Recent Developments II

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RPD Holdings, LLC v. Tech. Pharm. Servs. (In re Provider Meds, LLC), 907 F.3d 845 (5th Cir. 2018), cert. denied 2019 U.S. LEXIS 1823 (U.S. Mar. 18, 2019)

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- When Rule 9(b)'s heightened pleading standards may apply

Presented:
38th Annual Bankruptcy Conference

November 14 -15, 2019
Austin, Texas

Recent Developments in Consumer Bankruptcy 2019

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RECENT DEVELOPMENTS IN CONSUMER BANKRUPTCY 2019

THANKS TO SARAH MCHANEY FOR ASSISTANCE WITH THESE MATERIALS.

MISCELLANEOUS..... .....

***In re Henry*, 17-36854, 2019 WL 623873 (Bankr. S.D. Tex. Feb. 12, 2019)**. *Debtor will not be allowed to expunge voluntarily dismissed case where he signed and authorized the filing of the bankruptcy petition*. Chapter 13 debtor who had filed his case pro se and subsequently dismissed it, filed motion requesting that court expunge his bankruptcy case as it was a result of fraud. At hearing, debtor testified that fraudulent legal group had duped him into filing bankruptcy to stop foreclosure on his home. Hinging primarily on the fact that debtor acknowledged that he had signed and filed his Chapter 13 petition himself (as opposed to it having been filed without his permission by someone else), the court concluded that expungement was not appropriate and denied the motion.

***In re Hernandez*, 18-33200, 2019 WL 113664 (Bankr. S.D. Tex. Jan. 4, 2019)**. *Mistaken in warranty deed that is obviously clerical in nature does not invalidate warranty deed*. Debtors had repeatedly and continuously lost in state and federal court in efforts to prevent mortgage holder from foreclosing on their home and evicting them. After approximately six years of litigation, debtors filed chapter 7 petition. When mortgage holder moved for relief from stay, debtor argued *pro se* that fact that 2004 warranty deed which mistakenly identified them as grantors and the actual grantor as grantee meant that deed of trust held by mortgage holder was invalid because debtors were not legal owners of home. Mortgage holder argued that 2007 correction warranty deed which noted the mistaken reversal of grantors and grantees on the original deed corrected a clerical error and that under Tex. Prop. Code §§ 5.28-5.30 correction of a clerical error substitutes the original instrument. The bankruptcy court agreed with the mortgage holder, finding that facts that original deed had the correct names of the parties but only the roles transposed and that the correction deed was signed by all parties and recorded in the same county as the original warranty deed mandated the conclusion that it constituted a correction of a clerical error and that the debtors were therefore the legal owners of the home at of the 2004 warranty deed.

***In re Alfonso*, 16-51448-RBK, 2019 WL 4254329 (Bankr. W.D. Tex. Sept. 6, 2019)**. *Court will reject Rule 9019 compromise where evidence is strong that settlement amount is low and trustee is unable to present evidence explaining how proposed settlement amount was calculated*. Chapter 7 trustee sought approval of a settlement of a personal injury claim pursuant to Rule 9019 and the law firm that had been representing the debtors in the personal injury litigation objected, arguing that the settlement amount was far too low. The bankruptcy court reviewed the evidence supporting the factual basis for the personal injury claim and concluded that it had a strong probability of success on the merits at a dollar amount greatly in excess of the trustee's proposed settlement. In particular, the bankruptcy court focused on the trustee's inability to present anything more than generalizations as to why the proposed settlement amount was fair and equitable whereas the objecting law firm went into both specific facts and governing law relating to liability in order to establish the potential value of the personal injury litigation. Because it concluded that the trustee had not presented facts supporting the proposed settlement, the court sustained the law firm's objection and denied the 9019.

***In re Odam*, 17-50035-RLJ7, 2019 WL 1752584 (Bankr. N.D. Tex. Apr. 17, 2019)**. *Bankruptcy court can sua sponte dismiss case for debtor's contempt of court order and can retain jurisdiction over funds recovered by trustee*. Chapter 7 debtor who was under bankruptcy court order to refrain from filing further vexatious pleadings, blew up a chapter 7 sale by filing a vexatious pleading attacking the sale, the trustee, and the court. Noting the absurdity of a number of the debtor's filings and the debtor's apparent disdain for the authority of the court over his bankruptcy case, the court issued a contempt and sue sponte a show cause order against debtor instructing debtor to show cause why his case should not be dismissed with prejudice for two years with the court retaining jurisdiction over all funds collected by the trustee.

***In re Grundmeyer,* 2019 WL 3330790 (Bankr. E.D. La. July 24, 2019).** *Pursuant to a very specific set of facts presented in this case, the debtor's litigation rights are not property of the estate.* Trustee filed his motion to reopen bankruptcy case alleging that Mr. Grundmeyer filed a claim in state court related to a product liability suit and that such claim was not scheduled in debtors' bankruptcy case. Trustee wanted case reopened to administer funds related to this state court personal injury suit. Debtors filed an objection stating that Mr. Grundmeyer had not received the diagnosis until after the bankruptcy case was closed so there was no claim to disclose in the bankruptcy schedules. Mr. Grundmeyer had an unrelated diagnosis of renal cancer prior to the bankruptcy being filed. As a result of this cancer, Mr. Grundmeyer received frequent monitoring by his doctors to ensure that if the renal cancer reoccurred, it would be caught timely. Debtors included with their objection dated medical reports that showed that Mr. Grundmeyer had not yet been diagnosed with Non-Hodgkin's Lymphona which is the personal injury Mr. Grundmeyer sought compensation for. Mr. Grundmeyer had been exposed to products causing his injuries in the 1960s and 1970s but was not diagnosed until after the bankruptcy case was closed. The Trustee argued that the personal injury claim was property of the estate because it originated from pre-petition benzene exposure. Debtors urged that the claim could not be property of the estate because the lymphoma developed post-petition and the lawsuit could not have been filed until Mr. Grundmeyer sustained damages. Court concluded that even though some of the tortious conduct may have occurred pre-petition, where the damages do not manifest until post-petition, the cause of action cannot be property of the estate. Here, Mr. Grundmeyer contracted Non-Hodgkin's Lymphona after his bankruptcy case was closed. Here, the number of medical exams right before the debtor filed his bankruptcy petition clearly showed he did not receive a diagnosis until after the petition date. The Court thus held that any settlement funds from the personal injury claim were not property of the estate.

***In re Ryan,* 2019 WL 3759147 (Bankr. E.D. La. Aug. 8, 2019).** *Court granted Motion for Permission to Sell Naked Ownership as the proceeds of sale of certain property are subject to a usufruct and proceeds should be remitted at sale to the usufructuary and not the judicial lien creditor of the debtor where debtor was only a naked owner of the property.* Debtor, Mr. Ryan's, father died intestate. Debtor's mother owned half of the former community property ("Property") and as such had a legal usufruct over the other half. Debtor and his three siblings are the naked owners. Prior, a judgment was entered in favor of Main Street Acquisition Corp. ("Main Street") against debtor for a repossessed

vehicle deficiency balance and Main Street filed the judgment of record creating a judicial lien on the Property. Debtor's mother, the usufructuary, wanted to sell the Property. Debtor requested permission to join in sale in order to transfer full title to the new owner. The issue before the Court was whether the Property could be sold and whether the sale proceeds must be used to satisfy Main Street's lien. Main Street's lien attached only to debtor's one-sixth naked ownership interest in the Property. However, Main Street had filed an unsecured proof of claim which was an admission against interest that it had no security interest in debtor's property. Further, the usufruct attached to the sale proceeds and must be remitted to the usufructuary. Creditors of naked owners are protected by La. C.C. Art. 618 which provides that a "naked owner may demand, within one year from receipt of the proceeds by the usufructuary that the usufructuary give security for the proceeds."

***In re House,* 2019 WL 267786 (Bankr. S.D. Miss. Jan. 18, 2019).** *Debtors, having agreed to surrender of certain property in their confirmed Chapter 13 plan as well as in two agreed orders, are barred from opposing mortgage creditor's foreclosure.* Ditech Financial LLC ("Ditech") sought a Motion to Compel Debtors to Comply with Prior Agreed Orders for Surrender of Real Property requesting debtors surrender certain real property ("Property") and to withdraw their pending requests for an injunction against foreclosure in state court and in a complaint for arbitration. Ditech urged that because debtors agreed to surrender the Property under the terms of two agreed orders and by the treatment of Ditech's claim in the confirmed Chapter 13 Plan, debtors may not oppose foreclosure. Debtors' plan provided for surrender of the Property by showing the proposed treatment of Ditech's claim as "Abandon" and referencing the Agreed Abandonment Order stating that "Debtors are surrendering Ditech's collateral." Debtors also acknowledged the surrender in the post-confirmation Agreed Order on Proof of Claim, which again stated "Debtors' intention to surrender their interest in the [P]roperty" and anticipates an unsecured deficiency claim "after Ditech liquidates its collateral." Here, debtors were bound by the plan to surrender the Property by ceasing their opposition to foreclosure, because the result debtors seek by injunction to avoid—losing possession of the Property—is exactly the result they agreed to by surrendering the Property in the first place.

***Glassel v. Ocwen Loan Servicing, LLC,* 2019 WL 2080303 (U.S.D.C. S.D. Tex. March 27, 2019).** *Here a valid contract between plaintiff and lender existed and lender had also demonstrated that a debt existed arising from the note and deed of trust executed by plaintiff, the debt was secured by a lien created under the Texas Constitution, plaintiff was in default, and plaintiff received notice of default and acceleration.* Before the Court is Intervenor-Plaintiff/Defendant Deutsche Bank National Trust Company's (assignee of the note and deed of trust) Motion for Summary Judgment based on the pleadings on its breach of contract claim, request for an order of foreclosure and request for declaration of lien priority against two abstracts of judgment and a federal tax lien. Plaintiff argued that any debt owed to Deutsche Bank under the note and deed of trust was discharged in his Chapter 7 bankruptcy case but provided no legal authority for this argument. Plaintiff also argued that any right Deutsche Bank had to foreclose is time-barred because Deutsche Bank had only until March 5, 2017 (four years after the date of the alleged discharge of the debt) to foreclose. The Court recognized that a person must bring suit for the recovery of real

property under a real property lien or the foreclosure of a real property lien not later than four years after the date the cause of action accrues which is often at time of default. Here, however, the note or deed of trust contained an optional acceleration clause making the action accrue when the holder of the note actually exercised its option to accelerate instead of upon default by plaintiff. Deutsche Bank exercised its option to accelerate on November 30, 2015, so it had until November 30, 2019 to exercise its foreclosure rights and its right to foreclose was not time-barred. As to Deutsche Bank's breach of contract claim, and its right to foreclose the motion was granted and Deutsche Bank was entitled to a judgment for the judicial foreclosure of plaintiff's real property. Court also held that Deutsche Bank's lien was superior, prior and senior to the abstract of judgments and the federal tax lien.

***In re Seiffert,* 2019 WL 1284299 (Bankr. N.D. Tex. March 8, 2019).** *The Court considered the Motion to Compel Compliance with Amended Statement of Intention and Amended Motion to Delay Entry of Discharge filed by 21st Mortgage denying both.* Twenty-first Mortgage requested the Court compel debtors to surrender a mobile home to 21st Mortgage and to delay entry of the debtors' discharge until 21st Mortgage had "secured" the mobile home relying on 521(a)(2) and 521(a)(6) as the statutory authority for its requested relief. Debtors filed an Amended Statement of Intention reflecting their amended election to "surrender" the mobile home as opposed to entering into a reaffirmation agreement with 21st Mortgage. Although the automatic stay had terminated with respect to the mobile home, 21st Mortgage filed its Motions seeking this additional relief because it believed that merely having relief from the stay does not benefit or adequately protect it. Debtors were not in default under their real estate installment contract with 21st Mortgage and there was no *ipso facto* clause making the filing of the bankruptcy petition an event of default. So even though the debtors were able to discharge their obligation to 21st Mortgage, the Court recognized that unless debtors defaulted in the future, 21st Mortgage may be precluded from protecting its interests in the mobile home or pursuing a foreclosure of its lien until a post-discharge default occurred. As such, 21st Mortgage argued that the debtors were attempting to "ride through" in violation of 521(a)(2) by retaining possession of the mobile home and making payments without having to reaffirm or redeem the mobile home. Court recognized that debtors did timely file a first Statement of Intention to reaffirm but then failed to take the necessary actions to perform their original intention as required by 521(a)(2)(B). As a result, the self-executing remedy provided by 362(h) was triggered—the 362(a) automatic stay terminated permitting 21st Mortgage to pursue its available rights and remedies, if any, under the retail installment contract and applicable nonbankrupty law with respect to the mobile home. The Bankrupty Code does not provide any other remedy available to 21st Mortgage resulting from the debtors' failure to comply with 521(a)(2). Court also determined that there was no provision or remedy provided to 21st Mortgage in the Bankruptcy Code if the debtors continued to maintain possession of the mobile home despite the "shall not retain possession" language contained in 521(a)(6). The stated remedy for secured creditors under 521(a)(2) and 521(a)(6) is termination of the automatic stay. Last, the Court determined that the debtors' failure to "surrender" the mobile home to 21st Mortgage did not constitute a meritorious ground under 727(a) to delay the entry of a discharge in the case.

