Chapter 9

Discharge and Dischargeability

§ 9:1 Introduction

There are two separate but sometimes related concepts in the Bankruptcy Code: *discharge* and *dischargeability* of debt.[1] Creditors contesting a debtor's entitlement to a discharge or to the discharge of a

1. *See* 11 U.S.C. §§ 523, 727.

particular debt must distinguish between the two concepts and acquaint themselves with the rules applicable to proceedings involving such contests.[2] Both objections to discharge and to the dischargeability of particular debts must be made by way of complaint in accordance with Rule 7001 of the Federal Rules of Bankruptcy Procedure. The Bankruptcy Rules impose strict deadlines for filing complaints. Moreover, the failure to file a complaint timely may result in extreme prejudice to creditors and malpractice claims by creditors against attorneys failing to represent their interests adequately.

Creditors considering the filing of an adversary complaint seeking either a determination of the dischargeability of a debt or the denial of the debtor's discharge should not ignore the problems inherent in trying to settle these actions.[3]

§ 9:2 Who Is Entitled to a Discharge?

The "fresh start" concept underlies the discharge. If a discharge is granted, the debtor's obligation to pay pre-petition debts is fully extinguished, except for those debts that specifically are not subject to discharge under the Bankruptcy Code or that the court determines are not dischargeable after the filing of a complaint and a hearing. The debts that are extinguished are said to be discharged. The Bankruptcy Code specifies which and to what extent debts can be discharged. It also specifies which debts are automatically non-dischargeable and the grounds upon which debts can be found to be non-dischargeable.

Denial of discharge is the severest civil punishment that can be dealt to a debtor. Ordinarily, if a discharge is granted in an individual's Chapter 7 case, the debtor loses all his nonexempt assets, but his future earnings and property acquired after the filing of the petition are protected from pre-petition creditors. If a discharge is denied, however, not only will the debtor's nonexempt assets be liquidated in the case, but the debtor's future earnings and any property acquired after the filing of the petition will be subject to reach by pre-petition creditors, to the extent permitted by state law.[4]

§ 9:2.1 Individuals

An individual is generally eligible for discharge under Chapter 7, 11, 12, or 13.[5]

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2. *See* FED. R. BANKR. P. 4004, 4007, and 7001.
3. *See* section 9:9, *infra*.
4. 11 U.S.C. § 362(c)(2)(C).
5. *Id.* §§ 727(a), 1141(d), 1228, and 1328.

[A] Requirements for Issuance of Discharge

Even a debtor who dies after filing a petition may be entitled to discharge in Chapter 7, which releases his estate from dischargeable debts.[6] A Chapter 7 debtor automatically receives a discharge, which can be entered fairly early in the case, except in the following circumstances:

(1) a complaint, or a motion under § 727(a)(8) or (a)(9), objecting to the discharge has been filed and not decided in the debtor's favor;

(2) the debtor has filed a waiver under § 727(a)(10);

(3) a motion to dismiss the case under § 707 is pending;

(4) a motion to extend the time for filing a complaint objecting to the discharge is pending;

(5) a motion to extend the time for filing a motion to dismiss the case under Rule 1017(e)(1) is pending;

(6) the debtor has not paid in full the filing fee prescribed by 28 U.S.C. § 1930(a) and any other fee prescribed by the Judicial Conference of the United States under 28 U.S.C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code, unless the court has waived the fees under 28 U.S.C. § 1930(f);

(7) the debtor has not filed with the court a statement of completion of a course concerning personal financial management as required by Rule 1007(b)(7);[7]

(8) a motion to delay or postpone discharge under § 727(a)(12) is pending;

(9) a motion to enlarge the time to file a reaffirmation agreement under Rule 4008(a) is pending;

(10) a presumption has arisen under § 524(m) that a reaffirmation agreement is an undue hardship; or

(11) a motion is pending to delay discharge, because the debtor has not filed with the court all tax documents required to be filed under § 521(f).[8]

The entry of the discharge can occur relatively early in a Chapter 7 case because, in Chapter 7 and Chapter 11 cases, the U.S. trustee is

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6. FED. R. BANKR. P. 1016.
7. FED. R. BANKR. P. 5009(b) requires the clerk to notify a debtor who has not timely filed the statement that the case will be closed without entry of a discharge unless the lapse is remedied.
8. FED. R. BANKR. P. 4004(c)(1)(B)–(L).

required to call a meeting of creditors "no fewer than 21 and no more than 40 days after the order for relief."[9] Thus, in the absence of circumstances such as a request for an extension of time for filing a complaint under 11 U.S.C. § 727, the filing of a motion to dismiss under section 707, or litigation with respect to complaints filed under section 727, and assuring the debtor has completed a personal financial management course required for individual Chapter 7 debtors and Chapter 13 debtors,[10] the debtor can expect to receive a discharge within several months of filing the petition. Additional requirements may extend the time between the filing of the petition and the entry of the discharge. For example, pursuant to section 727(a)(12), the court may not enter a discharge if section 522(q)(1) may be applicable to the debtor or there is a pending proceeding in which the debtor may be found guilty of a felony as described in section 522(q)(1)(A) and (B).[11]

An individual debtor in a Chapter 11 case receives a discharge only after the completion of all payments under the plan,[12] unless certain conditions akin to a Chapter 13 hardship discharge are met.[13]

Caution: An uncodified provision of the Act forbids the issuance of a discharge to an individual who has not provided requested tax documents.[14]

A Chapter 13 debtor ordinarily obtains a discharge by successful completion of the Chapter 13 plan.[15] The Chapter 13 discharge is not

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9. FED. R. BANKR. P. 2003(a).
10. 11 U.S.C. § 727(a)(11). The statement regarding completion of the personal financial management course must be filed not later than sixty days from the date first set for the 341(a) meeting. *See also* FED. R. BANKR. P. 1007(b)(7) and (c), and 4004(c)(1)(H). Incarceration does not warrant exemption from the requirement. *See In re* Denger, 417 B.R. 485 (Bankr. N.D. Ohio 2009); *In re* Cox, 2007 WL 4355254 (Bankr. M.D. Ga. Nov. 29, 2007). The personal financial management course must be taken post-filing. *In re* Skarbek, 2005 WL 3348879 (Bankr. W.D. Pa. Dec. 6, 2005).
11. 11 U.S.C. § 727(a)(12); *see also id*. § 522(q), which limits the debtor's exemption under state or local law for real or personal property used as a residence to $125,000 under certain circumstances.
12. *Id*. § 1141(d)(5)(A).
13. *Id*. § 1141(d)(5)(B).
14. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1228, 119 Stat. 23.
15. 11 U.S.C. § 1328(a). A Chapter 13 debtor that dies may be eligible for a hardship discharge. *See In re* Fogel, 550 B.R. 532 (D. Colo. 2015) (reversing dismissal of deceased debtor's Chapter 13 case, holding that death of debtor is incapacity warranting waiver of financial management course requirement, and concluding that debtor's non-debtor spouse, as appointed personal representative, could represent the debtor); *In re* Inyard, 532 B.R. 364, 368–89 (Bankr. D. Kan. 2015) (the vast majority of courts holds that Rule 1016 does not, as a matter of law, bar a hardship discharge for a deceased debtor, even if no further payments are made after death).

much broader than that in Chapter 7,[16] and the Chapter 13 debtor must complete a personal financial management course.[17] If a Chapter 13 debtor cannot successfully complete a Chapter 13 plan, he may be entitled to a "hardship discharge," which is similar in scope to the discharge available to an individual in a Chapter 7 or Chapter 11 case. To obtain a hardship discharge, the debtor must establish that:

(1) his failure to complete plan payments is "due to circumstances for which he should not justly be held accountable";

(2) the value of the property actually distributed under his plan is not less than what creditors with allowed unsecured claims would receive in a Chapter 7 liquidation; and

(3) modification of the plan is not practicable.[18]

[B] Waiver of Discharge

An individual debtor has a right to waive discharge. The waiver must be in writing, executed by the debtor after the order for relief, and approved by the court.[19] In determining whether to approve the debtor's proposed written waiver of discharge, the bankruptcy court must evaluate objecting creditors' interests along with evidence indicating the likelihood that the debtor may not have fully comprehended the import of the waiver.[20]

§ 9:2.2 Corporations and Partnerships

Only individuals are entitled to a discharge under Chapter 7.[21] Other debtors, including corporations and partnerships, are not entitled to a discharge under Chapter 7.[22] A Chapter 11 debtor who is not an individual can obtain a discharge pursuant to a confirmed

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16. *Id.* The Chapter 13 discharge is discussed in chapter 13 of this treatise. *See* section 13:4.5[A]–[B], *infra*.
17. FED. R. BANKR. P. 1007(b)(7) and (c).
18. 11 U.S.C. § 1328(b). Debts based on certain allowed post-petition claims filed under § 1305(a)(2) are excepted from the hardship discharge.
19. *Id*. § 727(a)(10).
20. Asbury v. Alliant Bank (*In re* Asbury), 423 B.R. 525, 528 (B.A.P. 8th Cir. 2010), in which the panel affirmed the bankruptcy court's refusal to approve the debtor's written waiver where it found the waiver was not in the best interests of the parties. In the bankruptcy court, the creditors argued that the debtor was attempting to escape the effect of having judgments entered against him and to force them to pursue him outside of bankruptcy, likely in his new home state of Florida. As to a debtor's right to vacate his discharge, see *In re* Newton, 490 B.R. 126 (Bankr. D.D.C. 2013).
21. 11 U.S.C. § 727(a)(1).
22. *Id*.

plan of reorganization, unless (1) the plan provides for the liquidation of all or substantially all of the property of the estate; and (2) the debtor does not engage in business after consummation of the plan.[23] A liquidation case is supposed to eliminate the existence of an operating business entity. To prevent "trafficking in corporate shells," the Bankruptcy Code provides that if the debtor reemerges, it will still be liable on its debts.[24]

§ 9:2.3 *Chapter 12 Debtors*

Chapter 12 differs from both Chapters 11 and 13 with respect to entitlement to a discharge. It makes no distinction among individuals, corporations, and partnerships[25] or whether the Chapter 12 plan contemplates liquidation or continued operation.[26] Thus, a family farmer or fisherman in Chapter 12 will receive a discharge regardless of whether the debtor is an individual, corporation, or partnership, and regardless of the type of plan.

Except for certain types of debts, a Chapter 12 debtor ordinarily obtains a discharge by successful completion of the Chapter 12 plan.[27] For individuals, debts excepted from discharge in a Chapter 7 case are similarly excepted from discharge in Chapter 12.[28] A Chapter 12 debtor also may obtain a discharge prior to completion of the Chapter 12 plan under certain conditions.[29] That discharge is the same as the one given for successful completion of a plan.

§ 9:3 Effect of a Discharge

A discharge voids any judgment at any time obtained if the judgment is determined to be a personal liability of the debtor with respect to a debt discharged under sections 727, 1141, 1228, and 1328.[30] The discharge also operates as a permanent injunction,

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23. *Id.* § 1141(d)(1), (3).
24. Report of the Senate Committee on the Judiciary accompanying S. 2266, S. REP. NO. 95-989, at 98 (1978); Report of the House Committee on the Judiciary accompanying H.R. 8200, H.R. REP. NO. 95-595, at 384 (1977).
25. 11 U.S.C. §§ 101(18), 101(19A).
26. *Id.* § 1222(b)(1)–(12).
27. *Id.* § 1228(a).
28. *Id.* § 1228(a)(2).
29. *Id.* § 1228(b).
30. *Id.* § 524(a)(1); *see* Williams v. Meyer (*In re* Williams), 438 B.R. 679, 686 (B.A.P. 10th Cir. 2010); *see also* Broos v. United States (*In re* Broos), 534 B.R. 358, 361 (B.A.P. 8th Cir. 2015) ("The Debtors may not bring an action for damages under section 7433 because they have failed to exhaust their administrative remedies. 26 U.S.C. § 7433(d). Section 7433(b)(1) permits recovery of actual damages and costs when a violation occurs. A

directed to the creditors of the debtor, against all forms of collection efforts on discharged debts against the debtor or his property.[31] Debts that are not excepted from discharge, even claims based upon the fraud of a non-debtor in forging the debtor's name, are discharged, resulting in a permanent injunction.[31.1]

Violation of this injunction can be treated as contempt.[34] Because the discharge injunction is "central to the statutory scheme" of the Bankruptcy Code, courts do not abuse their discretion in refusing to

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bankruptcy court may also award damages for willful violations of the automatic stay under 11 U.S.C. § 362 and the discharge injunction under 11 U.S.C. § 524 committed by employees of the IRS. 26 U.S.C. § 7433(e)(1). However, a bankruptcy court may not award punitive damages. 11 U.S.C. § 106(a)(3). Importantly, actual damages may not be awarded unless 'the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service.' 26 U.S.C. § 7433(d)."); *In re* Swensen, 438 B.R. 195, 198 (Bankr. N.D. Iowa 2010) ("in order to bring a § 524 petition against the IRS, the debtor must first comply with the jurisdictional prerequisites of 26 U.S.C. § 7433, one of which is to exhaust administrative remedies").

31. 11 U.S.C. § 524(a)(2) and (3). A mortgage lender's refusal to foreclose is not a violation of the discharge injunction. Canning v. Beneficial Me., Inc. (*In re* Canning), 706 F.3d 64 (1st Cir. 2013); *see* Heilman v. Heilman (*In re* Heilman), 430 B.R. 213 (B.A.P. 9th Cir. 2010) (discussing hold-harmless provision in a marital dissolution decree and section 523(a)(3)). The Bankruptcy Code does not have an implied exception from discharge for attorney fees allowable under 11 U.S.C. § 329(a), *see* Bethea v. Robert J. Adams & Assocs., 352 F.3d 1125 (7th Cir. 2003), *cert. denied*, 541 U.S. 1043 (2004), nor does it have such an exception for post-petition, pre-conversion Chapter 11 administrative expenses, *see* Fickling v. Flower, Medalie & Markowitz (*In re* Fickling), 361 F.3d 172 (2d Cir. 2004); *see also* Rittenhouse v. Eisen, 404 F.3d 395 (6th Cir.), *cert. denied*, 546 U.S. 872 (2005); Hessinger & Assocs. v. U.S. Tr. (*In re* Biggar), 110 F.3d 685 (9th Cir. 1997).

31.1. Jimenez v. Naviert Sols., LLC (*In re* Jimenez), 2017 WL 5592260, at *4 (Bankr. S.D. Tex. Nov. 20, 2017) (citing 11 U.S.C. § 101(5) which includes disputed matters in the definition of a claim, and stating that "[t]here are only two elements required to establish a violation of the discharge injunction: knowledge that an injunction exists and intent to commit the act which violates the injunction.").

32.–33. [Reserved.]

34. The weight of authority is that section 524 does not imply a private right of action, either alone or through section 105(a). *See* Green Point Credit, LLC v. McLean (*In re* McLean), 794 F.3d 1313, 1326 (11th Cir. 2015); Pertuso v. Ford Motor Credit Co., 233 F.3d 417, 421–23 (6th Cir. 2000); Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 507–10 (9th Cir. 2002) (following *Pertuso*'s analysis); Cox v. Zale Del., Inc., 239 F.3d 910, 917 (7th Cir. 2001) (agreeing with the result in *Pertuso* and determining that the only relief available to remedy alleged section 524 violations is a contempt action in the bankruptcy court that issued the discharge); *see also* Bessette v. Avco Fin. Servs., Inc., 230 F.3d 439, 444–45 (1st Cir. 2000) (refusing to

require arbitration of alleged violations.[34.1] The standard for finding a party in civil contempt for violation of the discharge injunction requires proof that the creditor "(1) has notice of the debtor's discharge . . . ; (2) intends the actions which constituted the violation; and (3) acts in a way that improperly coerces or harasses the debtor."[35] The moving party has the burden of showing by clear and convincing evidence that there was a violation of a specific and definite order of the court. Thereafter, the burden then shifts to the opposing party to demonstrate why there was a lack of compliance with the order.[35.1] Whether conduct is improperly coercive or harassing is evaluated under an objective standard.[36] The debtor's subjective feelings are insufficient.[37] Whether a creditor's conduct satisfies the objective standard is determined based upon all the facts and circumstances, such as the "immediateness of any threatened action and the context in which a statement is made."[38]

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address whether section implies a right of action, because, in the First Circuit's view, a bankruptcy court's contempt power under section 105(a) offers sufficient remedies); *cf.* Joubert v. ABN AMRO Mortg. Grp., Inc. (*In re* Joubert), 411 F.3d 452 (3d Cir. 2005) (concluding that "the decisions holding that § 105(a) does not authorize separate lawsuits as a remedy for bankruptcy violations, though established in the § 524 context, are equally applicable when the underlying complaint is grounded in § 506(b)"). Contempt proceedings for violation of the discharge injunction must be initiated by a motion in the bankruptcy case, and not an adversary proceeding. Barrientos v. Wells Fargo Bank, 633 F.3d 1186 (9th Cir. 2011). A judgment creditor's inaction, following discharge of judgment debtor in bankruptcy, in not making any effort to evidence effect of debtor's discharge on its judgment, violated discharge injunction. Johnson v. Cadles of Grassy Meadows II, LLC (*In re* Johnson), 466 B.R. 67 (Bankr. E.D. Va. 2012).

34.1. *See* Anderson v. Capital One Bank, N.A. (*In re* Anderson), 884 F.3d 382 (2d Cir. 2018); *In re* Bateman, 2018 WL 2324207, at *8 (Bankr. M.D. Fla. May 22, 2018) ("arbitration of a contempt proceeding for violation of the discharge injunction inherently conflicts with the Bankruptcy Code and undermines the bankruptcy court's authority to enforce its orders and exercise its powers of contempt").

35. Bates v. CitiMortgage, Inc., 844 F.3d 300, 304 (1st Cir. 2016) (citing Best v. Nationstar Mortg. LLC (*In re* Best), 540 B.R. 1, 9 (B.A.P. 1st Cir. 2015) (quoting Lumb v. Cimenian (*In re* Lumb), 401 B.R. 1, 6 (B.A.P. 1st Cir. 2009)).

35.1. Lorenzen v. Taggert (*In re* Taggart), 888 F.3d 438, 443 (9th Cir. 2018), *aff'g* Emmert v. Taggert, (*In re* Taggart), 548 B.R. 275 (B.A.P. 9th Cir. 2016).

36. *Bates*, 844 F.3d at 304.

37. *Id.* (citing, inter alia, Pratt v. Gen. Motors Acceptance Corp. (*In re* Pratt), 462 F.3d 14, 19 (1st Cir. 2006)). In contrast, a claim for violation of the Fair Debt Collection Practices Act is evaluated under the unsophisticated consumer standard.

38. *Bates*, 844 F.3d at 304 (citing, inter alia, Diamond v. Premier Capital, Inc. (*In re* Diamond), 346 F.3d 224, 227 (1st Cir. 2003)); *see In re* Hardej, 563 B.R. 855, 867 (Bank. N.D. Ill. 2017) (finding contempt but refusing to

A bankruptcy court is not deprived of jurisdiction to consider a debtor's contempt action against a creditor under the *Rooker-Feldman* doctrine or the full faith and credit statute, where the creditor had notice of the debtor's bankruptcy and obtained a judgment for a discharged debt.[38.1]

If a debtor asserts that the Internal Revenue Service has violated the discharge injunction, special rules apply. A debtor may claim damages, but not punitive damages, against an instrumentality of the United States for violation of the discharge injunction.[38.2] A debtor also must exhaust administrative remedies prior to petitioning this court for damages.[38.3]

There is an exception in the Ninth Circuit for some attorney fees:

> Under that standard, even if the underlying claim arose prepetition, the claim for fees incurred post-petition on account of that underlying claim is deemed to have arisen post-petition if the debtor 'returned to the fray' post-petition by voluntarily and affirmatively acting to commence or resume the litigation with the creditor.[39]

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award damages where creditor was unscheduled and the determination of whether the creditor's claims against the debtor were discharged "was a complex issue, made even more complicated by the long litigation history among the parties").

38.1. *See* Gray v. Nussbeck (*In re* Gray), 2017 WL 2484824 (Bankr. D. Kan. June 1, 2017).

38.2. *See In re* Thal, 2018 WL 2182304, at *4 (Bankr. S.D. Fla. May 9, 2018).

38.3. *Id*.

39. Emmert v. Taggart (*In re* Taggart), 548 B.R. 275, 289 (B.A.P. 9th Cir. 2016), *aff'd*, 888 F.3d 438 (9th Cir. 2018) (citing Bechtold v. Gillespie (*In re* Gillespie), 516 B.R. 586, 591 (B.A.P. 9th Cir. 2014), and Boeing N. Am. v. Ybarra (*In re* Ybarra), 424 F.3d 1018, 1026–27 (9th Cir. 2005), *cert. denied*, 547 U.S. 1163 (2006)). According to the court in *In re Taggart*:

> The rule is invoked to prevent a debtor from using the discharge injunction as a sword that enables him or her to undertake risk-free postpetition litigation at others' expense. "The *Ybarra* rule applies regardless of whether the litigation begins prepetition or postpetition, regardless of the nature of the underlying claim, and regardless of the forum in which the postpetition litigation takes place."

548 B.R. at 289 (citations omitted). *But see* ResCap Liquidating Tr. v. PHH Mortg. Corp. (*In re* Residential Capital, LLC), 558 B.R. 77 (S.D.N.Y. 2016). In that case, the district court observed:

> [I]n a recent decision decided after the Bankruptcy Court issued its Order, the Court of Appeals for the Ninth Circuit acknowledged that broad application of the *Ybarra* rule (and its progeny and ancestry) is inconsistent with the Ninth Circuit's fair contemplation test for claim accrual and, in an effort to reconcile the two, explained that the "voluntarily . . . returned to the fray" exception is only implicated where the creditor could not "fairly and reasonably

If a bankruptcy court finds a creditor in civil contempt for violation of the discharge injunction, it may award compensatory damages.[40] Some courts have determined that they lack jurisdiction to hear adversary proceedings for violations of the Fair Debt Collection Practices Act and that the debtors' remedies are limited to seeking contempt orders in the bankruptcy court.[41]

An unsecured creditor's assertion that he held an in rem claim that survived discharge and was excepted from the permanent injunction of section 542(a)(2) has been rejected where the creditor did not have an

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contemplate" further post-discharge litigation with the insolvent debtor.

Id. at 89 (citing Picerne Constr. Corp. v. Castellino Villas, A.K.F. LLC (*In re* Castellino Villas, A.K.F. LLC), 836 F.3d 1028, 1034–37 (9th Cir. 2016)).

40. *See* Holley v. Kresch Oliver, PLLC (*In re* Holley), 473 B.R. 212, 216 (Bankr. E.D. Mich. 2012), *aff'd*, 2013 WL 791549 (E.D. Mich. Mar. 4, 2013) (punitive damages may only be awarded for criminal contempt). *See also* Ocwen Loan Serv., LLC v. Marino (*In re* Marino), 577 B.R. 772, 788–89 (B.A.P. 9th Cir. 2017). In *Marino*, the court observed:

> Some bankruptcy courts understand *Dyer* [322 F.3d 1178 (9th Cir. 2003)] to mean that a bankruptcy court may not allow "punitive damages" for a violation of the discharge injunction but may award "relatively mild noncompensatory fines." *Martinez*, 561 B.R. at 175 ("this court has no authority to award punitive damages for a violation of the Discharge Injunction, but it does have authority to award mildly [sic], non-compensatory fines in appropriate circumstances"); *In re* Dickerson, 510 B.R. 289, 298 (Bankr. D. Idaho 2014) ("in general, punitive damages are not an appropriate remedy for § 105(a) contempt proceedings, [but] relatively mild noncompensatory fines may be acceptable in some circumstances"). Other courts have held that a bankruptcy court may award "punitive damages," so long as the amount is "relatively mild." *See, e.g.*, Rosales v. Wallace (*In re* Wallace), BAP No. NV-11-1681-KiPaD, 2012 WL 2401871, at *8 (9th Cir. BAP June 26, 2012) (recognizing that, under *Dyer*, "such punitive sanctions cannot be 'serious'"). We do not see any meaningful difference between "punitive damages" and "noncompensatory fines." The Ninth Circuit has authorized "noncompensatory fines," which are simply punitive damages by another name. However labeled, any such award must be "relatively mild."
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> It was thus an error for the bankruptcy court to preclude itself from considering an award of punitive damages. We do not hold that the bankruptcy court must award a fine or punitive damages, but we remand so that the bankruptcy court can consider whether to do so.

Marino, 577 B.R. at 788–89 (footnote omitted).

41. *See* Simon v. FIA Card Servs., 732 F.3d 259, 271 n.7 (3d Cir. 2013) (citing cases on both sides of the issue of whether FDCPA claims are precluded by the Code); *In re* Frambes, 454 B.R. 437 (Bankr. E.D. Ky. 2011) (citing Barrientos v. Wells Fargo Bank, N.A., 633 F.3d 1186 (9th Cir. 2011)); *see also* section 14:1.3[A], *infra*.

attachment or other remedy prior to the discharge.[41.1] A creditor's refusal to remove UCC-1 financing statements and its filing of UCC-3 continuation statements relating to after-acquired property, however, does not violate the discharge injunction in the absence of any demand for payment where creditor's liens passed through the debtor's bankruptcy unaffected.[41.2] The Eighth Circuit has determined that, although a state department of social services erred in attempting to collect a portion of its nondischargeable domestic support obligation claim, which had been disallowed by the bankruptcy court and not included in the debtors' confirmed Chapter 13, its action did not warrant a contempt order and sanctions for violating the discharge injunction or for abusing the terms of the confirmed plan and bankruptcy process.[41.3] Courts are divided with respect to the good faith defense to a discharge violation.[41.4]

41.1. *See* Parker v. Handy (*In re* Handy), 624 F.3d 19, 21–22 (1st Cir. 2010); *see also* Green Point Credit, LLC v. McLean (*In re* McLean), 794 F.3d 1313, 1320 (11th Cir. 2015) (holding that "§ 524(a)(2) prohibits filing a proof of claim for a discharged debt where the objective effect of the claim is to pressure the debtor to repay the debt"). In *McLean*, the Eleventh Circuit vacated a non-compensatory sanction of $50,000 as punitive and noted that an adversary proceeding was unwarranted to obtain relief, stating "Federal Rule of Bankruptcy Procedure 9020 specifically provides that 'a motion for an order of contempt' is governed by Rule 9014, which relates to contested matters. Thus, '[g]enerally speaking, civil contempt sanctions for the violation of the discharge injunction must be sought by contested matter rather than an adversary proceeding.'" *Id.* at 1326 (citing Chionis v. Starkus (*In re* Chionis), 2013 WL 6840485, at *4 (B.A.P. 9th Cir. Dec. 27, 2013), and Barrientos v. Wells Fargo Bank, N.A., 633 F.3d 1186, 1190 (9th Cir. 2011)); *see also* Maddox v. Capital One, N.A. (*In re* Maddox), 530 B.R. 889 (Bankr. M.D. Ala. 2015) (creditor violated the discharge injunction, and the Fair Debt Collection Practices Act, when it filed a proof of claim in debtor's Chapter 13 case with a reservation of the right to seek a deficiency where debtor had previously obtained a Chapter 7 discharge).

41.2. *See generally* Botson v. Citizens Banking Co. (*In re* Botson), 531 B.R. 719 (Bankr. N.D. Ohio 2015).

41.3. State of Mo. Dep't of Social Servs. (*In re* Spencer), 868 F.3d 748 (8th Cir. 2017).

41.4. *Compare* Internal Revenue Serv. v. Murphy, 2018 WL 2730764, at *1 (1st Cir. June 7, 2018) (holding "that an employee of the IRS 'willfully violates' a discharge order when the employee knows of the discharge order and takes an intentional action that violates the order. Under § 7433(e), the IRS's good faith belief that it has a right to collect the purportedly discharged debts is not relevant to determining whether it 'willfully violate[d]' the discharge order."), *with* Lorenzen v. Taggart (*In re* Taggart), 888 F.3d 438 (9th Cir. 2018) (creditors cannot be held in contempt for any alleged violation of the discharge injunction, when they act pursuant to their good faith belief that the discharge injunction did not apply to their claims.).

The debtor is free to pay voluntarily any debt discharged in bankruptcy, but creditors may not in any way coerce payments.[42] Additionally, the discharge of the debtor's debts does not affect the liability of any other entity on, or the property of any other debtor for, such debt.[43]

In Chapter 7 cases, liens pass through bankruptcy unaffected.[44] Secured creditors, while barred from seeking in personam relief against the debtor, retain their in rem rights against the debtor's property.[45]

If, however, a debtor is denied a discharge, or a creditor is successful in obtaining a determination that a particular debt is non-dischargeable, the debtor is liable for any debt that is not discharged. Thus, after the debtor's bankruptcy case is closed, or upon an earlier lifting of the automatic stay, holders of non-discharged debts may pursue the debtor and his property.[46]

Section 525 of the Bankruptcy Code prohibits discrimination against a person solely because of the filing of a bankruptcy petition. Section 525(a) applies to *persons* and prohibits governmental units from denying, revoking, suspending, or refusing to:

(1) renew a license, permit, charter, franchise, or other similar grant to,

(2) condition renewal of such a grant to,

(3) discriminate with respect to such a grant against,

(4) deny employment to,

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42. 11 U.S.C. § 524(f). It is not a violation of the discharge injunction for a creditor to refuse to foreclose on property that debtors intend to surrender. Canning v. Beneficial Me., Inc. (*In re* Canning), 462 B.R. 258 (B.A.P. 1st Cir. 2011), *aff'd*, 706 F.3d 64 (1st Cir. 2013).

43. 11 U.S.C. § 524(e); *see In re* Morris, 430 B.R. 824 (Bankr. W.D. Tenn. 2010) (under section 524(e), a creditor who had failed to file a proof of claim against debtor who had received a discharge was permitted to pursue debtor, as nominal defendant, in personal injury action to obtain recovery against debtor's insurer).

