

CONSUMER BANKRUPTCY PANEL: SELECTED HOT BAPCPA TOPICS

*Moderated by the Honorable Neil P. Olack**

JUDGE MULLINS: Good morning everybody. It reminds me of Sunday morning at church. Everybody is sitting in the back.

I'm going to introduce the consumer panel. First we have Michael J. McCormick, who is associated with the McCalla Raymer firm and practices in their bankruptcy department. Mike represents mortgage servicers and mortgage lenders, over 350 national lenders of that ilk. He is recognized by the American Board Certification as a consumer bankruptcy specialist.

Tamara M. Ogier is a partner and principal of the Atlanta firm, Ellenberg, Ogier, Rothschild, & Rosenfeld, P.C. She has been a Chapter 7 Trustee since 1998, is on the executive board of the State Bar of Georgia, and is also on a board of directors of the National Association of Bankruptcy Trustees, the main organizing body for Chapter 7 Trustees nationally.

Brian Cahn is a partner and principle in the firm of Perrotta, Cahn & Prieto in Cartersville, Georgia. He primarily practices in the consumer and bankruptcy area. Brian is a member of the National Association of Consumer Bankruptcy Attorneys.

Next, our moderator today is the Honorable Neil P. Olack from the U.S. Bankruptcy Court for the Northern and Southern Districts of Mississippi. Neil is a 1981 Emory Law graduate. He is a past president of the Mississippi Bankruptcy Conference, a former officer and director of the ABI, and a fellow of the American College of Bankruptcy. If he screws up, it's not because of the great instruction he received in baby judge school.

All three of the attorneys are active practitioners in the Northern District of Georgia. All are constant professionals, are very skilled, and make our jobs a

* Neil P. Olack serves the U.S. Bankruptcy Court for the Northern and Southern Districts of Mississippi. He is a fellow of the American College of Bankruptcy, a past president of the Mississippi Bankruptcy Conference, and a former officer and director of the American Bankruptcy Institute. Judge Olack is a 1981 graduate from Emory University School of Law.

lot easier on the bench. We appreciate their willingness to come out and participate this morning. Thank you.

JUDGE OLACK: It's great to be back in Atlanta, back at Emory. It's been a long time. We're going to start with a quick discussion of the recent Supreme Court case, *Marrama v. Citizens Bank of Massachusetts (In re Marrama)*,¹ and then lead into the fact pattern that's in your materials. We'll use the fact pattern as the vehicle to cover a number of interesting issues that we are all facing under the new legislation.

MS. OGIER: *Marrama* just came out in the last couple of weeks and is, in my opinion, as a chapter 7 trustee, a great case. It deals with the question of whether a chapter 7 debtor has an absolute right under § 706 to convert his case to a chapter 13, even where it looks like it will ultimately wind up coming back to a chapter 7. A lot of courts found under § 706(a) that there was an absolute right, that they had no discretion, and that the case had to be converted to a chapter 13. The Supreme Court looked at several reasons why that is not the case. It looked at § 706(d), which talks about the fact that the case cannot be converted if the debtor is ineligible to proceed under the other chapter. And in this case, *Marrama* had not been a very good boy. He had concealed a tax refund he was entitled to. He had lied on his schedules. He had transferred his residence into a trust. Shortly prepetition, he still took a homestead exemption on it even though he had it rented out to somebody else. And I think he even testified that he had done all of that to protect it from his creditors. So, the Court said that in a chapter 13, a case like that could be dismissed for cause because of bad faith. So, he was ineligible to be in a chapter 13. It also breathed new life into § 105 and gave the courts discretion to basically not allow a debtor to abuse the system by running into a chapter 13 if they're ineligible to be there or if they haven't conformed to the system. I think Judge Olack has a favorite line in the dissent.

JUDGE OLACK: Yes. The dissent is really interesting. I think you could read the entire decision on a number of different levels. Obviously, it's the good-faith case that determines if there is an implied duty of good faith in order to convert. And as Tamara said, it does breathe new life into § 105(a) which has been eroded over a number of years by other decisions. I think the most interesting aspect of this case is to see the sharp distinction in judicial philosophy between the majority and the dissent. Not only just judicial

¹ 127 S. Ct. 1105 (2007).

philosophy, but the role of the bankruptcy judge. The second to last paragraph of the dissent provides, “But whatever steps a bankruptcy court may take pursuant to § 105(a) or its general equitable powers, a bankruptcy court cannot contravene the provisions of the Code.”

MS. OGIER: You didn’t learn that in baby judge school.

JUDGE OLACK: Judge Mullins didn’t tell us in baby judge school that we weren’t supposed to contravene the provisions of the Code. According to the dissent, all you need to do is what the Code says: convert it to a chapter 13 and then if it’s not appropriate in the chapter 13, convert it back to the chapter 7.

MS. OGIER: Which happens all the time.

JUDGE OLACK: A contrary view would be to look past that and to see if it were converted, what would happen in the chapter 13. Well, it would’ve been a bad-faith chapter 13. So, why go through that step? Exercise discretion, leave it in the chapter 7, and determine it was bad faith.

I’m looking forward to scholars, such as Professor Jack Williams, who will write about this case, because I think there’s going to be a wealth of commentary well beyond just the good-faith issues that were raised in the case.

Let’s start with our fact pattern. I think you all should have that in the materials.

David and Debbie Debtor, Georgia residents, are contemplating filing bankruptcy. David Debtor is employed by Georgia Power and earns \$50,000 a year. In past years he’s earned an annual bonus of up to \$10,000, based on work performance in hurricane-damaged areas. However, he will not likely earn a bonus this year because of the mild hurricane season. Debbie Debtor was employed from January 2006 to November 2006 full-time as a paralegal with gross income of \$2500 a month. However, on December 1, 2006, Debbie was injured in an automobile accident. Because of her injuries, she was unable to work and took an unpaid leave of absence from her job. She anticipates returning to her job as a paralegal part-time in mid-March. The Debtors have two children in their household. In addition, David has another minor child who resides with his ex-wife.

The Debtors are considering bankruptcy for a number of reasons: the reduction in their income due to Debbie’s car accident and temporary inability to work; mortgage delinquency; medical bills due to chronic illness of one of their children; and some excessive spending during the holiday season.

Question 1: Calculate CMI to determine whether the means test creates a presumption of abuse pursuant to § 707(b)(2), or disposable income under § 1325(b)(2).

MR. CAHN: The CMI stands for current monthly income, which is ironic, because it has nothing to do with the debtors' current monthly income at all. Under the Code we're required to go back six months and look at all the income received each of the six months and calculate an average. In this case, it's fairly straightforward. David's income is steady. He's making \$50,000 a year. So every month, he's making \$4166. Debbie had an accident, so she was only working for month one, two and three; September, October, November making \$2500 a month for each of those months. So, her average income for those six months was \$1250. When you add that to David's average monthly income of \$4166, the CMI is \$5416. We multiply that by twelve to come up with a figure of \$65,000. Of course we're required to compare that CMI figure to the median income for a household the size of David and Debbie Debtor's. They have four in their household and currently the Georgia median for a four-person household is \$66,508. So, they are barely under that median and they have escaped a presumption of abuse. We therefore would not need to go to the deductions to see if there is a presumption under Part 2.

Now, we could throw this scenario for a couple of loops because in the real world, in my practice, it's never this easy. The client might have no idea how much they made each of these six months. And I deal with a lot of construction workers and they're just trying to remember how much it rained that month. They didn't save their pay stubs. So a lot of it is guess work.

Another problem that we'll have is what is income? For example, I had a client come in who settled a personal injury case for \$10,000. Arguably, that settlement is exempt and clearly it's not taxable, but is it income? And I looked at the Code and income is income whether it's taxable or not. So, I felt that I had to include that. That is a situation where that debtor may need to wait more than six months after they receive that settlement just to pass the test. It seems absurd, but that may have to happen.