Johnson v. JPMorgan Chase Bank, N.A., (In re Johnson),* 2019 WL 1423090 (Bankr. W.D. Tex. March 28, 2019*). *Due to the loan to value violation under the home equity provisions of the Texas Constitution, debtor alleged that lender breached the loan agreement and should forfeit all principal and interest paid and pay her attorney's fees. Debtor also brought a quiet title action seeking to void lender's lien under Article 50(c) of the Texas Constitution.* Debtor and her husband applied for a $120,000 home equity loan from JPMorgan Chase ("Chase"). Chase asked TransUnion Settlement Solutions to prepare a valuation of the property. TransUnion valued the 4.12 acre property at $150,000. TransUnion also included a section in the report called "Estimate of Value Prior to Inspection," that listed the assessed value at $76,465 and the owner estimate of value at $180,000. After Chase received the report, it determined it could only lend on the .5 acres that contained the debtors' homestead. Rather than request a new valuation from TransUnion for the .5 acres, Chase simply reduced the value of the property to $140,045 and the loan amount to $112,000, about 80% of the $140,045. Chase got this value through an extrapolation it did not explain. Chase moved for summary judgment that debtor's claims fail because of statute of limitation, quasi-estoppel and the Texas' Constitution's safe harbor provision under Article 50(h) of the Texas Constitution. Court held that the statute of limitations began to run at the time debtor entered into the loan agreement. As such, the deadline for debtor to bring this action was four years after the loan originated which was in 2010. As such debtor's breach of contract claim was barred by the statute of limitations. Because debtor's breach of contract action failed, so did her claim for attorney's fees. The Court denied lender's summary judgment motion with respect to quasi-estoppel. The Court noted that the Texas Supreme Court has held that when a lien is based on a home equity loan that violates the Texas Constitution, the lien is void even if the lender cures the non-compliance. Because the lien is void, no statute of limitations applies to a quiet title action to strip the lien. Chase urged that quasi-estoppel applied here because debtor previously swore under oath that the loan amount was less than 80% of her home's value. The Court found that there was evidence that the statement in the affidavit—the valuation—was wrong. This objective evidence of a lower value at the time the loan was made created an issue of fact on whether it would be unconscionable to let debtor show that the value she affirmed in the affidavit at the time of the loan was wrong. The Court also denied Chase's motion for summary judgment with respect to its safe harbor argument because the value acknowledged by debtor of $140,045 did not equal the $150,000 in the TransUnion valuation report. If Chase wanted to shield itself using the safe harbor provision, it should have obtained a new valuation for the homestead property.

***In re Wright*, 15-43533-ELM-13, 2019 WL 5075941 (Bankr. N.D. Tex. Oct. 9, 2019)**. *Bankruptcy Rule 9006(a) does not govern when order from court sets specific date for certain action to the taken*. Court entered scheduling order requiring response to Chapter 13 trustee's mortgage notice to mortgageholder on a date that fell on a weekend. The mortgageholder filed its response the following Monday and the debtors (pro se) objected on the grounds that the response was untimely filed. The court held that Bankruptcy Rule 9006(a) does not govern when an order from the court sets a specific date as the deadline for some action.

Kar Mkt. v. Turner (In re Turner) **not yet published (Bankr. S.D. Tex. 2019).** *Court holds Debtor in contempt for failure to comply with court's turnover order; has Debtor arrested for failure to appear at show cause hearing.* Chapter 7 Debtor was ordered to turnover 2012 Audi and 2015 Cadillac to lienholder/creditor. She failed to do so and also failed to appear for subsequent show cause hearing. Court finds her in civil contempt and orders the U.S. Marshal to take her into custody.

LIENS.....

Whitcomb et al v. Paull & Partners-Locke Lane, et al (In re Whitcomb)**, 599 B.R. 908 (Bankr. S.D. Tex. 2019)**. *Debtors conveyance of homestead to corporation in order to obtain tax lien loan may not result in loss of homestead rights, but tax lien lender may nevertheless be subrogated to rights of the taxing authority*. Debtors conveyed homestead into corporation in order to obtain tax lien loan. After obtaining loan, debtors re-conveyed property back to themselves. Debtors went into default on tax lien loan and filed chapter 7 in effort to halt foreclosure. In adversary proceeding, debtors sought to invalidate lien as being based upon pretended sale of homestead by debtors to corporation. Bankruptcy court found that transfer was an impermissible pretended sale on grounds that debtors (in spite of lack of language in documents) evidently intended at all times to transfer the property back to themselves and as sole members of corporation could do so. Court also concluded that tax lien lender had failed in its duty of inquiry with respect to the homestead nature of the property because it had constructive notice of the potential sham transaction, but that lender nevertheless had a valid lien on the property on the basis of its contractual subrogation to the rights of the taxing authority.

Payne, Chapter 7 Trustee v. Bowers, III (In re Pickens)**, 16-40667, 2019 WL 4741664 (Bankr. E.D. Tex. Sept. 27, 2019)**. *Contingency fee counsel's equitable lien may preclude recovery by Chapter 7 trustee under Section 547*. Pre-bankruptcy, contingency fee counsel had engagement with debtor that included language purporting to assign to counsel interest in claims against debtor's father. When lawsuit settled, funds were placed in counsel's IOLTA account. Creditor of debtor obtained turnover order. Despite turnover order, counsel distributed funds from IOLTA, including distribution to debtor and distribution to self. When debtor filed chapter 7, trustee brought preference claims against counsel for 1) the deposit of the full settlement amount into his IOLTA and in the alternative for 2) the distribution counsel made to self. The Court found that the assignment language did not transfer ownership, but did give counsel an equitable lien in the settlement. Because counsel did not own the claims, the deposit of the full settlement amount in to the IOLTA was not a transfer to counse. With respect to the distribution to self, the court held that counsel's equitable lien existed under common law and did not require any filing with the State in order to perfect; as such, counsel's interest in the proceeds were superior to those of the creditor that had obtained the turnover order. Because counsel had an equitable lien in the funds that he distributed to himself, that could not be avoided as a preference.

In re Christian**, 597 B.R. 319 (Bankr. N.D. Tex. 2019)**. Chapter 7 debtors moved for a determination of the validity of a prepetition assignment of their interests in their life insurance policy as collateral for a bank loan in light of a release between the parties.

However, because the settlement agreement resolved disputes between the parties specifically did *not* include any dispute over the life insurance policy, the release language cannot be construed to affect the validity of the bank's interest in the claim against the policy.

***In re LeBlanc*, 2019 WL 3718122 (Bankr. E.D. La. Aug. 7, 2019)**. *Motion for Rehearing denied where creditor fails to identify an error of fact or law*. At issue in this bankruptcy appeal is whether a property description in a conventional mortgage is sufficient to encumber a residential lot located in a subdivision. The motion for rehearing follows an order of this court affirming the bankruptcy court's ruling that the property description set forth in the creditor's original mortgage was insufficient to encumber the adjacent lot. The court held that although the creditor advances colorable arguments in support of its position, it failed to identify any error of fact or law underlying this court's determination that the property description in the original mortgage was misleading and therefore insufficient to encumber the adjacent lot. And further, because the creditor simply disagrees with this court's decision, rehearing is inappropriate and thus the motion for rehearing is denied.

EXEMPTIONS – STATE

***Brei v. Brinck et al (In re Brei)*, 599 B.R. 880 (Bankr. N.D. Tex. 2019)**. *Where debtors were engaged in overt acts of actual occupancy and usage of claimed homestead prior to creation of non-purchase money liens, homestead rights can result in invalidation of liens*. Debtor sued to invalidate three liens on property claimed as exempt homestead (the "Homestead") by debtor. Creditors argued that at the time their liens arose, debtor had not abandoned a prior claimed homestead interest in a separate piece of residential real property. The court found that the evidence supported debtor having engaged in overt acts of actual occupancy and usage of the Homestead prior to the origination of the liens and that under Texas law those overt acts of actual occupancy and usage trumped any representations made at the time by the debtor to the contrary.

***In re Cyr*, 18-50102-CAG, 2019 WL 3213053 (Bankr. W.D. Tex. July 16, 2019)**. *Transfer of homestead to non-qualified trust can result in loss of homestead rights*. Pre-petition, debtor transferred home to living trust in which he and his wife were settlors, trustees, and beneficiaries. Debtor and his wife remained liable for the monthly mortgage payments but the trust made the payments. The trust did not charge the debtor for living in the home and there was no agreement between the trust and the debtor regarding payment of expenses related to the home. The chapter 7 trustee objected to the debtor's claimed homestead exemption, arguing that the home lost its homestead status when transferred to the trust because the trust was not a "qualifying trust" under the terms of 41.0021(a) of the Texas Property Code. Under the statute, necessary qualifications include that the living trust be 1) revocable by the settlor or beneficiary without the consent of another person, 2) that the settlor or beneficiary have the right to exercise an inter vivos general power of appointment over the property claimed as homestead, and3) provide that the settlor or beneficiary be entitled to use and occupy the homestead at no cost. The bankruptcy court held that qualification 1) was not met because revocation required

consent of both debtor and wife, that 2) was not met because the trust agreement did not contain either a general or specific power of appointment affecting the home, and that 3) was not met because the trust agreement provided that the debtor and his wife could live at the home "rent free" which was not the as broad as the concept of "cost free" contained in the statute.

***In re Phung Tan Huynh*, 602 B.R. 632 (Bankr. S.D. Tex. 2019)**. *Fraudulent transfer done in effort to shield home from creditors is void and therefore does not result in loss of homestead rights*. Pre-petition, debtor had transferred home to third-party in order to shield it from a judgment creditor. In state court, judgment-creditor obtained a ruling that the transfer was fraudulent and that the home therefore was an asset of a post-judgment receivership initiated by the judgment creditor. Debtor filed chapter 7 case to stop receiver from selling home and claimed it as exempt. Evidence at hearing was that debtor had continuously lived at the home since 2007. Bankruptcy court held that conveyance of a homestead that has been simulated to shield homestead from creditors is void and cannot constitute abandonment of homestead rights and therefore overruled the judgment-creditor's objection to the debtor's claimed exemption in the home.

***In re Pool,* 2019 WL 1054981 (Bankr. W.D. Tex. March 5, 2019).** *Debtor's rural homestead exemption under Texas law included non-contiguous tract for automotive repair and restoration business.* Creditor objected to debtor's rural homestead exemption under Texas law as two separate, non-contiguous tracts of real property. Debtors claimed their rural residence of 1.4 acres in Llano County and a separate, rural, non-contiguous tract of less than an acre in Burnet County where Mr. Pool operated his automotive and restoration business. Together the two tracts are less than 200 acres. Court held that a rural homestead under Texas law can include non-contiguous (separate) property where a debtor actively operates a business to support a debtor's family and has a nexus to the residence. Under Texas law, rural homestead protection extends to both property where the family lives and to property where claimant operates a business to support the family. Here, the debtors' business was located on rural property. The debtors actively worked at the business and earned income necessary to support their family and their residence. Debtors themselves spent considerable time working in the business to earn their living. In addition, business had a nexus with the residence. Business was actually used by debtors to repair and maintain household items, make improvements to the residence, store equipment used at the residence and to repair the debtors' personal cars. The business also had a shower, kitchen and other facilities normally associated with a home. In many ways, the business was an extension of the residence. Homestead protection is liberally construed in Texas and this particular situation was no exception.

***In re Morgan*, 19-30004, 2019 WL 5078633 (Bankr. S.D. Tex. Oct. 9, 2019)**. *Debtor's claims to homestead may be rejected where Schedules, SOFA, and warranties in deed of trust reflect information that leads to conclusion that Debtor failed to establish homestead; debtor cannot claim homestead when he does not and has never lived with his spouse*. Pre-petition, debtor lived at property ("Property A") that he was leasing in anticipation of purchasing once his divorce was consummated. After consummation of divorce, debtor remarried and purchased Property A and a second residential property ("Property B")

located in another city. In deed of trust for Property A, Debtor represented that he would make Property A his residence. Debtor continued to reside at Property A and Debtor's new wife resided at Property B. In Schedules and SOFA, debtor made multiple representations that he had never lived at Property B. When debtor claimed Property B as exempt under Texas law, a creditor objected. The bankruptcy court held that 1) because debtor and his wife had never lived together, debtor could not claim either Property A or Property B as exempt and that even if he were entitled to claim a homestead debtor's various representations that he had never resided at Property B and that he was residing at and would reside at Property A precluded debtor from claiming Property B as his homestead.

COMMENCEMENT OF CASE-VOLUNTARY-INVOLUNTARY-SUBSTANTIAL ABUSE.....

***In re Dutka*, 18-33893, 2019 WL 3713694 (Bankr. S.D. Tex. Aug. 6, 2019)**. *Debtors will not be allowed to dismiss their chapter 7 case where their factual statements regarding the circumstances of the filing lack credibility and they used the filing of the bankruptcy to their benefit*. Chapter 7 debtors sought to dismiss their case, arguing that their attorney had filed the case without their permission and had failed to explain possible repercussions of filing bankruptcy with respect to preferential transfers they had made to family members. Noting the debtors' use of their bankruptcy filing to halt a summary judgment proceeding against them in state court, and relying heavily upon the inconsistencies in the arguments the debtors' presented in support of their claim that they had never signed the bankruptcy petition, the court denied the motion to dismiss.

***In re Fedoruk,* 2019 WL 3315457 (Bankr. S.D. Tex. July 23, 2019).** *Pursuant to the Amended Motion to Dismiss Chapter 7 Case under 11 U.S.C. 707(a), or in the Alternative, Motion for Abstention Pursuant to 11 U.S.C. 305, creditor did not meet the burden that would determine cause for dismissal, and after examining the factors for determining abstention, no factors weigh in favor of the Court abstaining.* Here, it was creditor's burden to prove that cause existed to dismiss Debtors' Chapter 7 case. Creditor pointed to Debtors' income, spending habits, and value of assets and alleged that Debtors acted in bad faith. Court could find nothing in the record that indicated bad faith. This was a primarily business debts case and the confines of the Means Test and resulting monthly disposable income did not come into play here nor was there any evidence of debtors' acting in bad faith post-petition. Debtors had cooperated with the trustee and the applicable laws and procedures of the Code. This was a case of debtors investing in a business adventure that ultimately failed. Creditor also requested that the Court abate the instant Chapter 7 Proceeding. The Court examined the seven abstention factors and determined that none of the factors weighed in favor of the Court abstaining.