44. Johnson v. Home State Bank, 501 U.S. 78 (1991); Owen v. Owen, 500 U.S. 305 (1991).

45. Watson v. Shandell (*In re* Watson), 192 B.R. 739, 749 n.8 (B.A.P. 9th Cir. 1996), *aff'd*, 116 F.3d 488 (9th Cir. 1997); *see also* Dewsnup v. Timm, 502 U.S. 410, 418 (1992); Johnson v. Home State Bank, 501 U.S. 78, 84 (1991). For a case involving an ex-spouse's equitable distribution rights in which the bankruptcy court determined that the ex-spouse could pursue "in kind" division or assignment of the debtor's pension plans without violating the discharge injunction, see Verner v. Verner (*In re* Verner), 318 B.R. 778 (Bankr. W.D. Pa. 2005).

46. *See In re* Diaz, 647 F.3d 1073 (11th Cir. 2011) (discussing the discharge injunction as it applies to attempts by state agencies to collect past-due child support obligations).

(5) terminate employment of, or

(6) discriminate with respect to employment against

a person that is or has been a debtor, or another person with whom such debtor has been associated, solely because such debtor is or has been a debtor, has been insolvent before the commencement of the case, during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable.[47]

Section 525(b) applies to private employers and prohibits them from terminating the employment of, or discriminating with respect to employment against, an *individual* who is or has been a debtor, or an individual associated with such debtor, solely because such debtor

(1) is or has been a debtor;

(2) has been insolvent before the commencement of a case but before the grant or denial of a discharge; or

(3) has not paid a debt that is dischargeable.[48]

§ 9:4 Reaffirmation, Redemption, and Surrender

An individual debtor whose liabilities include secured debts or personal property leases must file, pursuant to section 521 of the Code, a "statement of intention" within the earlier of the date of the section 341 meeting of creditors or thirty days from filing of the

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47. 11 U.S.C. § 525(a) and 11 U.S.C. § 101(41) (defining "person"); *see* FCC v. NextWave Pers. Commc'ns, Inc., 537 U.S. 293 (2003). In *NextWave*, the Court found the debtor's failure to pay a dischargeable debt owed to the Federal Communications Commission was the proximate cause of the cancellation of the debtor's licenses and, thus, that by canceling the licenses, the FCC had violated section 525. The Court rejected the FCC's argument that it had a "valid regulatory motive" for canceling the licenses, calling the agency's motive "irrelevant." *NextWave*, 537 U.S. at 301; *see also* Envtl. Source Corp. v. Mass. Div. of Occupational Safety (*In re* Envtl. Source Corp.), 431 B.R. 315 (Bankr. D. Mass. 2010).

48. 11 U.S.C. § 525(b); *see* Rea v. Federated Inv'rs, 627 F.3d 937 (3d Cir. 2010) (holding that section 525(b) did not prevent the defendant, a private employer, from "deny[ing] employment to" a person that has been bankrupt, as Congress is presumed to have intentionally omitted the language of section 525(a) prohibiting governmental units from denying employment in section 525(b)); Myers v. TooJay's Mgmt. Corp., 640 F.3d 1278 (11th Cir. 2011); Burnett v. Stewart Title, Inc. (*In re* Burnett), 635 F.3d 169 (5th Cir. 2011); *In re* Kamell, 451 B.R. 505 (Bankr. C.D. Cal. 2011); Stinson v. BB&T Inv. Serv., Inc. (*In re* Stinson), 285 B.R. 239 (Bankr. W.D. Va. 2002); Fiorani v. CACI, 192 B.R. 402 (E.D. Va. 1996); Pastore v. Medford Sav. Bank, 186 B.R. 553 (D. Mass. 1995); Madison Madison Int'l of Ill. v. Matra, S.A. (*In re* Madison Madison Int'l of Ill.), 77 B.R. 678 (Bankr. E.D. Wis. 1987). *Contra* Leary v. Warnaco, Inc., 251 B.R. 656, 658 (S.D.N.Y. 2000).

petition.[49] As to each affected item of property, the Chapter 7 debtor must select one of three options: surrender the property or, if the debtor wishes to retain the property, state whether he will reaffirm the debt secured by the property, or redeem the property by paying the amount of the allowed secured claim.[50] Prior to the effective date of BAPCPA, when this section only covered debts, not leases, some courts held that the debtor had a fourth option: continuing to make payments until the debt was paid in full while avoiding personal liability if he should fail to make payments. The fourth option has been eliminated as to personal property,[51] but may remain viable for real property.[52] The stated intention must be performed within thirty days from the date first set for the section 341(a) meeting.[53]

To make absolutely certain that the debtor acts upon the statement of intention, the debtor may not retain possession of personal property which is the subject of an allowed purchase money security interest unless the debtor redeems the property "not later than 45 days after

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49. 11 U.S.C. § 521(a)(2)(A). Once debtor has indicated a desire to reaffirm, the burden of preparing the reaffirmation agreement is on the creditor. Pac. Capital Bancorp. v. Schwass (*In re* Schwass), 378 B.R. 859 (Bankr. S.D. Cal. 2007). *But see In re* Cowgill, 2008 WL 4487669 (Bankr. N.D. Ohio Sept. 26, 2008).

50. 11 U.S.C. § 521(a)(2)(A), (B).

51. *See id*. § 521(a)(6). For a complete discussion of the issue and cases, see Dumont v. Ford Motor Credit Corp. (*In re* Dumont), 581 F.3d 1104 (9th Cir. 2009). A debtor who has done everything he could to reaffirm—executing the reaffirmation agreement and seeking court approval—will be able to retain the property if payments remain current even if the court refuses to approve the agreement. Ford Motor Credit Co. v. Baker (*In re* Baker), 400 B.R. 136 (D. Del. 2009); Coastal Fed. Credit Union v. Hardiman, 398 B.R. 161 (E.D.N.C. 2008); *see also In re* Perkins, 418 B.R. 680, 682 (Bankr. M.D.N.C. 2009).

52. *See In re* Lopez, 440 B.R. 447 (Bankr. E.D. Va. 2010); *In re* Hart, 402 B.R. 78, 82 n.16 (Bankr. D. Del. 2009) (concluding "debtors are permitted to take advantage of the ride through option with respect to relevant real property"); *In re* Wilson, 372 B.R. 816, 820 (Bankr. D.S.C. 2007) ("the Court finds that . . . controlling precedent in the Fourth Circuit . . . provides for a 'ride through' option for real property that was unaffected by the BAPCPA amendments"); *In re* Bennet, 2006 WL 1540842, at *1 (Bankr. M.D.N.C. 2006) ("the court finds that debtors . . . continue to have the right . . . to retain real property without being required to reaffirm or redeem, so long as payments to the creditor are current"); *see also In re* Waller, 394 B.R. 111, 113 (Bankr. D.S.C. 2008) (noting "[t]his Court recently confirmed the viability of the 'ride through' option for debts secured by real property"). *Contra* Taylor v. AGE Fed. Credit Union (*In re* Taylor), 3 F.3d 1512, 1517 (11th Cir. 1993); *In re* Steinberg, 447 B.R. 355 (Bankr. S.D. Fla. 2011) (*Taylor* survives BAPCPA).

53. 11 U.S.C. § 521(a)(2)(B). The time can be extended by the court for cause on a timely request. *Id*. This requirement is satisfied if the debtor takes steps to reaffirm the debt on its original terms within the specified period. *In re* Hinson, 352 B.R. 48, 50–51 (Bankr. E.D.N.C. 2006).

the first meeting of creditors under section 341(a)."[54] Further, if the debtor fails to do so, the automatic stay terminates with respect to the property, and it is no longer property of the estate unless the court orders otherwise.[55]

Without regard to the three alternatives, a debtor can always voluntarily repay a discharged debt.[56] The payment must be voluntary, and it does not create an enforceable obligation.[57]

§ 9:4.1 Reaffirmation

A debtor under any chapter of the Bankruptcy Code may enter into an agreement with a creditor to reaffirm his obligation to repay a debt that would otherwise be dischargeable.[58] Courts are divided as to whether a lease assumption agreement entered into under section 365(p) must also satisfy the reaffirmation requirements of section 524(c)—in other words, whether a lease assumption agreement entered into pursuant to section 365(p) is enforceable following discharge if the debtor did not also reaffirm the lease's underlying debt (with bankruptcy court approval) under section 524(c).[59] Reaffirmation agreements must be filed no later than sixty days after the first

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54. 11 U.S.C. § 521(a)(6). It is not clear whether this is the date first set, as in *id*. § 521(a)(2)(B), or the date the meeting is actually held.
55. *Id*. § 521(a)(6); *In re* Ruona, 353 B.R. 688 (Bankr. D.N.M. 2006).
56. *Id*. § 524(f).
57. *See In re* Arnold, 206 B.R. 560 (Bankr. N.D. Ala. 1997).
58. 11 U.S.C. § 524(c). A post-discharge consolidation of student loans that did not result in any new financing was in the nature of a reaffirmation agreement and unenforceable, since the debts might have been discharged under an undue hardship theory. *In re* Smith, 442 B.R. 550 (Bankr. S.D. Tex. 2010); *see also In re* Bailey, 664 F.3d 1026 (6th Cir. 2011) (holding that a bank waived its right to be treated as a secured creditor when it filed an unsecured claim and received distributions from the estate and, therefore, its reaffirmation agreement with the debtors was unenforceable). Courts cannot review reaffirmation agreements between represented debtors and credit unions. Bay Fed. Credit Union v. Ong (*In re* Ong), 461 B.R. 559 (B.A.P. 9th Cir. 2011).
59. Williams v. Ford Motor Credit Co., 2016 WL 2731191, at *1 (E.D. Mich. May 11, 2016) (holding that reaffirmation was not required); *see In re* Ebbrecht, 451 B.R. 241, 242 (Bankr. E.D.N.Y. 2011) (holding that the court lacked authority to approve reaffirmation agreements when the property at issue is subject to a personal property lease; denying approval of the reaffirmation agreement; and concluding that "the Bankruptcy Code allows for a personal property lease to be assumed by a Chapter 7 debtor under Section 365(p)(1), but not reaffirmed under Section 524"); *accord In re* Perlman, 468 B.R. 437 (Bankr. S.D. Fla. 2012). *But see* Thompson v. Credit Union Fin. Grp., 453 B.R. 823 (W.D. Mich. 2011), in which the court stated:

> This Court . . . holds that a Debtor's unapproved assumption under section 365(p) does not eliminate the discharge protection that

date set for the meeting of creditors and accompanied by a cover sheet, prepared as prescribed by the appropriate official form.[60] A reaffirmation agreement must be filed before entry of the discharge.[61] Reaffirmation agreements are more prevalent in individual Chapter 7 cases than in Chapter 11, 12, and 13 cases where the debtors provide for the treatment of claims in reorganization plans.[62] Even though unsecured debts need not be listed in the statement of intention, the statute authorizes reaffirmation of unsecured as well as secured debts. However, counsel should be aware that some bankruptcy judges are reluctant to permit the reaffirmation of unsecured obligations unless special circumstances are shown. To the extent an enforceable reaffirmation agreement is created, the debt reaffirmed is not discharged.

A debtor may have various reasons for reaffirming a debt. For example, an individual Chapter 7 debtor may want to retain property

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> flows from the Trustee's rejection of the lease. To set aside the discharge protection, a lessor must obtain not only the Debtor's assumption but also Bankruptcy Court approval under the reaffirmation provisions of section 524(c), or other appropriate Code provisions.

453 B.R. at 824–25; *accord In re* Eader, 426 B.R. 164 (Bankr. D. Md. 2010); *In re* Creighton, 427 B.R. 24 (Bankr. D. Mass. 2007).

60. FED. R. BANKR. P. 4008(a). "The court may, at any time and in its discretion, enlarge the time to file a reaffirmation agreement." FED. R. BANKR. P. 4008(a). It has been held that this limit may be extended for good cause shown. *In re* Boliaux, 422 B.R. 125, 130–31 (Bankr. N.D. Ill. 2010). *In re* Salas, 431 B.R. 394 (Bankr. W.D. Tex. 2010) (if a reaffirmation agreement is made before the entry of discharge, it will be possible for the debtor to file the reaffirmation agreement after the entry of discharge, provided the court grants relief under Rule 4008(a)).

61. *See* Venture Bank v. Lapides, 800 F.3d 442 (8th Cir. 2015) (holding that post-discharge repayment agreements that were never submitted to bankruptcy court for approval were unenforceable and that post-discharge payments made by a Chapter 7 debtor on discharged pre-petition mortgage debt, in exchange for mortgagee's forbearance and promises to work with the debtor and his wife in refinancing their mortgage debt, were not "voluntary" and violated discharge injunction); *see also In re* Hoffman, 582 B.R. 181 (Bankr. E.D. Mich. 2018) (court lacked authority to extend the deadline for filing a reaffirmation agreement where the motion was filed after the discharge was entered); Nuckoles v. Ford Motor Credit Co. (*In re* Nuckoles), 546 B.R. 651 (Bankr. W.D. Va. 2016) (where creditor prevented debtor from timely filing a reaffirmation agreement, the court ruled that the ipso facto clause in the security agreement signed by debtor would be ineffective such that the creditor could not rely upon sections 362 (h) and 521(a)).

62. *See In re* Am. Rice, Inc., 448 F. App'x 415 (5th Cir. 2011) (discussing issue of whether two post-confirmation contracts were unenforceable in a Chapter 11 case because each of the contracts failed to comply with 11 U.S.C. § 524(c)).

subject to a security interest, such as the family car, but may be unable to raise sufficient funds to redeem the secured creditor's interest under section 722.[63] In that event, the secured creditor may agree to permit the debtor to retain the collateral in exchange for the debtor's agreement to remain personally liable on the obligation. To the extent the value of the collateral is less than the secured creditor's claim, the secured creditor avoids having the unsecured portion of its claim treated as an unsecured claim. Another reason why debtors often agree to reaffirm a debt is to settle litigation involving a creditor's objection to the dischargeability of a particular debt. There is no requirement that a creditor enter into a reaffirmation agreement. It can simply refuse or condition the reaffirmation agreement on the reaffirmation of other debts.[64]

The Bankruptcy Code has strict requirements governing the enforceability of reaffirmation agreements, including the requirement that the reaffirmation agreement be entered into before the court grants the debtor a discharge[65] and that the agreement does not impose an

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63. *See In re* Clark, 401 B.R. 75 (Bankr. D. Conn. 2009) (discussing relationship among sections 362(h)(1), 521(a)(6), and 521(d)).

64. Jamo v. Katahdin Fed. Credit Union (*In re* Jamo), 283 F.3d 392, 404 (1st Cir. 2002); *see* Jacqueline B. Stuart, *All or Nothing Reaffirmation: Can Secured and Unsecured Debts Be Linked*, 58 BUS. LAW. 1308 (2003); *see also In re* Hinson, 352 B.R. 48, 52 (Bankr. E.D.N.C. 2006), and cases cited therein.

65. 11 U.S.C. § 524(c)(1). The discharge will not be vacated to permit the filing of a reaffirmation agreement. *In re* Engles, 384 B.R. 593 (Bankr. N.D. Okla. 2008); *In re* Lemoine, 384 B.R. 48 (Bankr. D. Conn. 2008); *In re* Wilhelm, 369 B.R. 882 (Bankr. M.D.N.C. 2007); *In re* Carrillo, 2007 WL 2916328 (Bankr. D. Utah July 25, 2007), and cases cited. A post-discharge reaffirmation has been held to be ineffective. *In re* Herrera, 380 B.R. 446 (Bankr. W.D. Tex. 2007); Sandburg Fin. Corp. v. Am. Rice, Inc., 448 F. App'x 415 (5th Cir. 2011). The agreement is effective, for timing purposes, when signed by the debtor. *In re* Merritt, 366 B.R. 637 (Bankr. W.D. Tex. 2007); *see In re* Lee, 356 B.R. 177 (Bankr. N.D. W. Va. 2006) (where the court declared agreements to be defective and unenforceable, the case would not be reopened to permit the filing of corrected agreements); *see also In re* Perkins, 418 B.R. 680 (Bankr. M.D.N.C. 2009) (reaffirmation agreement that debtor signed and returned to creditor whose debt was to be reaffirmed long before the expiration of sixty-day period specified in Rule 4008(a), but that was not filed because of creditor's delay within that period could not be approved; although court ordered the automatic stay to remain in effect as to creditor's collateral, collateral would remain part of bankruptcy estate and any ipso facto clause in security agreement or other document signed by debtor would remain ineffectual); *In re* Mausolf, 403 B.R. 761, 764 (Bankr. S.D. Fla. 2009) (Chapter 7 debtor permitted to reopen case for approval of proposed reaffirmation agreement with creditor whose claim was secured by motor vehicle because agreement was made prior to the entry of discharge). *See generally In re* Siegal, 535 B.R. 5, 13–14 (Bankr. D. Mass. 2015).

undue hardship on the debtor.[66] A reaffirmation agreement that fails to comply with section 524, even one represented by a promissory note based in part on a discharged debt, is a "void."[66.1] Absent the commencement of an adversary proceeding, parties cannot use a stipulation excepting a debt from discharge to avoid the requirements of section 524(c) regarding approval of reaffirmation agreements.[66.2]

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66. 11 U.S.C. § 534(c)(3)(B); *see In re* Cockrell, 496 B.R. 596 (Bankr. W.D. Ark. 2013) (must also be in debtor's best interest).

66.1. *See* SMS Fin. JDC, LP v. Cope, 685 F. App'x 648, 653 (10th Cir. 2017) (citing Republic Bank of Cal., N.A. v. Getzoff (*In re* Getzoff), 180 B.R. 572, 574 (B.A.P. 9th Cir. 1995)). In *Cope*, the U.S. Court of Appeals for the Tenth Circuit observed:

> [A] key distinction between a void and a voidable obligation is whether it is subject to ratification by the debtor. *See* Restatement (Second) of Contracts § 163, cmt. c ("[T]he recipient of a misrepresentation may be held to have ratified the contract if it is voidable but not if it is 'void.'"). An improperly reaffirmed debt is not subject to ratification. *In re* Lee, 356 B.R. 177, 182–83 (Bankr. N.D. W. Va. 2006). Moreover, discharge in bankruptcy is itself a defense, classed with fraud in the factum, that can defeat even the rights of a holder in due course. *See* U.C.C. § 3-305(2)(c), (d) (Am. Law Inst. & Nat'l Conf. Comm'rs Uniform State Laws 2014). Finally, as previously noted, § 524(c) prohibits reaffirmation of agreements that rely even in part on consideration based on a discharged debt. For this reason, most courts have held that giving new consideration (like a yacht loan) to persuade a debtor to reaffirm will not validate a non-complying agreement. Section 524(c) is not concerned with the consideration that the debtor received; instead, it invalidates non-complying agreements where any part of the consideration given by the debtor involves his promise to pay a discharged debt. Every reaffirmation agreement involves some element of new consideration. Otherwise, the debtor would not agree to pay the discharged debt.

SMS Financial, 2017 WL 1352076 at *4.

66.2. *In re* Maiers, 2017 WL 5033660, at *3 (Bankr. C.D. Ill. Oct. 31, 2017). In that case, the court observed the following:

> If § 727(a)(10) could be used to waive the discharge of a specific debt, then the requirements for reaffirmation agreements under § 524(c) would be meaningless. A waiver under § 727(a)(10) needs only to be in writing, signed by the debtor after the petition is filed, and approved by the court . . . Clearly, if a debtor and creditor wish to settle the issue of dischargeability of a specific debt without filing an adversary complaint, then they must do so through a reaffirmation agreement that strictly complies with the provisions of § 524(c).

Id. (citations omitted).

Section 524 contains highly detailed provisions for disclosures which must be contained in a reaffirmation agreement. These provisions should be carefully reviewed particularly by counsel representing creditors who may be called upon to draft the reaffirmation agreement and accompanying disclosures.

The statute requires a "disclosure statement" that must set forth the amount of debt reaffirmed, the applicable annual percentage rates, the repayment schedule, and the meaning and effect of reaffirmation.[67] The statement must also be accompanied by a statement of the total income and total expense amounts stated on Schedules I and J.[68] The detailed provisions also outline the form of the reaffirmation agreement.[69]

If the debtor is represented by counsel, the agreement must contain a certificate of counsel that the agreement represents a fully informed and voluntary agreement by the debtor that does not impose an undue hardship on the debtor or the debtor's dependents and that counsel has fully explained the legal effects and consequences of the agreement and default thereunder.[70] Further, if a presumption of undue hardship has been established with respect to the agreement, the attorney must certify that, in the attorney's opinion, the debtor is able to make the required payment.[71] "Undue hardship" is a presumption that arises when the information that the debtor discloses as part of the

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67. 11 U.S.C. § 524(k)(3). Subsections 524(k)(3)(A)–(J) contain the required disclosures; subsection 524(k)(3)(J) contains additional statements that must be included in the disclosure statement, including statements as to the debtor's right to rescind the reaffirmation agreement. These disclosures track requirements of section 524(c)(3)–(6); *see* 11 U.S.C. § 524(c)(3)–(6); *see also* 11 U.S.C. § 524(k)(6)(A); FED. R. BANKR. P. 4008(b).

68. FED. R. BANKR. P. 4008. If there is a difference between the income and expense amounts on Schedules I and J and the statement required by this section, the difference must be explained. *Id*.

69. 11 U.S.C. § 524(k)(4).

70. *Id*. § 524(k)(5)(A). If the debtor is represented by an attorney who certifies that the presumption does not arise, there is no need for a hearing. *In re* Calabrese, 353 B.R. 925 (Bankr. M.D. Fla. 2006). One court has held that it did not have authority to approve agreements where the debtor is represented by counsel. *In re* Barron, 441 B.R. 131 (Bankr. D. Ariz. 2010). If the debtor is not represented, a hearing must be held. *In re* Pitts, 462 B.R. 844 (Bankr. M.D. Fla. 2012). If an attorney certifies that an undue hardship does not exist and a court finds to the contrary, he may be exposed to sanctions under Rule 9011 of the Federal Rules of Bankruptcy Procedure. *See In re* Griffin, 563 B.R. 171 (Bankr. M.D.N.C. 2017).

71. 11 U.S.C. § 524(k)(5)(B); *see also In re* Minardi, 399 B.R. 841 (Bankr. N.D. Okla. 2009).

reaffirmation process indicates income insufficient to make the scheduled payments.[72] The presumption may be rebutted.[73]

In a case concerning an individual, when the court has determined whether or not to grant a discharge in a Chapter 7, 11, 12, or 13 case, the court has the option of holding a hearing at which the debtor is to appear in person.[74] At any such optional discharge hearing, the court shall inform the debtor that discharge has been granted or the reason why a discharge has not been granted.[75]

A debtor who is in the process of negotiating a reaffirmation agreement may move to postpone the entry of a discharge order.[76] An amended statement of intention filed by a Chapter 7 debtor to surrender collateral securing debt that was the subject of a reaffirmation agreement will not serve to rescind the reaffirmation agreement, and thus a debtor cannot prevail in an action for contempt.[77] Similarly, a modification to a reaffirmation agreement may not constitute

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72. 11 U.S.C. § 524(m)(1). The figures provided as part of the reaffirmation form (Part D of the form) control, without regard to the differing figures shown on Schedules I and J. *In re* Wilson, 363 B.R. 220 (Bankr. D.N.M. 2007). This presumption does not apply to reaffirmation agreements where the creditor is a credit union. 11 U.S.C. § 524(m)(2). *See In re* Payton, 338 B.R. 899 (Bankr. D.N.M. 2006) (refusing to approve reaffirmation agreement upon consideration of debtor's income and expenses).

73. 11 U.S.C. § 524(m)(1); *see* 11 U.S.C. § 524(k)(1)(A); FED. R. BANKR. P. 4008(b); *see also In re* Visnicky, 401 B.R. 61 (Bankr. D.R.I. 2009), in which the court stated:

> To rebut a presumption of undue hardship, the debtor must identify and explain the sources of the additional funds. "The income of another party may, in appropriate circumstances, constitute a satisfactory 'additional source of funds' but only if the court is satisfied that the other person is both motivated to provide the funds and financially capable of doing so."

Id. at 64.

74. 11 U.S.C. § 524(d); *see In re* Harvey, 452 B.R. 179, 180 (Bankr. W.D. Va. 2010), in which the court concluded that its responsibilities and authority with respect to approval of reaffirmation agreements were limited to the following situations "where (i) bankruptcy debtors are not represented by counsel in the bankruptcy case, or (ii) they are represented by counsel in cases where a 'presumption of undue hardship' has arisen pursuant to the provisions of 11 U.S.C. § 524(m) and their counsel has executed the certification prescribed by § 524(k)(5)(B) that even though the presumption of undue hardship has been established, 'in the opinion of the attorney, the debtor is able to make the payment.'"

75. 11 U.S.C. § 524(d); *see* Venture Bank v. Lapides, 800 F.3d 442 (8th Cir. 2015).

76. FED. R. BANKR. P. 4004(c)(2).

77. *In re* Graham, 430 B.R. 473 (Bankr. E.D. Tenn. 2010).

a rescission of an earlier timely filed reaffirmation agreement.[78] A reaffirmation agreement, however, may be rescinded "at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later."[79]

§ 9:4.2 Redemption

Redemption allows a debtor to redeem consumer goods from a lien by paying the creditor the amount of the allowed secured claim.[80] The amount must be paid in full at the time of redemption.[81] The specific statutory prerequisites are:

(1) an individual debtor;

(2) tangible consumer goods securing dischargeable consumer debt;

(3) property that has either been claimed as exempt by the debtor[82] or has been abandoned by the trustee.[83]

While the statute appears to require approval of redemption by the court on motion,[84] there is authority for the proposition that consensual redemption agreements do not require bankruptcy court approval.[85]

There are practical problems with redemption. First, in the absence of agreement, the court must determine the value of the property to be redeemed. The *Rash* test applied by the Supreme Court to Chapter 13 cramdowns[86] does not apply to redemptions as there is no ongoing

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78. *In re* Pickerel, 433 B.R. 679, 685 (Bankr. N.D. Ohio 2010) (noting that to "effectuate the rescission of a reaffirmation agreement, § 524(c)(4) imposes two basic requirements on a debtor. The first is temporal, with § 524(c)(4) requiring that the debtor rescind the agreement prior to discharge or within 60 days after the agreement is filed with the court, whichever occurs later. The second requirement . . . concerns the form of the rescission.").
79. 11 U.S.C. § 524(c)(4); *see In re* Larson, 479 B.R. 355 (Bankr. W.D. Pa. 2012) (court exercised equitable powers under section 105 to extend sixty-day deadline to rescind where creditor denied the existence of the reaffirmation agreement and then implemented actions not contemplated by the existing credit agreement to repossess debtor's vehicle).
80. 11 U.S.C. § 722.
81. *Id*.
82. *See id*. § 522.
83. *See id*. § 554.
84. FED. R. BANKR. P. 6008.
85. Arruda v. Sears, Roebuck & Co., 310 F.3d 13 (1st Cir. 2002); Sears, Roebuck & Co. v. Spivey, 265 B.R. 357 (E.D.N.Y. 2001).
86. *See* section 13:3.5[A], *infra*.

risk to the creditor who receives cash.[87] Where the debtor is an individual in Chapter 7 or 13, the value of personal property subject to an allowed secured claim is to be based on "replacement value of such property as of the date of the filing without deduction for costs of sale or marketing."[88] For property acquired for personal, family, or household purposes, replacement value means "the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined."[89]

Bankruptcy courts have employed three valuation approaches to determine the value at which a debtor may redeem personal property:

(1) the fair market value, which is the net amount a creditor would receive after repossessing and disposing of the collateral as permitted under non-bankruptcy law;

(2) the liquidation value, which is the amount that the personal property would generate in an auction or forced sale; and

(3) the commercially reasonable disposition approach.[90]

The last approach allows the court to examine a variety of factors, such as the age and condition of the property, in valuing the personal property.[91]

§ 9:4.3 *Surrender*[92]

If the debtor elects to surrender property, the property must be surrendered within thirty days after the date first set for the section 341(a) meeting.[93] It has been held the debtor does not have to pack up or deliver the collateral, merely make it available for pickup.[94] Other

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87. Triad Fin. Corp. v. Weathington (*In re* Weathington), 254 B.R. 895, 900 (B.A.P. 6th Cir. 2000) (citing Assocs. Commerce Corp. v. Rash, 520 U.S. 953 (1997)); *see also In re* Perez, 318 B.R. 742 (Bankr. M.D. Fla. 2005).
88. 11 U.S.C. § 506(a)(2).
89. *Id*.
90. *See In re* Airhart, 473 B.R. 178, 183 (Bankr. S.D. Tex. 2012).
91. *Id*. The court in *Airhart* adopted the third approach.
92. "Surrender" requires a mutual agreement of the parties. *See* Losak v. Beneficial Consumer Disc. Co. (*In re* Losak), 375 B.R. 162, 164 (Bankr. W.D. Pa. 2007) (citing cases).
93. 11 U.S.C. § 521(a)(2)(B). The debtor must perform his stated intention to redeem, reaffirm or surrender within thirty days of the date first set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such thirty-day period fixes. *Id*.
94. *In re* Pratt, 462 F.3d 14, 18–19 (1st Cir. 2006) ("[T]he most sensible connotation of 'surrender' in the present context is that the debtor agreed to make the collateral available to the secured creditor—*viz.*, to cede his possessory rights in the collateral—within 30 days of the filing of the notice of intention to surrender possession of the collateral. Similarly,

courts have granted the creditor relief from stay to enable it to recover the property by appropriate state law remedies.[95]

While the debtor may not have to physically surrender property, there is a split of authority as to whether he can continue to defend or contest a foreclosure sale in state court because, in effect, he is arguably resisting surrender of the property.[96] The debtor does not

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nothing in subsection 521(a)(2) remotely suggests that the secured creditor is required to accept possession of the vehicle at the end of the 30-day period, as such a reading would be at odds with well-established law that a creditor's decision whether to foreclose on and/or repossess collateral is purely voluntary and discretionary."). In *In re* Elkouby, 2016 WL 798177 (Bankr. S.D. Fla. Feb. 29, 2016), the court stated:

> A Chapter 7 debtor who indicates surrender of real property in his statement of intention is not obligated to surrender that property to the lienholder, whether or not the property is administered by the Chapter 7 trustee. Compulsory surrender of real property collateral by a debtor to a lienholder in Chapter 7 is not supported by, and indeed ignores, the express provisions of the Bankruptcy Code.