I had a client with a regular job and a side business on eBay selling antiques. For the first three or four months, they were losing money due to start-up costs and a slow economy, but the last two months, they were making money. When I took the average, there was a business loss on average and I really wanted to plug that loss into my means test and off-set the regular income. But the form itself doesn't let me do that. It says, "Do not enter a

number less than zero.” It doesn’t seem right that we can’t do that, but the form won’t let me. So, these are interesting issues.

Finally, what if a client sold a house, made \$20,000, and immediately purchased another one and put that \$20,000 into the new house? That’s not a taxable event when they file the returns, but is it income? I don’t know the answer to that, but these are all issues that are going to come up and that are going to have to be resolved.

JUDGE OLACK: Any other thoughts on CMI? Let’s go then to Question 2, Subpart A.

Question 2, Subpart A: David and Debbie want to surrender their 2006 Ford Explorer. They owe \$24,000 on this vehicle. Can they take a secured debt deduction on the means test, even if the plan provides for surrender?

Michael?

MR. MCCORMICK: I think there’s a split on that, with most cases saying, yes, that you can do that.

MR. CAHN: There is a split and luckily we have a local case. Judge Drake, locally here in the Northern District of Georgia, has issued an opinion, *In re Walker*.² Judge Drake looked at the plain language of the statute. Section 707(b)(2)(a)(iii) permits the debtor to deduct expenses on account of secured debts. For accounts that are scheduled as contractually due to secured creditors in each month of the sixty months following the date of the petition. It doesn’t say anything about surrender. And the fact of surrender doesn’t change the fact that the payments are actually contractually due. So, the plain language and the structure of the test allow the debtor to deduct secured payments even if the collateral is being surrendered.

Now, of course, maybe this isn’t a perfect statute because there are cases going the other way, such as *In re Harris*.³ The *Harris* court respectfully disagreed with *Walker*, and concluded that monthly payments for secured debt cannot be included in the means test calculation when the debtor intends to surrender the corresponding collateral.

² No. 05-15010-WHD, 2006 WL 1314125 (Bankr. N.D. Ga. May 1, 2006).

³ 353 B.R. 304 (Bankr. E.D. Okla. 2006).

So in my opinion, each of these approaches create bad incentives. And it's really choosing the lesser of the two evils. Under *Walker*, there is an incentive to go into bankruptcy with a lot of secured debt. The more secured debt you've got, the more you can deduct and the greater your probability of passing the means test. So, this rewards the debtor who is not frugal. The other approach looks at the schedules. What do the schedules say? If the schedules say that you're going to surrender secured debt, then you cannot take a corresponding deduction. Well, doesn't that create an incentive for the chapter 7 debtor to reaffirm too much, bite off more than he can chew just so he can pass the means test? I don't think that's good policy either. But I do agree with *Walker*, Judge Drake's decision. I've had some interesting dialogue with the U.S. Trustee's Office about a lot of secured debt deductions that I've taken, but I'm certainly going to defer to *Walker*.

MR. MCCORMICK: Isn't that one of those absurd results that you need to go beyond the plain meaning?

MR. CAHN: Yes, it is.

JUDGE OLACK: When you read these post-BAPCPA cases, you start to see differences again in judicial philosophy. You have a group of bankruptcy judges who did not want BAPCPA. This group is unhappy with it and finds that this legislation doesn't make good sense in certain provisions. Nevertheless, they apply the plain meaning. On the other side, another group of judges think they can determine what Congress meant and deviate from the plain meaning and try to find a rational resolution of whatever the issue is. A few in the middle try to bridge that gap between plain meaning and intent. It's very difficult. You don't really have any legislative history and this is a great illustration of what did Congress really intend?

MR. CAHN: That same argument goes to the next part of the question on the car ownership allowance in the means test.

Question 2, Subpart B: The Debtors own a 1997 Chevy Malibu (no liens). What's the proper deduction?

The transportation allowance that we're allowed to take is divided into two parts. There's an operating cost which is a local cost that varies from county to county. And then there's an ownership cost. It's an allowance that you're allowed to take depending on the number of cars you've got. The U.S. Trustee's position and the position of the majority of the cases that have looked at this is that somebody who has a paid-for car cannot take an ownership

allowance. Now, the view of the National Association of Consumer Bankruptcy Attorneys is that people that have a paid-for car should be allowed to take an ownership cost simply because of the cost of upkeep. Usually these paid-for cars are older and they require upkeep and sometimes they need to be replaced within the period of the plan. So, it's not fair because you're punishing the more frugal debtor. In our opinion, the policy should be that we're entitled to this deduction. The majority of the cases that have looked at it so far, and again we're not very far in to this legislation, have said that if the debtor is not actually incurring expenses for the purchase or the lease of the car, then we can't even take that ownership expense. The U.S. Trustee is, however, allowing us to take an additional \$200 on the operating cost if we have a paid-for car. So, I guess that's their compensation.

JUDGE OLACK: And where did they find the authority for that?

MR. CAHN: There is no authority for that.

JUDGE OLACK: The debtor owns the 1997 Chevy Malibu with no liens?

MR. CAHN: That's correct.

JUDGE OLACK: Question 2, Subpart C.

Question 2, Subpart C: David had a twenty-eight percent of his gross income deducted for taxes but an effort to save money he changed his deductions two months ago to fifteen percent. What's the proper tax deduction on the means test? Debbie wasn't working for the past three months, what's her tax allowance on the means test?

MR. CAHN: This is also not clear from the form—if you look at Line 30 of Form B22, the means test, it says enter the total average monthly expenses—that sounds historical—that you actually incur, which sounds to be in the future for all federal, state, and local taxes. So, what do you take? Do you take what your average taxes have been over the past six months or do you look at what you're incurring or projecting to incur?

There has been a decision out of Utah, *In re Lawson*,⁴ which concluded that this is a forward-looking application. The debtor needs to take the taxes that they're actually incurring now, now being at the time of the petition. So, in our example, assuming that Debbie Debtor is going back to work now making \$2500 a month, she's allowed to take whatever her tax bracket is. Maybe

⁴ Nos. 06-22766, 06-22812, 2007 WL 184733 (Bankr. D. Utah Jan. 25, 2007).

twenty percent of her \$2500. She's going to get a windfall. If you look at her CMI, it's going to be three zeros in there but she's going to be able to take twenty percent of the whole thing. So, she's going to get a windfall. Conversely, if you have a debtor in the past six months who has been making a lot of money, getting a lot of overtime and bonuses, and now they're making half that amount, technically, I think we need to take the amount that they're actually incurring now which is going to be far less. So, they're going to be penalized, and the *Lawson* court acknowledged that subtracting future expenses from a historical income test produces curious results. But the court had to read it the way it was written.

JUDGE OLACK: Question 2, Subpart D.

Question 2, Subpart D: David has a 401(k) loan deducted from his paycheck. Is this an allowed deduction on the means test?

MR. MCCORMICK: I think it is. I know there's one case, *In re Njuguna*,⁵ and I think it's allowed. I remember having this issue when I was on the debtor side and I had to convince Judge Gains that it was okay. If you don't allow the debtor to pay back that 401(k) loan it would eventually be treated as a distribution and there's tax consequences for that at the end of the year.

MR. CAHN: This issue, surprisingly enough, is being litigated. The U.S. Trustee was taking the position that this is not a mandatory payroll deduction. That's the only place to deduct it on the means test, under other necessary expenses, Line 26, mandatory payroll deductions. The U.S. Trustee, I believe, takes the position that repayment is not mandatory, that the debtor could in fact default, if they wanted to.

JUDGE OLACK: They incur the tax consequences and where do the tax consequences associated with the default show up on the form?

MR. CAHN: Sure. I guess you would have to take a tax deduction. That would just blow up the plan.

JUDGE OLACK: So you'd have the postpetition liability, but nothing based on the plan sheet, available to pay it?

MS. OGIER: This would be one of the biggest changes pre- and post-BAPCA. Pre-BAPCA, I looked at chapter 7 filings to see if they deducted 401(k) deductions or loans repayments, and I just added those back in for purposes of

⁵ No. 06-10353, 2006 WL 3702674 (Bankr. D.N.H. Aug. 17, 2006).

whether they should be in a chapter 7 or a chapter 13. You know, why do you get to pay yourself a hundred percent if you're not giving your creditors anything?