AUTOMATIC STAY (SEE ALSO TURNOVERS/PROP. OF ESTATE).....

***Rachal v. Select Portfolio Servicing, Inc.*, 4:17-CV-871, 2018 WL 6171793 (E.D. Tex. Nov. 21, 2018), appeal dismissed, 18-41184, 2019 WL 2612720 (5th Cir. Apr. 30, 2019)**. *Automatic stay does not prevent district court from adopting submitted report and recommendation from magistrate judge*. After magistrate judge submitted report containing proposed findings of fact and conclusions of law, plaintiff filed a suggestion of

bankruptcy. The district court found that the automatic stay did not bar it from adopting the magistrate judge's report and recommendation because judgment resolved only affirmative claims asserted by the defendant/debtor.

***In re Ainsworth*, 17-20418, 2018 WL 5304719 (Bankr. S.D. Tex. Oct. 23, 2018)**. *Debtor's plan cannot carve up secured creditor's collateral to remove lien from portion of collateral.* Secured creditor sought relief from automatic stay or adequate protection related to its interest in 51 acres owned by debtor. Debtor argued that under his dirt-for-debt plan, creditor could be compelled to accept the 20-acre improved portion of the 51 acres in full satisfaction of its claim. The two sides disputed the value of the property and whether or not the 20-acre improved portion was worth as much as the stipulated debt owed to the secured creditor. The Court adopted portions of the conclusions reached by each sides' appraisers, but concluded that the testimony of the creditor's expert witness regarding the overbuilding of the property to be persuasive in reaching the conclusion that the secured creditor was entitled to retain its lien on the whole property and because there was a limited equity cushion the debtor would be given a limited amount of time to either pay the creditor or confirm a plan that provided otherwise.

***Toyota Motor Credit Corp. v. Brinkley*, 3:17-CV-3022-S, 2019 WL 317446 (N.D. Tex. Jan. 23, 2019)**. *Passive retention of vehicle repossessed pre-petition constitutes violation of automatic stay*. Creditor repossessed vehicle. When debtor filed chapter 7 bankruptcy petition, creditor refused to return the vehicle. Debtor brought an adversary seeking turnover of the vehicle and sanctions for violation of the automatic stay and then converted case to one under chapter 13. Among other things, creditor argued that it did not have a duty to return to the debtor but rather to the trustee (who had never made a turn over demand), that passive retention of a repossessed vehicle did not constitute an "act to exercise control over property of the estate" under section 362(a)(3), and that the debtor could not have a right to possession of the vehicle until after his exemptions had become final. The district court affirmed the bankruptcy court, holding that the creditor's argument that only the trustee could request turnover simply meant that creditor should have turned vehicle over to the trustee, that passive retention constituted a violation of the automatic stay, and that a debtor's exemptions do not have to be final before the debtor can be entitled to possession of an asset.

***In re Jackson*, 18-10647, 2019 WL 329424 (Bankr. M.D. La. Jan. 16, 2019)**. *Chapter 13 debtor cannot use insurance proceeds to buy new vehicle where secured creditor is entitled to those proceeds*. Debtor was in car accident prepetition. In proposed chapter 13 plan, debtor sought to use insurance proceeds to purchase new vehicle and to pay creditor that had lien on wrecked car through the plan. Creditor objected, asserting that the insurance proceeds were less than amount debtor owed creditor, debtor had no interest in the proceeds and creditor was entitled to receive full proceeds. The court concluded that both the insurance contract and governing state law gave the creditor rights to the insurance proceeds such that the proceeds were not property of the estate and that even if they were property of the estate the debtors had failed to provide adequate protection because there was no evidence that they had plans to purchase a specific replacement vehicle and could not explain how the creditor's interests would be protected in light of the rapid decline in

value that automobiles suffer when used as heavily as debtors indicated they would use a replacement vehicle.

***Magee v. Southern Financial Systems, Inc.*, 2019 WL 1503919 (Bankr. S.D. Miss. April 4, 2019).** *Creditor did not willfully violate the automatic stay due to failure of creditor to prevent a pre-petition writ of garnishment from being served on debtor's employer post-petition.* Court determined that creditor ultimately took all necessary action to release its garnishment. According to unrefuted affidavits, creditor faxed the justice court to cancel the judgment and dismiss the garnishment, using a fax machine that was programmed to print an error report when a transmission was unsuccessful: this feature had functioned correctly in the past; and the machine did not print an error report. When service of the Complaint alerted creditor that the garnishment had not been canceled, creditor promptly contacted the justice court by phone and follow-up fax, resulting in cancellation of the garnishment before any funds were withheld from debtor's paycheck. Creditor's actions were a result of circumstances beyond its control. Creditor's actions therefore constituted a good faith effort that satisfied the obligation to comply with 362(a).

***Lewis v. Money Mayday Loans and Tracy Cullum (In re Lewis),* 2019 WL 2158832 (Bankr. W.D. La. May 16, 2019).** *Defendants willfully violated the automatic stay by retaining the vehicle after they were informed of debtor's bankruptcy filing and refusing to surrender it despite repeated requests.* Defendants were predatory lenders which charged an annual percentage rate equal to 209.81% for a loan secured by a vehicle. After Debtor filed bankruptcy, defendants unlawfully seized the vehicle to satisfy a debt of $125. Defendants refused to surrender the vehicle after advised of the existence of the automatic stay. Both defendants forged and backdated instruments to make it appear that they sold the vehicle to a third party before they learned about the commencement of the case. Evidence showed that defendants never sold the vehicle, refused to surrender it and continued to possess it. Court awarded debtor a total of $21,895 against both Defendants, *in solido,* representing: (1) damages for the loss of property in the amount of $2,050; (2) damages for lost wages of $312; (3) damages for transportation costs in the amount of $698; (4) emotional distress of $3,000; (5) $5,835 for recovery of attorney's fees and expenses; and (6) punitive damages in the amount of $10,000 together with judicial interest at the maximum federal rate from date of judicial demand and until paid in full.

***Judd, Thomas, Smith & Co. v. Wofford et al (In re Wofford)*, 18-40533, 2019 WL 4793125 (Bankr. E.D. Tex. Sept. 30, 2019)**. *Non-compete provisions in asset purchase agreement do not form basis for excluding payments on APA from estate where payments are not conditioned upon compliance with the non-compete.* Pre-petition, debtor sold company. Asset purchase agreement contained non-compete provision. Debtor excluded future payments under the APA from his schedules. Adversary proceeding was initiated when the payments came to light. The court held that because the payments under the APA were not conditioned upon compliance with the non-compete, they constituted property of the bankruptcy estate.

***In re Garza*, 2019 WL 3365899 (Bankr. S.D. Tex. 2019)**. The automatic stay imposes a moratorium on collection efforts regarding property of the estate. Property of the estate is

comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." The Creditor repossessed Debtor's car after the bankruptcy was filed, which constituted a taking of property of the estate under section 362(a)(3). Thus, the Creditor violated the automatic stay provisions of section 362(a)(3).

***In re Prescott*, 2019 WL 3421676 (Bankr. S.D. Tex. 2019).** *Court determines that issues of fact remain for trial, in denying in part motions for summary judgment alleging stay violations during Debtor's Chapter 13 plan.* Motions for Summary Judgment granted in part and denied in part with respect to discharged Debtor's claim against mortgage company for violation of the automatic stay.

***In re Seaberry*, 2019 WL 1590536 (Bankr. S.D. Miss. 2019)**. Debtor alleges that the automatic stay was violated by sending the debtor's counsel a letter after the commencement of the bankruptcy. This court stated that the fifth circuit has set forth a three part test for establishing an violation of the stay under Section 362(k) of the Bankruptcy Code including: the entity must have known of the existence of the stay, the entity's acts must have been intentional, and the entity's acts must have violated the automatic stay. The letter as a whole was information and not a collection letter, therefore the automatic stay was not violated, Since the automatic stay does not protect the debtor from all communications but only communication that threatens any act to collect, access, or recover prepetition debts.

EXEMPTIONS IN BANKRUPTCY.....

***In re Galindo,* 2018 WL 6016542 (Bankr. W.D. Tex. Nov. 15, 2018).** *In determining whether an amendment of exemptions would prejudice a party in interest, court will determine whether creditor would be adversely affected by having detrimentally relied on a debtor's initial position.* Here, debtors originally filed a Chapter 13 and initially exempted a Camaro and a Sportster pursuant to Tex. Prop. Code. 42.001(a)(1), (2) and 42.002(a)(9). No party objected. Court confirmed the debtors' Chapter 13 plan. Debtors voluntarily converted their case to Chapter 7. After conversion, debtors and Ford Motor Credit entered into an Agreed Order Lifting the Stay that terminated the stay on debtors' F-150 which they had not previously exempted. Ford Motor then repossessed and sold the F-150 at auction. Ford Motor then sent the Chapter 7 trustee $9,723 which was surplus of proceeds that remained after Ford Motor satisfied its lien. In addition, Randolph Brooks FCU obtained an Order Lifting the Stay against the Camaro. RBFCU liquidated the Camaro. After RBFCU applied the sale proceeds from the Camaro to obligations owed by debtors, a deficiency remained of $797. Debtors then filed Amended Schedules B and C and changed their automobile exemptions still claiming an exemption in the Sportster but now claiming an exemption in the F-150 proceeds instead of the Camaro. Trustee objected to the amended exemptions claiming prejudice by debtors' removal of the Camaro and addition of the F-150 proceeds to their Amended Schedule C because he was deprived of the opportunity to liquidate the Camaro. Court determined that the debtors' amendments did not allow them to exempt more property than was originally claimed and originally exempt. They claimed two vehicles for two drivers. Trustee could have tried to sell the F-150 before Ford Motor entered into the Agreed Order Lifting Stay allowing it to liquidate.

Trustee made no attempt to liquidate during the period of time in which the F-150 was non-exempt. Trustee had not administered any assets. In fact, after debtors' post-conversion 341 meeting of creditors was held, trustee filed a Report of No Distribution. Until RBFCU and Ford Motor liquidated the Camaro and F-150, neither the trustee nor debtors believed that either car had any equity. As such, trustee's inability to recover from an exempt asset does not constitute grounds for denying an amendment under Rule 1009(a). Based on these facts, Court concluded that trustee failed to demonstrate that he was prejudiced by debtors' amendments to their schedules.

***In re Brady*, 2019 WL 3429165 (U.S.D.C. N.D. Tex. July 30, 2019).** *Sole issue on appeal is whether bankruptcy court erred in sustaining objections to appellant/debtor's claimed exemptions with respect to her interest in certain closely held entities.* Appellant claims that because there were no timely objections to her claimed exemptions while her case was pending under Chapter 11, that her interest in certain closely held entities were no longer part of the bankruptcy estate and the conversion to Chapter 7 could not restart the clock for filing objections thereto. In a case converted to Chapter 7, Bankruptcy Rule 1019(2)(B) provides that a new time period commences under Bankruptcy Rule 4003(b) for filing objections to claims of exemption (unless certain exceptions not relevant in this case apply). Appellant argued that a procedural rule cannot supersede a substantive property right given to her under 522(l). Court concluded she was claiming the substantive right through procedural rule, Bankr. R. 4003, just as appellees were granted the right to object through a different procedural rule, Bankr. R. 1019(2)(B). Appellant could not explain why one procedural rule should trump another especially where the latter specifically applies when a case is converted to Chapter 7. Appellant could not demonstrate that the bankruptcy court's opinion was erroneous. Court affirmed.

JURISDICTION AND VENUE…….

***Matter of Benjamin*, 932 F.3d 293 (5th Cir. 2019)**. *Bankruptcy courts can exercise jurisdiction over claims for money based on allegations that Social Security Administration failed to comply with its own regulations but not where allegation is one of entitlement to benefits*. Chapter 7 debtor brought adversary proceeding alleging that Social Security Administration (SSA) had collected overpayments from him in violation of its own regulations. Bankruptcy court dismissed for lack of subject matter jurisdiction on reasoning that 42 U.S.C. § 405(h) bars bankruptcy courts from exercising jurisdiction over Social Security claims under 28 U.S.C. §1334 despite fact that Section 405(h) only refers to 28 U.S.C. §§ 1331 and 1346. Circuit Court rejected notion that there was a "hidden jurisdictional bar" and held that on remand bankruptcy court would need to determine whether debtor's claims where primarily about entitlement to benefits or primarily a claim for money because SSA failed to comply with its own regulations because the bankruptcy court could exercise jurisdiction over the latter but not the former.

***Matter of Penn*, 18-51055, 2019 WL 5081268 (5th Cir. Oct. 9, 2019)**. *Where debtor opts for entry of dismissal order without obtaining ruling on all of Chapter 13 trustee's bases for objection to plan confirmation, district court will lack jurisdiction over appeal of denial of plan confirmation.* Chapter 13 debtor moved to retain entire tax refund and confirm

Chapter 13 plan containing non-standard provision. Chapter 13 trustee lodged multiple objections. When bankruptcy court refused to grant motion regarding retention of tax refund, court offered debtor opportunity to submit revised plan; debtor asked the court to deny her motion regarding the tax refund and her motion to confirm plan and to dismiss the bankruptcy case under the belief that she could then appeal the denial of plan confirmation. The Fifth Circuit held that because the debtor asked the bankruptcy court to enter dismissal order without obtaining ruling on all of the Chapter 13 trustee's objections to plan confirmation, result was voluntary dismissal of case. As such, Fifth Circuit held that district court lacked jurisdiction over appeal and remanded for dismissal of the appeal.