Id. at *8. The decision represents a minority view. *See In re* Elowitz, 550 B.R. 603, at 606–09 (Bankr. S.D. Fla. 2016).

95. *In re* Logan, 124 B.R. 729 (Bankr. S.D. Ohio 1991); Homeway Rentals v. Martin (*In re* Martin), 64 B.R. 1 (Bankr. S.D. Ga. 1984).

96. *Compare In re* Failla, 529 B.R. 786, 792 (Bankr. S.D. Fla. 2014), *aff'd*, 542 B.R. 606 (S.D. Fla. 2015), *aff'd*, 838 F.3d 1170 (11th Cir. 2016), *and In re* Elowitz, 550 B.R. 603 (Bankr. S.D. Fla. 2016), *with In re* Ryan, 560 B.R. 339, 350 (Bankr. D. Haw. 2016). In *Ryan*, the bankruptcy court expressed its disagreement with the Eleventh Circuit decision stating the following:

> Surrender should not affect a debtor's substantive rights for a number of reasons.
>
> First, the Code spells out the consequences of a stated intention to surrender: in certain circumstances, the automatic stay is terminated. If Congress intended that "surrender" would have the far-reaching consequences described in *Failla*, Congress could and would have said so.
>
> Second, the Code gives only the trustee the authority to compel a debtor to file the statement of intention and to carry out the stated intention. The fact that Congress did not give creditors the power to enforce the debtor's stated intention emphasizes the limited effect of "surrender."
>
> Third, the savings clause or "hanging paragraph" of section 521(a)(2), fairly read, means that "surrender" does not alter any substantive rights or defenses.
>
> Finally, there is no reason to read the ambiguous word "surrender" under section 521(a)(2) to give secured creditors a free pass to violate the foreclosure laws. The *Failla* decision implies that a debtor's post-discharge objection to a foreclosure is always abusive, but this is simply incorrect. Debtors may have perfectly legitimate

have the right to defend a foreclosure action because he explicitly admitted the validity of the debt when he stated his intention to surrender the property. If a debtor refuses to surrender property pursuant to 11 U.S.C. § 521(a)(2), the refusal could be considered both fraud on the court and a violation of 11 U.S.C. § 521(a)(2)(B).[97] A debtor's decision to surrender property may affect a subsequent claim of exemption in sale proceeds if a trustee sells the property.[97.1]

Bankruptcy courts have considered whether a creditor can be compelled to take affirmative steps to foreclose property surrendered through a debtor's Chapter 13 plan and have considered whether failure to do so violates the automatic stay.[98] The court in *In re Moore* held that a creditor could not be compelled, reasoning that nothing in section 521(a) required a secured creditor to accept possession[99] and that the debtor remained the equitable owner of the property

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> reasons to defend a foreclosure case post-discharge. For example, the property may be subject to a junior lien securing a non-dischargeable debt, such as taxes. This is a particularly common problem in Hawaii, where condominium ownership is prevalent and condominium assessments that are due and payable post-petition are not dischargeable. In such a case, the debtor has a good reason to want the senior lienholder to comply with the law and secure the highest possible price for the property, in order to minimize the debtor's nondischargeable liability.
>
> Thus, the Ryans' statement that they intended to "surrender" the residence and their surrender declaration do not, as a matter of bankruptcy law, preclude the Ryans from defending against a foreclosure or asserting claims based on an allegedly improper foreclosure.

Ryan, 560 B.R. at 350 (footnotes omitted). *See also In re* Kurzban, 2017 WL 3141915, at *2 (Bankr. S.D. Fla. July 24, 2017) ("the Eleventh Circuit did not rule that a debtor's decision to surrender lasted in perpetuity no matter what might occur subsequent to that decision.").

97. *Failla*, 529 B.R. at 793.

97.1. Brown v. Ellmann (*In re* Brown), 851 F.3d 619, 625 (6th Cir. 2017) (section 522 will not support an exemption on the basis of state-law redemption rights in a piece of property if the proceeds from the sale of that property are "insufficient to satisfy the prior obligations owed to the secured creditors.").

98. *See In re* Moore, 477 B.R. 918 (Bankr. S.D. Ga. 2012).

99. *Id*. at 920 (citing *In re* Arsenault, 456 B.R. 627, 630 (Bankr. S.D. Ga. 2011); Pratt v. Gen. Motors Acceptance Corp., 462 F.3d 14, 19 (1st Cir. 2006) ("[N]othing in subsection 521(a)(2) remotely suggests that the secured creditor is required to accept possession. . . ."); *In re* Canning, 442 B.R. 165, 172 (Bankr. D. Me. 2011), *aff'd sub nom*. Canning v. Beneficial Me., Inc. (*In re* Canning), 706 F.3d 64 (1st Cir. 2013); *In re* Serv., 155 B.R. 512, 514–15 (Bankr. E.D. Mo. 1993) (recognizing surrender as a "contractual act" but only with the consent of both parties requiring surrender by the debtor and willing acceptance of title by the creditor).

and was not divested of his ownership obligations until an actual foreclosure sale occurred or until the lender took affirmative steps of ownership.[100]

§ 9:5 Discharge Orders

In a Chapter 7 case, if no complaints objecting to discharge are filed, the discharge order shall issue "forthwith" upon expiration of the time fixed for filing such complaints.[101] The time for entering discharge orders in Chapter 11, 12, and 13 cases is somewhat different from the time for such orders in Chapter 7. Similarly, the timing in Chapters 12 and 13 is different from that in Chapter 11. In broad terms, the confirmation of a Chapter 11 plan constitutes a discharge order[102] except for individual Chapter 11 debtors.[103] In the case of individual debtors, unless the court orders otherwise, after notice and a hearing, and for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan.[104] This provision is discussed in chapter 11 of this treatise.

In Chapter 12 and 13 cases, the court is to grant the debtor a discharge of all debts dischargeable under those chapters as soon as practicable after completion of all payments under the plan.[105] As more fully discussed below, Chapters 12 and 13 also provide for "hardship discharges" in the event that not all payments are completed under the plan.

To obtain a discharge, Chapter 7 and Chapter 13 debtors must complete a personal financial management course from an approved provider.[106] For all individual debtors, section 522(q)(1) must not be applicable.[107]

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100. *Moore*, 477 B.R. at 921.
101. FED. R. BANKR. P. 4008.
102. 11 U.S.C. § 1141(d)(1).
103. *Id*. § 1141(d)(2) and (5).
104. *Id*. § 1141(d)(5)(A).
105. *Id*. §§ 1228, 1328.
106. *Id*. §§ 727(a)(11), 1328(g). An individual debtor must file the statement in a Chapter 11 case if section 1141(d)(3) applies. *See* FED. R. BANKR. P. 1007(B)(7).
107. 11 U.S.C. §§ 727(a)(12), 1141(d)(5)(C), 1228(f), and 1328(h). A statement in that regard must be filed by individual debtors in Chapter 11, 12, or 13. FED. R. BANKR. P. 1007(b)(8). The discharge cannot issue until thirty days after the filing of the statement. FED. R. BANKR. P. 4004(c)(3).

§ 9:6 Objection to an Individual Debtor's Discharge

§ 9:6.1 *Introduction*

In Chapter 7 cases, only individual debtors are entitled to a discharge.[108] An individual Chapter 7 debtor is entitled to a discharge unless one of several specified conditions is present.[109] Generally, courts have recognized, on the one hand, that exceptions to discharge should be strictly construed against creditors and in favor of debtors, and, on the other hand, that a discharge is a privilege and not a right.[110]

An individual in a Chapter 7 case who has committed certain improper acts is not entitled to a discharge. Any creditor, the trustee, or the U.S. trustee may file a formal complaint alleging facts that constitute grounds for denial of discharge under section 727.[111] Moreover, on request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.[112]

§ 9:6.2 *Procedure and Time for Objections*

A complaint to determine the debtor's entitlement to a discharge must comply with the procedures set forth in the Federal Rules of Bankruptcy Procedure.[113] The plaintiff must file a complaint, and the debtor will be required to file an appropriate response, and the litigation may proceed through discovery and trial. Objections to discharge based

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108. 11 U.S.C. § 727(a)(1).
109. These conditions are discussed in section 9:6.3, *infra*.
110. *In re* Juzwiak, 89 F.3d 424, 427 (7th Cir. 1996); Boroff v. Tully (*In re* Tully), 818 F.2d 106, 110 (1st Cir. 1987).
111. 11 U.S.C. § 727(c)(1); *see* Rosenfeld v. Rosenfeld (*In re* Rosenfeld), 535 B.R. 186, 191 (Bankr. E.D. Mich. 2015), *aff'd*, 558 B.R. 825 (E.D. Mich. 2016) (bankruptcy court lacked subject matter jurisdiction over adversary proceeding because it could not award any meaningful relief to the plaintiff because, even if the plaintiff were successful in obtaining an order denying the debtor a discharge under 11 U.S.C. § 727(a), which is the only relief plaintiff was requesting in the adversary proceeding, the plaintiff would gain nothing for himself, beyond what he already had, namely a non-dischargeable debt under 11 U.S.C. § 523(a)(15)).
112. *Id*. § 727(c)(2).
113. FED. R. BANKR. P. 4004(a), 7001, 7008–10; *see* Filice v. United States (*In re* Filice), 580 B.R. 259 (Bankr. E.D. Cal. 2018) (holding that an objection to discharge was not required where the debtor received two Chapter 7 discharges within two years and that the court could vacate a discharge under FED. R. CIV. P. 60(a) even years later, if the second discharge was not permissible under section 727(a)(8)). *See also* part VII of the Federal Rules of Bankruptcy Procedure and chapter 14, *infra*.

upon a prior discharge having been granted are made by motion governed by Rule 9014.[114]

In a Chapter 7 case, creditors and the trustee have sixty days following the *first* date set for the meeting of creditors to file complaints objecting to discharge.[115] The U.S. Court of Appeals for the Ninth Circuit has determined that the one-year "lookback" period for section 727(a)(2), providing for the denial of a debtor's discharge if the debtor "within one year before the date of the filing of the petition," transferred, concealed, or otherwise disposed of property with intent to hinder, delay, or defraud creditor, was not in nature of statute of limitations, and, thus, equitable tolling was inapplicable.[116] Therefore, a complaint must be filed before the expiration of the deadline or the

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114. FED. R. BANKR. P. 4004(d); *see* 11 U.S.C. § 727(a)(8) (Chapter 7 debtor not entitled to Chapter 7 discharge if debtor received discharge under 11 U.S.C. § 1141 within eight years); 11 U.S.C. § 727(a)(9) (Chapter 7 debtor not entitled to a discharge if debtor received a discharge under 11 U.S.C. § 1228 or § 1328 in a case commenced within six years of the filing of the petition, subject to certain exceptions); 11 U.S.C. § 1328(f) (Chapter 13 debtor not entitled to a discharge if discharge was granted under Chapter 7, 11, or 12 within the four-year period preceding the date of the order for relief or within two years of a prior Chapter 13 discharge).

115. FED. R. BANKR. P. 4004(a); *see* Jenkins v. Simpson (*In re* Jenkins), 784 F.3d 230 (4th Cir. 2015) (holding that a complaint to deny a Chapter 7 debtor a discharge was not timely filed prior to expiration of extended deadline set by court (that is, "sixty days beyond . . . whenever the 341 [creditors'] meeting is concluded") where the trustee failed to adjourn the meeting to a stated later date and time, and trustee's complaint was filed more than sixty days after that date); Bieros v. Pocius (*In re* Pocius), 499 B.R. 472 (Bankr. E.D. Pa. 2013) (interpreting FED. R. BANKR. P. 4004 and 9006). Frequently, creditors mistakenly assume that they have sixty days from the date the section 341(a) meeting is held to file a complaint. The computation of time is from the first scheduled date of the section 341(a) meeting. If the meeting is postponed for whatever reason, the time period is not automatically extended. Where the court erroneously sends multiple notices of the deadline date, with different dates, a creditor can rely on the later date. *In re* Crawford, 347 B.R. 42 (Bankr. S.D. Tex. 2006). A noncreditor plaintiff has no right to seek to extend time for filing objection to discharge. *In re* Aloia, 496 B.R. 366 (Bankr. E.D. Pa. 2013).

116. DeNoce v. Neff (*In re* Neff), 824 F.3d 1181 (9th Cir. 2016). In *Neff*, the Ninth Circuit explained:

> Unlike a statute of limitations, the § 727(a)(2) exception to discharge is not designed to encourage a specific creditor to prosecute its claim promptly to avoid losing rights, and it does not serve the purposes of "repose, elimination of stale claims," and certainty. Young [v. United States], 535 U.S. [43] at 47, 122 S.Ct. 1036 [(2002)]. While the statutes considered in *Young* encouraged the government to file its claims no later than three years after those claims accrued (in order to ensure the claims would be nondischargeable in any subsequent bankruptcy), § 727(a)(2) does not encourage (or require) a creditor to take any action at all. Because

allowance of an extension of that deadline by the bankruptcy court. A creditor may obtain an extension of time within which to file a complaint, if he files a request for an extension before the expiration of the sixty-day period.[117] An informal agreement to extend the deadline is ineffective.[118] Thus, the extension must be authorized by the court.[119] There are limited exceptions to the filing of a motion to extend the time after its expiration and before discharge.[120] The Supreme Court has held that this time limit is not jurisdictional and may be waived.[121]

> the improper conduct that triggers the one-year period in § 727(a)(2) may be conducted secretly without creditors' knowledge, the one-year period does not give creditors an opportunity to protect their rights. *Cf.* Hallstrom [v. Tillamook County], 493 U.S. [20] at 27, 110 S.Ct. 304 [1989] (stating that a time period that is not triggered by any violation giving rise to the plaintiff's cause of action is not a statute of limitations subject to equitable tolling). If anything, the application of § 727(a)(2) detracts from the goals of statutes of limitations, because by precluding the discharge of all debts, it provides a windfall to creditors who have slept on their rights. In short, the one-year time period does not cut off creditors' rights, and it addresses policy issues that are "not the sort of interest addressed by a statute of limitations," Lozano [v. Montoya Alvarez, __ U.S. __,] 134 S.Ct. [1224] at 1234–35 [2014].
>
> We therefore conclude that § 727(a)(2) is not a statute of limitations. Because § 727(a)(2) is not a statute of limitations, it is not subject to a presumption of equitable tolling.

Neff, 824 F.3d at 1186–87. *Contra* Womble v. Pher Partners (*In re* Womble), 299 B.R. 810 (N.D. Tex. 2003), *aff'd on other grounds*, 108 F. App'x 993 (5th Cir. 2004), which, relying upon Young v. United States, 535 U.S. 43 (2002), held that the one-year period in section 727(a)(2)(A) is a limitation period that can be equitably tolled. *Cf.* Tidewater Fin. Co. v. Williams (*In re* Williams), 498 F.3d 249, 257 (4th Cir. 2007), which criticized *Womble* and held that the eight-year lookback period for denial of discharge under section 727(a)(8) is a statute of repose not subject to equitable tolling.

117. FED. R. BANKR. P. 4004(b)(1). A plaintiff may not amend a complaint to add counts setting forth additional counts under section 727 unless the conduct set forth in the new count arises out of the same transaction or occurrence. *See* Willms v. Sanderson, 723 F.3d 1094 (9th Cir. 2013); SunTrust Bank v. Korfonta (*In re* Korfonta), 417 B.R. 707 (Bankr. E.D. Va. 2009).

118. *See* Shahrestani v. Alazzeh (*In re* Alazzeh), 509 B.R. 689, 694–95 (B.A.P. 9th Cir. 2014).

119. *Id.*

120. FED. R. BANKR. P. 4004(b)(2).

121. Kontrick v. Ryan, 540 U.S. 443 (2004). In DeAngelis v. Rychalsky (*In re* Rychalsky), 318 B.R. 61 (Bankr. D. Del. 2004), the court noted that *Kontrick* reserved the issue of whether FED. R. BANKR. P. 4004 is subject to expansion based upon doctrines such as equitable tolling. In deciding the issue in the affirmative, the court indicated that the doctrine of equitable tolling is available when "'(1) the defendant has actively misled

In a Chapter 11 case, parties in interest have until the first date set for a hearing on confirmation to file a complaint objecting to discharge.[122] On motion of any party in interest, the court may for cause extend the time for filing such a complaint. The motion, however, must be made before the appropriate time period has expired.[123]

Rule 4004(b)(2) provides that a motion to extend the time to object to discharge may be filed after the time for objection has expired and before discharge is granted if the movant can satisfy two conditions: (1) the objection is based on facts that, if learned after the discharge, would provide a basis for revocation of the discharge under 11 U.S.C. § 727(d); and (2) the movant did not have knowledge of those facts in time to permit an objection.[124] The motion must be filed promptly after the movant learns of the facts on which the objection is to be based.[125]

If the deadline passes without a party in interest obtaining an extension or filing a complaint, the creditor or trustee is barred from objecting to discharge. On the other hand, a debtor forfeits any right to rely on the time limit if debtor does not raise the issue before the bankruptcy court reaches the merits of the creditor's objection.[126] Creditors and trustees should note that a complaint objecting to discharge (or a complaint objecting to the discharge of a particular debt) cannot be amended to add new transactions after the date for filing objections has passed.[127]

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the plaintiff respecting the plaintiff's cause of action; (2) the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) the plaintiff has timely asserted his or her rights mistakenly in the wrong forum.'" *Id*. at 64. Finding equitable tolling was appropriate, the court allowed the U.S. trustee to amend her complaint objecting to the debtor's discharge to add an additional ten counts related to newly discovered evidence. *See also* Penland v. Bryan (*In re* Bryan), 448 B.R. 866 (Bankr. M.D. Ga. 2011), in which the court equitably tolled the deadline for filing a complaint objecting to the debtor's discharge for a pro se creditor. *But see* W. Union Fin. Serv. v. Mascarenhas (*In re* Mascarenhas), 382 B.R. 857 (Bankr. S.D. Fla. 2008).

122. FED. R. BANKR. P. 4004(a).

123. FED. R. BANKR. P. 4004(b). Rule 9006(b)(3) provides that the court may enlarge the time for taking action under Rule 4004(a) "only to the extent and under the conditions stated" in Rule 4004(a). FED. R. BANKR. P. 9006(b)(3). *See In re* Borczyk, 458 B.R. 468 (Bankr. N.D. Ill. 2011). When a single creditor seeks an extension, the court has discretion to grant the extension as to all creditors. Donegal Mut. Ins. Co. v. Watkins (*In re* Watkins), 365 B.R. 574 (Bankr. W.D. Pa. 2007).

124. FED. R. BANKR. P. 4004(b)(2); *see In re* Moseley, 470 B.R. 223 (Bankr. M.D. Fla. 2012).

125. *Id*.

126. Kontrick v. Ryan, 540 U.S. 443 (2004).

127. FED. R. BANKR. P. 4004(b). *But see In re* Rychalsky, 318 B.R. at 64.

§ 9:6.3 Grounds for Denial of Discharge

There are a number of grounds relating to a debtor's improper acts for denial of an individual debtor's discharge, as well as certain circumstances that preclude the entry of the discharge. The following subsections [A] through [H] contain descriptions of the improper acts that warrant denial of an individual debtor's discharge.

Courts are reluctant to approve settlements of adversary proceedings relating to denial of a debtor's discharge. Courts take three approaches:

(1) the per se rule, which precludes settlement of a section 727 objection to discharge;[128]

(2) the "trustee" approach, which recognizes "the tension between the 'vindication of the public interest in upholding the policies behind § 727, and the public interest in fostering the peaceful, just, speedy and inexpensive resolution of disputes'";[129] and

(3) the "cautious but pragmatic" approach, pursuant to which courts carefully reviewed settlements to ensure that they are in the best interests of the estate and that the settlement is not tainted.[130]

[A] Fraudulent Transfer, Concealment, or Destruction of Property[131]

The debtor will lose his right to a discharge if, with intent to hinder, delay, or defraud creditors, he has transferred, destroyed, mutilated, or concealed property or permitted the transfer, destruction, mutilation, or concealment of property, within one year prior to the filing of the petition.[132] The debtor also will be denied a discharge if he commits

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128. *See* Parker v. Bullis (*In re* Bullis), 515 B.R. 284, 287–88 (Bankr. E.D. Va. 2014) (discussing each approach and citing cases).
129. *Id*.
130. *Id*. at 288.
131. 11 U.S.C. § 727(a)(2); *see In re* Marcus-Rehtmeyer, 784 F.3d 430 (7th Cir. 2015) (for purposes of section 727(a)(2)(A), debtor concealed property with intent to defraud through false testimony at a citation examination to discover assets after entry of state court judgment).
132. *Id*. § 727(a)(2)(A). Coady v. D.A.N. Joint Venture (*In re* Coady), 588 F.3d 1312 (11th Cir. 2009); Jennings v. Maxfield (*In re* Jennings), 533 F.3d 1333, 1349 (11th Cir. 2008) (setting forth badges of fraud). In Martin v. Bajgar (*In re* Bajgar), 104 F.3d 495, 498 (1st Cir. 1997), the U.S. Court of Appeals for the First Circuit determined that a debtor, who admitted making a transfer of real property within one year of the filing of his bankruptcy petition with actual intent to hinder, delay, and defraud his creditors, but who arranged for the re-transfer of the property post-petition, was not entitled to a discharge under section 727(a)(2)(A). Additionally, in *In re* Snyder, 152 F.3d 596, 601 (7th Cir. 1998), the U.S. Court of Appeals

any of the above acts in connection with property of the estate after the commencement of the bankruptcy case.[133]

Courts frequently apply the doctrine of continuing concealment in circumstances where "a debtor, prior to the year before the bankruptcy, has transferred property but has secretly held something back, and has concealed that secret interest in the months immediately preceding bankruptcy."[134] Such conduct preceding the "critical" year prior to the bankruptcy can provide circumstantial evidence of concealment activity and fraudulent intent within that year, thus enabling a creditor to establish that the debtor is not entitled to a discharge under section 727(a)(2)(A).

[B] Failure to Keep or Destruction of Records[135]

The debtor will be denied a discharge for failure to keep or preserve records from which the debtor's financial condition and business transactions can be ascertained.[136] The First Circuit has stated that "[r]ecord-keeping need not be precise to the point of pedantry: records can be adequate without being textbook models. The operative standard is functional: a debtor's records must 'sufficiently identify the

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for the Seventh Circuit stated that "proof of harm is not a required element of a cause of action under Section 727." *See also* Laughlin v. Nouveau Body & Tan, L.L.C. (*In re* Laughlin), 602 F.3d 417 (5th Cir. 2010) (a pre-petition renunciation of an inheritance is not a transfer under Louisiana law).

133. 11 U.S.C. § 727(a)(2)(B).

134. R.I. Depositors Econ. Prot. Corp. v. Hayes (*In re* Hayes), 229 B.R. 253, 259–60 (B.A.P. 1st Cir. 1999) (citing Hughes v. Lawson (*In re* Lawson), 122 F.3d 1237, 1240–41 (9th Cir. 1997) (upholding the denial of discharge where debtor granted a deed of trust to her mother more than one year before bankruptcy, but retained a secret interest in the property superior to her mother's)); s*ee* Thibodeaux v. Olivier (*In re* Olivier), 819 F.2d 550, 554–55 (5th Cir. 1987) (transfer of residence to relative seven years before bankruptcy, intended to delay and defraud creditors, followed by continuing retention of secret interest, warranted discharge denial); Flushing Sav. Bank v. Vidro (*In re* Vidro), 497 B.R. 678, 686 (Bankr. E.D.N.Y. 2013) (concealment refers to placing assets beyond the reach of creditors or withholding pertinent information, and need not involve an actual transfer).

135. 11 U.S.C. § 727(a)(3).

136. *Id.; see* Buescher v. First United Bank & Tr. (*In re* Buescher), 783 F.3d 302 (5th Cir. 2015); Mercantile Peninsula Bank v. French (*In re* French), 499 F.3d 345 (4th Cir. 2007); Lansdowne v. Cox (*In re* Cox), 41 F.3d 1294, 1296 (9th Cir. 1994); *In re* Juzwiak, 89 F.3d 424, 428 (7th Cir. 1996); see also *In re* Caneva, 550 F.3d 755 (9th Cir. 2008); *In re* Cacioli, 463 F.3d 229 (2d Cir. 2006); Strzesynski v. Devaul (*In re* Devaul), 318 B.R. 824 (Bankr. N.D. Ohio 2004), for a thorough examination of these cases and others involving the burden of proof under section 727(a)(3).

transactions [so] that intelligent inquiry can be made of them.'"[137] Courts utilize an objective standard, and a debtor's records may be inadequate even if he or she did not intend to conceal financial information.[138]

A debtor also may lose a discharge for falsifying, concealing, or destroying these records. However, a debtor who can justify the failure to keep or preserve records will be entitled to a discharge. The inquiry into the debtor's financial condition, according to the Second Circuit, is limited to "the span from a reasonable period of time before the bankruptcy filing through the pendency of the bankruptcy proceedings."[139]

[C] False Oath or Claim[140]

The debtor may lose a discharge if, in connection with the bankruptcy case, the debtor makes a false oath or account or presents or uses a false claim.[141] The First Circuit has said:

> [T]he very purpose of certain sections of the law, like 11 U.S.C. § 727(a)(4)(A), is to make certain that those who seek the shelter

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137. Harrington v. Simmons (*In re* Simmons), 810 F.3d 852, 857–58 (1st Cir. 2016) (citing Razzaboni v. Schifano (*In re* Schifano), 378 F.3d 60, 69 (1st Cir. 2004), and Meridian Bank v. Alten, 958 F.2d 1226, 1230 (3d Cir. 1992)).

138. *Simmons*, 810 F.3d at 858; *see also* State Bank of India v. Sethi (*In re* Sethi), 250 B.R. 831, 837 (Bankr. E.D.N.Y. 2000); Miller v. Pulos (*In re* Pulos), 168 B.R. 682, 692 (Bankr. D. Minn. 1994).

139. Berger & Assocs., P.C. v. Kran (*In re* Kran), 760 F.3d 206, 210 (2d Cir. 2014).

140. 11 U.S.C. § 727(a)(4).

141. *Id*. § 727(a)(4)(A), (B); *see* Robinson v. Worley, 849 F.3d 577, 587 (4th Cir. 2017), in which the court stated:

> > The threshold to materiality is a low bar. As the statute makes clear, any fraudulent misstatement "in or in connection with the case" is sufficient grounds for the denial of discharge. 11 U.S.C. § 724(a)(4)(A). While courts may be "more reluctant to deny a debtor's discharge when assets are undervalued than when they are undisclosed," *In re* Zimmerman, 320 B.R. 800, 807 (Bankr. M.D. Pa. 2005), all that the provision requires for a denial of discharge is a single false account or oath, Schreiber v. Emerson (*In re* Emerson), 244 B.R. 1, 28 (Bankr. D.N.H. 1999).
>
> 849 F.3d at 587; *see also* Lardas v. Grcic, 847 F.3d 561, 570 (7th Cir. 2017) ("materiality in the bankruptcy context has a broad meaning: 'a fact is material "if it bears a relationship to the debtor's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of the debtor's property"'"). *But see In re* Kempff, 847 F.3d 444 (7th Cir. 2017) (debtor was unaware of transfer by accountant from his account to satisfy a state tax levy and misstatements in schedules were innocent mistakes or typographical errors).

> of the bankruptcy code do not play fast and loose with their assets or with the reality of their affairs. The statutes are designed to insure that complete, truthful, and reliable information is put forward at the outset of the proceedings, so that decisions can be made by the parties in interest based on fact rather than fiction. . . . Neither the trustee nor the creditors should be required to engage in a laborious tug-of-war to drag the simple truth into the glare of daylight.[142]

The debtor signs an oath in connection with his or her petition, statement of financial affairs, and schedule of assets and liabilities. False statements or omissions in these documents, in the debtor's testimony at the meeting of creditors, or at an examination pursuant to Bankruptcy Rule 2004 are the most common sources for complaints filed under this section but the false oath also may occur during trial.[142.1]

To constitute grounds for denial of discharge, the falsehood must be made knowingly and fraudulently and must be material.[143] A false oath is material if its subject matter "bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property."[144]

[D] Bribery[145]

A debtor who knowingly and fraudulently gives, offers, or receives a bribe in connection with the case will be denied a discharge.

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142. Boroff v. Tully (*In re* Tully), 818 F.2d 106 (1st Cir. 1987) (citations omitted).

142.1. Siewe v. Locci (*In re* Siewe), __ F. App'x __, 2018 WL 2111076 (11th Cir. May 8, 2018).

143. *Id*. In certain limited circumstances, "a debtor's genuine and reasonable reliance on an attorney's advice" may prevent a finding that the debtor acted with fraudulent intent. *See* Houghton v. Marcella (*In re* Marcella), 2009 WL 3348251, at *16 (Bankr. D. Mass. Oct. 15, 2009).

144. Crawford v. Premier Capital LLC (*In re* Crawford), 841 F.3d 1, 8 (1st Cir. 2016) (quoting *Tully*, 818 F.2d at 111). In *Crawford*, the plaintiff's complaint and pre-trial submissions did not identify the omission of the asset that resulted in the denial of the debtor's discharge. The First Circuit upheld the lower court's reliance on Rule 15(b) of the Federal Rules of Civil Procedure, which permits an unpleaded claim to be considered when the parties' conduct demonstrates their express or implied consent to the litigation of the claim. 841 F.3d at 6 (citing Antilles Cement Corp. v. Fortuno, 670 F.3d 310, 319 (1st Cir. 2012)).

145. 11 U.S.C. § 727(a)(4)(C).

[E] Failure to Cooperate with Officers of the Estate[146]

The debtor is required to provide the trustee or other officer of the estate with all recorded information, such as documents and records, relating to the debtor's property or financial affairs.[147] A debtor who knowingly and fraudulently withholds such information will be denied a discharge.