MR. CAHN: Another policy argument is that there was a new section added to § 362(b), exceptions to the stay. Section 362(b)(19) permits continuation of the 401(k) loans deductions. That's not a stay violation. When you look at § 362(b), any time there's an exception to stay and there's a debt associated with that exception to the stay it's typically an allowed deduction for the means test. For example, payment of criminal restitution, payment of domestic support obligations. Those sorts of things are allowed deductions so why shouldn't we be permitted to repay a 401(k) loan?

JUDGE OLACK: If it's not specifically addressed?

MR. CAHN: Exactly.

JUDGE OLACK: Let's go onto the next question.

Question 3: You claim all allowed deductions under § 707(b)(2) and have \$250 a month remaining. The debtors have unsecured debts totaling \$35,000, the debtors schedules, I & J, show actual disposable income of \$500 a month. Question 3, Subpart A: What are the appropriate dividends of unsecured creditors and is the "applicable commitment period" the actual length of the plan?

MR. CAHN: With regard to the dividend, I think finally there's an area where there's not a whole lot of dispute. It's a mathematical formula. If this is an above-the-median case, we're looking at a sixty month commitment period and that's a multiplier. We take our amount left over at the end of the means test and multiply it by sixty.

David and Debbie have \$250 left over, multiplied by sixty is \$15,000, and according to the fact scenario where we've got \$35,000 in unsecured debt, so I believe they would have to pay back forty-three percent of their unsecured debt. That is a minimum distribution that's going to be required under this legislation. As far as the commitment period, that's a big issue. What is the commitment period? Is that commitment period temporal? Is it a number of months, either thirty-six or sixty? Or is it simply the multiplier we use to determine the dividend? Courts are split on that.

*In re Schanuth*⁶ basically explains the two different arguments. The monetary argument is that the applicable commitment period just contemplates a fixed sum based on the disposable income multiplied by the commitment period. And you can pay off that sum quicker than thirty-six or sixty months as long as you've paid that set amount, you're done. The temporal argument is that the applicable period is just that. It's a period of time that you have to be in the plan and you can't pay your way out of it quicker unless you pay everybody a hundred percent. This court rejected the monetary argument and concluded that the word "period" in its plain and natural definition means time. So it went with the temporal argument.

There are other cases, *In re Carlin*⁷ and *In re Fuger*.⁸ *Fuger* said that the commitment period does not require the debtors to commit to a plan lasting sixty months. So long as their projected disposable income is computed over that length of time. *Lawson* didn't see any real purpose in using the time, the temporal argument, since most cases—and I'll attest to this—that I file result in zero or less on that means test. So, even if we're over the median and we have a sixty-month commitment period, I'd say ninety or ninety-five percent of the cases I file have zero or less left over for disposable income. So, it's ridiculous, the *Lawson* court noted, that we should have a zero dollar per month payment for sixty months to general unsecured creditors. That seemed absurd to that court. You know, the courts are going both ways on this.

JUDGE OLACK: What percentage of your cases would you think are over the median?

MR. CAHN: I would say no more than twenty-five percent.

JUDGE OLACK: I think nationally ninety percent are below the median. There will be a lot of time and effort spent trying to address these over-the-median cases when they're only representing about ten percent nationally.

MR. CAHN: Sure.

MS. OGIER: I think the number is probably even lower in chapter 7s. The cases that I see, there are very few over-the-median.

MR. CAHN: Question 3, Subpart B.

⁶ 342 B.R. 601 (Bankr. W.D. Mo. 2006).

⁷ 348 B.R. 795 (Bankr. D. Or. 2006).

⁸ 347 B.R. 94 (Bankr. D. Utah 2006).

Question 3, Subpart B: What's the proper chapter 13 plan payment?

Judge Mullins is here, and we have an opinion on this. If we have a discrepancy in the amount left over on the means test, and the amount actually shown on schedules I & J, what's your chapter 13 payment? And there are cases, again, going both ways. But Judge Mullins was of the opinion that we need to look at projected monthly income for funding of a chapter 13 plan in *In re Grady*.⁹

JUDGE OLACK: Judge Mullins, I ruled similarly.

MR. CAHN: And I think that's the right way, too. Not just because you're here, Judge Mullins. So here, under our hypothetical, the actual plan payment would control if the case were filed in Judge Mullins's court.

Again, this rationale makes sense. Most of the cases that I file have a zero or negative number left over under the means test and to use the I & J schedules still makes sense.

JUDGE OLACK: This projected disposable income is one of those areas that I mentioned earlier where you see this sharp difference in judicial philosophy. And some of the brightest bankruptcy judges have taken the position, "You want me to read the statute with plain meaning. This is what it says."

Judge Bonapfel.

SPEAKER, Judge Paul W. Bonapfel, FROM THE AUDIENCE: I have a question. Does the use of the actual numbers relate to just the income part of the test or does it also go to the expense part?

MR. CAHN: We're talking about I & J?

JUDGE BONAPFEL: Right.

MR. CAHN: Well, it's a function of both. And I think that when we're looking at §§ 1325(b)(1)(B) and 1325(b)(2), there's a distinction between projected disposable income and disposable income. And projected disposable income would be the projections of I & J. Basically, I minus J would be our projected disposable income in our plan payment.

⁹ 343 B.R. 747 (Bankr. N.D. Ga. 2006).

JUDGE OLACK: There's a good opinion with an opposite opinion from North Carolina, *In re Alexander*, authored by Judge Rich Leonard.¹⁰ Judge Leonard wrote a thoughtful opinion on why it wouldn't be I & J. Consult that opinion if you want to see the other side of it.

Question 4: Debbie Debtor and David Debtor previously filed a chapter 13 case on December 28, 2006 to stop a January foreclosure. Because they were proceeding pro se, the Debtors did not know what they were doing. Their case was dismissed, but they can't tell you exactly when or why. If the debtors wish to file another chapter 13, what are the first things you need to ascertain?

MR. MCCORMICK: Since I represent the mortgage company, maybe I'll weigh in on this one. Because it's March 1 and next Tuesday is foreclosure day, you probably want to see if there's a foreclosure set because you have a limited amount of time to determine the debtors' eligibility to file to get the prepetition credit counseling certificate. I know we're going to deal with that in the next question. Also, see if they can propose a feasible plan because we know that they're delinquent but we don't know from the fact pattern how many payments they're behind. I would also try to ascertain the exact language of the dismissal order to make sure there's nothing in there that would render them ineligible to file. For instance, make sure that the last case was not dismissed with prejudice, make sure there are no in rem orders out there against the property.

If there were an in rem order out there, the filing of a case by these debtors or anybody else is not going to stop a foreclosure. Finding an in rem order is obviously easier now because the § 362(d)(4) provision has the authority to record the order in the same place that you would record deeds. In the interest of time, I'm not going to spend a lot of time on § 362(d)(4).

MR. CAHN: What did we do without Pacer before? How did we survive? I don't know how we made it before and actually I was probably one of the last holdouts to start filing electronically. I know Judge Massey and Judge Bonapfel would ask me on a weekly basis if I started doing that and I think that I was the cause of a general order requiring electronic filing.

But now I don't know how we survived without it. And, as a debtor's attorney, that is the first thing I do when they come in: I'll put in their social security number to see if there are any previous filings because it's so

¹⁰ 344 B.R. 742 (Bankr. E.D.N.C. 2006).

important now. If they've got previous filings, you've got implications with the extensions of the stay.

MR. MCCORMICK: If you call our firm, you say, what's the position on the sale, what have you got outstanding there, are there any in rem orders?

MS. OGIER: Are there a lot of good in rem orders being entered?

MR. MCCORMICK: A lot when there are pro se debtors. Usually when there's § 360(d)(4), there's in rem. A lot of the time they're unopposed.