PROCEDURE .....

***In re Traylor*, 15-30943, 2018 WL 6650364 (Bankr. W.D. La. Dec. 14, 2018)**. *Debtor must show exception circumstances in order to vacate dismissal pursuant to Rule 60(b)(6)*. Debtor failed to make plan payments and court dismissed case on motion by Chapter 13 trustee. More than 14 days later, debtor filed motion to vacate dismissal order. Bankruptcy court held that debtor's failure to seek relief within the 14-day appeal deadline meant that debtor had to meet the Rule 60(b)(6) standard which calls for a showing of exceptional circumstances. The court held that debtor's failure to plead any specific grounds or facts sufficient to establish exceptional circumstances necessarily resulted in her motion to vacate being denied.

***In re Sylvester*, 15-30608, 2018 WL 6653016 (Bankr. W.D. La. Dec. 14, 2018)**. *Debtor must show exception circumstances in order to vacate dismissal pursuant to Rule 60(b)(6)*. Debtor failed to make plan payments and court dismissed case on motion by Chapter 13 trustee. More than 14 days later, debtor filed motion to reinstate case. Bankruptcy court held that debtor's failure to seek relief within the 14-day appeal deadline meant that debtor had to meet the Rule 60(b)(6) standard which calls for a showing of exceptional circumstances. The court held that debtor's failure to plead any specific grounds or facts sufficient to establish exceptional circumstances necessarily resulted in her motion to vacate being denied.

***Smith v. Mid-S. Maint., Inc.*, 363 F. Supp. 3d 701 (N.D. Miss. 2019)**. *Bankruptcy court has inherent authority to make reasonable interpretation of agreed order in order to prevent a manifest injustice*. Bankruptcy court entered an agreed order extending the deadline to object to discharge. Debtors later challenged timeliness of complaint objecting to dischargeability on grounds that order only applied to objections to discharge. The bankruptcy court rejected the debtors' arguments, finding that at a status conference on the agreed order the parties had represented that they understood the extension to apply to both discharge and dischargeability. After trial, bankruptcy court entered judgment against debtors finding a debt to be nondischargeable under section 523(a)(2)(A) and (a)(6) on grounds that debtors had knowingly received funds which had been embezzled by their mother. Noting that even debtors had in their pleadings used the terms "discharge" and "dischargeability" interchangeably, the district court declined to find that the bankruptcy court had clearly erred by interpreting the agreed order to extend the deadline as to both 523 and 527 complaints but rather held that the bankruptcy judge had the inherent authority

to make a reasonable interpretation of the agreed order in order to prevent a manifest injustice. In what we assume is a delightfully droll conclusion, the district court affirmed "[the bankruptcy court's] ruling denying [debtors] a discharge" (apparently deliberately conflating "dischargeability" with "discharge").

***Raborn v. Schott*, 18-CV-00675-BAJ-RLB, 2019 WL 346715 (M.D. La. Jan. 28, 2019), appeal dismissed sub nom. Matter of Raborn, 19-30164, 2019 WL 4121015 (5th Cir. July 23, 2019)**. *Equitable mootness can bar challenge to Chapter 7 trustee's final report*. Debtor challenged chapter 7 trustee's final report arguing that some of monies were attributable to an exempted asset. The bankruptcy court approved the final report, specifically finding that the distributions did not impact the claimed exemption. The district court held that equitable mootness barred the appeal because debtor failed to obtain order staying final distribution to creditors and did not provide evidence that non-parties to the proceeding (i.e. the creditors who received distributions) would not be negatively impacted if debtor received the relief requested and further found that the debtor lacked standing to appeal because the factual record made it clear that even if she prevailed on appeal there would be insufficient funds in the estate to generate a surplus that would result in a distribution to the debtor.

***In re Young*, 17-14065-NPO, 2018 WL 6060338 (Bankr. N.D. Miss. Nov. 19, 2018)**. *2004 exam transcript will not be considered for purposes of summary judgment because 2004 exam does not constitute a "deposition" under Rule 7030*. Creditor/plaintiff sought summary judgment against debtor in adversary proceeding and included 2004 exam transcript in attempt to establish lack of genuine issue of material fact. Debtor failed to object to inclusion of 2004 exam transcript in the record, but the court held that it could not consider the 2004 exam for purposes of summary judgment because 2004 exams do not qualify as a "deposition" taken under Rule 7030 of the Federal Rules of Bankruptcy Procedure and the evidence in the record was insufficient for the court to determine that the procedural safeguards provided with respect to depositions had been observed for the 2004 exam. Because the 2004 exam provided the sole basis for plaintiff's assertion that there was no genuine issue of material fact, the court denied summary judgment.

***Burch v. Aurzada, (In re Burch),* 2019 WL 2089086 (U.S.D.C. N.D. Tex. April 30, 2019).** *Findings, Conclusions and Recommendations of the United States Magistrate Judge with respect to a civil action brought by debtor pro se against the Chapter 7 trustee.* Debtor alleged, in general, that he had been harmed by how the Chapter 7 trustee performed her duties. This action was referred to the US Magistrate for pretrial management under 28 U.S.C. 636(b) and a standing order of reference from the United States District Judge. Magistrate first examined the Court's subject matter jurisdiction. Court does not assume it has jurisdiction and if it determines at any time that it lacks subject matter jurisdiction, the Court must dismiss the action. The Magistrate determined that pursuant to the *Barton* doctrine, a debtor must obtain leave of the bankruptcy court before initiating an action in the district court when the action is against a trustee or other bankruptcy-court-appointed officer for acts done in the actor's official capacity. Consequently, the Magistrate recommended that the Court dismiss this action for lack of subject matter jurisdiction

without prejudice to debtor's ability to refile it in the bankruptcy court or after obtaining leave from the bankruptcy court.

***McClenon v. Statebridge Company, LLC, Cozy Homes and Francois Delille,* 2019 WL 451241 (Bankr. S.D. Tex. Feb. 4, 2019).** *Court, sua sponte, abstained from adjudicating this adversary proceeding and dismissed the law suit pursuant to 28 U.S.C. 1334(c)(1).* Debtor filed suit against defendants alleging causes of action for (1) wrongful foreclosure; (2) negligence; (3) breach of Texas Deceptive Trade Practices Act; and (4) conversion. Court recognized that only permissive abstention could be applicable here. The Court considered the fourteen factors a court may consider when deciding to abstain pursuant to 1334(c)(1). The Court found ten factors weighed in favor of abstention and none weighed against. Four factors were inapplicable. Court recognized it had discretion to give different weight to each factor. Court placed substantial weight on 1) effect or lack thereof on the efficient administration of the estate finding that there was simply no material nexus between the adversary proceeding and the administration of debtor's estate; 2) extent to which state law issues predominate over bankruptcy issues finding that all claims in the suit were state law claims; 3) difficult or unsettled nature of applicable law finding that the claims asserted were "garden variety" state law causes of action that a state court can easily adjudicate; 6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case finding that because a plan had already been confirmed, the nexus is remote; and 13) comity finding that deference should be given to a state court to decide state law issues under the circumstances.

CLAIMS .....

***U.S. v. Chesteen*, CV 18-2077, 2019 WL 1499532 (E.D. La. Feb. 25, 2019)**. *Shared responsibility payment in Affordable Care Act is nondischargeable*. IRS sought to have debtor's obligations for the shared responsibility payment under the Patient Protection & Affordable Care Act declared a tax and not a penalty. The debtor focused on the wording of the statute, which uses the term "penalty" eighteen times and "tax" none. Relying on *National Federation of Independent Business v. Sebelius* (567 U.S. 519 (2012), the district court held that the labels did not matter so much as the function and that the shared responsibility payment functioned like a tax and therefore constituted one for purposes of priority nondischargeability under 11 U.S.C. § 507(a)(8)(A)(iii).

***Matter of Cousins,* 601 B.R. 609 (Bankr. E.D. La. 2019)**. *Shared responsibility payment in Affordable Care Act is priority tax debt*. Debtors objected to IRS's claim to priority treatment for shared responsibility payment created by Affordable Care Act arguing that it was not a tax but rather a penalty. Court held that shared responsibility payment constituted a tax for purposes of Section 507(a) because its form and function was that of a tax.

***In re Simon*, 15-12181, 2019 WL 3759555 (Bankr. W.D. La. Aug. 8, 2019)**. *Court will enforce plan provisions specifically in favor of creditor even when creditor does not respond to debtor's objection to claim*. Post-confirmation, Chapter 13 debtor objected to claim of creditor and creditor did not respond. Court rejected debtor's arguments that claim

was barred by plan because the plan expressly provided that amounts on proof of claims controlled over amounts listed in the plan.

***Quezada v. United States*, 1:18-CV-797-LY, 2019 WL 4765183 (W.D. Tex. Sept. 30, 2019)**. *Where two forms are required to be filed and debtor only filed one, statute of limitations under Section 6501 of the IRC does not run because filings were incomplete*. For multiple years pre-petition, debtor claimed deductions for payments made to supposed independent contractors and did not make tax withholdings. IRS sent him a notice that his Form 1099 had missing or incorrect TINs and that he would need to start backup withholding. Debtor never did backup withholding. When IRS hit debtor with seven-figure backup-withholding tax liability, debtor filed bankruptcy and brought adversary challenging the assessment. The bankruptcy court held that it was valid and nondischargeable. Sole issue on appeal was whether the filing of Forms 1099 and 1040 by the debtor commenced the three-year statute of limitations under Section 6501 of the IRC. The district court affirmed the bankruptcy court's ruling that because debtor was required to file two forms and only filed one, the statute of limitations had not begun to run because the debtor's filings were incomplete.

***In re Beal*, 19-50053-RLJ13, 2019 WL 5057942 (Bankr. N.D. Tex. Oct. 8, 2019)**. *Creditor that takes note by assignment may still be subject to same defenses that could have been asserted by debtors against the original noteholder*. Prepetition, debtors traded in vehicle to reduce purchase price on new vehicle; pursuant to purchase contract, seller was supposed to pay off the note on the old vehicle. Seller failed to pay off note on old vehicle, then sold note on new vehicle to third party. Debtors filed chapter 13 and objected to claim of third party on basis that third-party's claim failed to account for responsibility to pay off note on the old vehicle. The court sustained the objection and held that under the Holder Rule (40 Fed. Reg. 53506 (Nov. 18, 1975), consumer credit contracts are required to have language that preserve a consumer's defenses and claims and that as such transfer of note on new vehicle could not prevent debtors from asserting offset claim against new note holder.

***In re Patterson*, 2019 WL 995717 (Bankr. M.D. La. Feb. 12, 2019)**. *A deed in lieu of foreclosure did not create a new, post-discharge obligation independent of its pre-petition lien*. A chapter 13 debtor objected to a claim filed as derivative of a debt in a prior chapter 7 case. After debtor's chapter 7 discharge in 2009, he signed a deed in lieu of foreclosure in favor of a new noteholder in connection with property for which his personal liability of the debt was discharged. Subsequently, Fidelity, having issued a policy of title insurance for the transaction with the new noteholder, failed to note the property did not have clear title. The holder of the existing judicial mortgage on the property was paid by Fidelity and Fidelity then sued debtor in state court and obtained a judgment. The debtor later filed a chapter 13 petition and Fidelity filed a proof of claim based on the state court's judgment. The court held that the *Rooker-Feldman* doctrine does not apply when the discharge injunction has been violated and a deed in lieu of foreclosure did not create a new, post-discharge obligation independent of its pre-petition lien. Further, § 524 voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141,

1228 or 1328, whether or not such debt is waived. The evidence established that a 2009-chapter 7 discharge relieved the debtor of all personal liability for his mortgage debt. The state court judgment was taken in violation of the debtor's discharge injunction and the Bankruptcy Code rendered that judgment void and the debtor's objection is sustained.

DISCHARGE - OVERALL-EFFECT OF DISCHARGE .....

***William T. Neary, United States Trustee v. Moody (In re Moody),* 2018 WL 6653015 (Bankr. N.D. Tex. Dec. 17, 2018).** *Pursuant to 11 U.S.C. 727(a)(3) and 727(a)(4), United States Trustee has met his burden of proof with respect to all elements and discharge is denied*. Debtor/defendant was primarily in the business of manufacturing and selling commercial trailers and worked for a company called Factory Transport, Inc. ("FTI"). FTI had previously filed bankruptcy as well. The debtor's girlfriend was the CEO of FTI while debtor worked there. Debtor had been working in a similar role for another entity, Race Trailer Parts, Inc. since January 2018. His girlfriend was also the CEO of this company. FTI paid most, if not all, of the debtor's personal expenses rather than paying the debtor a wage or salary, making it impossible to determine debtor's income the year before filing or any of the several years preceding the bankruptcy. Debtor would also use more than half-dozen personal credit cards for his life expenses as well as FTI's expenses and then FTI would pay debtor's entire credit card bill to compensate him for work. There was no way to differentiate between personal and business expenses. FTI would also just directly pay personal expenses of the debtor from its corporate bank account. These facts demonstrated a failure to keep records from which the debtor's true financial condition could be ascertained constituting grounds under 727(a)(3) to deny discharge. Debtor also made false oaths in the case because he did not disclose his true income on his schedules and SOFAs. He put on his amended schedules and SOFA that he grossed zero income for the year 2017 and 2018 even when FTI paid most, if not all, of the debtor's personal expenses. Approximately 6 months prior to filing for bankruptcy debtor had completed a credit application for a new vehicle where he listed his gross income at $24,000 a month for working at FTI. Court determined such actions to be incredulous and a reckless disregard for the truth especially when FTI was selling trailers for six figure prices and even one for over a million. FTI's 2016 tax return shows it grossed over a million while debtor's SOFA showed he had only $15,000 of gross income for 2016. Together all these facts demonstrated a reckless disregard for the truth and constituted grounds to deny the discharge under 727(a)(4) as well.