[F] Failure to Explain Loss of Assets[148]

If the debtor had assets at one time that have now disappeared without apparent explanation, the trustee or the creditors may demand an explanation of what happened to those assets. If the debtor cannot supply a satisfactory explanation, the court may deny the debtor's discharge.[149] To sustain the initial burden under section 727(a)(5), the plaintiff must establish that "(1) the debtor at one time possessed or claimed to control substantial and identifiable assets; (2) those assets have disappeared, their disposition or placement now unknown; and (3) no plausible explanation for this deficiency is apparent from the submitted records or has been articulated by the debtor."[150] The debtor may supply this explanation at any time prior to the court's determination of denial of discharge.

Many of the disappearing asset cases involve gamblers, or persons who claim that the missing assets were lost by gambling. Without substantiation, the unlucky debtor has difficulty in rebutting the plaintiff's case.[151]

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146. *Id.* § 727(a)(4)(D).
147. *Id.* § 521(a)(4).
148. *Id.* § 727(a)(5).
149. *See* Aoki v. Atto Corp. (*In re* Aoki), 323 B.R. 803 (B.A.P. 1st Cir. 2005) (involving piercing the corporate veil in conjunction with the debtors' failure to explain the loss of assets); *see also* Comerica Bank v. Bressler (*In re* Bressler), 321 B.R. 412 (Bankr. D. Mich. 2005) (citing Dolin v. N. Petrochemical Co. (*In re* Dolin), 799 F.2d 251 (6th Cir. 1986)); Noland v. Johnson (*In re* Johnson), 387 B.R. 728 (Bankr. S.D. Ohio 2008).
150. Pu v. Mitsopoulos (*In re* Mitsopoulos), 548 B.R. 620, 627 (Bankr. E.D.N.Y. 2016) (citing Abai v. Mihalatos (*In re* Mihalatos), 527 B.R. 55, 69 (Bankr. E.D.N.Y. 2015)). The court in *Mitsopoulos* add: "[T]he proper question the court must ask under Section 727(a)(5) is what happened to the assets, not why it happened." *Id.* (citing Minsky v. Silverstein (*In re* Silverstein), 151 B.R. 657, 663 (Bankr. E.D.N.Y. 1993)); *see also* Harrington v. Simmons (*In re* Simmons), 810 F.3d 852, 860 (1st Cir. 2016) ("To invoke section 727(a)(5), it is unnecessary to show that the debtor has acted fraudulently or in bad faith . . . Rather, the issue turns on whether a satisfactory explanation is—or is not—forthcoming.").
151. *See* David S. Kennedy & James E. Bailey, *Gambling and the Bankruptcy Discharge: An Historical Exegesis and Case Survey*, 11 BANKR. DEV. J. 49 (1994–95).

[G] Failure to Follow Valid Orders[152]

A debtor may not refuse to obey any lawful order of the court in the bankruptcy case. A debtor may be required by court order to produce documents, submit to an examination under Rule 2004, testify, or respond to material questions in other contexts. If the debtor disobeys any such court order, such disobedience is grounds for denial of discharge.[153] The refusal must be willful and intentional.[154]

A debtor will not be denied a discharge for refusal to testify or respond to material questions if the debtor has invoked the right against self-incrimination under the Fifth Amendment, unless, of course, immunity has been granted.[155]

[H] Forbidden Acts in Another Bankruptcy Case[156]

If the debtor in a pending case has committed any of the acts described above, within a year before the filing of the bankruptcy petition or during the case, in connection with the bankruptcy case of *another* debtor who is an insider, the debtor in the pending case will be denied a discharge.[157] For an individual, insiders include relatives of the debtor, a partnership in which the debtor is a general partner, the other general partners in partnership with the debtor, relatives of the other general partners of the debtor, and any corporation of which the debtor is the director, officer, or other controlling person.[158]

[I] Personal Financial Management Training

Before the court will enter a discharge, a Chapter 7 debtor must complete an instructional course concerning personal financial management given by a provider approved by the U.S. trustee. A debtor

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152. 11 U.S.C. § 727(a)(6).
153. *Id*. Refusal to comply with a confirmation order may result in denial of a discharge. Standiferd v. U.S. Tr., 641 F.3d 1209, 1213 (10th Cir. 2011); see Martinez v. Los Alamos Nat'l Bank (*In re* Martinez), 126 F. App'x 890 (10th Cir. 2005), for a case in which the debtors were denied their discharge for failure to comply with the bankruptcy court's order compelling discovery.
154. Riley v. Tougas (*In re* Tougas), 354 B.R. 572 (Bankr. D. Mass. 2006). Failure to obey is not necessarily "refusal" to obey. Shaefer v. Demar (*In re* Demar), 373 B.R. 232 (Bankr. E.D.N.Y. 2007).
155. 11 U.S.C. § 727(a)(6)(B) and (C); *see* McCormick v. Banc One Leasing Corp. (*In re* McCormick), 49 F.3d 1524, 1526 (11th Cir. 1995); Martin-Trigona v. Belford (*In re* Martin-Trigona), 732 F.2d 170 (2d Cir.), *cert. denied*, 469 U.S. 859 (1984). *But see* U.S. Tr. v. Gregg (*In re* Gregg), 510 B.R. 614 (Bankr. W.D. Mo. 2014) (discharge denied for failure to file schedules upon conversion of case from Chapter 11 to Chapter 7 despite Fifth Amendment claim).
156. 11 U.S.C. § 727(a)(7).
157. *Id*.
158. *Id*. § 101(31).

must file the certificate of completion within forty-five days after the first date set for the section 341 meeting of creditors, not within forty-five days of when the first meeting of creditors actually takes place.[159] If the debtor fails to complete the course and file a certificate of debtor education, the court will not enter a discharge.[160] There is an exception to the requirement for those individuals whom the court finds, after notice and a hearing, are unable to complete the course because of "incapacity, disability, or active military duty in a military combat zone."[161] There is an additional exception under section 727(a)(11) if the U.S. trustee has determined that the approved instructional courses described in section 111[162] are inadequate.[163]

[J] Prior Discharge; Other Grounds

Besides wrongdoing by the debtor, and the failure to file the certificate regarding completion of a financial management course, the Code sets out other circumstances in which a debtor is not eligible to receive a discharge. One such circumstance is a prior discharge previously granted in a Chapter 7 or Chapter 11 case commenced within eight years before the date of the filing of the current petition.[164] Similarly, a debtor granted a discharge in Chapter 12 or 13, in a case commenced within six years before the filing of the current petition, is ineligible for discharge unless the debtor paid at least 70% of the claims of unsecured creditors under the plan.[165] Moreover, that plan must have been proposed in good faith and must have constituted the debtor's best effort.[166] A debtor may execute a written waiver of

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159. *See id*. § 111 and FED. R. BANKR. P. 1007(b)(7). In *In re* Meaney, 397 B.R. 390, 395 (Bankr. N.D. Ill. 2008), the court permitted the debtor to reopen his case upon a showing of excusable neglect to file the certificate of debtor education that he obtained after the case was closed and to obtain a discharge.
160. 11 U.S.C. § 727(a)(11); *see also* FED. R. BANKR. P. 4004(c)(1)(H), and Official Form B423, Certification About a Financial Management Course.
161. 11 U.S.C. §§ 727(a)(11), 109(h)(4).
162. *Id*. § 111.
163. *Id*. § 727(a)(11).
164. *Id*. § 727(a)(8); *In re* Kramer, 552 B.R. 702, 706 (Bankr. E.D. Mich. 2016) (debtor ineligible for a discharge because he was granted a discharge under 11 U.S.C. § 1141 within eight years before the filing of his present case). The time period is not subject to equitable tolling. Tidewater Fin. Co. v. Williams, 498 F.3d 249 (4th Cir. 2007).
165. 11 U.S.C. § 727(a)(9); *see* Banks v. Griffin (*In re* Griffin), 352 B.R. 475 (B.A.P. 8th Cir. 2006); *In re* Ward, 456 B.R. 766 (Bankr. E.D. Mich. 2010). Where a prior case was commenced under Chapter 13 but converted to Chapter 7, the longer Chapter 7 period is applicable to a subsequent filing. McDow v. Sours (*In re* Sours), 350 B.R. 261, 267 (Bankr. E.D. Va. 2006); *In re* Grydzuk, 353 B.R. 564 (Bankr. N.D. Ind. 2006); *In re* Capers, 347 B.R. 169 (Bankr. D.S.C. 2006).
166. 11 U.S.C. § 727(a)(9).

discharge after the order for relief. If the court approves this waiver, the debtor will be denied a discharge.[167] The plain language of section 727(a)(10) contains four requirements, namely that a waiver must be:

(1) in writing,

(2) signed by the debtor,

(3) filed post-petition, and

(4) approved by the court.[168]

There is a split of authority as to whether the court should consider the interests of creditors and other parties in interest in approving a waiver, or the debtor's motive.[169]

In Chapter 7 and Chapter 13 cases, the court may not enter a discharge if after notice and a hearing it determines that there is reasonable cause to believe that the provisions of section 522(q) apply.[170] The same applies in Chapters 11 and 12.[171]

§ 9:6.4 Burden of Proof

In a trial on a complaint objecting to the debtor's discharge, the party making the objection has the burden of proving all elements constituting the objection.[172] The Bankruptcy Rules are silent as to when the burden of going forward shifts to the debtor, and the courts are free to formulate rules governing this shift.[173] At least five circuits have held that a trustee or creditor must establish grounds for denial of the discharge under section 727(a) by a preponderance of the evidence based upon the standard articulated by the Supreme Court in *Grogan v. Garner*[174] with respect to the burden of proof for complaints under section 523 of the Code.[175]

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167. *Id*. § 727(a)(10); *see In re* Ferri, 2011 WL 3962117 (Bankr. D.N.M. Sept. 7, 2011).
168. *See In re* Akbarian, 505 B.R. 326, 328 (Bankr. D. Utah 2014).
169. *Id*. at 328–29.
170. *See* 11 U.S.C. §§ 727(a)(12), 1328(h). This provision is discussed in chapter 7, *supra*.
171. 11 U.S.C. §§ 1141(d)(5)(c), 1228(f).
172. FED. R. BANKR. P. 4005.
173. *See* FED. R. BANKR. P. 4005 advisory committee note.
174. Grogan v. Garner, 498 U.S. 279 (1991); *see infra* section 9:8.3.
175. *See, e.g., In re* Scott, 172 F.3d 959, 966–67 (7th Cir. 1999); Barclays/Am. Bus. Credit, Inc. v. Adams (*In re* Adams), 31 F.3d 389, 394 (6th Cir. 1994), *cert. denied*, 513 U.S. 1111 (1995); Farouki v. Emirates Bank Int'l Ltd. (*In re* Farouki), 14 F.3d 244, 249 n.17 (4th Cir. 1994); Beaubouef v. Beaubouef (*In re* Beaubouef), 966 F.2d 174, 178 (5th Cir. 1992); First Nat'l Bank of Gordon v. Serafini (*In re* Serafini), 938 F.2d 1156, 1157 (10th Cir. 1991).

§ 9:7 Revocation of Discharge

Under a narrow set of circumstances, a discharge already granted in Chapter 7, 11, 12, or 13 may be revoked.[176] The 2011 amendment to FED. R. BANKR. P. 4004(b) eliminated what was known as the "gap period"—the time between the expiration of the time to object to discharge and the actual entry of discharge. Under the old version of Rule 4004, any requests for extensions of time to object to discharge had to be made before the bar date for complaints under section 727. Thus, if a party did not learn of the debtor's fraudulent conduct until after the bar date, but before the discharge was entered, the party was precluded from bringing a section 727(d) complaint. Rule 4004(b)(2) changes that result.[176.1]

Similar to the procedure for objecting to a discharge, a proceeding to revoke a discharge is an adversary proceeding that is commenced by the filing of a complaint by the trustee, a creditor, or the U.S. trustee.[177] The plain language of section 727(d) contains no suggestion that the knowledge of one party may be imputed to another. Accordingly, the U.S. trustee is not barred from commencing an action even though the Chapter 7 trustee had knowledge of the debtor's fraud.[178]

A Chapter 7 discharge may be revoked by a trustee, creditor, or the U.S. trustee within a year from the granting of the discharge, if the discharge was obtained by fraud.[179] The requesting party must prove that he did not learn of the fraud until after the granting of the

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176. *See* Houghton v. Marcella (*In re* Marcella), 2009 WL 3348251 (Bankr. D. Mass. Oct. 15, 2009), in which the court stated: "Revocation of discharge is an extraordinary remedy . . . [that] runs contrary to the general policy of the Bankruptcy Code of giving Chapter 7 debtors a fresh start." *Id*. at *13 (quoting *In re* Jordan, 521 F.3d 430, 433 (4th Cir. 2008)); *see also* Yules v. Gillis (*In re* Gillis), 403 B.R. 137, 144 (B.A.P. 1st Cir. 2009); *In re* Koss, 403 B.R. 191, 211 (Bankr. D. Mass. 2009).

176.1. FED. R. BANKR. P. 4004(b)(2). *See* Fitzhugh v. Birdsell (*In re* Fitzhugh), 2018 WL 1789596, at *6 (B.A.P. 9th Cir. Apr. 13, 2018).

177. 11 U.S.C. § 727(d); FED. R. BANKR. P. 7001; *see* 11 U.S.C. §§ 1144, 1228(d), and 1328(e); *see also In re* Perrotta, 406 B.R. 1 (Bankr. D.N.H. 2009) (U.S. trustee permitted to pursue section 727 complaint against debtor for misconduct discovered between expiration of the deadline set forth in FED. R. BANKR. P. 4004(a) and the entry of the discharge).

178. McDermott v. Larson (*In re* Larson), 553 B.R. 646, 650 (Bankr. W.D. Mich. 2016).

179. 11 U.S.C. § 727(d)(1), (e)(1); *see* White v. Nielsen (*In re* Nielsen), 383 F.3d 922 (9th Cir. 2004) (Creditor who had not been properly listed on the bankruptcy court's mailing list matrix and did not receive notice of Chapter 7 debtors' no-asset bankruptcy filing sought revocation of debtors' discharge on the ground that it had been procured by fraud. The court determined that, even if the debtors' discharge had been "obtained through" the alleged fraud and creditor's debt did not fall within the

discharge.[180] A discharge may also be revoked if the debtor acquired property of the estate or became entitled to acquire such property, but fraudulently concealed the property or the right to acquire it.[181]

There are additional grounds for revocation of the discharge. A Chapter 7 debtor may have his discharge revoked if he has failed to explain a material misstatement uncovered in an audit,[182] failed to make records available in connection with the audit,[183] or failed to

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discharge exception that makes some debts non-dischargeable for failure to schedule a creditor, discharge would not have been prevented.). *But see* Colonial Sur. Co. v. Weizman, 564 F.3d 526, 531 (1st Cir. 2009) (construing 11 U.S.C. § 532(a)(3)(A)).

180. 11 U.S.C. § 727(d)(1). The request to revoke the discharge must be brought within one year after the discharge is granted. 11 U.S.C. § 727(e)(1). The doctrine of equitable tolling does not apply to the one-year deadline. *See* Cadle Co. v. Andersen (*In re* Andersen), 476 B.R. 668 (B.A.P. 1st Cir. 2012) (section 727(e)(1), (2) is jurisdictional); Blackstone Fin. Grp. Bus. Tr. v. Myler (*In re* Myler), 477 B.R. 227, 232–33 (Bankr. D. Utah 2012) (because statute was clear on its face, it had to be enforced according to its terms).

See also Romano v. Defusco (*In re* Defusco), 500 B.R. 664 (Bankr. D. Mass. 2013), in which the court stated:

> The orders setting the deadline for Mr. Romano to object to Mr. Defusco's discharge, and by inference extending the time to seek revocation of the discharge, to a date after the expiration of the jurisdictional limit under § 727(e)(1) were entered in error. Unlike errors in setting bar dates for filing proofs of claim or filing dischargeability actions, both of which are deadlines set not by statute but by the Federal Rules of Bankruptcy Procedure, the discharge deadline is statutory insofar as § 727(e)(1) establishes an outside limit on actions to revoke discharges. While courts have used their equitable power to prevent harm to parties who have complied with incorrect non-statutory deadlines, Nicholson v. Isaacman (*In re* Isaacman), 26 F.3d 629 (6th Cir. 1994), courts have no such power with respect to the jurisdictional bar imposed by § 727(e)(1).

In re Defusco, 500 B.R. at 668. *Contra* Weil v. Elliott, 859 F.3d 812, 814 (9th Cir. June 14, 2017) (observing that "Congress did not clearly state that the filing deadline imposed by § 727(e)(1) should be regarded as jurisdictional" and that "the one-year filing deadline imposed by 11 U.S.C. § 727(e)(1) is a non-jurisdictional claim-processing rule," adding "[a] non-jurisdictional time bar is an affirmative defense that may be forfeited if not timely raised").

181. 11 U.S.C. § 727(d)(2). Velde v. Thiel (*In re* Thiel), 579 B.R. 527, 530 (Bankr. D. Minn. 2018) ("The plaintiff must prove by a preponderance of the evidence that: (1) the debtor acquired property of the estate; (2) and the debtor knowingly and fraudulently failed to report, to deliver, or to surrender that property to the trustee.").

182. *Id*. § 727(d)(4)(A); *see also* 28 U.S.C. § 586(f).

183. 11 U.S.C. § 727(d)(4)(B); *see also* 28 U.S.C. § 586(f); *In re* Ventura, 375 B.R. 103 (Bankr. E.D.N.Y. 2007).

provide requested tax documents.[184] Finally, the discharge may be revoked for disobedience of lawful orders of court, failure to respond to material questions, failure to testify on grounds other than self-incrimination, or refusal to respond to such questions or to testify after a grant of immunity.[185] A debtor's failure to abide by a lawful turnover order, despite an attempt to appeal that order, constituted grounds for revocation of the discharge order.[185.1] A complaint on grounds

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184. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1228(a), 119 Stat. 23. This provision is not codified in title 11.

185. 11 U.S.C. § 727(a)(6), (d)(3). *See generally* Stein v. Stubbs (*In re* Stubbs), 565 B.R. 115 (B.A.P. 6th Cir. 2017). In *Stubbs*, the panel observed:

> Revocation under § 727(d)(3) incorporates the basis for denying a discharge under § 727(a)(6). Therefore, § 727(a)(6)(A), read together with § 727(d)(3), provides for the revocation of a discharge if "the debtor has refused, in the case . . . to obey a lawful order of the court . . . ." 11 U.S.C. § 727(a)(6)(A). Case law is divided as to whether "refused" as used in § 727(a)(6) requires willfulness or intent to not comply with a court order. The Fourth Circuit requires a finding of willfulness or intent, which may be established with evidence "that the debtor received the order in question and failed to comply with its terms." *Jordan*, 521 F.3d at 433 (citation omitted). Upon such showing, the burden shifts to the debtor to explain his lack of compliance. *Id.* (citations omitted). The Eleventh Circuit also appears to follow this standard. The Cadle Co. v. Parks-Matos (*In re* Matos), 267 Fed. Appx. 884, 886 (11th Cir. 2008). Mistake or inadvertence could negate a finding of intent or willfulness. *See* Davis v. Osborne (*In re* Osborne), 476 B.R. 284, 296–97 (Bankr. D. Kan. 2012) (citation omitted) (contrasting the willful standard with the civil contempt standard).
>
> Other courts, including many bankruptcy court decisions within the Sixth Circuit, follow the civil contempt standard. *See, e.g.* Hunter v. Magack (*In re* Magack), 247 B.R. 406, 410 (Bankr. N.D. Ohio 1999). In the Sixth Circuit, civil contempt is established by showing that "(1) the alleged contemnor had knowledge of the order which he is said to have violated; (2) did in fact violate the order; and (3) the order violated must have been specific and definite." *Id.* (citing Glover v. Johnson, 138 F.3d 229, 244 (6th Cir. 1998)). If these elements have been shown, the debtor can provide evidence of impossibility or inability to comply. Hazlett v. Gorshe (*In re* Gorshe), 269 B.R. 744, 746 (Bankr. S.D. Ohio 2001).

Stubbs, 565 B.R. at 125.

185.1. Rainsdon v. Anderson (*In re* Anderson), 2018 WL 2059600, at *4 (Bankr. D. Idaho Apr. 30, 2018) ("A trustee seeking to revoke a discharge pursuant to §§ 727(d)(3) and (a)(6)(A) must show that the debtor (a) was aware of the order; and (b) willfully or intentionally refused to obey the order (i.e., something more than a mere failure to obey the order through inadvertence, mistake or inability to comply.).").

other than actual fraud must be filed by the later of (1) the date the case is closed, or (2) one year after the grant of discharge.[186]

In a Chapter 11 case, the discharge is revoked by revoking the order of confirmation.[187] The court may revoke such an order only on the ground that the order was procured by fraud.[188] Any party in interest may file this type of complaint within 180 days after the entry of the order of confirmation.[189]

In a Chapter 12 or 13 case, a discharge may be revoked by filing a complaint within one year after the discharge is granted, but, as in a Chapter 11 case, only on the ground of *actual* fraud in procuring the discharge. The discharge will not be revoked if the requesting party knew of the fraud at the time the discharge was granted. Any "party in interest" may file the complaint.[190]

§ 9:8 Dischargeability of Debts

§ 9:8.1 Introduction

As previously discussed, a debtor's entitlement to a discharge does not necessarily discharge a debtor from all debts. For purposes of understanding the substance, procedure, and timing for a determination of dischargeability of a particular debt, non-dischargeable debts can be divided into two categories: (1) section 523(c) debts,[191] for which there is a "short deadline" to commence an action to determine dischargeability;[192] and (2) other section 523 debts, for which non-dischargeability is often self-operating. For the latter type of debts, generally, there is no requirement for a court determination of non-dischargeability unless a critical element of the basis for non-dischargeability is in dispute (for example, whether a debt is actually a domestic support obligation). If such a determination is requested, there is no deadline for filing a complaint to determine dischargeability.[193]

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186. *Id*. § 727(e)(2).
187. *Id*. § 1144(2).
188. *Id*. § 1144.
189. *Id*.
190. *Id*. §§ 1228(d), 1328(e).
191. *Id*. § 523(c) provides that the debtor shall be discharged from debts specified in subsections 523(a)(2), (4), and (6) unless the court determines the debt to be excepted from discharge after notice and a hearing.
192. FED. R. BANKR. P. 4007(c) and (d). Where the creditor was not given notice of the filing, this deadline may be equitably extended. *See In re* Phelan, 420 B.R. 791 (Bankr. N.D. Ill. 2009).
193. Although complaints to determine dischargeability of debts other than those under section 523(c) may be filed by either the debtor or creditors, they are ordinarily filed by the debtor, as discussed below.

Section 523(a) lists non-dischargeable debts, all of which are potentially non-dischargeable in an individual's Chapter 7 case.[194] In a Chapter 11 case, unless the debtor is an individual, and subject to section 1141(d)(3), all debts that arise prior to confirmation of the plan are discharged except to the extent the plan provides for payment.[195] An individual in a Chapter 11, however, is subject to the same non-dischargeability rules as a Chapter 7 debtor.[196]

There are certain types of claims that remain dischargeable in Chapter 13 that are not dischargeable in Chapter 7.[197] Additionally, a Chapter 13 debtor may propose to cure defaults in an installment debt and to maintain payments during the life of the plan. If the last payment is due after the final payment under the plan, the successful completion of the plan does not discharge the balance of the debt still owing at the time of the completion of the plan.[198]

There is also a "hardship discharge" in Chapter 13. If a debtor is unable to complete the plan successfully, the debtor may nonetheless petition for a discharge if the failure to complete is due to circumstances for which "the debtor should not be justly held accountable,"[199] the distribution to creditors is at least as great as they would have received in Chapter 7,[200] and modification of the plan is not practicable.[201] Typical examples of circumstances that may warrant the entry of a hardship discharge are health problems or changes in employment status. If each of the unsecured creditors has been paid at least as much as he would have received in a Chapter 7 liquidation and modification of the plan is impracticable, a hardship discharge will be granted.[202] A hardship discharge, of course, does not discharge the installment debts that are due beyond the term of the plan, as these are ordinarily non-dischargeable in a successful Chapter 13 case. Moreover, a hardship discharge does not discharge any of the section 523(a) debts that are non-dischargeable in Chapter 7.[203]

The Chapter 12 discharge is akin to the discharge granted to an individual in a Chapter 11 case.[204] In Chapter 12, as soon as

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194. 11 U.S.C. § 523(a).
195. *Id.* § 1141(d)(1).
196. *Id.* § 1141(d)(2).
197. *Id.* § 1328(a)(2); *see* chapter 13 of this treatise and Appendix 13A.
198. *Id.* §§ 1322(b)(5), 1328(a)(1).
199. *Id.* § 1328(b)(1).
200. *Id.* § 1328(b)(2).
201. *Id.* § 1328(b)(3).
202. *Id.* § 1328(b)(2), (3).
203. *Id.* § 1328(c). Section 1328 provides that the hardship discharge does not discharge debts based on an allowed post-petition claim filed under section 1305(a)(2) if prior approval by the trustee was practicable and not obtained. *See also* FED. R. BANKR. P. 4007(d).
204. *See* chapter 12, *infra*.

practicable after the debtor completes all payments under a confirmed plan, the court is to grant the debtor a discharge of all allowed debts provided for under the plan and all debts that have been disallowed under section 502. The discharge is to be granted notwithstanding the fact that all payments of long-term debts and to claimants who are to receive property of the estate have not been completed. These debts are excepted from discharge in Chapter 12.[205]

The debtor may receive a hardship discharge in Chapter 12 even if payments are not completed under the confirmed plan.[206] The requirements for a hardship discharge in Chapter 12 are virtually the same as for Chapter 13.[207] Under Chapter 12, the debts that are dischargeable under a hardship discharge are identical to the debts discharged after completion of payments.[208] As a consequence, there is no distinction between the discharge granted for completion of payments or for a hardship in a Chapter 12.

§ 9:8.2 Procedure and Time for Objections

A determination of dischargeability, if one is necessary, is made by filing a complaint.[209] As with a complaint objecting to discharge, the filing commences an adversary proceeding governed by part VII of the Federal Rules of Bankruptcy Procedure.[210] Notably, a creditor's non-dischargeability claim can be mooted by a confirmation order that provides that the claim has been fully satisfied.[211]

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205. 11 U.S.C. § 1228(a)(1)–(2). There is a difference in language between Chapter 12 and Chapter 13, but it may not be material. *Compare* 11 U.S.C. § 1328(a)(1) *with* 11 U.S.C. § 1228(a)(1).
206. *Id*. § 1228(b).
207. The Chapter 12 hardship discharge is subject to the revocation provisions set forth in section 1228(d), whereas the Chapter 13 hardship discharge in section 1328(b) is subject to the provision set forth in section 1328(d) governing the non-dischargeability of section 1305 claims.
208. 11 U.S.C. § 1228(c).
209. FED. R. BANKR. P. 4007(a); *see* Beem v. Ferguson, 713 F. App'x 974 (11th Cir. 2018) (holding that a motion, filed before the expiration of the bar date, pursuant to which a creditor sought to except a debt from discharge, was the functional equivalent of a complaint, such that creditor's subsequent non-dischargeability complaint could relate back); *see also* United States v. Horras (*In re* Horras), 399 B.R. 885 (Bankr. S.D. Iowa 2009), in which the court addressed the issues of whether the court may grant an extension for filing a section 523(c) complaint, pursuant to a request made after the expiration of the initial deadline but within the time period of an extended deadline, concluding that it could, and extended the ruling in Kontrick v. Ryan, 540 U.S. 443, 454 (2004), that Rule 4004 is not jurisdictional to Rule 4007.
210. FED. R. BANKR. P. 7001.
211. *See In re* Schupbach, 607 F. App'x 831 (10th Cir. 2015).

The necessity of filing a complaint and the deadline for doing so depend on which category of non-dischargeable debt is involved. For section 523(c) debts for individuals in Chapters 7, 11, and 12, as well as for Chapter 13 debtors, a complaint must be filed within sixty days following the *first date set* for the meeting of creditors.[212] Courts are divided as to whether equitable tolling may apply to permit complaints after the deadline.[213] In a Chapter 13 case, if the debtor moves for a hardship discharge, the court will set a date for filing complaints to determine the dischargeability of section 523(a)(6) debt.[214]

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212. FED. R. BANKR. P. 4007(c) and 9006(b)(3); *seeIn re* Sheppard, 532 B.R. 672, 680 (B.A.P. 6th Cir. 2015) (motions to extend the deadline should be liberally granted when circumstances merit such a finding; cause to extend the deadline existed where the short time between when the creditor obtained actual notice of the bankruptcy case and the filing deadline meant that it would be nearly impossible for the creditor's counsel to determine what filings were needed to be made to prevent the dischargeability of the creditor's debt); Crescent Ctr. Apartments v. Fries (*In re* Fries), 436 B.R. 26 (Bankr. W.D. Ky. 2010) (creditor cannot amend complaint that failed to state a claim under 11 U.S.C. § 727(a) to state a claim under 11 U.S.C. § 523(a) using the same set of facts after deadline expired); *In re* Owen-Moore, 435 B.R. 685 (Bankr. S.D. Cal. 2010) (creditor could not rely upon extension of bar date obtained by Chapter 7 trustee, as Chapter 7 trustee is not "party in interest" with standing to move for extension of bar date for creditor to file non-dischargeability complaint); *see also* Frati v. Gennaco, 2011 WL 241973, at *3 (D. Mass. Jan. 24, 2011) (discussing cases and possible exceptions to general rule); Molasky v. Bustos (*In re* Molasky), 492 F. App'x 801 (9th Cir. 2012) (intervenor's failure to file his own non-dischargeability complaint prior to expiration of bar date for complaints under section 523(c) was not jurisdictional bar to his ability to proceed with litigation of non-dischargeability claims timely raised by original complaining creditor whose complaint was dismissed for failure to prosecute). One court has held that when an extended date is specified in an agreed order, that date will not be extended if it falls on a weekend. *In re* Gray, 492 B.R. 923 (Bankr. M.D. Pa. 2013).