JUDGE OLACK: The U.S. Trustee's Office receives a report of each of the debtors who filed and whether they had filed previous cases. And they match that up to the pleadings to see if they disclosed all their previous filings. So, if you think, "Well, I don't have to take the time, it will come out at the § 341 hearing, I won't worry about it," think again. You have to do the due diligence because the U.S. Trustee is looking behind your work.

MR. CAHN: One other red flag that was raised by our clients in the fact situation is that Debbie Debtor had an injury claim on the car accident so you definitely want to ask her about that. If there is a personal injury claim, we've got to do whatever is necessary to make sure that injury claim is scheduled and disclosed to avoid the affects of judicial estoppel. I think *Barger v. City of Cartersville, Georgia*¹¹ should be required reading for any debtor's attorney, because even if we casually mention a potential injury claim to the Trustee at the § 341 hearing, that may not be sufficient. You really have to be careful and make sure that you schedule those claims.

MS. OGIER: It's also really important to educate the debtor's personal injury attorney about what they can and can't do because of the filing. In chapter 7s, a debtor will tell me about the personal injury action and by the time I've gotten to the attorney in that action, they've already settled it and disbursed money or they've entered into a mediation order. They've done all sorts of things that are without force and affect because they cannot do it without my consent and the court's consent. So, it is incumbent on the debtor's attorney to let them know what's happening.

MR. MCCORMICK: Exactly.

¹¹ 348 F.3d 1289 (11th Cir. 2003).

JUDGE OLACK: Plus, there are other aspects of this case we can talk about. If it were within the previous year, you will have to explain to your client that you will file a motion to extend the stay. They must satisfy the requirement of good faith. And if it weren't a dismissal and they received a discharge, obviously, there are some problems now under § 1328 whether they will receive a discharge in this case.

Your review of the docket reveals the following: David and Debbie attempted to file a chapter 13 plan and schedules. However, they failed to attend prepetition credit counseling, failed to attend the meeting of creditors, and failed to provide the necessary tax returns to the chapter 13 trustee. (At the time, the Debtors had not filed their 2005 federal return; they are in the process of preparing both their 2005 and 2006 tax returns). Confirmation of their plan was denied and their case was dismissed on February 26, 2007.

In addition, you discover that Debbie Debtor has another previous bankruptcy filing. Debbie Debtor filed a chapter 13 case on August 1, 2002. She converted this case to chapter 7 on December 1, 2003, and received a chapter 7 discharge on March 1, 2004.

Question 5: Assuming Debbie and David need to file another chapter 13, what are the implications of the previous filings?

MR. MCCORMICK: The 2006 filing is the one that causes the most concern because it was both pending and dismissed within the last twelve months. The filing of the new case means that the automatic stay is going to terminate within thirty days unless the court extends the stay.

That 2002 filing by Debbie ending in a discharge was more than a year ago so it's not going to factor in that § 362(c) calculus. Thus barring any in rem orders or orders precluding the Debtors from being eligible to file, there will be an automatic stay at the outset of the case. Thus the debtor can stop the foreclosure and at least propose a plan of reorganization, assuming the arrears aren't too high.

There is still the potential discharge issue though, because now you look from filing to filing and you have that 2002 case. In *In re Knighton*,¹² the conversion of that latter case caused the case to be considered as it was originally filed under chapter 7 when the original chapter 13 was filed. Debbie's original case was filed more than four years ago, so she would be okay to get a chapter 13 discharge, but if for some reason they couldn't make it

¹² No. 06-10492-JDW, 2006 WL 3734391 (Bankr. M.D. Ga. Dec. 19, 2006).

and needed to convert to chapter 7, Debbie would not be able to get a chapter 7 discharge in this new case.

MR. CAHN: Exactly. We're talking about § 1328(f)(1) and that establishes a four-year waiting period to be eligible to receive a discharge in the chapter 13 if you have a prior chapter 7. The question in this case is, was the conversion tantamount to filing or does the filing relate back to the original petition? We look at *Knighton* and § 348(a). The case and the statute clearly state that you don't look at the date of conversion. Conversion will relate back to the date of the original filing under the original chapters. So, because the other original chapter 13 was more than four years ago, Debbie would be entitled to her discharge if she completes her chapter 13.

JUDGE OLACK: In Atlanta, what are you doing with respect to the deadline for raising § 1328(f)(1) and (2), because Rule 4004 doesn't address it? The rule only addresses discharge complaints in a non-chapter 13 context. So, if someone has an objection to this debtor receiving a discharge because of 1328(f)(1) or (2), when do you have to raise it?

SPEAKER, Judge Joyce Bihary, FROM THE AUDIENCE: I don't think that's come up in a case as such. I don't know. We've certainly not passed a local rule with respect to that. Usually those things come up in confirmation hearings.

JUDGE OLACK: I know that the rules committee is considering an amendment. But arguably, there's no deadline. So, you can go through the entire plan and at the very end someone says, "Thank you for clearing up all these other debts. I have this large unsecured claim and you're not getting a discharge."

MR. MCCORMICK: But the issue would be different as far as eligibility if somebody were ineligible because they had failed to file a credit counseling certificate. There have already been several cases. So, you have to raise that by the time of confirmation.

JUDGE OLACK: In Mississippi, the U.S. Trustee is raising it. He is actually filing the complaints if he determines that the debtor had a previous case. The U.S. Trustee is doing it because he does not have to pay the adversary filing fee. The chapter 13 trustees are not exempt from paying this fee.

SPEAKER FROM THE AUDIENCE: Are you seeing many of them?

JUDGE OLACK: A few.

MR. CAHN: I have a case before Judge Brizendine in Atlanta and I believe that case was being administered by the chapter 13 trustee's office. The chapter 13 trustee filed an objection to confirmation, which said that confirmation should be denied and the case should be dismissed because the debtor is not eligible for a discharge. I agreed that the debtor was not eligible for a discharge because there was a previous chapter 7. However, I didn't think dismissal was appropriate.

JUDGE OLACK: I don't think dismissal is appropriate either under the facts I have seen so far.

SPEAKER FROM THE AUDIENCE: I think that confirmation doesn't depend on whether you get a discharge not. They really aren't clear. But I think trustees typically are raising the issue just like Brian said. This is a conflict of confirmation hearing where everybody's going to know if there's a problem. But it doesn't, I think, prevent confirmation.

MR. CAHN: The trustee simply wanted a supplemental order to confirmation confirming that no discharge would be issued at the end of the case.

JUDGE OLACK: Something must be cued in the case so that the bankruptcy clerks do not enter it automatically.

MR. CAHN: Sure.

JUDGE OLACK: I agree that it's not an eligibility question relating to chapter 13. It's a discharge question.

MS. OGIER: Brian, would the fact that these two debtors have a different number of filings cause you to look at filings separately for them?

MR. CAHN: Well, I think that the supplemental order, for example, could be applicable to only one of the debtors. I think we have two separate estates, two separate debtors, so the order could apply just to one debtor.

MR. MCCORMICK: In *In re Parker*,¹³ under the § 362(c) calculus you have to look at each debtor individually. In *Parker*, the husband had two prior filings and the wife did not have any prior filings and so the court correctly determined that there was no automatic stay as to the husband but there was an

¹³ 336 B.R. 678 (Bankr. S.D.N.Y. 2006).

automatic stay as to the wife. So a joint filing is really two separate bankruptcy cases that are administrated jointly for the convenience of all parties.

JUDGE OLACK: Okay.

The Debtors explain to you that they previously lived in Florida for several years but moved to Georgia exactly eighteen months ago.

Question 6: What exemptions apply?

MR. CAHN: This happened to me. I had a client that moved to Calhoun, Georgia from Florida about eighteen months ago. She sold her house in Florida, realized \$50,000, and put it into her house in Calhoun, Georgia. She comes to see me; she had a tremendous amount of unsecured debt. We're looking at it from the perspective of a chapter 7 and when it came to light that she lived in Florida two years ago, I thought, "Eureka!" This is something that's going to work for me. I can go back and use Florida's exemptions under the amended § 522(b)(3)(A). And as we know, Florida has generous homestead exemptions, more so than Georgia. Under amended § 522(b)(3)(A), we're looking at the applicable state exemption law. According to that amendment, we look to the place in which the debtor's domicile has been for the last 730 days immediately preceding the date of filing the petition or, if the debtor's domicile has not been in a single state for such 730-day period, the place in which the debtor's domicile was located for the 180 days immediately preceding the 730-day period.