***United States Trustee v. Long (In re Long),* 2019 WL 1556679 (Bankr. S.D. Miss. April 9, 2019).** *Court found that the United States Trustee failed to meet is burden under 727(a)(2)(B) or 727(a)(4)(A) to establish an exception to discharge.* The United States Trustee ("UST") alleged that debtors intended to hinder, delay or defraud a creditor or officer of the estate by failing to disclose property of the estate in violation of 727(a)(2)(B) and knowingly and fraudulently made materially false oaths in connection with the case in violation of 727(a)(4). UST established that debtors did not schedule certain assets, primarily an interest in an LLC that owned an apartment complex. However, debtors presented credible evidence that they had done their best to disclose all assets. Testimony established a misunderstanding and failure to communicate about the apartment complex,

the related debt and other alleged assets, but not an intent to defraud. That there was no equity in the apartment complex for the debtors' benefit further evidenced no benefit to them of any concealment and a lack of intent to defraud. No evidence presented to show value of any of the other LLCs. Burden was not met to establish a discharge exception under 727(a)(2)(B). UST established that the debtors made statements under oath that were false. Debtors failed to disclose a guaranty owed, another debt, and the interests in the LLC that owned the apartment complex and other LLCs. These omissions were material in that they bear a relationship to the debtors' business or estate, business dealings or existence and disposition of property. However, UST did not meet its burden again. Testimony of debtors and their bankruptcy attorney indicated that a misunderstanding between them lead to the failure to disclose accurate information. Court viewed this failure as an honest mistake due to confusion or inadvertence. Additionally, Mr. Long did not believe he owed one of the debts and the additional LLCs that were not included in the schedules and statements did not do any business, own any assets, or were dissolved, resulting in the debtors' erroneous assumption that they were not relevant to the bankruptcy. Court could not find this failure to indicate fraudulent intent to conceal an asset and discharge not denied pursuant to 727(a)(4)(A) either.

***In re Collins*, 2018 WL 6605913 (Bankr. S.D. Miss. 2018)**. The Debtor transferred property to his brother within one year of the filing of his bankruptcy petition with the intent to hinder, delay, or defraud his creditors. Under 727(a), a court must grant a debtor a discharge unless one of the enumerated exceptions for denying a debtor a discharge under § 727(a) is proven. "The exceptions are construed strictly against the creditor and liberally in favor of the debtor." The burden of proof is on the creditor and "must be proven by a preponderance of the evidence."

***In re Franco*, 2019 WL 2236800 (Bankr. S.D. Tex. 2019)**. Under section 727(d)(1), the Court shall revoke a discharge if the debtor obtained the discharge through fraud, and the requesting party did not know of the fraud prior to the granting of the discharge. The fraud under section 727(d) must be fraud relating to the entire discharge and cannot be fraud upon an individual creditor. Here, the only evidence that the Creditor brought before this Court is that the Debtor misspelled "Tuam" and nothing more. On its own, this is not enough to establish that the Debtor engaged in fraudulent intent under section 727(d). Because the Creditor has failed to carry his burden in showing that the Debtor obtained a discharge through fraud, the Creditor's claim for revocation of the Debtor's discharge must be denied.

***In re Nichols*, 2019 WL 2591592 (Bankr. S.D. Miss. Jun. 24, 2019)**. *Debtor denied discharge pursuant to § 727(a)(4)(A)*. Debtor filed a Chapter 7 petition and, on the same day, the schedules, statements and other documents as required by Rules 1007(c) and/or 3015(b) of the Federal Rules of Bankruptcy Procedure, which includes the Original Statement of Financial Affairs. In response to question 18 on the Original Statement of Financial Affairs, debtor indicated that she did not make any property transfers within two (2) years of filing the petition. At the meeting of creditors, debtor's former bankruptcy attorney, a creditor in the case, questioned debtor about transfers made prior to the commencement of the bankruptcy case. Debtor subsequently filed an Amended Statement

of Financial Affairs, following which Trustee filed a complaint alleging debtor provided sworn testimony and signed papers under oath that were not true and failed to disclose monetary transfers before filing the Amended Statement of Financial Affairs, and requested that the court deny the debtor's discharge. In evaluating a debtor's truthfulness, courts may use circumstantial evidence to infer a debtor's fraudulent intent or reckless disregard for the truth (*In re Duncan* (citing *In re Sholdra*)). Additionally, "the Fifth Circuit [has] held that there [is] sufficient evidence of the debtor's reckless indifference to the truth based on 'the existence of more than one falsehood, together with [the debtor]'s failure to take advantage of the opportunity to clear up all inconsistencies and omissions when he filed his amended [s]chedules.'" (*In re Gainey* (citing *In re Beaubouef*); *In re Ridgway*). Accordingly, the court concluded that the Trustee demonstrated debtor knowingly and fraudulently, in or in connection with a bankruptcy case, made a false oath and should be denied her discharge pursuant to § 727(a)(4)(A).

DISCHARGE - PARTICULAR DEBTS .....

***In re Carter*, 17-35082, 2018 WL 6060391 (Bankr. S.D. Tex. Nov. 19, 2018)**. *Just because estoppel does not provide creditor with judgment does not mean court will not grant judgment after taking evidence*. Debtor had entered into professional services contract with creditor whereby debtor would provide services to third parties and send invoices under the creditors letterhead with debtor and creditor splitting the collections. Debtor entered into contracts with third parties using creditor's name but then directly invoiced third parties and kept all proceeds for herself. Creditor sued in state court and received jury findings of breach of contract and fraud, opting to have judgment entered on breach of contract in order to recover attorney's fees. Debtor filed for chapter 7. Creditor brought adversary proceeding and alleged that debtor was collaterally estopped from challenging whether a state court judgment against her was nondischargeable under Section 526(a)(6) (willful and malicious injury) and (a)(2) (false representations, false pretenses). The bankruptcy court held that debtor was estopped from arguing that she had breached her agreement with the creditor, but that because the jury charge had lacked language regarding willfulness and maliciousness and because creditor had opted for judgment under its breach of contract theory instead of its fraud theory the debtor was not estopped from arguing that her debt was dischargeable. However, the Court went on to conclude based on the facts evinced at trial that both Section 523(a)(2) and (a)(6) applied to the debt.

***In re Williams*, 18-30446-HDH7, 2018 WL 6650363 (Bankr. N.D. Tex. Dec. 17, 2018)**. *Plaintiff must prove nondischargeability of debt by preponderance of evidence*. Pro se plaintiff brought adversary against pro se debtor seeking determination that debt related to debtor's failure to pay second mortgage on house purchased from debtor by plaintiff was nondischargeable. Applying Section 523(a)(2)(A) and (a)(6), the court held that plaintiff failed to prove by preponderance of evidence that debtor's representation that he would pay off the second mortgage was false at the time that it was made or that debtor intended to harm plaintiff.

***In re Jackson*, 17-80090, 2018 WL 5785244 (Bankr. S.D. Tex. Nov. 1, 2018)**. *Punitive damages awarded in state court judgment may be nondischargeable as willful and*

malicious injury. Pre-petition, debtor had engaged in scheme to win contract work from school district by bribing member of board of trustees. Competitor brought lawsuit alleging intentional interference with prospective business relations and obtained state court judgment awarding punitive damages. When debtor filed bankruptcy, competitor brought adversary seeking non-dischargeability determination pursuant to Section 523(a)(6) with respect to the punitive damages portion of its judgment. Applying the actual malice standard in light of the state court jury's findings, the bankruptcy court found the punitive damages to be non-dischargeable because the bankruptcy court found that the debtor's subjective intent was to inflict willful and malicious injury on her competitor.

***In re Arguello*, 17-80324, 2018 WL 6720772 (Bankr. S.D. Tex. Dec. 20, 2018)**. *Debtor did not "accidentally" shoot at stepson where Debtor fired five shots hitting stepson twice*. Debtor's stepson alleged that debtor shot him twice (out of a total five shots) and sought a determination that his damages stemming from that shooting were non-dischargeable under Section 523(a)(6) (willful and malicious). Debtor argued that his conduct was negligent or reckless but that he never intended to hit his stepson. The court held that for a finding of willful and malicious injury, subjective notice to cause harm was sufficient and that in light of the multiple shots fired it did not matter whether stepson's or debtor's version of events were believed in order for the court to conclude that the Debtor had the subjective intent to inflict a willful and malicious injury.

***BancorpSouth Bank v. Avery (In re Avery)*, 594 B.R. 655 (Bankr. S.D. Miss. 2018)**. *Statements made at 341 meeting will not be considered for purposes of summary judgment in unchallenged adversary proceeding against debtor*. Creditor in dischargeability adversary moved for summary judgment based upon statements made by debtor at 341 meeting. Even though debtor failed to respond to the summary judgment motion, the court held that it could not consider the statements made at the 341 meeting for purposes of a summary judgment motion because they did not qualify under Bankruptcy Rule 7030 to be used as evidence in an adversary proceeding under Bankruptcy Rule 7056(c)(1)(A). The motion was denied so that a further record could be developed.

***McCoy v. U.S.*, 3:18-CV-21, 2019 WL 1084211 (S.D. Tex. Mar. 7, 2019)**. *Debtor's testimony will be insufficient to establish persistent inability to maintain minimal standard of living where supposed medical conditions pre-dated student loans*. Eighteen months after finishing her Ph.D studies, debtor with no dependents filed chapter 7 petition and sought to discharge $350k in student loan debt. At trial, debtor was sole witness. Applying the *Gerhardt* (348 F.3d 89, 5th Cir. 2003) test, the bankruptcy court held that debtor failed to establish that additional circumstances existed indicating that her inability to maintain a minimal standard of living if forced to repay the loans were likely to persist for a significant portion of the repayment period. In affirming the bankruptcy court, the district court made it clear that debtor's own testimony was insufficient to establish persistent inability to maintain minimal standard of living where debtor was relying upon supposed medical and psychological conditions that pre-dated her Ph.D. studies.

***Matter of Pendergraft*, 745 Fed.Appx. 517 (5th Cir. 2018)**. *Debts will not escape nondischargeable debts by arguing that monies they improperly diverted were diverted to*

a company they owned. Non-profit for which debtors were directors brought adversary seeking to have debts relating to alleged self-dealing by debtors determined to be nondischargeable. Debtors unsuccessfully argued that because the diverted monies went to a company they owned they were not personally liable and that bankruptcy judge should have recused himself providing as their only evidence the allegation that their attorney had told them prior to trial that the judge hated them. The Circuit Court found that the bankruptcy court had not improperly pierced the corporate veil because the tort claims it had adjudicated were made directly against the debtors and that the effort to recuse the bankruptcy judge was per se untimely because it was based on information that the debtors had prior to trial but was made only after the unfavorable ruling.

***Matter of Thomas*, 931 F.3d 449 (5th Cir. 2019)**. *Debtor's admission that she could do sedentary work may preclude discharge of student loan debts*. Chapter 7 debtor with diabetic neuropathy affecting her lower extremities brought adversary proceeding against Department of Education seeking discharge of student loan debt in amount of $7,806.45. Debtor urged Circuit Court to adopt totality of the circumstances test instead of *Brunner* test. The panel declined to deviate from its prior precedent and held that Debtor failed to establish that her inability to pay her loans and maintain a minimal standard of living would persist through a significant portion of the repayment period because Debtor admitted that she was capable of doing sedentary work.

***In re Davis*, 18-10559, 2019 WL 2158772 (Bankr. M.D. La. May 16, 2019)**. *Debt relating to false representations may still be discharged where creditor was not reasonable in relying upon false representations*. Debtor lied to creditor in credit application and nearly immediately defaulted on loan. When debtor filed bankruptcy, creditor brought adversary under Section 523(a)(2)(B). The bankruptcy court held that although debtor had made false representations on the credit application and intended the creditor to rely upon them, the creditor was not reasonable in relying upon them because the sum total of the application should have resulted in the creditor recognizing that numerous budget line items on the debtor's credit application were implausible on their face.

***In re Luithle*, 17-33240, 2019 WL 169197 (Bankr. S.D. Tex. Jan. 10, 2019).** *Obligations in divorce decree that are intended to by in the nature of support and alimony will not be discharged but those that are intended to be property division will be discharged*. Ex-spouse of debtor brought nondischargeability complaint relating to certain obligations contained in their divorce decree. The bankruptcy court held that 1) an obligation relating to a joint credit card debt was property division and therefore dischargeable, 2) responsibility to maintain life insurance was in the nature of support and alimony and therefore nondischargeable because it was intended to protect the obligation to pay a portion of a 401(k) plan, and 3) the 401(k) obligations were in the nature of support and alimony in light of the length of the parties' marriage (34 years), pending retirement and earning disparity.