213. *Compare* Kontrick v. Ryan, 540 U.S. 443 (2004) (holding that Rule 4004 is subject to equitable defenses), *and In re* Benedict, 90 F.3d 50, 54 (2d Cir. 1996) (holding that Rule 4007 is subject to equitable defenses), *with* Byrd v. Alton (*In re* Alton), 837 F.2d 457, 459 (11th Cir. 1988) (Rule 4007(c) is not subject to equitable tolling), *and* Anwar v. Johnson, 720 F.3d 1183 (9th Cir. 2013) (same), *and* Neeley v. Murchison, 815 F.2d 345, 346–47 (5th Cir. 1987) (same), *and* Sullivan v. Costa (*In re* Costa), 2013 WL 63916 (B.A.P. 1st Cir. Jan. 3, 2013) (same), *and* Lyon v. Aguilar (*In re* Aguilar), 470 B.R. 606, 615–16 (Bankr. D.N.M. 2012) (Rule 4007(c) is in the nature of a "statute of repose" that is not subject to equitable tolling), *and In re* Moseley, 470 B.R. 223 (Bankr. M.D. Fla. 2012) (same), *and* Owen v. Miller (*In re* Miller), 333 B.R. 368, 372 (Bankr. N.D. Tex. 2005), *aff'd*, 2006 WL 6507922 (N.D. Tex. Mar. 28, 2006) (finding that equitable tolling cannot be "raised as a defense to a motion to dismiss a late-filed dischargeability action"); *see also* N.M. Dep't of Workforce Sols. v. Martinez (*In re* Martinez), 2012 WL 3028511 (Bankr. D.N.M. July 25, 2012) (citing cases).

214. *See* FED. R. BANKR. P. 4007(d).

The time for determining dischargeability may be extended for cause if a motion is filed before the expiration of the period for filing a complaint.[215] If, however, the creditor is not scheduled and can satisfy the requirements of section 523(a)(3) as to lack of notice,[216] it may maintain its action against the debtor alleging non-dischargeability beyond the time limit.[217] Alternatively, the court may find the debt is non-dischargeable.[218]

As to the remaining section 523 debts, non-dischargeability is often self-operating and, accordingly, there is no need to obtain a court determination of non-dischargeability. Occasionally, it may become desirable for someone to file a complaint to obtain a determination that a particular debt will be (or has been) discharged, in whole or in part.[219] A complaint to determine dischargeability of one of these debts may be filed at any time.[220] Indeed, a closed case may be reopened for purposes of filing a complaint to determine dischargeability.[221]

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215. FED. R. BANKR. P. 4007(c); FED. R. BANKR. P. 9006(b)(3); Halliburton Energy Servs., Inc. v. McVay (*In re* McVay), 449 B.R. 906 (Bankr. C.D. Ill. 2011) (the availability of electronic filing does not obviate application of Bankruptcy Rule 9006(a)(1)(C), which provides that, in calculating the time periods specified under the rules, the court must extend to the end of the next business day any deadline that would otherwise expire on a Saturday, Sunday, or legal holiday, so that a non-dischargeability complaint filed sixty-one days after the date first set for the first meeting of creditors was timely, where the sixtieth day following that date was a Sunday); Yip v. Soler (*In re* Soler), 486 B.R. 538 (Bankr. S.D. Fla. 2013) (while bankruptcy court cannot use its authority to extend deadlines set by Bankruptcy Rule 4007 on grounds of "excusable neglect," in a case where it has previously extended the deadline on a motion filed prior to the expiration of the deadline, it could thereafter grant an untimely motion for a further extension). The decision in *Soler* has been criticized. *See* Stuart v. Mendenhall (*In re* Mendenhall), 572 F. App'x 858 (11th Cir. 2014); United Cmty. Bank v. Harper (*In re* Harper), 489 B.R. 251 (Bankr. N.D. Ga. 2013) (deadline may not be extended on motion filed after the deadline has already expired); *see also* State of Kan. Dep't of Labor v. Hunter (*In re* Hunter), 552 B.R. 864 (Bankr. D. Kan. 2016) (copies of an insufficient cover sheet and an exhibit did not meet the requirements of a complaint and the plaintiff's late filed complaint did not relate back to initial defective filing).

216. *See* section 9:8.5[B], *infra*.

217. Chanute Prod. Credit Ass'n v. Schicke (*In re* Schicke), 290 B.R. 792 (B.A.P. 10th Cir. 2003), *aff'd*, 97 F. App'x 249 (10th Cir. 2004).

218. *See* Tidwell v. Smith (*In re* Smith), 582 F.3d 767, 778 n.4 (7th Cir. 2009).

219. Rule 4007(a) permits either any creditor or the debtor to file complaints to determine dischargeability. In cases involving determinations for debts not covered by section 523(c), the debtor is more likely to be the person to file, although this varies depending on the type of debt and the grounds for non-dischargeability.

220. FED. R. BANKR. P. 4007(b).

221. *Id*.

§ 9:8.3 Burden of Proof

Except for the presumption of fraud specified in connection with a consumer's pre-bankruptcy "loading-up" of debts,[222] the Bankruptcy Code and Rules are silent as to the burden of proof. In *Grogan v. Garner*,[223] the U.S. Supreme Court ruled that preponderance of the evidence was the standard of proof in the context of a complaint under section 523(a)(2)(A).[224] The standard has been applied to all exceptions from discharge under section 523(a), thereby overruling the numerous decisions pursuant to which courts, in keeping with the "fresh-start" policy behind discharge, required proof of fraud by clear and convincing evidence.

If the debt is a consumer debt, a creditor bears some risk in filing a complaint objecting to dischargeability under section 523(a)(2).[225] Congress sought to prevent the abuse by creditors of the threat of suit to obtain reaffirmation agreements or consents to the entry of judgments determining consumer debts to be non-dischargeable. If a creditor pursues a complaint against the debtor with respect to a consumer debt and the court ultimately finds that the debt is dischargeable, a creditor may have to pay the debtor's costs and attorney fees incurred in defending the complaint, unless the creditor's position was substantially justified or "if special circumstances would make the award unjust."[226]

Courts have fashioned a three-part test for the recovery of attorney fees under section 523(d):

(1) the creditor requested a determination of the dischargeability of the debt under section 523(a)(2);

(2) the debt is a consumer debt; and

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222. 11 U.S.C. § 523(a)(2)(C).

223. Grogan v. Garner, 498 U.S. 279 (1991).

224. *See* deBenedictis v. Brady-Zell (*In re* Brady-Zell), 500 B.R. 295, 303 (B.A.P. 1st Cir. 2013), *aff'd*, 756 F.3d 69 (1st Cir. 2014) (affirming the bankruptcy court and bankruptcy appellate panel where the bankruptcy court could not find fraudulent intent because under the totality of circumstances the weight of the evidence was inconclusive, being split evenly between the plaintiff and the defendant and where the law requires the plaintiff to prove his or her case by a preponderance of the evidence).

225. 11 U.S.C. § 523(d).

226. *Id.; see, e.g.*, FIA Card Servs. v. Knoche (*In re* Shahidulla), 465 B.R. 511 (Bankr. D. Minn. 2012); Trs. of Will Cty. Carpenters, Local 174, Health & Welfare Fund v. Cooney, 532 B.R. 296, 299 (N.D. Ill. 2015) (debtor who was an attorney and initially defended the underlying case but then obtained the services of his partner to prepare for and try the case was entitled to attorney fees where the complaint was substantially unjustified).

(3) the debt was discharged.[227]

Once the debtor satisfies these three elements, the burden shifts to the creditor to demonstrate that its position was substantially justified.[228] Courts are split as to whether a determination of the status of a debt as consumer or business is a factual question reviewed for clear error or a legal inquiry subject to de novo review.[229]

Creditors frequently rely upon state court judgments to establish exceptions to discharge. Collateral estoppel bars relitigation of issues determined in prior court actions. Also known as issue preclusion, it applies to discharge exception proceedings under section 523(a).[230] In utilizing collateral estoppel, federal courts must grant the same preclusive effect to the judgment as a court in the rendering state.[231]

§ 9:8.4 Non-Dischargeable Debts Under Section 523(c)

The types of debts discussed in this section are called "523(c) debts" because they are listed in that subsection, which refers to subsections 523(a)(2), (a)(4), and (a)(6). They are dischargeable in cases under all chapters unless, on the complaint of an affected creditor in an adversary proceeding, the court determines the debt to be excepted from discharge.[232] Attorneys should be aware of the short deadline for filing complaints to determine the non-dischargeability of these debts.[233] If fraud is involved, Rule 9 of the Federal Rules of Civil Procedure applies through Bankruptcy Rule 7009, requiring that the circumstances of fraud be pleaded with particularity. Moreover, collateral estoppel may apply to eliminate the necessity of further litigation.[234]

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227. Bushkin v. Singer (*In re* Bushkin), 2016 WL 4040679, at *6 (B.A.P. 9th Cir. July 22, 2016) (citing Stine v. Flynn (*In re* Stine), 254 B.R. 244, 249 (B.A.P. 9th 2000), *aff'd*, 19 F. App'x 626 (9th Cir. 2001); Am. Sav. Bank v. Harvey (*In re* Harvey), 172 B.R. 314, 317 (B.A.P. 9th 1994), and Chevy Chase, F.S. B. v. Kullgren (*In re* Kullgren), 109 B.R. 949, 953 (Bankr. C.D. Cal. 1990)).

228. *Bushkin*, 2016 WL 4040679 at *6 (citations omitted).

229. *Compare* Aspen Skiing Co. v. Cherrett (*In re* Cherrett), 523 B.R. 660, 667 (B.A.P. 9th Cir. 2014), *aff'd,* 873 F.3d 1060 (9th Cir. 2017) (the purpose of a loan is the sort of "essentially factual" inquiry that we review for clear error), *with In re* Booth, 858 F.2d 1051, 1053 n.5 (5th Cir. 1988) (whether bankruptcy court correctly classified a debt as consumer or business for purposes of section 707(b) is a legal inquiry and subject to de novo review).

230. Gambino v. Koonce, 757 F.3d 604, 2014 WL 2959130, at *2 (7th Cir. 2014) (citing Grogan v. Garner, 498 U.S. 279, 284 n.11 (1991)).

231. *Id*. (citing Jensen v. Foley, 295 F.3d 745, 748 (7th Cir. 2002)); *see also* McCrory v. Spigel (*In re* Spigel), 260 F.3d 27, 33 (1st Cir. 2001).

232. 11 U.S.C. § 523(c)(1).

233. FED. R. BANKR. P. 4007(c).

234. *See* Stoehr v. Mohamed, 244 F.3d 206 (1st Cir. 2001) (section 523(a)(2)(A)); Rutanen v. Baylis (*In re* Baylis), 217 F.3d 66 (1st Cir. 2000) (section

[A] Debts Created by Fraud

[A][1] False Pretenses, False Representations, and Actual Fraud

If a debt is created when the debtor obtains money, property, services, or credit by false pretenses, false representations, or actual fraud, the debt is not dischargeable under section 523(a)(2)(A).[235] The First Circuit has adopted a six-part test for establishing that a debt is non-dischargeable because of false pretenses, a false representation or actual fraud:

> [A] creditor must show that (1) the debtor made a knowingly false representation or one made in reckless disregard of the truth, (2) the debtor intended to deceive, (3) the debtor intended to induce the creditor to rely upon the false statement, (4) the creditor actually relied upon the misrepresentation, (5) the creditor's reliance was justifiable, and (6) the reliance upon the false statement caused damage.[236]

523(a)(4)); *see also* McCrory v. Spigel (*In re* Spigel), 260 F.3d 27 (1st Cir. 2001) (state law determines the preclusive effect of state court judgments) Bucklund v. Stanley-Snow, 405 B.R. 11 (B.A.P. 1st Cir. 2009). In *In re* Catt, 368 F.3d 789, 791 (7th Cir. 2004), the court determined a default judgment was entitled to collateral estoppel effect. It stated a "significant minority" of courts had so ruled "provided that the defaulted party could have appeared and defended if he had wanted to." *Id*. (citing, inter alia, *In re* Cantrell, 329 F.3d 1119 (9th Cir. 2003)).

235. *See* Siraguza v. Collazo (*In re* Collazo), 817 F.3d 1047 (7th Cir. 2016) (applying statute of limitations, which began to run, at the very latest, when the creditors learned of a sale of units for which they had provided financing, to fraud claims that creditors had against the principal of a limited liability company for inducing them to extend loans to the company for a condominium conversion project by falsely representing that these loans would promptly be repaid).

236. McCrory v. Spigel (*In re* Spigel), 260 F.3d 27, 32 (1st Cir. 2001); 11 U.S.C. § 523(a)(2)(A); *see also* SEC v. Bocchino (*In re* Bocchino), 794 F.3d 376, 382 (3d Cir. 2015) (section 523(a)(2)(A)'s scienter requirement was satisfied by debtor's gross recklessness); Sharfarz v. Goguen (*In re* Goguen), 691 F.3d 62 (1st Cir. 2012) (discussing causation in fact and legal causation). Fraud against the original lender may be enforced by an assignee. First Am. Title Ins. Co. v. Pazdzierz (*In re* Pazdzierz), 459 B.R. 254, 261 (E.D. Mich. 2011), *aff'd in part*, 718 F.3d 582 (6th Cir. 2013). Silence may not constitute false pretenses or representations. Andrews v. Chamblee (*In re* Chamblee), 510 B.R. 370 (Bankr. N.D. Ala. 2014). *Contra* United States v. Drummond (*In re* Drummond), 530 B.R. 707 (Bankr. E.D. Ark. 2015) (in case involving Social Security overpayment and debtor's failure to report work activity, the court found false pretense where debtor was silent but had a duty to speak).

Under section 523(a)(2), false representations and false pretenses must relate to current or past facts. A promise to perform acts in the future is not considered a qualifying misrepresentation if the promise subsequently is breached. A debtor's misrepresentations of his intentions, however, may constitute a false representation if the debtor has no intention of performing when the representation was made.[237]

In *McClellan v. Cantrell*,[238] the U.S. Court of Appeals for the Seventh Circuit determined that section 523(a)(2)(A) extends to actual fraud where reliance is not relevant. The U.S. Court of Appeals for the First Circuit adopted the *McClellan* approach in *Sauer Inc. v. Lawson*.[239] On direct appeal from the bankruptcy court, the First Circuit resolved the narrow issue of "whether a debt that is not dischargeable in Chapter 13 bankruptcy as a debt for money or property 'obtained by . . . actual fraud' extends beyond debts incurred through fraudulent misrepresentations to also include debts incurred as a result of knowingly accepting a fraudulent conveyance that the transferee knew was intended to hinder the transferor's creditors," concluding that it does.[240] The First Circuit emphasized that its holding was limited to cases of actual, as opposed to merely constructive, fraud.[241] The U.S. Bankruptcy Appellate Panels for the Sixth Circuit and Tenth Circuits have adopted *McClellan*.[242] The U.S. Court of Appeals for the Fifth Circuit rejected *McClellan* in *Husky International Electronics, Inc. v. Ritz (In re Ritz)*.[243]

The U.S. Supreme Court resolved a split among the circuits reversing the decision of the U.S. Court of Appeals for the Fifth Circuit in *Husky International Electronics, Inc. v. Ritz*.[244] In *Ritz*, a corporation

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237. Metz v. Bentley (*In re* Bentley), 531 B.R. 671, 688 (Bankr. S.D. Tex. 2015).
238. McClellan v. Cantrell, 217 F.3d 890 (7th Cir. 2000).
239. Sauer, Inc. v. Lawson (*In re* Lawson), 791 F.3d 214 (1st Cir. 2015).
240. *Id*. at 216.
241. *Id*. at 220.
242. *See* Mellon Bank, N.A. v. Vitanovich (*In re* Vitanovich), 259 B.R. 873, 877 (B.A.P. 6th Cir. 2001); Diamond v. Vickery (*In re* Vickery), 488 B.R. 680, 691 (B.A.P. 10th Cir. 2013).
243. Husky Int'l Elec., Inc. v. Ritz (*In re* Ritz), 787 F.3d 312 (5th Cir.), *cert. granted*, 136 S. Ct. 445 (2015). In *Ritz*, the Fifth Circuit refused to follow *McClellan*, stating:

> No subsequent appellate court has adopted the interpretation of Section 523(a)(2)(A) endorsed by the *McClellan* majority, and we decline to do so today. First, *McClellan* [v. Cantrell, 217 F.3d 890 (7th Cir. 2000)] appears to be in tension with the Supreme Court's opinion in *Field v. Mans*, 516 U.S. 59 (1995), which "resolve[d] a conflict among the Circuits over the level of reliance that § 523(a)(2)(A) requires a creditor to demonstrate." *Id.* at 63.

Ritz, 787 F.3d at 317 (footnote omitted).

244. Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581 (2016).

known as Chrysalis Manufacturing Corp. incurred a debt to Husky International Electronics, Inc. The debtor, Daniel Lee Ritz, Jr., was a director and part owner of Chrysalis. He drained Chrysalis of its assets by causing Chrysalis to transfer moneys to other entities he controlled. Husky sued Ritz to recover on the debt, and Ritz then filed a Chapter 7 petition. Husky filed a complaint seeking to hold the debtor personally liable for Chrysalis's debt and to except its debt from discharge. It alleged that the "asset-transfer scheme was effectuated through a series of fraudulent conveyances—or transfers intended to obstruct the collection of debt," rendering the debt non-dischargeable under section 523(a)(2)(A) for "actual fraud."[245] As noted above, the Fifth Circuit affirmed the district court's determination that a misrepresentation from a debtor to a creditor is a necessary element of "actual fraud" and was not present in the case because Ritz made no false representations to Husky about the transfer of Chrysalis's assets.[246] The Supreme Court reversed, holding "[t]he term 'actual fraud' in section 523(a)(2)(A) encompasses forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation."[247]

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245. *Id*. at 1585–86.

246. *Id*. at 1586.

247. *Id*. The Supreme Court addressed a number of arguments advanced by the debtor, including the requirement that for a debt be excepted from discharge it must be "*obtained by*" actual fraud. The Court stated:

> It is of course true that the transferor does not "obtai[n]" debts in a fraudulent conveyance. But the recipient of the transfer—who, with the requisite intent, also commits fraud—can "obtai[n]" assets "by" his or her participation . . . . Thus, at least sometimes a debt "obtained by" a fraudulent conveyance scheme could be non-dischargeable under § 523(a)(2)(A). Such circumstances may be rare because a person who receives fraudulently conveyed assets is not necessarily (or even likely to be) a debtor on the verge of bankruptcy, but they make clear that fraudulent conveyances are not wholly incompatible with the "obtained by" requirement.
>
> The dissent presses further still, contending that the phrase "obtained by . . . actual fraud" requires not only that the relevant debts "resul[t] from" or be "traceable to "fraud but also that they "result from fraud *at the inception of a credit transaction.*" *Post*, at 3 (emphasis added). Nothing in the text of § 523(a)(2)(A) supports that additional requirement. The dissent bases its conclusion on this Court's opinion in *Field*, in which the Court noted that certain forms of bankruptcy fraud require a degree of direct reliance by a creditor on an action taken by a debtor. But *Field* [Field v. Mans, 515 U.S. 59 (1995)] discussed such "reliance" only in setting forth the requirements of the form of fraud alleged in that case—namely, fraud perpetrated through a misrepresentation to a creditor. *See* 516 U.S. at 61. The Court was not establishing a "reliance" requirement for frauds that are not premised on such a misrepresentation.

False statements of financial condition, however, are expressly excluded from subsection (a)(2)(A) and are governed by section 523(a)(2)(B), which requires a writing.[248] Courts have imposed a requirement of actual intent to deceive in cases of false pretenses or false representations.

In *Field v. Mans*,[249] the U.S. Supreme Court indicated that under section 523(a)(2)(A), in contrast to section 523(a)(2)(B), a creditor need only show *justifiable* reliance on the false representations of the debtor.[250] Moreover, in *Cohen v. De La Cruz*,[251] the Court considered the issue of whether section 523(a)(2)(A) encompassed treble damages awarded by a state court or just the value of the "money, property, services, or . . . credit obtained." The Court determined that treble damages were within the exception, thereby resolving a conflict among the circuits.

A difficult application of section 523(a)(2) is in the area of credit cards. After the initial credit card agreement, there is no face-to-face dealing between the card issuer and the cardholder, which has led to considerable confusion and the application of a wide variety of tests by various courts. This is one area where knowledge of local precedent is vital. What appears to be an increasingly popular approach by the courts (we doubt if there is a weight of authority) is this: Each

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Id. at 1589–90 (footnote omitted). On remand, the Fifth Circuit in Husky International Electronics, Inc. Ritz (*In re* Ritz), 832 F.3d 560, 565 (5th Cir. 2016), concluded that under Texas law, if a creditor could show that debtor's transfers satisfied the "actual fraud" prong of the Texas Uniform Fraudulent Transfer Act, then it also could show that debtor's conduct constituted actual fraud for purposes of veil piercing. In DZ Bank AG Deutsche Zentral-Genossenschaft Bank v. Meyer, 869 F.3d 839 (9th Cir. 2017), the U.S. Court of Appeals for the Ninth Circuit addressed a lower court decision premised on *Husky* in a dispute between a bank, as creditor, and the debtor where the debtor executed a scheme involving a series of transfers and sales in an effort to place assets beyond the reach of creditors. The Ninth Circuit determined that it was error to limit the amount of debt excepted from discharge to the amount of the collateralized debt, adding "[t]he bankruptcy court should have granted relief for the full [amount] that [the creditor] would have recovered if it had been able to execute against [the debtor's] ownership interest." *Id*. at 845.

248. 11 U.S.C. § 523(a)(2)(B); *see infra* section 9:8.4[A][2].

249. Field v. Mans, 516 U.S. 59 (1995); *see also* Stewart Title Guar. Co. v. Roberts-Dude (*In re* Roberts-Dude), 597 F. App'x 615, 617 (11th Cir. 2015) (to constitute justifiable reliance, "[t]he plaintiff's conduct must not be so utterly unreasonable, in the light of the information apparent to him, that the law may properly say that his loss is his own responsibility").

250. *See* Sanford Inst. for Sav. v. Gallo, 156 F.3d 71, 75 (1st Cir. 1998) (plaintiff was entitled to rely on debtor's statements in the absence of "warning signs of their falsity, even if obtaining a title search was easy and a matter of bank policy"). *But see* LaChance Fin. Serv., Inc. v. Gemma (*In re* Gemma), 459 B.R. 493 (Bankr. D. Mass. 2011).

251. Cohen v. De La Cruz, 523 U.S. 213 (1998).

transaction is a unilateral contract where the cardholder promises to repay the debt plus to periodically make partial payments along with accrued interest, where the card issuer performs by reimbursing the merchant who has accepted the credit card in payment or advancing the cash.[252]

In *Archer v. Warner*,[253] the Supreme Court held that "[a] debt embodied in the settlement of a fraud case 'arises' no less 'out of' the underlying fraud than a debt embodied in a stipulation and consent decree." It added that although a settlement agreement and releases may be a kind of novation, that does not bar a showing that the settlement debt arose out of "false pretenses, a false representation, or actual fraud."[254]

Fraud of one partner can be imputed to another. Where a debtor was at least recklessly indifferent to the conduct of his business partner in using the partnership business to perpetrate fraud on investors in connection with the sale of unregistered securities, the debtor was vicariously liable for his partner's fraud under state law, and the debts to the investors were non-dischargeable.[255]

Courts hold that a debtor's silence regarding a material fact may constitute a false representation that is actionable under section 523(a)(2)(A).[255.1]

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252. *See* AT&T Universal Card Servs. Corp. v. Searle, 223 B.R. 384 (D. Mass. 1998); *see also* AT&T Universal Card Servs. v. Mercer (*In re* Mercer), 246 F.3d 391 (5th Cir. 2001); Am. Express Centurion Bank v. Allen (*In re* Allen), 528 B.R. 854 (Bankr. N.D. Ga. 2015) (debtor did not engage in "actual fraud," within the meaning of 11 U.S.C. § 523(a)(2)(A), by charging substantial sum on her credit card in the four days preceding the due date of her minimum payment, even though she knew that she would not be making the minimum payment, but intended to pay the debt, where issuer's practice was to continue extension of credit notwithstanding missed minimum payment).

253. Archer v. Warner, 538 U.S. 314, 321 (2003).

254. *Archer*, 538 U.S. at 323. For an application of the decision, see Giaimo v. De Trano (*In re* De Trano), 326 F.3d 319 (2d Cir. 2003).

255. *See* Reuter v. Cutcliff (*In re* Reuter), 686 F.3d 511, 517 (8th Cir. 2012). *But see* Haig v. Shart (*In re* Shart), 505 B.R. 13 (Bankr. C.D. Cal. 2014). For a thorough discussion of imputed fraud and three lines of authority, see Sachan v. Huh (*In re* Huh), 506 B.R. 257, 264–66 (B.A.P. 9th Cir. 2014); *see also* Sullivan v. Glenn, 782 F.3d 378, 381 (7th Cir. 2015) ("'Proof that a debtor's agent obtains money by fraud does not justify the denial of a discharge to the debtor, unless it is accompanied by proof which demonstrates or justifies an inference that the debtor knew or should have known of the fraud.' *In re* Walker, 726 F.2d 452, 454 (8th Cir. 1984).").

255.1. Selenberg v. Bates (*In re* Selenberg), 856 F.3d 393, 399 (5th Cir. 2017) (citing Caspers v. Van Horne (*In re* Van Horne), 823 F.2d 1285, 1288 (8th Cir. 1987) (collecting cases), *abrogated on other grounds by* Grogan v. Garner, 498 U.S. 297 (1991); AT&T Universal Card Servs. v. Mercer (*In re* Mercer), 246 F.3d 391, 404 (5th Cir. 2001)).

[A][2] False Statements of Financial Condition

Certain debts that result from using false statements of financial condition in order to obtain money, property, or services are not dischargeable.[256] These statements must be in writing and must contain a materially false representation of the debtor's financial condition or the financial condition of an insider of the debtor, made with an intent to deceive.[257] The creditor must have *reasonably* relied on the statement in extending the credit or supplying the property or services.[258]

There was a major division in the cases as to whether "a statement respecting the debtor's or an insider's financial condition" should be read broadly or narrowly. The narrow view—that such a statement must deal with the debtor's net worth or overall financial condition—has been adopted by the Fifth, Eighth, and Tenth Circuits and the

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256. *See* Privitera v. Curran (*In re* Curran), 855 F.3d 19 (1st Cir. 2017), the court in interpreting section 523(a)(2)(B)'s requirement of material falsity, stated:

> Material falsity is an element of a claim under section 523(a)(2)(B). *See* 11 U.S.C. § 523(a)(2)(B)(i); Abramov v. Movshovich (*In re* Movshovich), 521 B.R. 42, 61 (Bankr. D. Mass. 2014). To make out a claim that a statement is materially false within the purview of section 523(a)(2)(B), a plaintiff must plausibly allege that the statement misrepresented the kind of information that "would normally affect the decision to grant credit" and thus portrayed a substantially untruthful picture of the debtor's financial condition. Bethpage Fed. Credit Union v. Furio (*In re* Furio), 77 F.3d 622, 625 (2d Cir. 1996) (citation omitted); *see In re* Movshovich, 521 B.R. at 61. A statement may be rendered materially false either by an affirmative misrepresentation, *see, e.g., In re* Movshovich, 521 B.R. at 62, or by omission, see, e.g., Leominster Hous. Auth. v. Dunbar *(In re* Dunbar), 474 B.R. 14, 21 (Bankr. D. Mass. 2012). To sink to the level of a misstatement by omission, the party privy to the omitted information must have been obligated to furnish it. *See id*. (collecting cases).

Curran, 855 F.3d at 25–26.

257. 11 U.S.C. § 523(a)(2)(B); *see* Associated Mortg. Corp. v. Weaver (*In re* Weaver), 579 B.R. 865 (Bankr. D. Colo. 2018) (applying section 523(a)(2)(B) to situation where debtor fraudulently manipulated a loan file to ensure that her brother could obtain a loan to refinance his home mortgage and that, after he closed on the loan, he immediately defaulted, leading to foreclosure and loss to creditor who then sought a determination that the debt, including direct, consequential, and exemplary damages, was non-dischargeable).

258. *See* Follo v. Morency, 507 B.R. 421 (D. Mass. 2014) (district court took judicial notice of facts outside the record, concluding plaintiff's reliance was reasonable).

Bankruptcy Appellate Panel for the Ninth Circuit,[259] and rejected by the Fourth and Eleventh Circuits.[260] The bankruptcy courts are widely split.[261]

In *Lamar, Archer & Cofrin, LLP. v. Appling,*[261.1] the Supreme Court, in resolving the split among the circuits and lower courts, affirmed the decision of the U.S. Court of Appeals for the Eleventh Circuit. It held that a statement about a single asset can be a "statement respecting the debtor's financial condition," within the meaning of the fraud discharge exception.[261.2] Prior to the commencement of his bankruptcy case, the debtor, Appling, had represented to his attorneys that he would cover the cost of legal fees from an expected tax refund, but then used the tax refund for business expenses; even after receipt of the refund, he represented that he would satisfy his legal bills from the refund, thus inducing his attorneys to complete pending litigation. After his attorneys commenced an adversary proceeding seeking to except the debt from discharge, Appling moved to dismiss. The Bankruptcy Court denied the motion and held the debt to be nondischargeable under section 523(a)(2)(A), determining that Appling made material misrepresentations upon which his attorneys justifiably relied, thus incurring damages. The District Court affirmed, but the Eleventh Circuit reversed, holding that a "statement respecting the debtor's financial condition" may include a statement about a single asset. Because Appling's statements were not in writing, the Court held section 523(a)(2)(B) did not bar him from discharging his debt to Lamar. The Court explained why its decision mattered, stating:

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259. Bandi v. Becnel (*In re* Bandi), 683 F.3d 671 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 845 (2013) ("The term 'financial condition' has a readily understood meaning. It means the general overall financial condition of an entity or individual, that is, the overall value of property and income as compared to debt and liabilities."); Rose v. Lauer (*In re* Lauer), 371 F.3d 406, 413–14 (8th Cir. 2004); Cadwell v. Joelson (*In re* Joelson), 427 F.3d 700 (10th Cir. 2005); Barnes v. Belice (*In re* Belice), 461 B.R. 564, 577–78 (B.A.P. 9th Cir. 2011). A "projection" is not a statement of financial condition. Douglas v. Kosinski (*In re* Kosinski), 424 B.R. 599, 609 (B.A.P. 1st Cir. 2010).