So, basically, you look back two years. If the debtor has not continuously lived, say, in Georgia for the last two years, then you have to go back two years and look at the 180-day window before that. In my case the debtor continuously lived in Florida until eighteen months ago, so Florida was the proper exemption state. But, then I had to go to Florida's exemptions. The issue was whether or not Florida's exemption statute had extraterritorial affect. Can residents of Georgia, with property in Georgia, use the Florida exemption statute? It has to be permitted by Florida's exemption statute. In other words, the exemption statute has to have extraterritorial affect. The majority of state exemption statutes do not have that extraterritorial affect, and only apply their exemptions to property and people in that state. But there are a minority of states that do allow their exemptions to apply to people and property living outside that state's boundaries. Examples are California, Arizona, Louisiana, Maryland. There's a list of them on the National Association of Consumer

Bankruptcy Attorneys website.¹⁴ It's a chart that indicates which states under established case law and under their statutes have extraterritorial exemptions and which states don't. So, with regard to Florida, I even found a case, post-BAPCPA, *In re Battle*.¹⁵ That case involved a Texas debtor that moved to Texas from Florida and had to apply the Florida exemptions because she lived in Florida for the 180 days preceding the 730-day look-back. The judge in *Battle* basically applied the explicit terms of the Florida exemptions statute. I also looked at a pre-BAPCPA case, *In re Schulz*,¹⁶ and concluded that Florida exemptions only apply to Florida residents. So, what do we do then? Georgia's exemptions didn't apply. Florida's exemptions didn't apply. I had to go to the hanging paragraph after § 522(b)(3), which says that if the affect of the domicile requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect to use the federal exemptions. The federal exemption for homestead was \$18,450, my client had \$50,000 equity. So she was not currently a debtor under any chapter.

JUDGE OLACK: There are a number of law suits around the country challenging the constitutionality of various provisions in BAPCPA. I have heard one argument regarding the changes to exemptions, that Congress couldn't cap exemptions in places like Texas where the exemption is in the Texas Constitution. Professor Erwin Chemerinsky at Duke has written articles about these constitutional challenges. We'll see what happens on that one. But it's an interesting argument.

MS. OGIER: I just wanted to let everybody know that right now in the Georgia Congress, a bill is pending that is looking at increasing the exemptions dramatically in Georgia. So, people may want to pay attention to that because it may make it worth waiting those two years. It's a dramatic enough of a change.

JUDGE OLACK: Question 7.

The Debtors want you to file their chapter 13 today. They can complete their prepetition credit counseling on the internet, using a computer in your office.

Question 7: What are your concerns? Any?

¹⁴ National Association of Consumer Bankruptcy Attorneys, <http://www.nacba.com>.

¹⁵ No. 06-50454-C, 2006 WL 3702734 (Bankr. W.D. Tex. Dec. 12, 2006).

¹⁶ 101 B.R. 301 (Bankr. N.D. Fla. 1989).

MR. CAHN: I've got immediate concerns because of certain opinions that have come out interpreting § 109(h)(1). Section 109(h)(1) is the provision that now requires prepetition credit counseling and it requires it to be done within the 180-day period preceding the date of the filing. Courts are really looking at that language. The issue is whether or not that means the day of filing or the moment of filing.

A few cases have correctly, in my opinion, interpreted "date" to mean the actual moment of filing, such as *In re Hudson*,¹⁷ a Maryland case, and *In re Warren*,¹⁸ an Arkansas case. These cases both involved a debtor who filed the petition the same day as the credit counseling. They did the credit counseling and then filed the petition. Those courts interpreted the word "date" to mean a moment in time, not day. And the courts noted that there were again absurd consequences if there were a different interpretation because you are rewarding the procrastinating debtor who files an exigent circumstances affidavit. And the diligent debtor who actually completes the credit counseling before filing is punished because they're not eligible. So, the *Hudson* court allowed that debtor to proceed. That rationale was followed in *Warren*, which basically looked at the legislative history of this statute and determined that there was really no reference to a one-day waiting period. That wasn't what Congress intended to do. But again, there's authority on the other side of this.

There's *In re Mills*¹⁹ out of the District of Columbia, which looked at the plain meaning of the statute and determined that "date" means day, and that's the common and ordinary, accepted meaning of the word "date," so that debtor was deemed ineligible.

MR. MCCORMICK: You also have another issue: If you can't get that credit counseling certificate and you have to file a motion for exigent circumstances, what do you have to include with your certification? I think most courts now have imposed requirements saying that just a generic requirement that simply says, "I couldn't get that credit counseling beforehand," is insufficient. You have to lay out the facts and the circumstances why. And there have been some court decisions that have come out and said that simply that the debtor was facing a foreclosure is no longer sufficient.

MR. OGIER: You gave a lot of notice about the foreclosure, didn't you?

¹⁷ 352 B.R. 391 (Bankr. D. Md. 2006).

¹⁸ 339 B.R. 475 (Bankr. E.D. Ark. 2006).

¹⁹ 341 B.R. 106 (Bankr. D.D.C. 2006).

MR. CAHN: Yes. Because under most states' statutes, you get three to four weeks notice. And there have been several cases, *In re Talib*,²⁰ for instance, where the debtor did not show up to the attorney's office until 5 p.m. on the afternoon of the scheduled foreclosure, so that was insufficient. Look at Judge Isgur's opinion in *In re Hubbard*,²¹ which is pretty good. He comes out with an opinion about every other week on something to do with bankruptcy reform. And he was the one who laid out the requirement in *Hubbard*.

MS. OGIER: How does the debtor pay for the credit counseling if they get it done in your office, the day they file?

MR. CAHN: Under the original policy, the U.S. Trustee would not allow the debtor to pay it through my office. The requirement was that the debtor had to pay by a money order or a wire transfer or actually had to physically go to the office of the credit counselor and pay in cash. Now, the U.S. Trustee's office has loosened that requirement and I have a credit card account with Consumer Credit Counseling Services. And the debtor can go into my vacant office and complete the online counseling using my credit card—they pay me, and it gets charged to my credit card. So, it does facilitate a faster process, and it does facilitate internet counseling because you certainly don't want a creditor or a debtor putting it on a credit card immediately prior to filing. That's not going to work.

JUDGE OLACK: I know there have been several opinions discussing the availability of credit counseling over the internet and I'm sure in urban areas like Atlanta, the debtors have access to computers. I know that Al Gore did a great thing in inventing the internet. Unfortunately, he didn't supply the rural poor with computers in their homes! The rural poor often cannot afford electricity, let alone a monthly internet provider, let alone a computer. And what you're doing is very commendable by having it available in your office.

MR. CAHN: I am surprised to see how many debtors actually have their certificate before they even come see me. I've never met with them before, they just know that they've got to do the pre-filing budget review and they've done it.

JUDGE OLACK: I am aware of cases where the debtors can't obtain the credit counseling on the eve of foreclosure and the debtor's lawyers are arguing,

²⁰ 335 B.R. 417 (Bankr. W.D. Mo. 2005).

²¹ 333 B.R. 377 (Bankr. S.D. Tex. 2005).

“Well, the lenders misled the debtor into thinking they had a work-out and then didn’t cancel the foreclosure.” The argument for not having credit counseling: “I thought we had a deal, and that’s why I didn’t spend the money on credit counseling. And I’m here on the day of foreclosure. I don’t have a credit counseling certificate, I can’t get one.” And so it’s arguably an exigent circumstance. The courts then have an evidentiary hearing on whether the debtors were misled. Because you’re right, Michael, there are cases saying that “My house is going to get foreclosed” is not by itself an exigent circumstance.

