendered $34,000 from proceeds of sale of condominium, trustee should not have paid car lender in full but instead should have paid one $573 monthly installment to the car lender and then paid the balance pro rata to unsecured creditors. Neither confirmed plan nor administrative order establishing distribution waterfall in the district supported payment in full of the 72-month car loan. Debtor's motion is granted to require car lender to turn over the proceeds that trustee should not have paid to the car lender.).

***In re Smith*, No. 20-40870-CJP, 2022 WL 5223992, at *3 (Bankr. D. Mass. Oct. 5, 2022) (Panos)** (Plan is confirmed over objection from trustee to nonstandard provision that pays priority claims first, delaying distributions to secured creditors. Debtor has no projected disposable income and no secured creditor objected. Code does not specify order in which claims will be paid in a Chapter 13 case. "[T]he Code does not provide that secured claims must be paid contemporaneously with priority claims and does not appear to expressly prohibit such a provision in a plan. . . . Section 1326(b)(1) requires that fees of a Chapter 13 debtor's attorney are to be paid '[b]efore or at the time of each payment to creditors under the plan' and does not

appear to conflict with requirements for treatment of allowed secured claims under § 1326(a)(5) . . . .").

C. Proofless Claim Black Hole: distributions? lien survival? stay relief? discharge? Rule 3004?

***Weyer v. Valley Cmtys. Credit Union*, No. 19-cv-926-wmc, 2022 WL 1597293, at *1–*5 (W.D. Wis. May 19, 2022) (Conley)** (Car lender that failed to timely file proof of claim is entitled to stay relief based on lack of adequate protection notwithstanding that the confirmed plan would have paid car lender in full if lender had not disabled itself to receive payments from the trustee. Equities do not favor the debtor because the debtor could have filed a claim on behalf of the lender under Bankruptcy Rule 3004 and debtor is now driving the car without paying for its use. "[T]he Weyers' proposed Chapter 13 plan included language from the Western District of Wisconsin's form plan, which alerts creditors that they 'must file a timely proof of claim in order to be paid.' . . . [A]fter the plan was confirmed, the trustee refused to make payments to VCCU because they did not timely file a proof of claim. However, the Weyers also failed to make payments to VCCU outside of the plan. . . . [T]he bankruptcy court did not err in concluding as a matter of fact that VCCU lacked adequate protection. . . . Rule 3004 provides an adequate avenue for a debtor to protect itself from any inequities associated with a creditor not participating in the plan and receiving payment outside of it.").

***In re Sherrell*, No. 19-05254-5-DMW, 2021 WL 5869102, at *1–*3 (Bankr. E.D.N.C. Dec. 10, 2021) (Warren)** (When car lender failed to file a proof of claim and Chapter 13 debtor completed payments under confirmed plan without any distributions to car lender, discharge resolved only the debtor's personal liability, not car lender's lien on the car; car lender did not violate confirmation order or discharge order when it contacted debtor to repossess car after case was closed. "The Trustee did not disburse any funds to Citizens during the pendency of this case, because Citizens did not file a proof of claim. . . . [A]fter the court entered the Order of Discharge, Citizens contacted the Debtor about repossessing the Vehicle and has refused to release its lien against the Vehicle. . . . Under the sound reasoning and precedent of [*Cen-Pen Corp. v. Hanson*, 58 F.3d 89 (4th Cir. June 22, 1995) (Wilkinson, Hamilton, Heaney),] the lien of Citizens was unaffected by confirmation of the Plan and the Debtor's subsequent discharge. . . . The Debtor cannot rely on the proposed, but unfulfilled, repayment provision in the Plan to seek the windfall of an unencumbered vehicle after the Trustee did not remit any payments to Citizens. Citizens was under no obligation to file a claim in the Debtor's case, and if the Debtor wanted Citizens to receive payment under the terms she proposed, then the Debtor should have filed a proof of claim on behalf of Citizens pursuant to [Bankruptcy] Rule 3004 . . . . [C]onfirmation and the subsequent Order of Discharge had no effect on Citizens' lien—only the Debtor's *in personam* liability to Citizens was discharged. . . . Citizens' attempts to repossess the Vehicle after extended non-payment on its claim did not violate the court's Order confirming the Plan or the Order of Discharge . . . .").

D. Say nothing plans: a bad idea on steroids

***In re Thomason*, 642 B.R. 8 (Bankr. D. Idaho June 13, 2022) (Meier), *reconsideration denied*, No. 21-40435-JMM, 2022 WL 3149458 (Bankr. D. Idaho Aug. 5, 2022) (Meier)** (Plan fails the confirmation requirement in § 1325(a)(5) because the plan proposes no payment to mortgagee with large, secured claim, the plan says nothing about lien retention but the debtor retains the property without consent from the lienholder.).

***In re Cohen*, No. 21-60939-dwh13, 2022 WL 141514, at *3–*6 (Bankr. D. Or. Jan. 14, 2022) (Hercher)** (No provision of Code requires a Chapter 13 plan to provide for a secured claim; plan is confirmed over objection of trustee notwithstanding that plan makes no provision for payment or any other treatment of an allowed $450 claim secured by furniture and pillows. "[A] secured claim as to which the plan is silent is simply not provided for by the plan. . . . Both former section 621(1) and current section 1325(a)(5) impose secured-claim-related confirmation requirements that apply only to subsets of all secured claims. . . . [R]equiring chapter 13 debtors to state their intentions regarding collateral, just as chapter 7 debtors must, would be good policy. But advancing good policy is for Congress. . . . A chapter 13 debtor must schedule creditor claims even if the debtor intends not to provide for them in the plan. . . . But because the Cohens' plan is silent about the bank's secured claim, the claim is simply not treated in the plan. They have made no commitment to pay anything to the bank—and indeed have expressed their intention not to do so—so there's no need to inquire whether they will be able to make payments to the bank. . . . [I]t means nothing to say that the bank is bound by a plan that neither alters its rights nor impose [*sic*] duties on it. . . . The Cohens don't dispute that a discharge would serve their interests, but they assert that their personal liability on the bank's secured claim 'is extinguished upon the Court's entry of Discharge,' leaving the bank only its lien. . . . Whether a chapter 13 debtor should have the option to pursue the possible benefit and risk associated with not providing for a secured claim is a policy matter for Congress.").