260. Engler v. Van Steinberg (*In re* Van Steinberg), 744 F.2d 1060, 1061 (4th Cir. 1984); Appling v. Lamar, Archer & Cofrin, LLP (*In re* Appling), 848 F.3d 953 (11th Cir. 2017), *aff'd*, ___ S. Ct. ____, 2018 WL 2465174 (June 4, 2018).

261. *See* cases collected at Schneiderman v. Bogdanovich (*In re* Bogdanovich), 292 F.3d 104, 112–13 (2d Cir. 2002).

261.1. Lamar, Archer & Cofrin, LLP. v. Appling, __ S. Ct.__, 2018 WL 2465174 (June 4, 2018).

261.2. The Supreme Court's decision has the effect of abrogating decisions such as Bandi v. Becnel (*In re* Bandi), 683 F.3d 671 (5th Cir. 2012), and Cadwell v. Joelson (*In re* Joelson), 427 F.3d 700 (10th Cir. 2005).

> The answer matters to the parties because the false statements at issue concerned a single asset and were made orally. So, if the single-asset statements here qualify as "respecting the debtor's financial condition," § 523(a)(2)(B) poses no bar to discharge because they were not made in writing. If, however, the statements fall into the more general category of "false pretenses, . . . false representation, or actual fraud," § 523(a)(2)(A), for which there is no writing requirement, the associated debt will be deemed nondischargeable.[261.3]

The Supreme Court concluded that "[u]se of the word 'respecting' in a legal context generally has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject."[261.4]

Fraudulent credit applications or financial statements provided to a lender are the major causes for filing complaints under this section. Attempts to avoid the writing requirement by framing the complaint under section 523(a)(6) generally fail.[262]

[A][3] "Loading Up" Consumer Debts and Credit Card Debts

Certain consumer debts (incurred for personal, family, or household purposes) owed to a single creditor carry a presumption of actual fraud under certain circumstances.[263]

If the debtor owes a single creditor a debt of more than $650 for "luxury goods or services" and that debt was incurred within ninety days of the bankruptcy filing, the debt is presumed to be nondischargeable.[264] "Luxury goods and services" are defined only by excluding goods and services reasonably necessary for the support or maintenance of the debtor and the debtor's dependents.[265]

261.3. Lamar, Archer & Cofrin, LLP. v. Appling, __ S. Ct.__, 2018 WL 2465174, at *3.

261.4. *Id.* 2018 WL 2465174, at *6.

262. Berkson v. Gulevsky (*In re* Gulevsky), 362 F.3d 961, 964 (7th Cir. 2004) ("But § 523(a)(6) cannot make all debts procured by fraud nondischargeable, because that would make superfluous § 523(a)(2), § 523(a)(4), and § 523(a)(11), all of which make different sorts of debts procured by fraud nondischargeable.").

263. 11 U.S.C. § 523(a)(2)(C).

264. *Id.* § 523(a)(2)(C)(i)(I).

265. *Id.* § 523(a)(2)(C)(ii)(II). Be careful with the use of pre-BAPCPA cases construing this paragraph. It formerly covered goods "reasonably acquired" rather than "reasonably necessary." *See* AmeriCredit Fin. Servs. Inc. v. Rodriguez (*In re* Rodriguez), 547 B.R. 272, 277 (Bankr. N.D. Ill. 2016).

The presumption also extends to cash advances of more than $925 obtained under an open end credit plan within seventy days prior to filing.[266]

[B] Fiduciary's Fraud or Fiduciary's Defalcation and Embezzlement or Larceny

A debt incurred as a result of fraud or defalcation while acting in a fiduciary capacity, or by embezzlement or larceny, is not dischargeable.[267] In objecting to the discharge of a claim arising out of a

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266. *Id*. § 523(a)(2)(C)(i)(II) and (ii)(I). A "balance transfer" or "refinancing" is not a "cash advance" subject to this provision. U.S. Bank Nat'l Ass'n v. Pugh (*In re* Pugh), 356 B.R. 528 (Bankr. D. Colo. 2006), and cases cited therein; Nat'l City Bank v. Manning (*In re* Manning), 280 B.R. 171 (Bankr. S.D. Ohio 2002); *see* Chase Bank USA v. Ritter (*In re* Ritter), 404 B.R. 811, 822 (Bankr. E.D. Pa. 2009).

267. 11 U.S.C. § 523(a)(4). In Rutanen v. Baylis (*In re* Baylis), 313 F.3d 9 (1st Cir. 2002), the First Circuit summarized the elements of a claim under section 523(a)(4) against a fiduciary:

> [C]ertain rules are clear about the availability of the exception:
>
> 1) The burden of proof to establish defalcation is on the creditor, given the "fresh start" policy. *In re* Menna, 16 F.3d [7 (1st Cir. 1994)] at 9 (a claimant must prove that his "claim comes squarely within an exception enumerated in Bankruptcy Code § 523(a)"); *see also* Palmacci v. Umpierrez, 121 F.3d 781, 786 (1st Cir. 1997).
> 2) The creditor must show defalcation by a preponderance of the evidence. Grogan [v. Garner], 498 U.S. at 286–87, 111 S. Ct. 654.
> 3) The exception to discharge applies to fiduciaries only while they are acting in a fiduciary capacity.
> 4) Inherent in "defalcation" is the requirement that there be a breach of fiduciary duty; if there is no breach, there is no defalcation.
> 5) In order to avoid redundancy, defalcation must mean something other than fraud and different from "willful and malicious injury," 11 U.S.C. § 523(a)(6).
> 6) Defalcation is to be measured objectively. Cent. Hanover Bank & Tr. Co. v. Herbst, 93 F.2d 510, 512 (2d Cir. 1937).
>
> That then leaves the question of the standard to measure when a fiduciary breach is a "defalcation." . . . The etymology of the word thus shows the term historically has covered both fraudulent and non-fraudulent acts. Our view is that not every breach of a fiduciary duty amounts to defalcation.

313 F.3d at 17–18 (footnotes omitted). In a footnote, the court observed: "Some years ago, the Supreme Court noted that under § 523(a)(4), the exception for fiduciary capacity applies only to express trusts, and not to equitable trusts created by the debtor's conduct. Davis v. Aetna Acceptance Co., 293 U.S. 328, 333 (1934). Whether this continues to be so is in doubt. *See, e.g.*, Republic of Rwanda v. Uwimana (*In re* Uwimana), 274 F.3d 806,

fiduciary's fraud or defalcation, an attorney must be particularly aware of the bankruptcy definition of these terms. Thus, courts have determined that the meaning of "fiduciary" in section 523(a)(4) is an issue of federal law.[268] The fiduciary relationship, for example, has been limited to cases of an express or technical trust created by law, as opposed to a constructive trust implied as a result of wrongdoing.[269] Therefore, not all agents, corporate officers, or partners will be treated as fiduciaries, although such parties may be fiduciaries when specifically entrusted with funds for a particular purpose or purposes.[270]

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811 (4th Cir. 2001) (ambassadors are fiduciaries for countries they represent)." *Id*. at 17 n.3. Plaintiff cannot try to prove embezzlement when the pleading only alleged a fiduciary capacity exception to discharge. Duggins v. Bratt (*In re* Bratt, 491 B.R. 572 (Bankr. D. Kan. 2013).

268. *See* Ragsdale v. Haller, 780 F.2d 794, 796 (9th Cir. 1986).

269. An ERISA plan administrator has such a relationship. Hearn v. Goodwin (*In re* Goodwin), 355 B.R. 337 (M.D. Fla. 2006); *see* Bos. v. Bd. of Trs., 795 F.3d 1006 (9th Cir. 2015) (discussing circuit cases and resolving issue of whether debtor, as company president had ERISA fiduciary responsibilities for unpaid contributions, concluding that he did not), *cert. denied*, 136 S. Ct. 1452 (2016).

State construction trust fund statutes may create a fiduciary relationship. *See, e.g.*, Pritchard Concrete, Inc. v. Barnes (*In re* Barnes), 377 B.R. 289 (Bankr. D. Colo. 2007); *In re* Coley, 354 B.R. 813 (N.D. Tex. 2006); T&D Moravits & Co. v. Munton (*In re* Munton), 352 B.R. 707 (B.A.P. 9th Cir. 2006); Owens v. Bolger (*In re* Bolger), 351 B.R. 165 (Bankr. N.D. Okla. 2006). *Contra* Arrow Concrete Co. v. Bleam (*In re* Bleam), 356 B.R. 642 (Bankr. D.S.C. 2006). A landlord holding security deposits is a fiduciary. *In re* Frempong, 460 B.R. 189 (Bankr. N.D. Ill. 2011). Mere fact that debtor was CEO of claimant does not establish fiduciary capacity. Jenkins v. IBD, Inc., 489 B.R. 587 (D. Kan. 2013). A trust under the Perishable Agricultural Commodities Act is an express trust because duties imposed by regulations are sufficiently material to impose fiduciary relationship and qualify the trust as an express trust. *See* Michael Farms, Inc. v. Lundgren (*In re* Lundgren), 503 B.R. 717, 721 (Bankr. W.D. Wis. 2013).

270. In Braden Tr. v. Chavez (*In re* Chavez), 430 B.R. 890, 894 (Bankr. D. Ariz. 2010), the court held that, under Arizona law, corporate directors, officers, and shareholders that have the ability to control a corporation owe a fiduciary duty to the corporation and other shareholders. In Tenn. Educ. Lottery Corp. v. Cooper (*In re* Cooper), 430 B.R. 480, 497–98 (Bankr. E.D. Tenn. 2010), the court held that the debtor, who, as result of contract that he signed to be able to sell state lottery tickets at his store pursuant to Tennessee statutes and regulations, was required to maintain proceeds from sale of lottery tickets in a segregated account and thus had fiduciary duty to properly account for and pay over such proceeds, stood in a "fiduciary capacity" to the state lottery corporation and, by recklessly failing to account for proceeds, committed a "defalcation while acting in a fiduciary capacity." In *Cooper*, the court noted a split of authority on the issue. *Id*. at 490–91 (citing cases). In Sellers v. Parks (*In re* Parks), 352 B.R. 66 (Bankr. W.D. La. 2006), the court determined that an employer who fails in his statutory duty to provide workers' compensation insurance is not a fiduciary within the section. Similarly, a debtor's withdrawal liability

Attorneys, thus, may be fiduciaries to their clients.[271]

In many states, a corporate officer or director assumes a fiduciary duty toward the corporation, its shareholders, and, upon the corporation's insolvency, also to its creditors.[272] Bankruptcy courts and district courts are divided as to whether that is sufficient for liability

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under a multiemployer pension fund has been held not to be incurred in a fiduciary capacity. Carpenters Pension Tr. Fund v. Moxley, 734 F.3d 864 (9th Cir. 2013). For other examples of decisions examining whether fiduciary relationships exist, see Arvest Mortg. Co. v. Nail (*In re* Nail), 680 F.3d 1036, 1041 (8th Cir. 2012) (Arkansas law did not create the requisite fiduciary relationship to render the debt non-dischargeable); FNFS, Ltd. v. Harwood (*In re* Harwood), 637 F.3d 615, 622 (5th Cir. 2011) (officer and director of partnership's corporate general partner who exercised control over affairs breached fiduciary duty owed to limited partnership); Patel v. Shamrock Floorcovering Servs., Inc. (*In re* Patel), 565 F.3d 963 (6th Cir. 2009) (technical trust existed and contractors, as result of duty imposed on them by the Michigan Builders Trust Fund Act to account to subcontractors and materialmen for any funds received on construction project, stand in "fiduciary capacity" to subcontractors and materialmen); Bd. of Trs. of Ohio Carpenters' Pension Fund v. Bucci (*In re* Bucci), 493 F.3d 635, 643 (6th Cir. 2007), *cert. denied*, 553 U.S. 1093 (2008) (under ERISA the debtor had only a contractual obligation to pay the employer contributions which was not enough, for "the debtor must hold funds in trust for a third party to satisfy the fiduciary relationship element of the defalcation provision of § 523(a)(4)"); Navarre v. Luna (*In re* Luna), 406 F.3d 1192, 1207 (10th Cir. 2005) (same); Gupta v. E. Idaho Tumor Inst., Inc. (*In re* Gupta), 394 F.3d 347 (5th Cir. 2004) (state court findings as to relationship between parties in a joint venture insufficient for determination of fiduciary relationship); Airlines Reporting Corp. v. Ellison (*In re* Ellison), 296 F.3d 266 (4th Cir. 2002) (fiduciary relationship existed between debtors and creditor of their corporation).

271. *See* Chaney v. Grigg (*In re* Grigg), 619 F. App'x 195 (3d Cir. 2015) (holding that section 523(a)(4) applied because debtor owed plaintiff a fiduciary duty as his lawyer; debtor violated that duty; and plaintiff suffered resulting economic loss because the debtor consciously disregarded "a substantial and unjustifiable risk" that his conduct would turn out to violate a fiduciary duty as he continued to spend the disputed funds); Stallworth v. McBride (*In re* McBride), 512 B.R. 103 (Bankr. D. Mass. 2014) (when client property is entrusted to attorney, the fiduciary relationship based on specialized skill also becomes a technical trust).

272. *See* 5 WILLIAM L. NORTON, JR., NORTON BANKR. L. & PRAC. 3D § 96:4 (2010) (majority view is that insolvency places corporate assets in trust for corporate creditors, and in some jurisdictions the fiduciary duty of directors shifts to include creditors); Huong v. Tatung Co. (*In re* Huong), 636 F. App'x 396 (9th Cir. 2016) (relying upon the "trust fund doctrine," set forth in Berg & Berg Enter., LLC v. Boyle, 100 Cal. Rptr. 3d 875, 893 (Ct. App. 2009), pursuant to which "all of the assets of a corporation, immediately upon becoming insolvent, become a trust fund for the benefit of all [of the corporation's] creditors, the court held that the duties created by the trust fund doctrine satisfy the criteria for a "fiduciary" relationship for purposes of non-dischargeability under section 523(a)(4) because the trust fund doctrine "clearly and expressly impose[s] trust-like obligations" on the controllers of an insolvent entity).

under section 523(a)(4).[273] Recently, the Seventh Circuit held that, in the absence of fraud, the section 523(a)(4) exception to discharge cannot be stretched so far as to make officers and directors of insolvent corporations personally liable for a wide range of corporate debts.[274]

Once the fiduciary relationship has been established the creditor must establish fraud or defalcation. The term "fraud" continues to be construed as actual fraud, as opposed to constructive fraud or fraud implied by law, even though section 523(a)(4) merely refers to "fraud."[275] A creditor, therefore, must prove intentional wrongdoing or moral turpitude. However, the term "defalcation" continues to encompass a broader range of acts. The Supreme Court has attempted to resolve years of confusion in the cases by defining "defalcation":

> [W]here the conduct at issue does not involve bad faith, moral turpitude, or other immoral conduct, the term requires an intentional wrong. We include as intentional not only conduct that the fiduciary knows is improper but also reckless conduct of the kind that the criminal law often treats as the equivalent. Thus, we include reckless conduct of the kind set forth in the Model Penal Code. Where actual knowledge of wrongdoing is lacking, we consider conduct as equivalent if the fiduciary "consciously disregards" (or is willfully blind to) "a substantial and unjustifiable risk" that his conduct will turn out to violate a fiduciary duty . . . . That risk "must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves *a gross deviation*

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273. *See* Follet Higher Educ. Grp., Inc. v. Berman (*In re* Berman), 629 F.3d 761, 766–67 (7th Cir. 2011). The Seventh Circuit cited Energy Prods. Eng'g, Inc. v. Reuscher (*In re* Reuscher), 169 B.R. 398, 402–03 (S.D. Ill. 1994) (accepting theory and reversing bankruptcy court's dismissal of complaint); Salem Servs., Inc. v. Hussain (*In re* Hussain), 308 B.R. 861, 867–68 (Bankr. N.D. Ill. 2004) (accepting theory but finding no defalcation); Berres v. Bruning (*In re* Bruning), 143 B.R. 253, 256 (D. Colo. 1992) (holding that a fiduciary obligation arises upon insolvency and falls within section 523(a)(4)'s ambit). *Contra* Murphy & Robinson Inv. Co. v. Cross (*In re* Cross), 666 F.2d 873, 880–81 (5th Cir. 1982) (concluding that an officer did not owe the corporation's creditor any fiduciary duty within the meaning of section 523(a)(4)); Econ. Dev. Growth Enters. Corp. v. McDermott (*In re* McDermott), 434 B.R. 271, 281 (Bankr. N.D. N.Y. 2010), *aff'd*, 478 B.R. 123 (N.D.N.Y. 2012) (determining that fiduciary obligations of officers of insolvent corporations are insufficient for the purposes of section 523(a)(4)); First Options of Chi., Inc. v. Kaplan (*In re* Kaplan), 162 B.R. 684, 704–06 (Bankr. E.D. Pa. 1993) (rejecting the premise that an officer's debt would be non-dischargeable as a result of the corporation's wrongdoing, despite state law making the officer a fiduciary).

274. *In re* Berman, 629 F.3d 761, 767–68 (7th Cir. 2011) (citing Davis v. Aetna Acceptance Co., 293 U.S. 328 (1934)).

275. In contrast, section 523(a)(2) refers to "actual fraud."

> from the standard of conduct that a law-abiding person would observe in the actor's situation."[276]

Creditors often rely upon state or federal statutes to argue the existence of a fiduciary relationship with mixed results. Sometimes the statutes are clear and establish a technical trust.[277] At other times, the statute may simply create a trust *ex malificio*[278] or fail to create a trust relationship.[279]

Debts created by embezzlement and larceny are non-dischargeable, whether or not they arise in a fiduciary relationship. Both terms include an element of fraud or intentional wrongdoing. Embezzlement involves the wrongful *appropriation* of funds or property lawfully in possession of the debtor.[280] Larceny involves the fraudulent and

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276. Bullock v. BankChampaign, N.A., 133 S. Ct. 1754, 1759 (2013) (citations omitted); *see* Cora v. Jahrling (*In re* Jahrling), 816 F.3d 921, 926 (7th Cir. 2016) (applying *Bullock*'s subjective standard to except from discharge a malpractice judgment obtained as a result of debtor's gross deviation in standard of conduct in representing non-English-speaking client by communicating with his client through counsel for the adverse party in the transaction); Whittaker v. Whittaker (*In re* Whittaker), 564 B.R. 115 (Bankr. D. Mass. 2017) (construing *Bullock* and holding that the debtor, who was a trustee of trusts established by his parents for his benefit and the benefit of his siblings, stood in a "fiduciary capacity" to his siblings and that his risky options trading strategy was a gross deviation from the standard of care that he should have observed, while aware of risks involved, thus rising to the level of a fiduciary defalcation).

277. *See* Stoughton Lumber Co. v. Sveum, 787 F.3d 1174 (7th Cir. 2015) (Wisconsin "theft by contractors" statute created trust in hands of prime contractor); Raso v. Fahey (*In re* Fahey), 482 B.R. 678, 689 (B.A.P. 1st Cir. 2012) (ERISA established a technical trust).

278. *See* Breed's Hill Ins. Agency, Inc. v. Fravel (*In re* Fravel), 485 B.R. 1 (Bankr. D. Mass. 2013) (state statute regarding insurance agents created trust *ex malificio*).

279. *See* Reshetar Sys., Inc. v. Thompson (*In re* Thompson), 686 F.3d 940, 945 (8th Cir. 2012) ("A state cannot magically transform ordinary agents, contractors, or sellers into fiduciaries by the simple incantation of the terms 'trust' or 'fiduciary.' Rather, to meet the requirements of § 523(a)(4) a statutory trust must (1) include a definable res and (2) impose 'trust-like' duties."); Arvest Mortg. Co. v. Nail (*In re* Nail), 680 F.3d 1036, 1040 (8th Cir. 2012) (same).

280. It is assumed that Congress intended the common law definition of "embezzlement." Sherman v. Potapov (*In re* Sherman), 603 F.3d 11, 13 (1st Cir. 2010). *But see* Jenkins v. Schmank (*In re* Schmank), 535 B.R. 243 (Bankr. E.D. Tenn. 2015), in which the court stated:

> The Sixth Circuit has explained that: "[f]ederal law defines 'embezzlement' under section 523(a)(4) as 'the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come.' A creditor proves embezzlement by showing that he entrusted his property to the debtor, the debtor appropriated the property for a use other than

wrongful *taking* of property with the intent to convert.[281] For purposes of an exception to discharge for larceny, the intent and actions of a debtor's co-conspirators is sufficient to support nondischargeability.[281.1]

The doctrine of unclean hands may apply to claims under section 523(a)(4). Determining whether the doctrine of unclean hands precludes relief, however, requires balancing the plaintiff's alleged wrongdoing against that of the defendant, and "'weigh[ing] the substance of the right asserted by [the] plaintiff against the transgression which, it is contended, serves to foreclose that right.'"[282]

[C] Willful and Malicious Injury

A claim arising out of a willful and malicious injury is not dischargeable.[283] Both willfulness and malice are required.[284] In

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that for which it was entrusted, and the circumstances indicate fraud."

535 B.R. at 260 (citing Brady v. McAllister (*In re* Brady), 101 F.3d 1165, 1172–73 (6th Cir. 1996), *abrogated on other grounds as explained in* Nat'l Dev. Servs. v. Denbleyker (*In re* Denbleyker), 251 B.R. 891 (Bankr. D. Colo. 2000) (quoting Gribble v. Carlton (*In re* Carlton), 26 B.R. 202, 205 (Bankr. M.D. Tenn. 1982), and Moore v. United States, 160 U.S. 268, 269 (1895)), and Ball v. McDowell (*In re* McDowell), 162 B.R. 136, 140 (Bankr. N.D. Ohio 1993)). The court in *Schmank* continued:

> To demonstrate embezzlement a creditor must prove all three elements: "(1) 'that he entrusted his property to the debtor,' (2) that 'the debtor appropriated the property for a use other than that for which it was entrusted,' and (3) that 'the circumstances indicate fraud.'"

535 B.R. at 260 (citing Cash Am. Fin. Servs., Inc. v. Fox (*In re* Fox), 370 B.R. 104, 115–16 (B.A.P. 6th Cir. 2007), and quoting *In re Brady*, 101 F.3d at 1173).

281. Breed's Hill Ins. Agency, Inc. v. Fravel (*In re* Fravel), 485 B.R. 1, 18 (Bankr. D. Mass. 2013).

281.1. Cowin v. Countrywide Home Loans, Inc. (*In re* Cowin), 864 F.3d 344 (5th Cir. 2017) (citing Deodati v. M.M. Winkler & Assocs. (*In re* M.M. Winkler & Assocs.), 239 F.3d 746 (5th Cir. 2001)).

282. Northbay Wellness Grp., Inc. v. Beyries, 789 F.3d 956, 960 (9th Cir. 2015) (quoting Republic Molding Corp. v. B.W. Photo Utils., 319 F.2d 347, 350 (9th Cir. 1963)) (vacating dismissal of complaint against a Chapter 7 debtor, an attorney, who stole $25,000 from judgment creditor, his client, a California medical marijuana dispensary).

283. 11 U.S.C. § 523(a)(6). A claim for negligent infliction of emotional distress is not within the discharge exception. Hawkins v. Tyree, 483 B.R. 598 (S.D.N.Y. 2012).

284. In two cases, circuit courts have reversed the decisions of bankruptcy and district courts concluding that the debts in question were nondischargeable. In Jett v. Sicroff (*In re* Sicroff), 401 F.3d 1101 (9th Cir.), *cert. denied*, 545 U.S. 1139 (2005), the Ninth Circuit determined that a

Kawaauhau v. Geiger,[285] the U.S. Supreme Court determined the issue of "whether a debt arising from a medical malpractice judgment, attributable to negligent or reckless conduct, falls within this statutory exception."[286] In holding that it does not, the Court relied upon the *Restatement (Second) of Torts*, section 8A, comment a, indicating that a contrary interpretation would render subsections 523(a)(9) and (a)(12) superfluous. In *Geiger*, the Court concluded section 523(a)(6) applies to "acts done with the actual intent to cause injury," but excludes intentional acts that cause injury.[287]

Courts have formulated the standard for willful injury as the commission of "an intentional act the purpose of which is to cause

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libel judgment was non-dischargeable because the published libelous statements were made without just cause or excuse. In Raspanti v. Keaty (*In re* Keaty), 397 F.3d 264 (5th Cir. 2005), the Fifth Circuit, applying the issue preclusion rules of Louisiana, determined that an award of sanctions against an attorney for intentionally pursuing a frivolous lawsuit satisfied the requirements of section 523(a)(6). *See also* Mann Bracken, LLP v. Powers (*In re* Powers), 421 B.R. 326, 332 (Bankr. W.D. Tex. 2009) (discussing, inter alia, Berry v. Vollbracht (*In re* Vollbracht), 276 F. App'x 360, 361–62 (5th Cir. 2007), and *In re* Miller, 156 F.3d 598 (5th Cir. 1998)). In Rutledge v. Rutledge (*In re* Rutledge), 105 F. App'x 455 (4th Cir. 2004), the Fourth Circuit affirmed the district court's reversal of the bankruptcy court refusal to find attorney fees arising out of a custody dispute non-dischargeable. The court concluded that the award of fees was non-dischargeable because of the debtor's conduct in making false charges of sexual abuse.

285. Kawaauhau v. Geiger, 523 U.S. 57 (1998).

286. *Id*. at 59; *see* Petralia v. Jercich (*In re* Jercich), 238 F.3d 1202 (9th Cir.), *cert. denied*, 533 U.S. 930 (2001), interpreting *Geiger* and answering question of the state of mind required to satisfy section 523(a)(6)'s willful requirement in the context of a debt for unpaid wages.

287. *Geiger*, 523 U.S. at 61; *see* McAlister v. Slosberg (*In re* Slosberg), 225 B.R. 9 (Bankr. D. Me. 1998), noting that *Geiger* "has worked significant changes in the law. It overrules decisions holding that the discharge exception's willfulness element could be satisfied without proving that the debtor acted with the intent to cause the injury" and stating that "[t]he requirement that the debtor act with the intent to cause injury necessitates different proof, more demanding proof than many courts previously required, of creditors seeking to establish this element of § 523(a)(6) nondischargeability." 225 B.R. at 18 (footnotes omitted); *see also* Jendusa-Nicolai v. Larsen, 677 F.3d 320 (7th Cir. 2012). A state court judgment for tortious interference with a contract does not establish a willful and malicious injury. Guerra & Moore Ltd. v. Cantu (*In re* Cantu), 389 F. App'x 342 (5th Cir. 2010); Lewis v. Long (*In re* Long), 528 B.R. 655 (Bankr. W.D. Va. 2015) (in case involving criminal conviction of debtor for statutory rape, court held that intent may not be implied for the purposes of Bankruptcy Code section 523(a)(6), based upon court's understanding of *Geiger*).

injury or which is substantially certain to cause injury."[288] Circuit courts are divided about whether the term "substantial certainty" is a subjective standard, requiring a creditor to prove that a debtor actually knew that the act was substantially certain to injure the creditor, or an objective standard, requiring a creditor to show that a debtor's act was substantially certain to cause injury.[289] The Fifth Circuit has adopted a condensed approach, such that "[t]he test for willful and malicious injury under Section 523(a)(6) . . . is condensed into a single inquiry of whether there exists either an objective substantial certainty of harm or a subjective motive to cause harm on the part of the debtor."[290]

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288. Maxfield v. Jennings (*In re* Jennings), 670 F.3d 1329, 1334 (11th Cir. 2012); Hope v. Walker (*In re* Walker), 48 F.3d 1161, 1165 (11th Cir. 1995); *see also* Gerard v. Gerard, 780 F.3d 806, 811 (7th Cir. 2015) ("[w]illfulness requires a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury . . . . [i]t can be found either if the debtor's motive was to inflict the injury, or the debtor's act was substantially certain to result in injury"); First Weber Grp., Inc. v. Horsfall, 738 F.3d 767 (7th Cir. 2013) (same).

289. *Compare In re* Markowitz, 190 F.3d 455, 464 (6th Cir. 1999) ("[W]e now hold that unless 'the actor desires to cause the consequences of his act, or . . . believes that the consequences are substantially certain to result from it,' he has not committed a 'willful and malicious injury' as defined under § 523(a)(6)." (citations omitted), *In re* Thoms, 505 F. App'x 603, 605 (8th Cir. 2013) (stating "[w]e construe the § 523(a)(6) exception narrowly," and holding that "[i]f the debtor knows that the consequences are certain, or substantially certain, to result from his conduct, the debtor is treated as if he had, in fact, desired to produce those consequences") (citations omitted), *In re* Ormsby, 591 F.3d 1199, 1206 (9th Cir. 2010) (requiring creditor to show that "debtor believes that injury is substantially certain to result from his own conduct"), *and In re* Englehart, 229 F.3d 1163 (10th Cir. 2000) (applying the subjective standard), *with In re* Shcolnik, 670 F.3d 624, 630 (5th Cir. 2012) (finding willfulness where creditor showed an "objective substantial certainty of harm") (citations omitted). *See* Margulies v. Hough (*In re* Margulies), 517 B.R. 441 (S.D.N.Y. 2014) (discussing approaches and adopting subjective standard); Trenwick Am. Reinsurance Corp. v. Swasey (*In re* Swasey), 488 B.R, 22, 34–38 (Bankr. D. Mass. 2013) (discussing subjective and objective approaches); *see also* Kane v. Stewart Tighman Fox & Bianchi, P.A. (*In re* Kane), 755 F.3d 1285, 1293 (11th Cir. 2014) (recognizing split but determining that it was unnecessary to resolve the issue).