MR. MCCORMICK: *In re Hess*²² is similar to that. It was the first case that didn’t strictly apply the rules, but I think it was the debtor who pretty much did everything. It was a combination of two cases. In one of the cases, they held back the petition, they were waiting to get their certificate. And in the other case, the debtor’s attorney was sick. Where the debtor does absolutely everything necessary and something really outrageous happens, there the court let the debtor off.

JUDGE OLACK: It does say completed credit counseling, and I actually had one case where they had not completed the credit counseling before. It was in a couple of different phases and they filed in the middle.

MS. OGIER: How would you rule?

JUDGE OLACK: Based on the facts, I dismissed the case.

MR. MCCORMICK: Okay. The next question: if the debtor doesn’t complete credit counseling, do you dismiss the case or do you strike the petition?

JUDGE OLACK: I have not had that issue. For those in Atlanta, do you have any cases on striking?

MR. MCCORMICK: Yes. We have Judge Bonapfel in the back of the room and I agree with his opinion.

SPEAKER, Judge Paul W. Bonapfel, FROM THE AUDIENCE: We dismiss the case. We don’t strike.

MR. MCCORMICK: I think that’s the proper thing because it gives you more certainty.

²² 347 B.R. 489 (Bankr. D. Vt. 2006).

JUDGE OLACK: I've looked at those cases. There are a few cases holding that the judge has the ability to strike pleadings under § 105(a). Rule 7012(f) provides that you strike pleadings because they're scandalous, etc. I am not clear on the authority for "striking."

We're back to the Malibu.

The Debtors have a 1997 Chevrolet Malibu with no debt. If necessary, Debbie's mother has an extra car available to the Debtors at no cost. The Debtors have a 2006 Ford Explorer, purchased November 1, 2006, through WE-SELL-CARS AUTO CO. The Explorer is worth \$22,500, with debt of \$26,000.00.

Question 8, Subpart A: What's the amount of the allowed claim of WE-SELL-CARS AUTO? And Question 8, Subpart B: What's the appropriate interest rate?

MR. CAHN: I think we've got to go directly to the hanging paragraph and it's crystal clear. The car was purchased within 910 days. Assuming this is a purchase money security interest and the vehicle was acquired for the personal use of the debtor, then the allowed claim is \$26,000 and that's going to be secured. There are other questions that follow: what's the interest rate that we apply to this? The cases surprisingly are split on this. I would have thought giving the tenure of the entire legislature that they would receive the *Till*²³ rate on top of that. That seems to be the majority view. *In re Robinson*²⁴ involved a situation where the debtor proposed the *Till* rate. In that district, it was prime plus three percent. The creditors claimed that under the hanging paragraph and § 1325(a)(5) they were entitled to receive the full value of their claims and that the value includes the contractual interest rate which was higher than the *Till* rate. The court held that BAPCPA did not overrule *Till*, and therefore applied *Till*. I'm of the pessimistic opinion that the only reason that the legislation didn't overrule *Till* was because *Till* came out so close to the passage, I just don't think they had time to address it. But the majority of the cases still seemed to apply *Till* to the hanging paragraph.

Of course we've got contrary cases, such as *In re Taranto*.²⁵ That is the situation where the debtor proposed to pay the contract rate which was only zero percent. Of course the creditor objected and wanted the *Till* rate. The *Taranto* court basically said that BAPCPA, by including the hanging

²³ *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004).

²⁴ 338 B.R. 70 (Bankr. W.D. Mo. 2006).

²⁵ 344 B.R. 857 (Bankr. N.D. Ohio 2006).

paragraph, created an artificially inflated claim and eliminated the creditor's risk exposure. So, in essence, this was Congress's way of reacting to *Till* and creating that risk cushion. The court did acknowledge that the amount of interest should be determined on a case-by-case basis.

Judge Walker in the Southern District took this even farther in *In re Carver*.²⁶ I've Shepardized this case. I haven't seen too many followers.

Essentially under the rationale of *Carver*, a 910-claim isn't a secured claim at all under § 506, because § 506 doesn't apply. It's not a secured claim. It's not an unsecured claim. It's just an allowed claim. And there is really no guidance on what to do with regard to interest. So, Judge Walker created a rule that said, in a chapter 13 plan, a 910-claim must receive the greater of the full amount of the claim without interest, or the amount the creditor would receive if the claim were bifurcated, with the bifurcated secured amount receiving *Till* interest and the unsecured portion being crammed down and getting paid pro rata. I thought about putting that plan provision in my plans here, but I'm going to wait until some more cases come out.

JUDGE OLACK: Question 8, Subpart C.

Question 8, Subpart C: Assume that the debtors traded in an older car when they purchased the 2006 Ford Explorer and WE-SELL-CARS financed the negative equity into the purchase price of the Explorer.

MR. CAHN: There are a pair of cases coming out of New York, *In re Peaslee*²⁷ and *In re Jackson*.²⁸ Both of those cases held that if negative equity is financed into the purchase, the transaction loses its purchase money character and therefore, it's not a 910-claim that could be fully secured. It can be bifurcated. The courts went directly to the New York State version of the U.C.C. and looked at the definition of purchase money security interest. And under that version, the definition was "value given to enable the purchase." And the term "enable" refers to value given to allow the consumer to pay the actual price, not additional sums paid. So, those courts basically said that if there's negative equity, then the claim could be bifurcated.

JUDGE OLACK: And it lost its "910" treatment.

²⁶ 338 B.R. 521 (Bankr. S.D. Ga. 2006).

²⁷ 358 B.R. 545 (Bankr. W.D.N.Y. 2006).

²⁸ 358 B.R. 560 (Bankr. W.D.N.Y. 2007).

MR. CAHN: It did. However, you know, those are New York cases and I remember back in the days when we had Judge Hugh Robinson on the bench, I cited a New York case and he looked at me like I had cited a case from Mars. He wanted cases that were closer to home.

JUDGE OLACK: Some would argue that it is like citing the Ninth Circuit outside of the Ninth Circuit.

MR. CAHN: Exactly.

MS. OGIER: I think Judge Laney recently ruled the opposite.

MR. CAHN: You're right. So, if we want a case that's closer to home, we have *In re Graupner*.²⁹ It's a Judge Laney case from the Middle District of Georgia. In that case the debtor purchased a 2005 Chevy Silverado and it was within the 910-day period. The creditor was Nuvel. They financed \$33,600 along with \$3300 in negative equity from a trade-in of a 2002 model. Fair market value was stipulated to be far less than what was owed. The issue was whether Nuvel held a purchase money security interest under the Georgia version of the U.C.C. So, Judge Laney looked to Georgia's version which is in O.C.G.A. § 11-9-103 and under that statute, purchase money obligation means an obligation incurred as all or part of the price of collateral to enable the debtor to acquire rights in the collateral. So, then, Judge Laney was forced to determine what is the price of collateral? Does it include extras? To assist with that, he went to another statute which was found in the Georgia Motor Vehicle Sales Finance Act. And that Act defined "cash sales price" to mean the price stated in the retail installment contract and it may also include any amount paid to the buyer or to a third party on behalf of the buyer. And so, in other words, it could include negative equity to satisfy the balance owed on a trade-in. So, it was explicit in that statute that the price paid would include negative equity on a trade-in. Because the Georgia U.C.C. definition of purchase money was not clear, Judge Laney considered the two statutes *in pari materia* and used the definition of one to apply to the other, determine that in all, it was a purchase money security interest. So, there is authority, at least in Georgia, that negative equity would create a situation where we still have a 910-definition under the hanging paragraph.

MS. OGIER: And I think that case is on appeal now.

MR. CAHN: Okay.

²⁹ No. 06-40237 JTL, 2006 WL 3759457 (Bankr. M.D. Ga. Dec. 21, 2006).

JUDGE OLACK: Question 8, Subpart D.

Question 8, Subpart D: Assume David purchased the Explorer, in his name only, for his wife Debbie to drive to and from work. What if Debbie did not file bankruptcy jointly with David?