***Tower Credit, Inc. v. Hickerson (In re Hickerson),* 2019 WL 2307131 (Bankr. M.D. La. May 30, 2019).** *Pursuant to 523(a)(2)(B) dischargeability action, creditor failed to carry its burden of proving that it reasonably relied on the debtor's 2011 and 2014 loan*

applications so its complaint was dismissed. Debtor applied for first loan with Tower Credit, Inc. ("Tower") in 2011 disclosing various debt obligations as well as her budget. Tower loaned debtor $5,778. Debtor defaulted on the loan and Tower sued and obtained a judgment. A year and a half later, despite the prior default and judgment, debtor applied for a second loan where she disclosed various debt obligations and her monthly budget. Debtor defaulted on second loan to Tower, which then sued and obtained a second judgment. Tower, in its complaint, claimed that defendant lied during the 2011 loan process by not disclosing that she gave her mother between $400 and $500 a month to help with her mother's expenses. Tower also claimed that debtor deceived it into making the 2014 loan because she actually lived alone when she contracted the second loan and was solely liable for rent (and not splitting rent with her boyfriend which she stated on application) and that she failed to disclose certain outstanding payday loans. With respect to the 2011 loan, the Court determined that the debtor's loan application mistakenly included information pertaining to a 2010 loan Tower had made to another borrower (the debtor's mother) which loan had been absent from the debtor's budget worksheet for her 2011 loan. The fact that Tower neither discovered the erroneous information on the application, or also failed to notice the absence of payments on a loan it believed debtor owed it, undermined Tower's position that it reasonably relied on the 2011 loan application to extend credit to the debtor. As such, Tower failed to carry its burden of proving that it reasonably relied on the debtor's statements in the 2011 loan application. The Court further determined that given the number of obligations missing from the debtor's budget that Tower knew or should have known about from its prior dealings with her, it did not reasonably rely on the contents of the 2014 loan application for a loan that required her to pay $270 per month.

***Nola Lanell Jenkins, Trustee of the Kathryn Chilress Irrevocable Trust v. Jones (In re Jones),* 2019 WL 1810892 (Bankr. W.D. Tex. April 24, 2019).** *Debt arising from $900,000 Financial Industry Regulatory Authority ("FINRA") arbitration award ("FINRA Award") fell within discharge exception for violation of securities laws.* The Court found that the FINRA Panel, a non-bankruptcy tribunal, had issued its FINRA Award determining that debtor/defendant was liable for compensatory damages, costs and attorney's fees in relation to violations of securities laws in connection with the sale of a security. The Court also found that the compensatory damages, costs, and attorney's fees awarded to the plaintiff in the FINRA Award were memorialized in a judicial order that was entered in Bexar County District Court. The Court then concluded that the FINRA Award arose, at least in part, in connection with the debtor's violation of Texas securities laws. Because the indebtedness owed to plaintiff by debtor was based in part upon violation of state securities laws and because the indebtedness had been memorialized by entry of the FINRA Award and related judgment in Bexar County District Court, the FINRA Award was determined to be non-dischargeable pursuant to Section 523(a)(19).

***Boyington Capital Group, LLC v. Haler (In re Haler),* 2018 WL 5259294 (Bankr. E.D. Tex. Oct. 19, 2018).** *Indebtedness owed to the plaintiff by defendant arising from the entry of an Amended Final Judgment in state court litigation is nondischargeable as a debt arising from embezzlement under 523(a)(4).* Here, the factual findings which bind the parties and the Court through the application of the principles of collateral estoppel were

sufficient to render the indebtedness owed by debtor/defendant to plaintiff pursuant to an Amended Final Judgment nondischargeable as a matter of law under 523(a)(4). Debtor was provided control of plaintiff's property. He then engaged in the unlawful appropriation of that property with an intent to deprive plaintiff of it. The jury expressly found that, as to his conduct with plaintiff, this individual debtor acted purposefully in perpetrating an actual fraud for his direct personal benefit. The jury determined that debtor's conduct was intentional and fraudulent. The jury then proceeded to determine that debtor had engaged in specific conduct that tracked the criminal definition of theft under Texas law as the prerequisite to assessing civil liability against the debtor for his intentional misconduct under the Texas Theft Liability Act. This factual finding was independently grounded in the debtor's failure to refund the unearned deposits of the plaintiff in addition to any action taken by the debtor in his acquisition of the sums from plaintiff. This factual determination fully subsumed the federal common law definition of embezzlement allowing the Court to conclude that there was no genuine issue as to any material fact and that the debt was non-dischargeable.

***Emmon Enterprises, LLC, d/b/a Jani King v. Gaddis (In re Gaddis),* 2019 WL 2006017 (Bankr. E.D. La. April 10, 2019).** *Defendant/debtor's action in attempting procurement of a service contract for another company was a breach of the non-solicitation provision in his franchise agreement that had not been terminated prior to the attempted procurement but because the defendant was unsuccessful in his attempt to lure the account to his new enterprise he did not make any profit and therefore there was likely no damages or debt that would be nondischargeable.* Plaintiff alleged that while debtor still owned and operated two Jani King franchises, that the debtor secretly created a new company, First Klass, and operated the company specifically to compete with Jani King and through First Klass, violated the non-compete and non-solicitation agreements in the contract between debtor and Jani King and debtor's concealment of First Klass along with actions taken by First Klass to procure certain cleaning contracts constituted fraud and any damages would be nondischargeable under 523(a)(2)(A). Court determined that debtor's behavior with respect to his attempted procurement of the cleaning contract with Pascale Manale's was a breach of the non-solicitation provision of the franchise agreement and sufficient for the Court to find fraud. However, because the debtor was unsuccessful in his attempt to lure this account to First Klass, he did not make any profit. Consequently, Court found there were likely no damages or debt that would be nondischargeable. Because the parties chose to bifurcate the trial and only address the question of damages if nondischargeability was found, Court conceded that Jani King may want a chance to try to prove damages for solicitation of the Pascale Manale's contract so agreed to hold a status conference with the parties to determine whether Jani King would pursue a damages claim. Jani King failed to carry its burden with respect to its claim against the defendant in connection with the Algiers Charter School Assn contract as the evidence was not probative that the debtor was running First Klass and competing with Jani King at the time this contract was actually procured.

***MC Oakhill, LLC v. Kite (In re Kite),* 2018 WL 6819509 (Bankr. N.D. Tex. Dec. 26, 2018).** *Partial summary judgment order granted judgment on the Plaintiff's claim for willful and malicious injury under 523(a)(6) with respect to a debt owed by debtor to*

Plaintiff under a credit agreement and related note; however amount of damages was reserved for trial. Debtor was the primary owner, operator and manager of a company ("GFP") that bought, renovated and resold distressed residential properties, for many of which it carried the purchasers' mortgages. In early stages of the relationship, GFP sold participations in those mortgages to Plaintiff. Later, Plaintiff began lending directly to GFP funds to actually acquire and renovate the homes for resale taking a first and senior lien on the mortgages as well as the proceeds from the mortgages and properties when GFP sold the properties. Several documents were entered memorializing these agreements. Debtor ratified these agreements as guarantor. Eventually GFP defaulted and Plaintiff filed a state court suit against debtor and GFP. The Receiver appointed in the state court suit discovered that GFP had not only defaulted on the note but had compromised Plaintiff's collateral position by mortgaging the real properties and selling additional participations in the mortgages. These actions effectively subordinated Plaintiff's liens to the mortgages of real estate lender, Home Savings. And, the additional participation interests primed Plaintiff's first lien position and further diminished the value of Plaintiff's collateral. The Receiver also discovered that Home Savings had started foreclosure proceedings and was compelled to borrow from Plaintiff to arrest the foreclosure and preserve the properties. The Court noted that the proper measure of damages here is the injury debtor and GFP's actions caused Plaintiff rather than contractual which would amount to the balance due under the note owed by debtor to Plaintiff. The Court determined that Plaintiff's damages properly comprised the decrease in the mortgages' value due to the senior Home Savings loans, plus the participations GFP sold to parties other than Plaintiff, plus the amount the Receiver borrowed from Plaintiff and paid to Home Savings to stop Home Savings from foreclosing on the properties.

***Reynolds et al v. Eckerd (In re Eckerd)*,18-41521, 2019 WL 5250774 (Bankr. E.D. Tex. Oct. 16, 2019)**. *Agreed judgment that merely states that it is nondischargeable is not entitled to preclusive effect in subsequent nondischargeability adversary*. Pre-petition, debtor and creditor entered into agreed judgment in state court lawsuit, with the terms of the agreed judgment indicating that it was to be nondischargeable in bankruptcy. Plaintiff in nondischargeable proceeding sought summary judgment, arguing preclusive effect of judgment entered in state court. Bankruptcy court denied summary judgment, noting that agreed judgment contained no admission of liability and no factual findings that would establish the elements of a nondischargeable claim.

***In re Dehler*, 593 B.R. 301 (Bankr. E.D. La. 2018)**. Parents whose baby was pronounced dead after a prolonged labor assisted by Chapter 7 debtor in her capacity as naturopathic practitioner certified to practice midwifery brought adversary proceeding to except debt from discharge on "willful and malicious injury" theory. Court finds Debtor was exceptionally negligent in practice and probably reckless in her adherence to the parents' wishes but does not find that she was willful or malicious.

***In re Hanna*, 2019 WL 3290941 (Bankr. S.D. Tex. 2019)**. Creditor brought adversary proceeding seeking to determine nondischargeability of debt arising from $150,000 loan to debtor's 100%-owned company, which was personally guaranteed by debtor. The Court

found that the debt was not dischargeable because the Debtor did not use the funds for expansion of the business in which the loan was to be used for.

***In re Jamison*, 2018 WL 5815927 (Bankr. S.D. Miss. 2018)**. The Court finds that Creditor has proven "by a preponderance of the evidence that the debtor made representations that were (1) knowing and fraudulent falsehoods, (2) describing past or current facts, (3) that were relied upon by the other party." For this reason, the Debtor's obligation to the Creditor is non-dischargeable pursuant to § 523(a)(2)(A).

***In re Hernandez*, 2019 WL 24002998 (Bankr. W.D. Tex. 2019)**. In an original proceeding, the court held that under Section 523(a)(4) of the Bankruptcy Code, a debt for fraud while acting in a fiduciary capacity is non-dischargeable. After an adversary proceeding, with the instruction of a heightened standard of defalcation, this court also held the debt is non-dischargeable. This case involved two persons entering a partnership however the debtor breached a fiduciary duty that was owed to the partnership, and also misappropriated funds for the partnership, therefore the debt was discharged.

***In re Ulbrich*, 2019 WL 2895618 (Bankr. W.D. Tex. 2019)**. The court analyzed whether assignment was (1) for the purpose of collecting, which retained non-dischargeable and priority treatment or, (2) "true" assignment which became dischargeable and nonpriority. The courts found that if a payee assigned a support claim to some entity solely for help in collecting arrears, the claim retained non-dischargeable and priority status pursuant to Section 523 and Section 507 of the Bankruptcy Code.

***In re Long*, (2019 WL 1556648) (Bankr. E.D. Tex. Apr. 9, 2019)**. *Complaint seeks a determination that debt owed by the defendant arising from state court litigation should be excepted from discharge under 11 U.S.C. § 523(a)(6) as a willful and malicious injury*. In an adversary proceeding against chapter 7 debtors, plaintiffs filed a complaint seeking a determination of dischargeability regarding a state court judgment debt which the court granted summary judgment against Mr. Long and declared that the indebtedness owed by him was excepted from discharge as a debt arising from a willful and malicious injury pursuant to 11 U.S.C. § 523(a)(6). The court found that any evidence regarding any affirmative action taken by Mrs. Long established in the findings of fact established no more than she engaged in a deliberate action which led to an injury – a circumstance which the United States Supreme Court has specifically found to be insufficient to establish nondischargeability as a willful and malicious injury under § 523(a)(6). *In re Miller* established that willful and malicious injury requires proof that such injury arose from a deliberate and intentional act by a debtor that was inflicted under circumstances evidencing either: (1) an objective substantial certainty of harm; or (2) a subjective motive to cause harm. The court held that plaintiffs failed to demonstrate by a preponderance of the evidence the inflection of a deliberate or intentional injury; that the actions of Mrs. Long created an objective substantial certainty of harm; or that any omission by Mrs. Long inflicted a deliberate or intentional injury or created an objective substantial certainty of harm. Accordingly, relief requested in plaintiff's complaint is denied.

***In re Stapleton*, 2019 WL 3403355 (Bankr. E.D. Tex. Jul. 26, 2019)**. *Relief sought in an adversary proceeding denied based upon the failure of plaintiff to prove by a preponderance of the evidence that all elements required to establish its cause of action under 11 U.S.C. § 523(a)(2)(B)*. After defaulting under the terms of a promissory note and a preferred mortgage granted to the bank by the debtor, the bank became a judgment creditor arising from the entry of a final judgment in its favor in federal court. An involuntary petition under Chapter 7 of the Bankruptcy Code was filed and the debtor subsequently consented to the entry of an order for relief. The bank filed an adversary proceeding objecting to the entry of a general discharge order under § 727 of the Bankruptcy Code, as well as an alternative count seeking determination of the dischargeability of a particular debt under 11 U.S.C. § 523(a)(2)(B) pertaining to the dischargeability of the federal court judgment. The court dissolved its abatement of this adversary proceeding after resolutions of the § 727 actions were reached without resulting in a denial of discharge. The bank contended that the judgment amount arising from the federal court judgment should be declared nondischargeable as a debt obtained through the alleged submission of a false financial statement by debtor. The court held that the bank failed to prove by a preponderance of the evidence all elements required to establish its cause of action under 11 U.S.C. § 523(a)(2)(B), thus denying relief to the plaintiff and rendering judgment in favor of the debtor-defendant.

CHAPTER 13 - GENERAL .....

***In re Anderson*, 2019 WL 3774076 (Bankr. N.D. Tex. Aug. 9, 2019).** *Trustee's "disposable income" objection asserting that the debtors overstated their monthly deduction for "transportation ownership costs" when calculating the debtors' projected "disposable income" under 1325(b) is denied.* Trustee argued that the debtors were entitled to deduct only their *actual* monthly transportation ownership cost of $65.38 per month while the debtors argued that they were entitled to deduct the full *allowance* of $497 listed on the applicable table of the "Local Standards" issued by the IRS. Court concluded that, based on the facts of this case, when calculating their monthly "disposable income" under 1325(b), the debtors are entitled to (i) a net monthly deduction of $431.62 as their transportation ownership cost under the Local Standards incorporated in 707(b)(2)(A)(ii)(I), and (ii) a monthly debt payment deduction of $65.38 under 707(b)(2)(A)(iii).