290. *See* Goaz v. Rolex Watch U.S.A., Inc. (*In re* Goaz), 559 F. App'x 377 (5th Cir. 2014) (citing Williams v. Int'l Bhd. of Elec. Workers Local 520 (*In re* Williams), 337 F.3d 504, 509 (5th Cir. 2003) (internal quotation marks and citations omitted)); *see also* Gerard v. Gerard, 780 F.3d 806, 811 (7th Cir. 2015) ("Willfulness requires a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury . . . . [i]t can be found either if the debtor's motive was to inflict the injury, or the debtor's act was substantially certain to result in injury."); Schmeckpeper v. Lewis (*In re* Lewis), 528 B.R. 885 (Bankr. E.D. Wis. 2015) (debtor did not act with specific intent to injure and there was no substantial certainty that injury

Although *Geiger* defined "willful," it did not illuminate the second modifier of injury, "malicious." Malice requires "a showing that the debtor's wilful, injurious conduct was undertaken without just cause or excuse."[291]

The Eighth Circuit has held that publishers relinquished their right to have a jury determine the amount of damages in an action for willful copyright infringement when they filed claims against the debtor's bankruptcy estate.[292] The court rejected the publishers' attempts to distinguish *Katchen v. Landy*,[293] *Granfinanciera, S.A. v. Nordberg*,[294] and *Langenkamp v. Culp*,[295] because their action was one under section 523(a)(6), rather than one by a trustee to recover a voidable preference.[296] The court also rejected their argument that the decision in *Stern v. Marshall*[297] cast doubt on the continued viability of *Katchen* and *Langenkamp*.[298]

A fraudulent transfer may rise to the level of a willful and malicious injury. For example, the Eleventh Circuit has held that a judgment creditor's property was willfully and maliciously injured when the debtor, who was a defendant in creditor's personal injury action, conspired with another defendant to fraudulently transfer unencumbered property to a third party. Although the creditor did not obtain his

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would occur so that parents of seventeen-year-old shooting victim, who had obtained a wrongful death judgment against the debtor, the shooter, after he was convicted of second-degree reckless homicide, failed to establish the non-dischargeability of the debt under section 523(a)(6)).

291. *See* Roussel v. Clear Sky Props., LLC, 829 F.3d 1043, 1047 (8th Cir. 2016) (no error in applying collateral estoppel to the requirement of malice where the jury instruction was whether the debtor "knew or ought to have known" that his conduct would "naturally and probably result in damages" and then continued acting "in reckless disregard of the consequences); Schmidt v. Nelson (*In re* Nelson), 2016 WL 5746252 (Bankr. D.S.D. Oct. 3, 2016) (same); Caci v. Brink (*In re* Brink), 333 B.R. 560, 567 (Bankr. D. Mass. 2005); *see also In* re Guthrie, 489 B.R. 480 (Bankr. N.D. Ala. 2013) (discussing requirement of malice where debtor was held in contempt by a state court); Liddell v. Peckham (*In re* Peckham), 442 B.R. 62 (Bankr. D. Mass. 2010) (similar); Estate of DiSabato v. DiGiovanni (*In re* DiGiovanni), 446 B.R. 709 (Bankr. E.D. Pa. 2011) (same).

292. Pearson Educ., Inc. v. Almgren, 685 F.3d 691 (8th Cir. 2012).

293. Katchen v. Landy, 382 U.S. 323, 337 (1966).

294. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 57–58 (1989).

295. Langenkamp v. Culp, 498 U.S. 42 (1990).

296. *Almgren*, 685 F.3d at 694–95.

297. Stern v. Marshall, 564 U.S. 462 (2011).

298. *Almgren*, 685 F.3d at 695 (The Eighth Circuit stated that "The Court [in *Stern*] expressly distinguished *Katchen* and *Langenkamp* as cases in which resolution of the ensuing action was "part of the process of allowing or disallowing claims," adding "in this case, a determination of the amount of the damages award is part of the process of allowing or disallowing the publishers' claims for copyright infringement.").

personal injury judgment until after the transfer occurred, he did obtain a judgment on his subsequent fraudulent transfer claim, the debtor was aware of personal injury claim at time of transfer, and there was no showing that the debtor had just cause to effect the transfer.[299]

Application of the willful and malicious standard pertinent to section 523(a)(6) poses difficulties when a plaintiff seeks to use collateral estoppel.[300] In addition, application is particularly difficult when the injuries are financial, and the court whose judgment the plaintiff seeks to enforce has not made specific findings as to the debtor's intent to injure.[301]

Whether contempt sanctions are willful and malicious is another area producing divergent decisions. Some courts have held that violation of a court order or a finding of contempt is per se a willful and malicious injury.[302] Other courts take a different approach, evaluating whether the debt resulting from the violation of a court order or a contempt sanction is dischargeable as a matter of law based upon

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299. Maxfield v. Jennings (*In re* Jennings), 670 F.3d 1329 (11th Cir. 2012); *see also* Kane v. Stewart Tilghman Fox & Bianchi, P.A. (*In re* Kane), 755 F.3d 1285 (11th Cir. 2014).

300. Schrader v. Sangha (*In re* Sangha), 678 F. App'x 561, 562 (9th Cir. Feb. 24, 2017) (relying upon Plyam v. Precision Dev., LLC (*In re* Plyam), 530 B.R. 456 (B.A.P. 9th Cir. 2015), the Ninth Circuit determined that a California state court's punitive damage award, standing alone, did not preclude relitigation of section 523(a)(6)'s "willful" intent requirement); Gerard v. Gerard, 780 F.3d 806 (7th Cir. 2015) (based on special verdict form, state court jury's slander of title findings did not preclusively establish that debtor acted "willfully" within the meaning of 11 U.S.C. § 523(a)(6) because the jury's verdict could have been based on debtor's negligence); Wilmers v. Yeager (*In re* Yeager), 500 B.R. 547, 553–54 (Bankr. S.D. Ohio 2013) (preclusive effect of state law battery conviction could be warranted depending upon standard applied); *see also* Helvetia Asset Recovery, Inc. v. Kahn (*In re* Kahn), 533 B.R. 576 (Bankr. W.D. Tex. 2015) (state court's finding in entering sanctions award against Chapter 7 debtor for commencing malicious suit to cloud title to lots owned by a corporation that had terminated him for purpose of interfering with and harming its business and attempting to extort money from it, conclusively established that debtor had filed suit both willfully and maliciously); Link v. Mauz (*In re* Mauz), 532 B.R. 589 (Bankr. M.D. Pa. 2015) (applying collateral estoppel to judgment against debtor where debtor engaged in willful and malicious conduct by bringing numerous spurious civil and criminal complaints against the plaintiff).

301. Trenwick Am. Reinsurance Corp. v. Swasey (*In re* Swasey), 488 B.R, 22, 41 (Bankr. D. Mass. 2013).

302. Westbury Vill. Ass'n v. Zweifel (*In re* Zweifel), 555 B.R. 659, 667 (Bankr. S.D. Ohio 2016) (citing PRP Wine Int'l, Inc. v. Allison (*In re* Allison), 176 B.R. 60 (Bankr. S.D. Fla. 1994), and Buffalo Gyn Womenservices, Inc. v. Behn (*In re* Behn), 242 B.R. 229 (Bankr. W.D.N.Y. 1999)).

whether the conduct leading to the violation or sanction gave rise to a willful and malicious injury.[303]

Courts are in agreement, however, that proof of an intentional tort is not required to except a debt from discharge under section 523(a)(6).[304] They reason that (1) the statute contains no express language requiring a showing of tortious conduct, and (2) the Supreme Court has not set forth such a requirement.[305]

§ 9:8.5 Non-Dischargeable Debts Other Than Under Section 523(c)

With some minor exceptions, the remaining section 523 debts are debts for which the Code provides special treatment for public policy reasons. Generally, the issue is one of proper classification, and not proof of affirmative or intentional wrongdoing. The non-dischargeability of these debts may be self-operating, and a complaint is filed only if a party requests a determination by the court. Hence, the deadline for filing complaints applicable to the section 523(c) debts does not apply, and a determination of dischargeability may be made at any time.[306]

[A] Gap Claims

Section 523(a)(1)(A) excepts from discharge taxes and customs duties specified in section 507(a)(3), which section grants priority to unsecured claims allowed under section 502(f). The last cited section deals with so-called gap claims, claims arising in the ordinary course by a debtor in the period between the filing of an involuntary petition and the entry of the order for relief.[307]

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303. *Zweifel*, 555 B.R. at 667 (citing Suarez v. Barrett (*In re* Suarez), 400 B.R. 732, 737 (B.A.P. 9th Cir. 2009), *aff'd*, 529 F. App'x 832 (9th Cir. 2013); Field v. Hughes-Birch (*In re* Hughes-Birch), 499 B.R. 134, 150 (Bankr. D. Mass. 2013); Liddell v. Peckham (*In re* Peckham), 442 B.R. 62, 80 (Bankr. D. Mass. 2010). The Court in *Zweifel* adopted the approach taken by the Massachusetts bankruptcy court stating "[t]he Court finds this approach persuasive and more consistent with the philosophy that exceptions to discharge are to be narrowly construed." 555 B.R. at 667.

304. Monson v. Galaz (*In re* Monson), 661 F. App'x 675, 682–83 (11th Cir. 2016); Williams v. Int'l Bhd. of Elec. Workers Local 520 (*In re* Williams), 337 F.3d 504, 510 (5th Cir. 2003) ("the dischargeability of contractual debts under Section 523(a)(6) depends upon the knowledge and intent of the debtor at the time of the breach, rather than whether conduct is classified as a tort").

305. *Monson*, 661 F. App'x at 683. In *Monson*, the Eleventh Circuit upheld the determination of the bankruptcy court that the debtor's improper disposition of collateral was willful and malicious even though the creditor's lien was unperfected.

306. FED. R. BANKR. P. 4007(b).

307. 11 U.S.C. §§ 523(a)(1)(A), 507(a)(3).

[B] Eighth Priority and Other Taxes

Section 523(a)(1)(A) also excepts from discharge taxes specified in section 507(a)(8). That convoluted provision covers seven different types of taxes. Additionally, applicable periods are suspended, and, hence, extended, by periods during which the taxing authority is prohibited from collection activities.[308] The non-dischargeability of the underlying taxes extends to penalties related to the tax claim.[309]

[B][1] Three-Year Taxes

Income and gross receipt taxes for pre-petition periods for which the return was due (including any extensions) within three years before the filing of the petition are non-dischargeable.[310] The time that the return was due controls. The time can be tolled. The unnumbered last paragraph, found after section 523(a)(19), commonly described as "§ 523(a)(*)," has led to a substantial conflict in the cases as to whether a late-filed return is a "return" for purposes of section 523(a)'s requirement that it conform to "applicable nonbankruptcy law (including applicable filing requirements)." The circuit courts of appeals are divided as to whether late-filed returns constitute "returns" under 11 U.S.C. § 523(a)(1)(B). The Eighth Circuit has held that a duly filed return, even if late, constitutes a return as long as it satisfies an objective

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308. *Id*. § 507(a)(8); *see* Young v. United States, 535 U.S. 43, 47–49 (2002); *In re* Redmond, 399 B.R. 628 (Bankr. N.D. Ind. 2008) (debt owed to credit card bank for charge made by debtor on credit card to pay property tax was non-dischargeable); *see also* Rizzo v. State of Michigan (*In re* Rizzo), 741 F.3d 703 (6th Cir. 2014) (debtor's personal liability for the unpaid single business tax (SBT) of a defunct company of which the debtor was formerly an officer was a nondischargeable excise tax under section 508(a)(8)(E)).

309. 11 U.S.C. § 507(a)(8)(G). It has been held that the assessment imposed for early withdrawal from a retirement plan is not a penalty entitled to priority. *In re* Cespedes, 393 B.R. 403 (Bankr. E.D.N.C. 2008).

310. 11 U.S.C. § 507(a)(8)(A)(i). The period cannot be truncated by filing a return pre-petition that is not due to be filed until later. Delgado v. Ramos (*In re* Delgado), 360 B.R. 406 (B.A.P. 1st Cir. 2006). "Year" means a calendar year. Elkins v. IRS (*In re* Elkins), 369 B.R. 741 (Bankr. S.D. Ga. 2007); *see* Cal. Franchise Tax Bd. v. Jones (*In re* Jones), 657 F.3d 921 (9th Cir. 2011), holding that, under the plain language of section 1327(b), the property of the estate revests in the debtor upon plan confirmation, unless the debtor elects otherwise in the plan. Because the debtor did not elect otherwise, she once again became the owner of her property at confirmation, except as to those sums specifically dedicated to fulfillment of the plan. Thus, the Franchise Tax Board was not prevented from collecting the post-petition tax debt from property that revested in Jones upon plan confirmation. *See* 11 U.S.C. § 362(a)(1). Since the tax debt arose after plan confirmation, the tax board could have collected on the debt during the three-year lookback period, and as a result the limitations period was not statutorily suspended.

standard.[311] The U.S. Courts of Appeals for the Eleventh and Ninth Circuits require application of a subjective standard looking as far back as the due date of the return.[312] The U.S. Courts of Appeals for the First, Tenth, and Fifth Circuits follow the "one day late" standard, which means that a return filed a single day after the original or extended due date can never constitute a tax return for bankruptcy purposes.[313] The Fourth, Sixth, and Seventh Circuits, in pre-BAPCPA decisions, have held that returns filed after an IRS tax assessment serve no useful purpose.[314] In *Giacchi*,[315] the Third Circuit addressed the issues posed by the so-called one-day-late rule, where the First, Fifth and Tenth

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311. *See* Colson v. United States (*In re* Colsen), 446 F.3d 836 (8th Cir. 2006) (in a pre-BAPCPA case issued post-BAPCPA) (finding that the "honest and reasonable attempt to satisfy the requirements of the tax law" prong should be determined from the face of the Form 1040 itself, not from the filer's delinquencies or the reasons for them; a filer's subjective intent is irrelevant as long as the tax return was prepared in good faith and evinces his or her intent to file an honest and reasonable return, an approach following Beard v. Comm'r, 82 T.C. 766 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986)); *see also* Maitland v. N.J. Div. of Taxation (*In re* Maitland), 531 B.R. 516, 520–22 (Bankr. D.N.J. 2015) (setting out five reasons the court rejected the one-day-late rule).

312. Smith v. United States (*In re* Smith), 828 F.3d 1094, 1096 (9th Cir. 2016) (applying the four-factor test articulated in United States v. Hatton (*In re* Hatton), 220 F.3d 1057, 1060–61 (9th Cir. 2000)); *In re* Justice, 817 F.3d 738, 740–41 (11th Cir. 2016) (same); United States v. Martin (*In re* Martin), 542 B.R. 479 (B.A.P. 9th Cir. 2015) (in order for untimely tax return to qualify as "return" for non-dischargeability purposes, court should use the version of the *Beard* test set forth in *Hatton*, 220 F.3d at 1060–61); *see* Van Arsdale v. Internal Revenue Serv. (*In re* Van Arsdale), 2017 WL 2267021 (Bankr. N.D. Ca. May 18, 2017) (applying four-factor *Hatton* test); Biggers v. IRS, 557 B.R. 589, 597 (M.D. Tenn. 2016) (the determination of the fourth prong of *Beard* is a subjective test that allows for circumstances in which there can be an honest and reasonable attempt to comply with the tax law even after assessment by the IRS and even when untimely forms do not report additional tax liability).

313. Fahey v. Mass. Dep't of Revenue (*In re* Fahey), 779 F.3d 1 (1st Cir. 2015); Mallo v. IRS, 774 F.3d 1313 (10th Cir. 2014); McCoy v. Miss. State Tax Comm'n, 666 F.3d 924 (5th Cir. 2012).

314. *See* Moroney v. United States, 352 F.3d 902 (4th Cir. 2003); United States v. Hindenlang, 164 F.3d 1029 (6th Cir. 1999); *In re* Payne, 431 F.3d 1055 (7th Cir. 2005). All three of these are pre-BAPCPA cases holding that a late filed return can still be a return up until the time the IRS makes an assessment and commences collection efforts. After assessment, a return filed by the debtor serves no useful purpose and is thus not a reasonable attempt to comply with the tax laws. *See also* Maryland v. Ciotti (*In re* Ciotti), 638 F.3d 276, 280 (4th Cir. 2011); Earls v. United States (*In re* Earls), 549 B.R. 871, 878 (Bankr. S.D. Ohio 2016) (following *Hindenlang*); Giacchi v. United States (*In re* Giacchi), 553 B.R. 36 (E.D. Pa. 2015) (following *Moroney*), *aff'd*, 856 F.3d 244 (3d Cir. 2017) (same).

315. Giacchi v. United States (*In re* Giacchi), 856 F.3d 244 (3d Cir. 2017).

Circuits have held that a tax debt never can be discharged under section 523(a)(1)(B)(i) if the underlying tax return was filed even one day late. Noting that the Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits employ the four-part *Beard* test,[315.1] the Third Circuit joined those courts in adopting the *Beard* test.[315.2] Nevertheless, it stated that "[o]nce the IRS assesses the taxpayer's liability, a subsequent filing can no longer serve the tax return's purpose, and thus could not be an honest and reasonable attempt to comply with the tax law."[315.3]

[B][2] 240-Day Taxes

Income and gross receipt taxes assessed within 240 days before the petition date are non-dischargeable.[316] In this case, it is the date of assessment, rather than the date the return is due, that controls. The time can be tolled by the periods when an offer in compromise is pending (plus thirty days)[317] or the time during which a stay is in effect (plus ninety days).[318]

315.1. *See* Beard v. Comm'r, 82 T.C. 766, 777 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986).

315.2. *Giacchi*, 856 F.3d at 247.

315.3. *Id*. In *Giacchi*, the debtor had not filed three years' worth of tax returns until after the IRS made assessments. The bankruptcy court held that the tax debt was not dischargeable and was upheld in district court. The Third Circuit rejected the debtor's argument that the late-filed returns qualified as "returns," stating:

> Forms filed after their due dates and after an IRS assessment rarely, if ever, qualify as an honest or reasonable attempt to satisfy the tax law. This is because the purpose of a tax return is for the taxpayer to provide information to the government regarding the amount of tax due. If a taxpayer does not file a return, the IRS is required to independently assess the taxpayer's liability, as it did when Giacchi failed to timely file his 2000, 2001, or 2002 tax returns. Once the IRS assesses the taxpayer's liability, a subsequent filing can no longer serve the tax return's purpose, and thus could not be an honest and reasonable attempt to comply with the tax law. Here, there is no dispute that Giacchi failed to file timely returns, and that, as a result of Giacchi's failure, the IRS had to estimate his taxes without his assistance.

Id. at 249.

316. 11 U.S.C. § 507(a)(8)(A)(ii); *see In re* Bisch, 437 B.R. 359, 361 (Bankr. E.D. Mo. 2010).

317. 11 U.S.C. § 507(a)(8)(A)(ii)(I).

318. *Id*. § 507(a)(8)(A)(ii)(II); United States v. Montgomery, 475 B.R. 742, 747 (D. Kan. 2012) (the tolling event described, which triggers suspension, is not each "prior case"; the tolling event is the time during which enforcement of the claim is stayed plus ninety days).

[B][3] Unassessed but Assessable Taxes

When a tax is not assessed pre-petition, but, by law or agreement, it may be assessed post-petition, it is not dischargeable.[319] This provision does not apply to unfiled or late filed returns or to fraudulent returns, both of which are excepted from discharge by other provisions of the Code discussed below.[320]

[B][4] Property Taxes

Property taxes incurred before filing and last payable without penalty within a year of filing are non-dischargeable.[321] Of course, under other law, these taxes may be a lien on the property taxed.

[B][5] Trust Fund Taxes

Taxes required to be collected or withheld for which the debtor is liable in any capacity are non-dischargeable.[322] These taxes include taxes for which the debtor may be liable as a responsible officer under tax law. There are no time limits on this classification.

[B][6] Employee Benefit Plan Taxes

Taxes on workers' compensation and related benefit payments are excepted from discharge.[323]

[B][7] Excise Taxes and Customs Duties

Excise taxes on pre-filing transactions when any required return is last due within three years of the bankruptcy filing, or, excise taxes, if a return is not required, with respect to a transaction or event occurring during the three years immediately before the filing of the petition, are non-dischargeable.[324] Certain customs duties are

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319. 11 U.S.C. § 507(a)(8)(A)(iii); Cal. State Bd. of Equalization v. Ilko (*In re* Ilko), 2009 WL 7751427 (B.A.P. 9th Cir. Oct. 15, 2009), *aff'd sub nom.* Ilko v. Cal. State Bd. of Equalization (*In re* Ilko), 651 F.3d 1049 (9th Cir. 2011). Taxes are assessed when the assessment becomes final. *In re* Proxim Corp., 369 B.R. 812 (Bankr. D. Del. 2007).
320. *See* 11 U.S.C. § 523(a)(1)(B), (C).
321. *Id.* § 507(a)(8)(B).
322. *Id.* § 507(a)(8)(C); *see In re* Calabrese, 689 F.3d 312 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 867 (2013) (retail sales taxes collected by debtor from third parties were "trust fund" taxes, rather than "excise" taxes, and were therefore non-dischargeable under section 523(a)(1)).
323. *Id.* § 507(a)(8)(D).
324. *Id.* § 507(a)(8)(E). In Carpenter v. Mont. Dep't of Labor & Indus. (*In re* Carpenter), 540 B.R. 691 (B.A.P. 9th Cir. 2015), the court observed:

> The battle over § 507(a)(8) priority tax status matters for two main reasons in Chapter 11 cases. First, a confirmable plan must provide for full payment of priority taxes within five years after the order for

non-dischargeable, but the provisions are complex and beyond the scope of this treatise.[325]

[B][8] Unfiled and Late-Filed Returns

In addition to the priority taxes described above, taxes or customs duties for which a required return or equivalent report or notice is not filed or given, or which is filed late and within two years of the bankruptcy filing, are non-dischargeable.[326]

[B][9] Tax Fraud

Also made non-dischargeable by section 523 are taxes arising when the debtor has made a fraudulent return or willfully attempted to evade or defeat the tax.[327] There is disagreement in the cases as to whether

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> relief (unless the taxing entity agrees otherwise). 11 U.S.C. § 1129 (a)(9)(C). Second, as to the individual Chapter 11 debtors, unpaid § 507(a)(8) priority taxes are excepted from discharge. 11 U.S.C. § 523(a)(1)(A).

Id. at 694. The court held that a claim for unpaid unemployment insurance taxes assessed against the debtors as officers of the corporate employer was in nature of an "excise tax" on a transaction occurring within three years prior to petition date, for which state was entitled to eighth-level priority claim. The assessment imposed for early withdrawal from a retirement plan is not an excise tax entitled to priority. *In re* Cespedes, 393 B.R. 403 (Bankr. E.D.N.C. 2008).

325. *See* 11 U.S.C. § 507(a)(8)(F).

326. *Id*. § 523(a)(1)(B); *see* McCoy v. Miss. State Tax Comm'n (*In re* McCoy), 666 F.3d 924 (5th Cir. 2012) (defining "return"); *see also* Pansier v. IRS (*In re* Pansier), 451 F. App'x 593 (7th Cir. 2011); Wogoman v. IRS (*In re* Wogoman), 475 B.R. 239 (B.A.P. 10th Cir. 2012) (Forms 1040 filed seventeen months after assessment of taxes not a return satisfying statutory requirements); Casano v. IRS (*In re* Casano), 473 B.R. 504 (Bankr. E.D.N.Y. 2012) (same); Green v. United States (*In re* Green), 472 B.R. 347 (Bankr. W.D. Tex. 2012) (discussing hanging paragraph in section 523(a)(*)). In *In re* Putnam, 503 B.R. 656 (Bankr. E.D.N.C. 2014), the court held that the two-year "lookback" period for non-dischargeability of tax debts under section 523(a)(1)(B)(ii) with respect to which an untimely return was filed less than two years prior to debtor's bankruptcy filing was in nature of statute of limitations, which could be equitably tolled.

327. 11 U.S.C. § 523(a)(1)(C); *see* United States v. Mitchell (*In re* Mitchell), 633 F.3d 1319, 1327 (11th Cir. 2011) (defendant must show that plaintiff "engaged in (1) evasive conduct with (2) a mental state consistent with willfulness"); United States v. Coney, 689 F.3d 365 (5th Cir. 2012). In *Coney*, the Fifth Circuit stated:

> By using the unqualified phrase "in any manner" to modify a debtor's "willful attempts" to evade or defeat his taxes, the plain language of the statute suggests that "willful attempts" under § 523 (a)(1)(C) include attempts to evade or defeat the payment or collection of a tax. . . . The plain language of the statute offers no reason

mere non-payment will trigger this section.[328]

[C] Unlisted or Unscheduled Debts

Sometimes, either intentionally or inadvertently, the debtor will fail to list a creditor or to schedule a debt.[329] As a result, the creditor may be unaware of the bankruptcy and miss the deadline for filing a proof of claim.[330] The debt owed to a creditor who had neither notice nor knowledge of the bankruptcy in time to file a proof of claim or to file a

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to conclude that "willful attempts" only refer to attempts to evade the assessment of tax, but not the collection or payment thereof.

Id. at 372. It added: "To *satisfy* § 523(a)(1)(C)'s mental state requirement, the Government had to establish that [the debtor] (1) had a duty to pay taxes under the law, (2) knew he had that duty, and (3) voluntarily and intentionally violated that duty." *Id*. at 374; *see also* Looft v. United States (*In re* Looft), 533 B.R. 910, 921 (Bankr. N.D. Ga. 2015) ("To establish the non-dischargeability of the tax liabilities at issue, defendant must prove evasive conduct and a willful mental state. As to the conduct element, defendant showed that plaintiff failed to pay taxes while maintaining an affluent lifestyle. When considered in the context of the totality of the circumstances, these facts are insufficient to establish evasion. As a result, defendant has failed to prove an element necessary to its claim. As to a willful mental state, plaintiff was aware of the tax liability and of his duty to pay it. However, his failure to pay the taxes in full was based on a reasonable, if mistaken, belief by plaintiff that he was improperly being held liable for the misconduct of others. To the extent the loss allocation plan enriched FERA rather than plaintiff, defendant has failed to prove the second element of its claim. Accordingly, plaintiff's tax liabilities for 1993 to 1998 are dischargeable."); Stephens v. IRS (*In re* Stephens), 547 B.R. 807 (Bankr. W.D. Ark. 2016); Rossman v. United States (*In re* Rossman), 487 B.R. 18 (Bankr. D. Mass. 2012).

328. *See* Steinkrauss v. United States (*In re* Steinkrauss), 313 B.R. 87 (Bankr. D. Mass. 2004). Several courts of appeal have addressed the issue. *See, e.g.*, Gardner v. United States (*In re* Gardner), 360 F.3d 551 (6th Cir. 2004); *In re* Fretz, 244 F.3d 1323 (11th Cir. 2001); Griffith v. United States (*In re* Griffith), 206 F.3d 1389 (11th Cir.), *cert. denied*, 531 U.S. 826 (2000); Tudisco v. United States (*In re* Tudisco), 183 F.3d 133 (2d Cir. 1999); United States v. Fegeley (*In re* Fegeley), 118 F.3d 979 (3d Cir. 1997); *In re* Birkenstock, 87 F.3d 947 (7th Cir. 1996); Dalton v. IRS, 77 F.3d 1297 (10th Cir. 1996); Bruner v. United States (*In re* Bruner), 55 F.3d 195 (5th Cir. 1995); *In re* Haas, 48 F.3d 1153 (11th Cir. 1995); Toti v. United States (*In re* Toti), 24 F.3d 806 (6th Cir.), *cert. denied*, 513 U.S. 987 (1994).

329. *See In re* Mooney, 532 B.R. 313, 324 (Bankr. D. Idaho 2015) (although the debtor did not schedule ex-spouse as a creditor on schedules D, E, or F but, instead, listed her as a co-debtor on schedule H, court rejected claim that ex-spouse was an unscheduled creditor with a claim excepted from discharge under section 523(a)(3)(A), which applies in Chapter 13 by virtue of section 1328(a)(2)).

330. *See* FED. R. BANKR. P. 3002.

complaint for determination of dischargeability of the debt under section 523 will not be discharged.[331]

In broad terms, debts provided for by a Chapter 12 or 13 plan or that are disallowed under section 502 are discharged.[332] Similarly, all debts in a Chapter 11 case that arise before the date of confirmation are discharged, except as provided by the plan[333] and by section 1141(d)(3). Suppose, however, that there is a pre-petition debt, not provided for by the plan and the debtor has failed to give notice of the bankruptcy to the creditor. It would appear that under Bankruptcy Rule 3002(a), a claim could be deemed disallowed for failure to file a proof of claim, even if the creditor had no notice of the bankruptcy. As courts have pointed out, this language would discharge a debt even if the failure to file a proof of claim (leading to omission from the plan) was due to the creditor's lack of notice resulting from the debtor's failure to list the creditor and schedule the debt. Courts have consistently recognized the constitutional problems in discharging a debt if the creditor had no notice of the need to file a proof of claim. Hence, courts have held these provisions to be unconstitutional to the extent they result in the discharge of the debt of a creditor who is without notice or knowledge of the bankruptcy and the need to file a proof of claim.[334]

Special problems arise with respect to the discharge of debts in no-asset cases. Courts have held that in Chapter 7 no-asset cases, section 523(a)(3)(A) does not apply because no bar date is set for filing claims. Creditors are not deprived of anything by the inability to file a timely claim because claims need not be filed.[335]

Under section 523(a)(3)(B), a debt that is not dischargeable under section 523(a)(2), (4), and (6) will not be discharged if the omitted

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331. 11 U.S.C. § 523(a)(3). As to the efficacy of notice to a creditor, see 11 U.S.C. § 342(c)(1), 342(g)(1).

332. *Id*. §§ 1228, 1328.