MR. CAHN: There is *In re Vagi*,³⁰ an Ohio case. That was a joint case. There was a van financed in the husband's name only and used only by his wife. That case held that debtor actually means debtors in a joint case. So, basically, personal use of the debtor means both of the debtors, and it was not allowed to be bifurcated.

There was a case going the opposite way, *In re Press*.³¹ That was a joint Florida case. There was a vehicle financed by the debtor husband only but it was acquired for and used by the debtor wife.

MR. MCCORMICK: If he filed only but she was the only one using the car.

MR. CAHN: Right. If she didn't file then there are cases that interpret the word "debtor" to mean the filing debtor.

MS. OGIER: The lesson of those cases is husbands buy your wives cars and wives buy your husbands cars.

MR. CAHN: Exactly.

MS. OGIER: Those cases are very strange to me.

JUDGE OLACK: This leads to an absurd result. You buy a car in another person's name in case you should ever file, thinking, "Honey, just in case you file I want the car in my name."

MR. CAHN: So, not only do we have that issue as to use by the debtor but then we've got this whole additional issue of personal use versus business use. And there are a number of cases that define personal use.

JUDGE OLACK: Question 9.

Question 9: David and Debbie are interested in lowering their chapter 13 payments by surrendering the Explorer to We-Sell Cars Auto Co. Will they have to fund the deficiency through the chapter 13 plan?

I guess here we're assuming it was a 910 car.

³⁰ 351 B.R. 881 (Bankr. N.D. Ohio 2006).

³¹ No. 06-10978 BKC JKO, 2006 WL 2734335 (Bankr. S.D. Fla. Jul. 26, 2006).

MR. CAHN: Correct. Well, the majority rule is that the debtor may surrender the vehicle in full satisfaction of debt. The count today, I believe, is sixteen to six. Sixteen cases that I've seen look at the hanging paragraph and it says § 506 shall not apply to 910 claims. And the majority of cases—it started with *In re Ezell*³²—those cases say that § 506 does not apply and assuming that § 506 is the mechanism to determine an unsecured deficiency, if that doesn't apply then the creditor should not be permitted to file an unsecured deficiency claim. Basically what's good for the goose is good for the gander. If there's a presumption under the law that the vehicle is worth every penny that's owed on it, then the debtor should be able to surrender that vehicle in full satisfaction of the debt. However, in our district, there seems to be a trend and all of the decisions that I've seen out of our district do not permit surrendering full satisfaction of the debt.

We've got *Daimlerchrysler Fin. Ams., LLC v. Barton (In re Barton)*.³³ It's not reported but it's my debtor, Pamela Barton, and Judge Bonapfel ruled that we cannot surrender that vehicle in full satisfaction. Judge Diehl has ruled in a couple of cases that the debtor may not surrender in full satisfaction. I know at least one of those cases is on appeal to district court. And then Judge Massey most recently ruled in *In re Leaks*³⁴ that we may not surrender in full satisfaction. Most of the opinions that I've read simply refer to the two most prominent opinions on this issue, *Dupaco Comm. Credit Union v. Zehrung (In re Zehrung)*³⁵ and *In re Particka*.³⁶ They make strong cases for not being able to surrender a car in full satisfaction. Under *Zehrung*, a Wisconsin case, the value of a unsecured deficiency claim really does not depend on § 506. Section 506 does not establish the unsecured deficiency. State law governs what an unsecured deficiency is based on the U.C.C. Under *Particka*, a Michigan case, § 506 provides a method of value and collateral to determine the amount of the secured claim when the estate has an interest in the property. Under that rationale, Judge Massey and these courts ruled that when the debtor surrenders property, the estate no longer has an interest in it. And for that reason, § 506 shouldn't even be applied to it. We need to look directly to state law. So there's an interesting divergence of opinion as to whether or not § 506 is the gateway to determining an allowed unsecured claim.

³² 338 B.R. 330 (Bankr. E.D. Tenn. 2006).

³³ No. 06-41283-PWB (N.D. Ga. Dec. 14, 2006).

³⁴ No. 06-69445 (N.D. Ga. Dec. 22, 2006).

³⁵ 351 B.R. 675 (W.D. Wis. 2006).

³⁶ No. 06-46162, 2006 WL 3350198 (Bankr. E.D. Mich. Nov. 17, 2006).

JUDGE OLACK: And on those cases that say you surrender in full satisfaction, certainly there is a hint of, “You drafted the statute this way, well here it is. You got the car!” Aren’t we bound by applicable bankruptcy law?

MR. CAHN: If you’re looking at the legislative history, you’re not going to find a specific comment on it. But just looking at the whole tenor of the legislation, *Particka* mentioned that the hanging paragraph was designed to elevate the rights of 910 creditors, not diminish their rights under state law.

JUDGE OLACK: Question 10.

Immediately after filing the Debtors’ chapter 13 on March 1, you file a Motion to Extend the Automatic Stay. You take your annual ski trip to Aspen, and schedule the hearing on April 4, the day after you return from the trip.

Question 10: What is the Judge’s ruling?

MR. MCCORMICK: I would imagine the court’s going to deny that Motion to Extend. In fact, we have pretty clear procedures on the court’s website that directs the attorney as to who has to be served and whose responsibility it is to schedule the hearing. If there is no regular hearing date available within the next thirty days, it’s up to the debtor’s attorney to contact the court and request an emergency hearing. I think the rules are pretty clear and easy compared to some other districts. In Michigan for instance, you’ve got to file your Motion to Extend within seven days after the filing of the case. I don’t know for a fact, but I think all of your judges are applying that rule pretty strictly that the hearing must be held within thirty days at least when the motions is styled as a Motion to Extend and not something else like a Motion to Impose or any combinations of a Motion to Reimpose.

Now take a look at *In re Covert*.³⁷ The motion was filed on the thirtieth day, so obviously it was pretty difficult for the court to get the hearing within thirty days. So what are your options? Can you file a Motion to Impose where there’s only prior dismissal under § 362(c)(4)? Well, the court said yes in *In re Toro-Arcila*,³⁸ but most other courts say no.

Judge Dallas agreed in *Whitaker v. Baxter (In re Whitaker)*.³⁹ In *In re Berry*,⁴⁰ which is the Middle District of Alabama case, the debtor had a

³⁷ 355 B.R. 327 (Bankr. N.D. Fla. 2006).

³⁸ 334 B.R. 224 (Bankr. S.D. Tex. 2005).

³⁹ 341 B.R. 336 (Bankr. S.D. Ga. 2006).

⁴⁰ 340 B.R. 636, 637 (Bankr. M.D. Ala. 2006)

previous case and the Motion to Extend the Stay was filed on the sixty-fourth day. So the court denied the Motion to Extend and also said that you could not use § 362(c)(4), a Motion to Impose. Judge Dallas suggested in *Whitaker* that the stay could be reimposed under § 305. Judge Brizendine has agreed in *In re Reed*.⁴¹ In *Berry* however, the court seemed to indicate that there was no such right. Judge Mullins has indicated that he's more apt to reimpose the stay where there's not been a hearing on the merits on a Motion to Extend. So, in other words, the debtor did not appear for the Motion to Extend hearing or the hearing was scheduled outside the thirty-day period. So, you can't file a Motion to Extend, have a hearing on the merits, it gets denied, and then come back and file a Motion to Reimpose and try to get a second bite at the apple to try to establish good faith. We do have one firm in the Northern District of Georgia that has a high volume of filings and they're now having to schedule the filing Motions to Reimpose outside the thirty-day period. And they're really nothing more than Motions to Extend styled as Motions to Reimpose.

JUDGE OLACK: Now, in Georgia you're actually holding an evidentiary hearing, Judge Mullins?

SPEAKER, Judge Mullins, FROM THE AUDIENCE: On the Motions to Extend, I think there's a difference of style in each court and whether they require a debtor to be there, or allow the lawyers to make their case if there is no objection.