***Zeba, LLC v. Hosseini (In re Hosseini)*, 2019 WL 1872930 (Bankr. S.D. Tex. April 25, 2019).** *Since the check cashing business was operated to obtain a profit, the promissory note was incurred as business debt and the co-debtor stay under 1301(a) does not apply.* At issue in this motion for summary judgment is debtor's counterclaim for contempt and violation of the co-debtor stay under 11 U.S.C. 1301. Debtor based his counterclaim on creditor's state court suit against debtor's parents. Debtor claims that creditor's suit violated the stay and the co-debtor stay because it attempted to collect the same debt in creditor's proof of claim. Creditor filed a motion for summary judgment on debtor's counterclaim, arguing that the debt it seeks to recover was part of a check cashing business that debtor and his father operated. Consequently, creditor claimed the state court suit to collect the debt from debtor's father cannot be subject to sanctions under 1301, as that

statute only applies to consumer debt. Evidentiary record was scant. However, the sole piece of evidence supporting the creditor's claim was a sworn affidavit of creditor's owner which stated creditor was involved in a joint venture with debtor's father and initially funded an account with $80,000 in capital. This affidavit supported the Court's findings that the check cashing business was operated to obtain a profit and that the promissory note was incurred as a business debt. As such, the co-debtor stay under 1301(a) did not apply.

***Howard v. Barkley*, 3:18-CV-163-SA, 2019 WL 1440290 (N.D Miss. 2019)**. Debtor's case was dismissed because Debtor failed to make payments under the approved plan, because Debtor disagreed with the amounts of the plan payment. A debtor's failure to commenced making payments, or either stops or pays less than the plan requires is a failure to *continue* making payments as required by the plan and is cause for dismissal. Further, on appeal the debtor failed to make any arguments as to why his case should not be dismissed, therefore the Court had nothing to review.

Chapter 13 - PLAN .....

***Briggs v. Johns*, 591 B.R. 664 (W.D. La. Sept. 28, 2018)**. *Bankruptcy court can refuse to approve terms of Chapter 13 plan that violate self-executing provisions of Bankruptcy Code but terms relating to non-self executing provisions of Bankruptcy Code require objection from party authorized by Code to do so*. Bankruptcy court *sua sponte* objected to chapter 13 debtor including in her calculation of disposable income the IRS standard for rent when her actual rent was substantially less. On appeal, district court held that bankruptcy courts can sua sponte object to terms in Chapter 13 plans that violate self-executing provisions of the Bankruptcy Code but that objections to non-self executing provisions must be made a party that the Bankruptcy Code authorizes to object. Emphasizing the language of Section 1325(b)(1), the district court concluded that it was not self-executing and that therefore bankruptcy courts are not authorized to sua sponte object to a debtor's disposable income calculation.

***Matter of Booker*, 753 Fed.Appx. 316 (5th Cir. 2019)**. *Where secured creditor does not object to proposed Chapter 13 plan and debtors commit Social Security income to plan, debtor may in good faith retain non-exempt collateral for loan*. Even though there were no objections filed by parties in interest, bankruptcy court rejected confirmation of Chapter 13 plan by elderly debtors as lacking requisite good faith under Section 1325(a)(3) because debtors proposed to retain a fishing boat, motor and trailer that served as partial collateral for a loan. Noting that not even the secured lender had objected and that debtors voluntarily committed their Social Security income to paying off the plan, the Circuit Court reversed the bankruptcy court's finding of lack of good faith.

***In re Arlin*, 596 B.R. 516 (Bankr. N.D. Tex. 2019)**. *Debtor can get away with cashing out 401k plan without telling Chapter 13 trustee if court finds the debtor to be sympathetic*. Post-confirmation, Chapter 13 debtor withdrew funds from 401k plan without seeking approval from court or notifying the Chapter 13 trustee. Upon receipt of debtor's tax returns and discovery that debtor had taken the withdrawal, Chapter 13 trustee moved to modify plan to require debtor to commit those funds to plan payments. The debtor argued

that she had withdrawn the funds to pay unanticipated medical and home-repair expenses. The bankruptcy court held that even though the funds had lost their exempt status, the trustee's proposed modification were not feasible because the funds had been spent on the unanticipated medical and home-repair expenses. The court additionally concluded that even had the modifications been feasible, it would deny them because although the debtor's withdrawal had been done in an imprudent fashion, it was not done in bad faith.

***Penn v. Viegelahn*, 5:18-CV-354-OLG, 2018 WL 5984844 (W.D. Tex. Nov. 13, 2018)**. *Debtor's efforts to use tax refund in contravention of district's form plan can warrant dismissal of case where debtor refuses to amend plan*. Chapter 13 debtor proposed non-standard plan provision that would allow her to return full $5,832.00 tax refund. Chapter 13 trustee objected and debtor filed motion seeking an order allowing her to retain the tax refund, arguing that she could use it to make repairs to an uninhabitable piece of real property that she owned so that the property could be rented out or she could live on it. The bankruptcy court gave the debtor the option of dismissing the case or amending her plan to conform to the standard provisions, and the debtor opted to have the case dismissed so that she could appeal the court's rejection of her proposed plan. On appeal, the district court held the bankruptcy court's implicit determination that the entire tax refund was not reasonably necessary for the maintenance and support of the debtor and therefore affirmed the bankruptcy court's denial of plan confirmation and dismissal of the case.

***Vega-Lara v. Viegelahn*, 5:18-CV-00796-RCL, 2019 WL 4545613 (W.D. Tex. Sept. 19, 2019)**. *Debtor's may not freely deviate from district's form plan*. Under Section 4.1 of the district's form plan, debtors are permitted to retain only $2,000.00 of their tax refund and had to turn any surplus over to Chapter 13 trustee as disposable income. Chapter 13 debtors challenged that provision, arguing that Section 4.1 runs contrary to provisions of the Bankruptcy Code, Local Rules, and local forms, and that Section 4.1 circumvents certain motion, notice, and hearing requirements created by the Bankruptcy Code and Bankruptcy Rules. In essence, debtors argued that Section 4.1 took control of the provisions of their chapter 13 plan out of their hands. The district court rejected the debtors' largely policy-based arguments and held that Section 4.1 appropriately reflected the intent and substance of the applicable provisions of the Bankruptcy Code and that it properly balanced the desire for uniformity and efficiency with the ability of debtors to present Chapter 13 plans that reflect their specific circumstances.

***In re Everhart*, 18-41896-MXM, 2019 WL 4458373 (Bankr. N.D. Tex. Sept. 17, 2019)**. *Debtors may use their actual monthly mortgage payments for purposes of calculating deductions on Form 122C-2*. Trustee objected to proposed Chapter 13 plan under Section 1325(b)(1)(B), arguing that debtors failed to dedicate all of their disposable income by overcalculating their tax withholdings, miscalculated home mortgage and vehicle payment deductions, and sought improper special circumstances expenses related to repaying 403(b) loans and home care and utilities. Construing the means test provisions of 707(b)(2) and the testimony given by the debtors, the court concluded that the debtors had properly calculated most items, except for a special circumstances expense for paid lawn care where evidence was that debtors could mow their lawn themselves. The primary dispute centered around the proper application of Section 707(b)(2)(A) when addressing home and vehicle

expenses, with the court concluding that statute allowed debtors to calculate their monthly mortgage debt in their deductions in accordance with Form 122C-2 and were not limited deducting the maximum mortgage expense authorized in the Local Standards.

***In re Smith,* 2019 WL 1890743 (Bankr. S.D. Tex, April 26, 2019).** *Proposed modification to debtor's confirmed plan which proposed to reduce contract interest rate originally provided for on claim secured by debtor's interest in motor vehicle was for a purpose permitted by 1329(a)(1), was permissible as long as 6% interest rate was sufficient to provide creditor with present value of its allowed secured claim, could be paid by the Chapter 13 trustee and was retroactively effective to date that the proposed modification was filed.* Under the original plan, debtor was current on her car loan payments to Americredit and acted as disbursing agent under the plan in accordance with the pre-petition contract at an interest rate of 15.5%. Debtor fell behind on the car payments, and Americredit filed a lift stay motion. Per the Agreed Order entered on the lift stay, debtor had to either pay the entire stipulated post-petition delinquent amount or file a plan modification to include an interest rate of 6% on the agreed post-petition, delinquent amount owed. Debtor first filed a modification to pay the post-petition delinquent amount through the trustee but did not address payment of the remaining claim amount owed to Americredit. Debtor then filed a second modification which provided for Americredit's entire remaining claim of $23,772 to be paid at 6% interest over 25 months. Americredit objected to this modification claiming that debtor could not amend her plan to reduce the contract rate of interest from 15.5% to 6% because the parties were bound by the terms of the plan, and because section 1329 did not allow debtor to modify a confirmed plan to change the interest rate provided in the plan. The Court found there was no *res judicata issue* because 1329 allows for plan modifications at any time so long as the plan meets the requirements of 1325. *Res judicata* does not bar such modifications by the debtor; the debtor often could just achieve the same result by dismissing the case and refiling. The court then determined that the proposed second modification where debtor proposed to reduce the interest rate to 6% from 15.5% on the entire remaining claim amount owed to Americredit was permissible under 1329. Court also determined that a post-confirmation modification is retroactively effective to the date of filing, after notice and hearing by the court.

POST CONFIRMATION .....

***Krishnan v. Ebert*, 4:17-CV-435, 2019 WL 1294454 (E.D. Tex. Mar. 20, 2019)**. *Debtor lacks standing to challenge Chapter 13 trustee's final report where case was dismissed without confirmed plan*. Chapter 13 debtor failed to obtain confirmation of plan and court dismissed case. Debtor objected to Chapter 13 Trustee's Final Report, alleging that trustee had committed gross negligence by not verifying the proof of claim filed by the mortgage lender that had successfully objected to his proposed chapter 13 plans. Upon debtor's appeal of the bankruptcy court's approval of the final report, the district court held that debtor lacked standing to object to final report because case had been dismissed without a confirmed plan.

***In re Thomas*, 2019 WL 413631 (Bankr. W.D. Tex. Jan. 30, 2019)**. *§ 1329(b)(2) preserves the court's power to decide the merits of a motion to modify, which cannot be prevented by the trustee by eliminating the circumstances under which the modification arose and a motion to modify does not satisfy the Fifth Circuit's test in Mendoza because it does not propose to simultaneously maintain current payments*. Post-confirmation of a Chapter 13 plan, debtor failed to make a plan payment and the trustee filed a motion to dismiss and debtor subsequently filed a motion to modify. The motion to modify proposed to (1) cure the post-petition mortgage arrears incurred, (2) resume conduit mortgage payments, and (3) cure plan payment arrears incurred by increasing the plan payment and without extending the plan beyond 60 months from confirmation of the plan. While the trustee rendered payment of post-petition mortgage arrears, thereby eliminating the circumstances under which the modification arose, the court held that the issue of adding missed post-petition mortgage payments was not moot. The court denied the motion to modify holding that it did not meet the second prong under *Mendoza* as it failed to propose to pay debtor's mortgage payments as the payments come due on the first of every month, and therefore is not maintaining current payments as required under *Mendoza*.

ATTORNEYS (FEES AND CONDUCT) .....

***In re Blevins*, 17-60019-RLJ7, 2019 WL 575664 (Bankr. N.D. Tex. Feb. 12, 2019)**. *Voluntary disgorgement by debtor's counsel of all fees may sufficiently resolve mistakes such that court will decline to award sanctions*. UST raised numerous concerns regarding performance of debtor's counsel, including missed 341 meetings, compensation disclosure problems, and a proposed redemption agreement on debtor's car that provided for debtor's counsel to receive attorney's fees from financing on car. Debtor's counsel refunded all fees paid and withdrew the requested redemption. The court held that the disgorgement of all fees sufficiently resolved the mistakes made by debtor's counsel and declined to impress further relief. The court further concluded that the association between debtor's counsel and Law Solutions Chicago, LLC (a Chicago-based entity that attempts to provide centralized consumer representation on a nationwide scale) did not constitute improper fee sharing pursuant to Section 504(a).

***In re Brackens*, 598 B.R. 420 (Bankr. W.D. La. 2019)**. *Bankruptcy petition preparer will be fined for failure to file declaration*. UST sought disgorgement of fees and imposition of fines against bankruptcy petitioner preparer for violations of 11 U.S.C. § 110. After evidentiary hearing, court concluded that bankruptcy petition preparer had prepared all of the documents filed for the debtor, and that her failure to file a declaration of payments made to bankruptcy petition preparer under Section 110(h) as well as her providing of legal advice by virtue of actually filling out the forms for the debtor. Based on those findings, the court ordered disgorgement of fees and imposed a fine of $250.00 for each violation of the provisions of Section 110 as well as the mandatory statutory damages of $2,000.00.

***Matter of Riley*, 923 F.3d 433 (5th Cir. 2019)**. *Routine expenses are part of standard no-look fee*. Chapter 13 debtor sought to confirm plan that proposed to pay her attorney the district's standard no-look fee as well as reimburse filing fee and other costs as an administrative expense sections 503 and 507(a). The Circuit Court held that the fact that

the standing order's silence as to whether a routine expense should be interpreted to mean that that routine expense is included in the no-look fee amount. Nevertheless, the Court held that credit report fees, credit counseling fees, and filing fees could be allowed under section 330(a)(4)(B).