JUDGE OLACK: There are those courts where if you have the required notice, and if no one objects, an order is entered with no evidence. Some courts say that they will allow an affidavit. Others want the attorney to come and give a proffer. And then the fourth option is an actual evidentiary hearing. There's very little consistency.

MR. MCCORMICK: Judge Diehl has a list of requirements. Judge Murphy has an injunctive-type standard that she requires in her court.

JUDGE OLACK: The next round of rules may clear this up because it's being handled in so many different ways. And in jurisdictions where there are multiple judges in that city, it is difficult to determine the appropriate procedure.

MR. CAHN: The standard is tough though. It's clear and convincing evidence. So, from the debtors' perspective, the debtors have to be there. If there are any

⁴¹ G05-25051-REB (Bankr. N.D. Ga. Feb. 28, 2006).

objections, we need to put them on the stand. And if they're not there, no judge that I have been before will grant that Motion to Extend the Stay.

JUDGE OLACK: You can certainly make an argument by looking at Judge Barry Russell's evidence manual that the only way to rebut a presumption is accepting actual testimony.

MR. MCCORMICK: But the next question is: with respect to whom does the Stay terminate? And I know what Brian's going to argue: that the stay did not terminate with respect to property, the estate.

MS. OGIER: I like that answer.

MR. MCCORMICK: Yes. I know you do. And I wasn't there that day to argue against you. The majority of cases—the first one was *In re Johnson*,⁴² out of Tennessee, then we have *In re Moon*,⁴³ *In re Jones*,⁴⁴ and *In re Gillcrese*,⁴⁵ which have interpreted that language in § 362(c)(3), that phrase terminates with respect to the debtor. To mean that the stay terminates only as to the debtor and/or his property but not property of the estate. Well, the practical implication of that is that arguably secured creditors have to file a Motion for Relief from Stay if they want to proceed against their collateral. The District Court of Massachusetts was the first one to issue any kind of an appellate decision and they've overturned the bankruptcy opinion in *In re Jumpp*,⁴⁶ now following the direction of most other bankruptcy court opinions. As of now, it appears there's only one bankruptcy court opinion that goes the other way. That's in the South Carolina, that's *In re Jupiter*.⁴⁷ In that case, that court adopted almost verbatim the logic of the Wedoff article.⁴⁸ Judge Wedoff from Illinois published an article last spring criticizing some of those earlier decisions. And he asked in that case if the stay had not terminated with respect to property, the estate, why did Congress give parties other than debtor, such as parties-in-interest, the ability to move to extend the stay? He also

⁴² 335 B.R. 805 (Bankr. W.D. Tenn. 2006).

⁴³ 339 B.R. 668, 673 (Bankr. N.D. Ohio 2006).

⁴⁴ 339 B.R. 360 (Bankr. E.D.N.C. 2006).

⁴⁵ 346 B.R. 373, 376 (Bankr. W.D. Pa. 2006).

⁴⁶ No. 06-031, 2006 WL 3802702 (1st Cir. B.A.P. Dec. 28, 2006).

⁴⁷ 344 B.R. 754 (Bankr. D.S.C. 2006).

⁴⁸ Eugene R. Wedoff, *The Automatic Stay and Serial Filings: How the Courts Have Interpreted § 362(c)(3) and (4)*, ABI CONSUMER BANKRUPTCY COMMITTEE NEWSLETTER (American Bankruptcy Institute), Vol. 4, No. 4, June 2006, available at <http://abiworld.net/newsletter/consumerbank/vol14num4/HotTopics111.pdf>.

analyzed *In re Parker*⁴⁹ and suggested that the phrase “with respect to the debtor” is reminding us that it’s important to perform that calculus with respect each debtor individually. So, when that article first came out, the creditor bar sort of embraced it and said, yes, that’s what that really means and this is good. But then we found out that Judge Wedoff doesn’t really handle a lot of consumer cases up in Illinois and it was going to be difficult to get that into a published decision. So the next question becomes: do you really need to file a Motion to Extend the Stay now?

JUDGE OLACK: All right. We have one more issue and we will have completed the materials.

Debbie’s employer in 2005 went out of business and Debbie claimed she never received her W-2s. Accordingly, the Debtors are unable to properly file their tax returns. Debbie has no pay stubs, as she was unemployed for the past three months. David has a pay stub from the last pay period in December of 2006, and one pay stub from February 15, 2007. The remaining stubs were lost.

Question 11: What are your concerns, in light of 11 U.S.C. § 521? How will you know if the case was “automatically” dismissed?

MR. CAHN: I put this in here just to show a typical example of what I see every day. You know, it’s so hard. And there’s not a whole lot that you can do to escape the consequences of § 521. It’s scary having a provision in there that says that the case shall be automatically dismissed. I’ve tried a couple of things in my plan that haven’t been tested yet. I’ve looked at § 521(i)(3), which says, “Upon request of the debtor made within forty-five days after the date of the petition, the court may allow the debtor an additional period not to exceed forty-five days to file all of the information.” So, as boiler-plate language in my chapter 13 plan, I put in a request for an additional forty-five days. It doesn’t say a motion is required but I put in that request. I haven’t tested the waters on that yet, so it may extend the period to ninety days. I don’t know.

Also, after confirmation, how do you know your case wasn’t automatically dismissed on the forty-fifth day? I did put language in my plan that says, “Entry of an order of confirmation shall constitute a finding that all of the requirements of § 521(a)(1)(B) have been met.” I know for sure that Judge

⁴⁹ 336 B.R. 678 (Bankr. S.D.N.Y. 2006).

Diehl is entering an order that just clarifies the docket that no objections have been made.

SPEAKER, Judge Mary Grace Diehl, FROM THE AUDIENCE: It's not just me. It's everybody.

MR. CAHN: Okay.

JUDGE DEIHL: We've got a form now and it goes out both of the chapter 7s and the chapter 13s.

MR. CAHN: Good. And that is, I think, it's important to have that. No debtor wants to be in their case for fifty-nine months only to find out it was dismissed fifty-eight months ago.

JUDGE OLACK: Well, we've concluded the materials. Any questions?

SPEAKER FROM THE AUDIENCE: Regarding the pay stub, the statute requires that you file a pay-advice or other evidence. And also the statute says that it's dismissed, etc., unless the court otherwise orders. Does that language provide any opportunities for solving the problem in the last question?

MR. CAHN: Sure. I believe it would. That's another barrier of protection. First of all, as a matter of practice, the trustees are not requesting dismissal. As long as they have a year-to-date paycheck stub and the debtor is paid the same amount every month, that is appropriate evidence of payment received within the past sixty days. So, they're not making the hard line on that.

And § 521(a)(1)(B) is prefaced by, "Unless the court orders otherwise." So, the court appeared to have discretion. It may not be mandatory.

MR. OGIER: I've seen debtors file affidavits saying "I earn this much," and they attach their bank statements showing their deposits and saying they don't have pay stubs. They're coming up with all sorts of the novel ways to find other evidence of what their income was.

MR. CAHN: Sure.

JUDGE OLACK: I think one judge did it sua sponte, went through the payment advices and dismissed the case.

SPEAKER FROM THE AUDIENCE: That judge needs more to do.

JUDGE OLACK: It is hard to imagine going through each and every payment advice to see if one was missing.

MS. OGIER: It's excruciating.

MR. CAHN: And, under the hypothetical, Debbie Debtor didn't receive her W-2. Her employer never gave it to her. So, I think that she could request application of § 521(e)(2)(B) that says if the debtor fails to provide tax returns, the court shall dismiss the case unless the debtor demonstrates that failure to do so was beyond her circumstances or circumstances beyond her control. So I think that gives the judge some discretion.

MS. OGIER: Can't she also request a copy of that W-2 from the taxing authorities?

MR. CAHN: I believe you can order it, but can you order it in time?

JUDGE OLACK: It takes a long time to get that.

SPEAKER FROM THE AUDIENCE: Well, if the company never gave the W-2, then technically the IRS never got it.

JUDGE OLACK: Well, the company may not have supplied the W-2's to its employees. Our consumer panel is concluded. Thank you.