***In re Farris,* 2019 WL 1012792 (Bankr. W.D. La. Feb. 26, 2019).** *United States Trustee filed motion for disgorgement of fees paid to bankruptcy petition preparer and imposition of appropriate fines based on petition preparer's alleged violations of multiple provisions of 11 U.S.C. 110 which regulates petition preparer's conduct.* The Court held that 1) evidence presented by the United States Trustee was sufficient to show that bankruptcy petition preparer had failed to prepare and deliver for filing a declaration of compensation received; 2) petition preparer violated statute prohibiting any use of the word "legal" in advertisement for her services; 3) petition preparer violated statute prohibiting the giving of legal advice; and 4) petition preparer's violations warranted fee disgorgement, fines and award of statutory damages. Petition preparer violated 110 of the Bankruptcy Code on multiple occasions. Evidence showed that the petition preparer was paid compensation by a Chapter 13 debtor that was not disclosed to the Court, advertised her petition preparer business as one offering "legal services," and illegally went beyond the scope of the "typing/scrivening' services that petition preparer's are authorized to do. Petition preparer had to repay $200 to debtor. Fines of $250 each were imposed for the three violations of 110 for an aggregate of $750. And petition preparer was also liable for mandatory statutory damages of $2,000.

***In re Husted*, 11-41903, 2019 WL 4744759 (Bankr. E.D. Tex. Sept. 27, 2019)**. *Special counsel's reimbursement request may be denied if documentary support is insufficient.* Chapter 13 debtor retained special counsel to pursue personal injury claims. Special counsel obtained a favorable settlement and presented her application for compensation and reimbursement to the bankruptcy court. The court awarded all of the fees and most of the reimbursements, but found that the documents submitted in support of several of the line items from the reimbursement request were insufficient to connect the reimbursement request with the work done for the estate, and accordingly denied a portion of the requested reimbursements.

***In re Dernick*, 18-32417, 2019 WL 5078632 (Bankr. S.D. Tex. Sept. 10, 2019)**. *Refusal to withdraw untimely discovery requests may result in award of fees against propounding party*. Jointly administered individual debtors were involved in adversary proceeding and contested matters relating to their changing Schedules and various mineral interests. After evidentiary hearing had begun on contested matters and after close of discovery in adversary proceeding, one of the counterparties in those matters/proceeding served discovery requests. Debtors' counsel tried to get propounding party to withdraw requests, but they refused. The debtors moved for a protective order, arguing that discovery requests were part of the pending matters/proceeding and therefore were untimely. Propounding party argued that facts were learned at the evidentiary hearing on the contested matters that caused them to require additional discovery. The court agreed with the debtors and pursuant to Rule 37(a)5) of the FRCP held that it would award reasonable expenses against the propounding party for refusing to withdraw the requests.

***In re Kakal*, (2019 WL 1868626) (Bankr. S.D. Tex. Apr. 25, 2019)**. *Motion to reconsider denied because "attorney's fees recoverable by a state statute cannot be awarded by a bankruptcy court."* The court held that the debtor's debt to plaintiff was nondischargeable under 11 U.S.C. § 523(a)(4) and (6) and subsequently determined that the plaintiff was entitled to an award of attorney's fees under the Texas Theft Liability Act and that the fees were also excepted from discharge under § 523(a)(4). Debtor filed a motion to reconsider alleging the court erred in its judgment arguing that a bankruptcy court cannot award attorney's fees. To be declared nondischargeable pursuant to § 523, attorney's fees must be (i) allowed by statute or contract, and (ii) arise from or on account of the conduct that resulted in a nondischargeable debt. *In re Kirk*. And, citing *Sanez v. Gomez*, 899 F.3d, 384, 390 (5th Cir. 2018) (citing *In re Morrison*), the court held that a bankruptcy court is not precluded from awarding and finding attorney's fees nondischargeable just because there is no prior state court judgment awarding the fees. The bankruptcy court is allowed to liquidate the total amount of debt that is excepted from discharge: [B]ankruptcy courts have both subject matter jurisdiction and the constitutional authority to liquidate state law claims in dischargeability actions. For the foregoing reasons, the motion to reconsider was denied.

***In re Butler*, 2019 WL 2618069 (Bankr. S.D. Tex. 2019).** *Court determines that criminal referral and bar referral are warranted by attorney's bad behavior.* Texas attorney entered into referral agreement with Synergy Law, LLC. Attorney filed several cases for consumer debtors containing material omissions and deficiencies in the schedules. Bankruptcy court held numerous hearings and ultimately determined that a criminal referral and a bar referral were appropriate, due to the egregiousness of the attorney's conduct.

ESTOPPEL THEORIES.....

***In re Mitchell*, 15-00852-NPO, 2018 WL 6978623 (Bankr. S.D. Miss. Dec. 21, 2018)**. *Bankruptcy court will not adjudicate issues addressed in interlocutory ruling made by district court in a separate proceeding*. In district court proceeding, district court held that litigation claims that debtors had not disclosed in a 2012 bankruptcy case that had been closed were property of that bankruptcy estate and not of the debtors' 2015 bankruptcy case. Debtors subsequently moved bankruptcy court to determine that those litigation claims belonged to the 2015 bankruptcy estate. Although holding that res judicata and claims preclusion did not apply because the district court's ruling was not a final ruling on the merits, the bankruptcy court held that under the law of the case doctrine it would refrain from revisiting the interlocutory conclusion reached by the district court.

***Cox v. Richards*, 761 Fed. Appx. 244 (5th Cir. 2019)**. *Debtor will be judicially estopped from pursuing claims not disclosed in bankruptcy case*. Debtor did not disclose in her bankruptcy alleged loan made by her to third party prior to the filing of the bankruptcy. Several years after filing her chapter 7 case, debtor sued the person to whom she had allegedly loaned money. With the district court taking judicial notice of various pleadings and statements from the bankruptcy proceedings, the defendant obtained dismissal of the lawsuit on the grounds that judicial estoppel barred the debtor from asserting her claim

against the defendant. The Circuit Court held that all of the elements of judicial estoppel applied.

***United States ex rel Bias v. Tangipahoa Parish School Board*, 766 Fed. Appx. 38 (5th Cir. 2019)**. *Debtor will be judicially estopped from pursuing claims not disclosed in bankruptcy case*. JROTC instructor reported alleged misappropriation of USMC funds and subsequently brought action against school board alleging retaliation in violation of the False Claims Act. At time that instructor initiated the retaliation suit, he was several years into completion of a chapter 13 plan. Instructor failed to disclose the retaliation suit in his bankruptcy case and received his discharge upon completion of this chapter 13 plan. Emphasizing the debtors are required to disclose post-petition causes of action regardless of whether they are to be treated as property of the estate or to vest in the debtor, the Circuit affirmed summary judgment against the instructor on the grounds that judicial estoppel precluded the instructor from pursuing a cause of action that he failed to disclose in his bankruptcy case.

***Mitchell v. Davis*, 3:18-CV-159-DPJ-FKB, 2019 WL 81580 (S.D. Miss. Jan. 2, 2019)**. *Bankruptcy trustee will be provided opportunity to elect to pursue claims debtor is judicially estopped from pursuing*. Shortly after filing lawsuit against former employer, debtor filed for chapter 13 bankruptcy. Debtor failed to disclose lawsuit in her schedules and did not disclose it at her 341 meeting. Defendant filed motion seeking summary judgment based on judicial estoppel. Debtor argued that she had not disclosed the lawsuit because her bankruptcy attorney failed to tell her that she needed to do so and that after the motion was filed she rectified the failure by amending her schedules. The court held that the excuses provided did not change the fact that debtor had not acted inadvertently when not originally disclosing the lawsuit and that therefore the bankruptcy trustee would be given an opportunity to pursue the claim but if the trustee declined the case would be dismissed with prejudice.

***Matter of Free*, 761 Fed. Appx. 314 (5th Cir. 2019)**. *Creditor is not estopped from bringing nondischargeability complaint based upon state court judgment against him on claim that does not include elements mirroring elements of nondischargeability*. After death of other member of LLC, debtor began depositing checks made to LLC into his personal account. Wife of deceased member sued debtor and obtained state court judgment. Debtor filed Chapter 7 and wife of deceased member brought adversary seeking 526(a)(6) nondischargeability. Debtor argued that he believed LLC had dissolved upon death of other member. Debtor argued that because creditor had pleaded conversion in the state court but not obtained judgment on that cause of action collateral estoppel precluded her from arguing willful and malicious injury. Court rejected that argument on grounds that conversion under Louisiana law does not require willful and malicious intent.

***King v. Huizar (In re Huizar)*, 18-52743-CAG, 2019 WL 4877629 (Bankr. W.D. Tex. Oct. 2, 2019)**. *Collateral estoppel and res judicata may create path to summary judgment on nondischargeability adversary relating to alieanation of affection claims*. Pre-petition, creditor obtained judgment under North Carolina alienation of affection law against debtor, who had engaged in extramarital affair with creditor's wife. Judgment contained holding

that debtor had engaged in malice and willful and wanton conduct. When debtor filed bankruptcy, creditor brought nondischargeability complaint. The bankruptcy court held that because the judgment from the North Carolina court contained factual findings necessary to establish the elements of a nondischargeably claim, collateral estoppel and res judicata precluded debtor from relitigating facts. Summary judgment was granted to the creditor.

***Vrana et al v. Thornhill, Jr. (In re Thornhill, Jr.)*, 19-20005, 2019 WL 4795601 (Bankr. E.D. Tex. Sept. 30, 2019)**. *Collateral estoppel may be basis for summary judgment of nondischargeability adversary relating to Texas Construction Trust Fun Act.* Judgement creditor brought adversary seeking determination of nondischargeability of judgment debt pursuant to Section 523(a)(4). Judgment debt was for breach of Texas Construction Trust Fund Act and included finding that debtor had not maintained account records sufficient to trace the disposition of the missing monies. The bankruptcy court granted the judgment creditor summary judgment, finding that under principles of collateral estoppel the judgment creditor had already established in the state court that the monies had been misapplied.

APPELLATE PROCEDURE ....

***In re LaMartina-Howell*, CV 18-6325, 2018 WL 5111977 (E.D. La. Oct. 19, 2018)**. *Debtors cannot not obtain relief related to alleged automatic stay violation from district court unless bankruptcy court has already ruled upon the alleged violation*. In debtors' appeal of the dismissal of an adversary proceeding initiated by them, debtors filed a motion seeking relief against a certain party for purported violations of the automatic stay. The district court denied the motion, finding that it lacked jurisdiction to consider the relief requested because the issue had not been ruled upon by the bankruptcy court.

***Clem v. Tomlinson*, 3:18-CV-1198-G, 2019 WL 201844 (N.D. Tex. Jan. 15, 2019)**. *Final appealability rule may not apply where interlocutory order is issued by different court than that issuing the final order*. Defendant in adversary proceeding filed notice of appeal of interlocutory bankruptcy court order denying his motion to dismiss sixty-one days after order was entered and filed separate appeal of final judgment. Defendant argued that appeal of the interlocutory order was timely because it was filed after final judgment in the adversary was entered. District court ruled that order was interlocutory and that Defendant had 1) failed to obtain from the bankruptcy court leave to appeal pursuant to 28 U.S.C. § 158(a)(3) and 2) failed to timely appeal. The court held that because the appeal of the final judgment was before a different district judge, the final appealability rule did not apply (i.e. the appeal of the interlocutory order and the final judgment should have been made together).

***Lall v. Power*s, 3:19-CV-0398-B, 2019 WL 2249717 (N.D. Tex. May 24, 2019)**. *Dismissal order will not be stayed absent showing of likelihood of success on merits*. Bankruptcy court dismissed chapter 13 debtor's case with prejudice for repeat filings upon finding that she was not proceeding in good faith. Debtor moved to vacate dismissal order and requested stay of dismissal order; bankruptcy court denied motion to vacate and

declined to stay the dismissal order. On appeal, Debtor requested stay of the dismissal order and argued that bankruptcy court had been biased against her. The district court held that the Debtor failed to show a likelihood of success on the merits and accordingly rejected her request for stay of the dismissal order.

TRANSFERS AND CLAIMS .....

***In re Jones*, 2019 WL 1167812 (Bankr. N.D. La. 2019)**. Trustee seeks to avoid the Transfer as a fraudulent transfer pursuant to Section 548 of the Bankruptcy Code or, alternatively, as a preferential transfer pursuant to Section 547 of the Bankruptcy Code. Trustee was unable to establish that the relationship between the Defendants and Jones was

***In re Villarreal*, 2019 WL 137569 (Bankr. N.D. Tex. Jan. 8, 2019)**. Relief to unwind a transfer of property, arguing that the transfer is either illusory and therefore void for lack of consideration, or is avoidable as a fraudulent transfer, denied. In a Chapter 13 adversary proceeding, the court held that plaintiff's allegations set forth in the complaint lacked merit. The court found that, with respect to the deed which reserved a life estate with the full power of disposition over the real property, and transferred a contingent remainder interest, is permitted by the Texas Property Code and is consistent with Texas common law. The court further held that the Texas Fraudulent Transfer Act applies to the transfer of 'assets,' the definition of which explicitly excludes property that is exempt under nonbankruptcy law. After the homestead character of property is established, the burden of showing abandonment or other loss of the homestead is on the creditor and plaintiff failed to prove that; thus, the transfer under the deed was not a fraudulent conveyance.
so great at the time that the transfer was not an arm's length transaction.

***In the Matter of Positive Health Management*, 769 F. 3d 899 (2014)**. Trustee brought an adversary proceeding to avoid transfer to creditor as fraudulent. The lower courts allowed innocent recipient of fraudulent transfers to retain all the funds it received under affirmative defense. The Court held that the Creditor that accepted funds from debtor as payments on loan made to another entity of debtor gave value within meaning of affirmative defense under good-faith exception to bankruptcy trustee's fraudulent-transfer avoidance power; bankruptcy court's use of prior appraisal to assess rental value for 27 months that followed appraisal was not clearly erroneous; and amounts received in a fraudulent transfer had to be netted against the value given to debtor.