333. *Id*. § 1141(d)(1), (3); *see* Dold v. Rainbows United, Inc. (*In re* Rainbows United, Inc.), 547 B.R. 430, 439 (Bankr. D. Kan. 2016) (holding that plaintiff's contingent claim for indemnity against her section 6672 "responsible person" tax penalty under the Internal Revenue Code arose before confirmation, the debtor's debt to her was discharged upon confirmation of the debtor's plan of reorganization under section 1141(d)(1), and the discharge injunction precludes the plaintiff from pursuing the debt against the debtor section 524(a)(2)).

334. *See In re* Hamilton, 179 B.R. 749, 753 (Bankr. S.D. Ga. 1995); Dilg v. Greenburgh (*In re* Greenburgh), 151 B.R. 709, 716 (Bankr. E.D. Pa. 1993).

335. McMahon v. Harmon (*In re* Harmon), 213 B.R. 805, 808 (Bankr. D. Md. 1997). *But see* Francis v. Nat'l Revenue Serv., Inc. (*In re* Francis), 426 B.R. 398 (Bankr. S.D. Fla. 2010) (mere fact that debtor's Chapter 7 case was "no-asset" case, in which no deadline for filing proofs of claim had been fixed, did not necessarily mean that his debt to unscheduled creditor that he reopened case to add was discharged).

creditor was deprived of the opportunity to file a claim and the opportunity to timely file a complaint to determine dischargeability of the debt, unless the creditor had notice or actual knowledge of the case in time to timely file a complaint.[336] A separate motion to reopen is not necessary when a creditor commences an action under section 523(a)(3)(B).[337]

Courts are split as to whether debtors should be permitted to reopen Chapter 7 no-asset cases in order to afford relief to debtors.[338] Some courts hold that reopening the case would afford no relief to the debtor as reopening of the case would be meaningless.[339] Other courts view the reopening more favorably, finding that reopening and amendment of the schedules ensures proper notice to creditors if dividends become possible.[340]

[D] Domestic Support Obligations and Other Divorce-Related Claims

Prior to BAPCPA, there was massive litigation concerning the issue of whether a particular obligation arising out of a marital dissolution was alimony or support, and hence non-dischargeable under former section 523(a)(5), or a property settlement, which might or might not be dischargeable under former section 523(a)(15). The situation has been substantially simplified by the revised statute. A new concept, the "domestic support obligation" (called a "DSO" in bankruptcy jargon), was introduced to replace the language of former section 523(a)(5).

If the obligation does not fall within the scope of a DSO, it will still be non-dischargeable if it is owed to a spouse, former spouse, or child of the debtor and arose out of the marital dissolution.[341] The intent of

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336. Tidwell v. Smith (*In re* Smith), 582 F.3d 767 (7th Cir. 2009). Laches may be asserted in defense of long-delayed non-dischargeability actions. Beaty v. Selinger (*In re* Beaty), 306 F.3d 914 (9th Cir. 2002). *But see* Hathorn v. Petty (*In re* Petty), 491 B.R. 554 (B.A.P. 8th Cir. 2013). *See also In re* Jenkins, 434 B.R. 604 (Bankr. D. Colo. 2010). There is a split of authority as to whether the omission of a reference to section 523(a)(15) in this section was a technical error that should be corrected by inserting that reference. *See* Anderson v. Richards (*In re* Anderson), 2009 WL 4840871, at *8 (Bankr. D. Mass. Dec. 10, 2009), and cases cited.

337. *See* Goldstein v. Diamond (*In re* Diamond), 509 B.R. 219, 221–22 (B.A.P. 8th Cir. 2014); *see also* Staffer v. Predovich (*In re* Staffer), 306 F.3d 967 (9th Cir. 2002).

338. *See* Colonial Sur. Co. v. Weizman, 564 F.3d 526 (1st Cir. 2009) (discussing cases construing section 523(a)(3) not to apply to so-called no-asset bankruptcies).

339. *See In re* Thibodeau, 136 B.R. 7, 10 (Bankr. D. Mass. 1992).

340. *See* McMahon v. Harmon (*In re* Harmon), 213 B.R. 805, 807 n.2 (Bankr. D. Md. 1997) (collecting cases).

341. 11 U.S.C. § 523(a)(15); Jacobs v. Jaeger-Jacobs (*In* re Jaeger-Jacobs), 490 B.R. 352 (Bankr. E.D. Wis. 2013). Note that the first priority accorded to

the parties is crucial for determination of dischargeability under section 523(a)(5).[342] In determining dischargeability, all evidence, direct or circumstantial, is relevant to the parties' subjective intent.[343] The following factors are informative of the decision:

(1) the language of the divorce agreement;

(2) the relative financial positions of the parties at the time of the agreement;

(3) the amount of property division;

(4) whether the obligation terminates on the death or remarriage of the beneficiary;

(5) the number and frequency of payments;

(6) whether the agreement includes a waiver of support rights;

(7) whether the obligation can be modified or enforced in state court; and

(8) whether the obligation is treated as support for tax purposes.[344]

DSO obligations under section 507(a)(1)(A) does not apply to debts that are non-dischargeable under section 523(a)(15). *See* Floody v. Kearney (*In re* Kearney), 433 B.R. 640 (Bankr. S.D. Tex. 2010) (applying collateral estoppel to a finding of contempt in a divorce action and determining debt was non-dischargeable under section 523(a)(15)); *see also* Berube v. Berube (*In re* Berube), 533 B.R. 352 (Bankr. D. Me. 2015) (debtor's divorce obligations to pay and to indemnify and hold wife harmless from certain credit cards and student loans were property and debt allocations rather than in the nature of "domestic support obligation," of kind excepted from discharge); Dittenber v. Brown (*In re* Brown), 488 B.R. 810 (Bankr. S.D. Ga. 2013) (similar).

342. Pylant v. Pylant (*In re* Pylant), 467 B.R. 246, 251 (Bankr. M.D. Ga. 2012) (citing Cummings v. Cummings, 244 F.3d 1263, 1266 (11th Cir. 2001)).

343. *Pylant*, 467 B.R. at 251; courts have held that because a determination under section 523(a)(5) is a matter of federal law, the parol evidence rule is inapplicable. *See* Edwards v. Colin (*In re* Colin), 546 B.R. 455, 461 (Bankr. M.D. Ala. 2016) (citing, inter alia, Brody v. Brody (*In re* Brody), 3 F.3d 35, 38–39 (2d Cir. 1993), and Tsanos v. Bell (*In re* Bell), 47 B.R. 284, 287 (Bankr. E.D.N.Y. 1985)).

344. *Pylant*, 467 B.R. at 252 (citing Benson v. Benson (*In re* Benson), 441 F. App'x 650 (11th Cir. 2011), and McCollum v. McCollum (*In re* McCollum), 415 B.R. 625 (Bankr. M.D. Ga. 2009)). In *Pylant*, the court held that debtor's obligation to provide his former spouse with a replacement home was in the nature of support. *See also In re* Angelo, 480 B.R. 70, 86 (Bankr. D. Mass. 2012). It has been held that an overpayment of a child support obligation to the debtor is a DSO. Kerr v. Meadors (*In re* Knott), 482 B.R. 852 (Bankr. N.D. Ga. 2012).

When the debt is not payable directly to the spouse or child, the courts have struggled with the applicability of section 523(a)(5). Courts, however, construe domestic support obligations broadly to effectuate a policy to prevent debtors from escaping familial obligations.[345] For example, debts payable to the former spouse's attorneys have been held non-dischargeable under this provision.[346] Fees payable to a guardian ad litem for children of divorcing parents have been held to be non-dischargeable.[347] A debtor's agreement to pay preexisting

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345. *See In re* Wyly, 525 B.R. 644, 652 (Bankr. N.D. Tex. 2015) (citing Milligan v. Evert (*In re* Evert), 342 F.3d 358, 367 (5th Cir. 2003)). In *Wyly*, the court held that a debtor's duties as an investment advisor were in the nature of support. *But see* Rivera v. Orange Cty. Probation Dep't (*In re* Rivera), 832 F.3d 1103 (9th Cir. 2016) (costs of incarceration of a delinquent minor do not qualify as a "domestic support obligation" that would render them non-dischargeable under section 523(a)(5)).

346. Holliday v. Kline (*In re* Kline), 65 F.3d 749 (8th Cir. 1995); Marshall v. Marshall (*In re* Marshall), 489 B.R. 630 (Bankr. S.D. Ga. 2013); *In re* Johnson, 445 B.R. 50 (Bankr. D. Mass. 2011); Tarone v. Tarone (*In re* Tarone), 434 B.R. 41 (Bankr. E.D.N.Y. 2010); Coleman v. Blackwell (*In re* Blackwell), 432 B.R. 856 (Bankr. M.D. Fla. 2010); Aldrich v. Papi (*In re* Papi), 427 B.R. 457 (Bankr. N.D. Ill. 2010) (citing cases); Howard v. Sullivan (*In re* Sullivan), 423 B.R. 881 (Bankr. E.D. Mo. 2010); *In re* Andrews, 434 B.R. 541 (Bankr. W.D. Ark. 2010); *In re* Prensky, 416 B.R. 406 (Bankr. D.N.J. 2009), *aff'd*, Prensky v. Clair Greifer LLP, 2010 WL 2674039 (D.N.J. June 30, 2010) (specifically holding that the attorneys had standing to bring the dischargeability adversary proceeding). *Contra* Loe, Warren, Rosenfield, Katcher, Hibbs & Windsor, PC v. Brooks (*In re* Brooks), 371 B.R. 761 (Bankr. N.D. Tex. 2007); *see also* Zimmerman v. Hying (*In re* Hying), 477 B.R. 731 (Bankr. E.D. Wis. 2012) (fee payable directly to attorney for representing spouse in contempt proceeding was a DSO); *In re* Tepera, 2012 WL 439257 (Bankr. S.D. Tex. Feb. 9, 2012) (following majority of courts that permit fees awarded to spouse to be paid to attorney and citing cases on both sides of issue). This does not apply to the fees of the debtor's own attorney. Berse v. Langman (*In re* Langman), 465 B.R. 395 (Bankr. D.N.J. 2012).

347. Wischmeyer v. Bobinski (*In re* Bobinski), 517 B.R. 900 (Bankr. N.D. Ind. 2014); Rackley v. Rackley (*In re* Rackley), 502 B.R. 615, 627–29 (Bankr. N.D. Ga. 2013) (citing pre- and post-BAPCPA cases); Kassicieh v. Battisti (*In re* Kassicieh), 467 B.R. 445 (Bankr. S.D. Ohio), *aff'd*, 482 B.R. 190 (B.A.P. 6th Cir. 2012); *In re* Anderson, 463 B.R. 871 (Bankr. N.D. Ill. 2011); *In re* Stevens, 436 B.R. 107 (Bankr. W.D. Wis. 2010) (guardian ad litem, mediation, and child development specialist fees); Epstein v. Defilippi (*In re* Defilippi), 430 B.R. 1 (Bankr. D. Me. 2010) (grandchild); Levin v. Greco, 415 B.R. 663, 665 (N.D. Ill. 2009); Kelly v. Burnes (*In re* Burnes), 405 B.R. 654, 657 (Bankr. W.D. Mo. 2009). A debt that debtors owed, not to a spouse, former spouse, or child of debtors, but to their former daughter-in-law, on attorney fee award entered by state court in action that debtors had brought in unsuccessful attempt to establish visitation rights with their former daughter-in-law's child, *i.e.*, the debtors' grandchild, was not in nature of a non-dischargeable "domestic support obligation." Tucker v. Oliver, 423 B.R. 378 (W.D. Okla. 2010). Fees payable to the

marital debt owed to third party that was embodied in separation agreement that omitted an express hold harmless or indemnification agreement was a debt "to a former spouse" that fell within the discharge exception for nonsupport divorce debt.[348] The Tenth Circuit has held that an overpayment of spousal support is non-dischargeable under section 523(a)(15).[349] Mortgage payments that may have been labeled as a property settlement in an agreement or decree may still constitute maintenance or support under federal bankruptcy law.[350] A state court's designation of divorce-related award as something other than alimony, support, or maintenance does not control a bankruptcy court's finding as to its true function.[351]

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debtor's own attorney do not qualify for the benefits of this section. Eric D. Fein, PC v. Young (*In re* Young), 425 B.R. 811 (Bankr. E.D. Tex. 2010). Punitive daily late fees intended to enforce a debtor's compliance with a separate support obligation were not a DSO. Smith v. Pritchett (*In re* Smith), 586 F.3d 69 (1st Cir. 2009). Privately negotiated amounts do not satisfy the requirements of the statute. Ziino v. Baker, 613 F.3d 1326 (11th Cir. 2010); *see also In re* Cordova, 439 B.R. 756 (Bankr. D. Colo. 2010) (holding that non-governmental third party, to which a child and family investigator appointed in debtor's marriage dissolution proceeding had voluntarily assigned claim for purpose of collection, did not have a non-dischargeable DSO).

348. Francis v. Wallace (*In re* Francis), 505 B.R. 914, 918 (B.A.P. 9th Cir. 2014) ("in spite of the absence of specific 'indemnification' language in Francis' covenants in the Judgment, Wallace has an implied indemnification claim against Francis under California law that constitutes a 'debt' for purposes of § 101(12)"); *In re* Wodark, 425 B.R. 834 (B.A.P. 10th Cir. 2010); *see also In re* Bub, 494 B.R. 786 (Bankr. E.D.N.Y. 2013); *In re* Brown, 2012 WL 10191 (Bankr. D. Mass. Jan. 3, 2012) (former spouse and co-debtor violated the automatic stay in attempting to collect debt that debtor agreed to pay as part of separation agreement and that she had listed on Schedule G filed in her Chapter 13 case); *In re* Georgi, 459 B.R. 716 (Bankr. E.D. Wis. 2011) (same). *But see In re* Mayes, 455 B.R. 506 (Bankr. W.D. Va. 2011) (creditor failed to establish that debt was incurred as part of separation agreement).

349. *See* Taylor v. Taylor (*In re* Taylor), 737 F.3d 670, 682 (10th Cir. 2013) ("Despite [the debtor's] assertion to the contrary, Congress's concern for the dependent spouse as the creditor when 'hold harmless' agreements are in play does not equate to concern for the dependent spouse as the debtor when repayment is sought of wrongfully paid spousal support.").

350. *In re* King, 461 B.R. 789, 794–95 (Bankr. D. Alaska 2010) (collecting cases).

351. DeHart v. Miller (*In re* Miller), 424 B.R. 171, 177 (Bankr. M.D. Pa. 2010) (construing language of exemption statute, section 522(d)(10)(D) the same as section 523(a)(5), and stating "whether the obligation is in the nature of alimony, maintenance or support for the purposes of the Bankruptcy Code is a question of federal, not state, law" (citing *In re* Gianakas, 917 F.2d 759, 762 (3d Cir. 1990)). Agreement to employ wife until she is eligible for Social Security benefits was held to be in the nature of a DSO. *In re* Ashby, 485 B.R. 567 (Bankr. W.D. Ky. 2013).

While exemptions available to a debtor do not apply to domestic support obligations,[352] the trustee is under no obligation to object to the claim of exemption on that basis, and the trustee need not administer or liquidate exempt assets for the benefit of the beneficiary of the obligation, even though the obligation will receive a priority distribution from non-exempt assets.[353]

[E] Fines and Penalties

Fines, penalties, or forfeitures that are not compensation for actual pecuniary loss may not be discharged.[354] Although the decisions of state courts describing state laws may be useful when deciding whether the debt created amounts to a "penalty" under section 523(a)(7), the ultimate determination is a question of federal law.[355] While the statutory language restricts the provision to amounts "payable to or for the benefit of a governmental unit," the Supreme Court has

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352. 11 U.S.C. § 522(c)(1).

353. *Id*. § 507(a)(1)(A); *see In re* Ruppel, 368 B.R. 42 (Bankr. D. Or. 2007); *In re* Quezada, 368 B.R. 44 (Bankr. S.D. Fla. 2007); *In re* Vandeventer, 368 B.R. 50 (Bankr. C.D. Ill. 2007); *In re* Covington, 368 B.R. 38 (Bankr. E.D. Cal. 2006).

354. 11 U.S.C. § 523(a)(7). The provision is self-executing. Williams v. Meyer (*In* re Williams), 438 B.R. 679 (B.A.P. 10th Cir. 2010). This includes surcharges on fines for traffic offenses. Holder v. Tex. Dep't of Pub. Safety (*In re* Holder), 376 B.R. 802 (S.D. Tex. 2007). Costs of prosecution are not restitution or a criminal fine. Ryan v. United States (*In re* Ryan), 389 B.R. 710 (B.A.P. 9th Cir. 2008). Similarly, costs assessed by an administrative body have been held to be dischargeable. Schaffer v. La. State Bd. of Dentistry, 515 F.3d 424 (5th Cir. 2008); *see also* State Bar of Cal. v. Findley (*In re* Findley), 593 F.3d 1048 (9th Cir. 2010) (debts relating to costs of attorney disciplinary proceedings fall within exception); Tobkin v. Fla. Bar, 509 B.R. 731 (S.D. Fla.), *aff'd*, 578 F. App'x 962 (11th Cir. 2014) (same); *In re* Feingold, 474 B.R. 293 (S.D. Fla. 2012) (same); *In re* Stasson, 472 B.R. 748 (Bankr. E.D. Mich. 2012) (where debt for costs to the State Bar of Michigan was "compensation for pecuniary loss" within the meaning of section 523(a)(7) it was dischargeable); Love v. Scott (*In re* Love), 442 B.R. 868 (Bankr. M.D. Tenn. 2011) (not within exception); State *ex rel.* Salazar v. Jensen (*In re* Jensen), 395 B.R. 472 (Bankr. D. Colo. 2008) (assessments for violation of federal and state consumer protection laws may be included); Wiebe v. Kan. Dep't of Labor (*In re* Wiebe), 485 B.R. 667 (Bankr. D. Kan. 2013) (penalty for failing to maintain workers' compensation insurance not compensation for actual pecuniary loss and hence not dischargeable).

355. Thompson v. Virginia (*In re* Thompson), 16 F.3d 576, 578 (4th Cir.), *cert. denied*, 512 U.S. 1221 (1994) ("In any case, notwithstanding our respect for the decision of a state court, we cannot allow it to occasion a result at war with federal bankruptcy law."); Philadelphia v. Gi Nam (*In re* Gi Nam), 273 F.3d 281, 288 (3d Cir. 2001) ("Although the label that state law affixes to a certain type of debt cannot of itself be determinative of the debt's character for purposes of the federal dischargeability provisions, such state-law designations are at least helpful to courts in determining the generic nature of such debts under the law that most directly governs their

expanded its reach to amounts payable to individuals as well.[356] Sometimes a debtor will file a complaint to obtain a determination that a fine or penalty really was compensation for damages. If the penalty or fine relates to a tax obligation, it will be discharged unless it

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creation, *e.g.*, whether they are penal or civil, fines or forfeitures."); Hickman v. Texas (*In re* Hickman), 260 F.3d 400, 405 (5th Cir. 2001) ("Whether the bail bond debt of a surety is a forfeiture under § 523(a)(7) is a question of federal law. But we look to state law to determine whether the debt at issue possesses the attributes of a forfeiture."); *see also* Wayne County v. Newall (*In re* Newell), 554 B.R. 825, 829, 832 (E.D. Mich. 2016) (debt for legal costs associated with unsuccessful whistleblower claim was not a penalty and was dischargeable).

356. *See* Kelly v. Robinson, 479 U.S. 36 (1986). This provision applies where the government unit will pay over the amount to injured parties (Troff v. Utah (*In re* Troff), 488 F.3d 1237 (10th Cir. 2007); Colton v. Verola (*In re* Verola), 446 F.3d 1206 (11th Cir. 2006); *In re* Rayes, 496 B.R. 449 (Bankr. E.D. Mich. 2013)), or where the debt is to a creditor who provided funds to satisfy the restitution liability (Pogue v. Estate of Roberts (*In re* Pogue), 357 B.R. 756 (Bankr. W.D. Ky. 2006)); *see also* Auto-Owners Ins. Co. v. Smith (*In re* Smith), 547 B.R. 774 (E.D. Mich. 2016) (restitution obligations imposed upon Chapter 7 debtor in state criminal court were non-dischargeable even though they were payable to the victim and measured by the victim's injures where the restitution served a governmental interest and societal purpose).

In Scheer v. State Bar of Cal. (*In re* Scheer), 819 F.3d 1206 (9th Cir. 2016), the court criticized the decision in *Kelly*, stating:

> The Court's approach in *Kelly*—to untether statutory interpretation from the statutory language—has gone the way of NutraSweet and other relics of the 1980s and led to considerable confusion among federal courts and practitioners about section 523(a)(7)'s scope. For example, some courts have held that civil restitution payable to the government and then distributed to fraud victims is dischargeable. *See, e.g.*, *In re* Towers, 162 F.3d 952, 956 (7th Cir. 1998); Hawaii v. Parsons (*In re* Parsons), 505 B.R. 540, 544 (Bankr. D. Haw. 2014), *recons. denied*, No. 09-02937, 2014 WL 1329541 (Bankr. D. Haw. Mar. 19, 2014). And some courts treat Rule 11 sanctions and a default judgment from a legal malpractice action payable to a private litigant the same way. *See* Hughes v. Sanders, 469 F.3d 475, 476–79 (6th Cir. 2006); Wash v. Moebius (*In re* Wood), 167 B.R. 83, 88–89 (Bankr. W.D. Tex. 1994). But other courts hold that the costs of an attorney disciplinary proceeding, payable to the government, are nondischargeable, as are funds owed to the State Bar's Client Security Fund. *See* Disciplinary Bd. of the Supreme Court of Pa. v. Feingold (*In re* Feingold), 730 F.3d 1268, 1274–76 (11th Cir. 2013); State Bar of Cal. v. Findley (*In re* Findley), 593 F.3d 1048, 1054 (9th Cir. 2010); Richmond v. N.H. Supreme Court Comm. on Prof'l Conduct, 542 F.3d 913, 920 (1st Cir. 2008); *In re* Phillips, No. CV 09-2138 AHM, 2010 WL 4916633 at *5 (C.D. Cal. Dec. 1, 2010). And while *Kelly* holds that state criminal restitution is nondischargeable, a fellow appellate court holds that federal criminal restitution is dischargeable. Rashid v. Powel (*In re* Rashid), 210 F.3d 201, 208 (3d Cir. 2000). It is fair to say that the "I know it when I see it approach" of *Kelly* has led to predictably unpredictable results.

relates to a non-dischargeable tax claim.[357] Moreover, if the fine or penalty relates to an event that occurred more than three years prior to the bankruptcy filing, it will be discharged. There is a significant split of authority on the question of the dischargeability of contempt sanctions.[358] Several courts, including courts of appeal, have held that section 523(a)(7) excepts criminal court costs from discharge.[359] Incarceration costs or "pay to stay" costs are dischargeable because the "pay to stay" program's only purpose is to compensate the state or its counties for their expenses housing prisoners.[360]

Scheer, 819 F.3d at 1210 (holding that where there were no costs or fees assessed for disciplinary reasons, a debt that was effectively the amount that the debtor improperly received from a client was not a fine or penalty, but compensation for actual loss).

357. *See In re* McCarthy, 553 B.R. 459 (Bankr. D. Mass. 2016). In *McCarthy*, the court stated:

> Before assessing the specific requirements contained in § 523(a)(7)(A) and (B), this Court must first resolve the parties' dispute as to whether § 523(a)(7)(A) and (B) are conjunctive or disjunctive requirements—that is, for a debtor to receive a discharge of a tax penalty, must the penalty meet both the conditions of (A) and (B), or only one? The Court begins, where it must, with the statutory language. *See*, United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989).
>
> Sticklers for proper grammatical construction bristle at the prospect of a double negative. Worse still, § 523(a)(7)(A) and (B) require the interpretation of a triple negative. Working through the grammatical labyrinth, however, leads to the conclusion that § 523(a)(7)(A) and (B) are separate and disjunctive exceptions to the premise that tax penalties are non-dischargeable

McCarthy, 553 B.R. at 464–65 (citing Burns v. United States (*In re* Burns), 887 F.2d 1541, 1544 (11th Cir. 1989); Roberts v. United States (*In re* Roberts), 906 F.2d 1440 (10th Cir. 1990); Bair v. Ohio (*In re* Bair), 302 B.R. 564 (Bankr. N.D. Ohio 2003); Henderson v. United States (*In re* Henderson), 137 B.R. 239 (Bankr. E.D. Ky. 1991); *In re* Frary, 117 B.R. 541 (Bankr. D. Alaska 1990)).

358. Tipsey McStumbles, LLC v. Griffin (*In re* Griffin), 491 B.R. 602 (Bankr. S. D. Ga. 2013); *see In re* Feingold, 730 F.3d 1268 (11th Cir. 2013) (costs of attorney disciplinary proceedings not dischargeable).

359. *See* Thompson v. Commonwealth (*In re* Thompson), 16 F.3d 576, 581 (4th Cir. 1994), *cert. denied*, 512 U.S. 1221 (1994); Tennessee v. Hollis (*In re* Hollis), 810 F.2d 106, 108–09 (6th Cir. 1987); *In re* Zarzynski, 771 F.2d 304, 306 (7th Cir. 1985); *In re* Lopez, 475 B.R. 418 (Bankr. E.D. Pa. 2012). *But see* Ryan v. United States (*In re* Ryan), 389 B.R. 710, 717 (B.A.P. 9th Cir. 2008) (holding that under section 1328(a)(3) the exception to discharge "for restitution, or a criminal fine included in the sentence on the debtor's conviction of a crime" did not extend to costs of criminal prosecution).

360. County of Dakota v. Milan (*In re* Milan), 546 B.R. 187, 196 (Bankr. D. Minn.), *aff'd*, 556 B.R. 992 (B.A.P. 8th Cir. 2016).

[F] Student Loans

Student loans fall within four definitions: (1) educational loans made, insured, or guaranteed by a governmental unit or (2) made pursuant to a program funded by a governmental unit or nonprofit organization;[361] (3) obligations to repay funds received as an educational benefit, scholarship, or stipend;[362] or (4) any other educational loan that is a "qualified education loan" as defined in the Internal Revenue Code.[363]

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361. 11 U.S.C. § 523(a)(8)(A)(i); *see* Decker v. EduCap, Inc., 476 B.R. 463 (W.D. Pa. 2012) (discussing meaning of nonprofit institution under section 523(a)(8)(A)(i)); Tift Cty. Hosp. v. Nies (*In re* Nies), 334 B.R. 495 (Bankr. D. Mass. 2005) (considering meaning of "educational loan"); *see also In re* Chambers, 348 F.3d 650 (7th Cir. 2003) (open student account for unpaid tuition not in the nature of an educational "loan" and could be discharged without finding of undue hardship).

362. 11 U.S.C. § 523(a)(8)(A)(ii); *see* Kashikar v. Turnstile Capital Mgmt., LLC (*In re* Kashikar), 567 B.R. 160 (B.A.P. 9th Cir. 2017) (holding that "a 'loan' was not an 'educational benefit' within § 523(a)(8)(A)(ii)" and remanding for a determination of whether the obligation was excepted from discharge under section 523(a)(8)A)(i)). Inst. of Imaginal Studies v. Christoff (*In re* Christoff), 527 B.R. 624 (B.A.P. 9th Cir. 2015) (no funds received); Brown v. Rust (*In re* Rust), 510 B.R. 562 (Bankr. E.D. Ky. 2014); Benson v. Corbin (*In re* Corbin), 506 B.R. 287 (Bankr. W.D. Wash. 2014); Sensient Tech. Corp. v. Baiocchi (*In re* Baiocchi), 389 B.R. 828, 832 (Bankr. E.D. Wis. 2008) (funds received from former employer qualify under this provision); Chi. Patrolmen's FCU v. Daymon (*In re* Daymon), 490 B.R. 331 (Bankr. N.D. Ill. 2013) (similar); *see also* Inst. of Imaginal Studies v. Christoff (*In re* Christoff), 510 B.R. 876 (Bankr. N.D. Cal. 2014) (university tuition credit did not constitute "funds received" rendering the obligation dischargeable); Barstow Sch. v. Shojayi (*In re* Shojayi), 515 B.R. 329 (Bankr. D. Kan. 2014) (same).

363. 11 U.S.C. § 523(a)(8)(B); 26 U.S.C. § 221(d)(1). The cited definition means indebtedness incurred by a taxpayer on behalf of the taxpayer, the taxpayer's spouse, or any dependent, solely to pay qualified higher education expenses attributable to education furnished during a period during which the recipient was an eligible student. There are certain exceptions. "Most courts, including the Courts of Appeals for the Fifth and Seventh Circuits, have analyzed whether a loan is a qualified educational expense by focusing on the stated purpose for the loan when it was obtained, rather than how the proceeds were actually used by the borrower." Rumer v. Am. Educ. Servs. (*In re* Rumer), 469 B.R. 553, 562 (Bankr. M.D. Pa. 2012) (citing *In re* Sokolik, 635 F.3d 261 (7th Cir. 2011), and Murphy v. Pa. Higher Educ. Assistance Agency (*In re* Murphy), 282 F.3d 868, 870 (5th Cir. 2002)); *but see In re* Hazelton, 582 B.R. 223, 227 (Bankr. W.D. Wis. 2018) (unpaid tuition constitutes a loan). *See In re* Moore, 407 B.R. 855 (Bankr. E.D. Va. 2009) (obligation to law school for unpaid tuition was not in nature of debt for "educational benefit overpayment" or student "loan" and could be discharged); Key Educ. Res./GLESI v. Nunez (*In re* Nunez), 527 B.R. 410, 416 (Bankr. D. Or. 2015) (flight school was not an "eligible educational institution").

An obligation to pay tuition without a concomitant promissory note or receipt of cash proceeds is not a student loan.[364]

Student loans are not dischargeable unless the debtor can show that excepting the loan from discharge would impose an undue hardship on him or a dependent.[365] This rule applies even if the student was someone other than the debtor.[366] The rule is different for Health Education Assistance Loans (HEAL), discussed below.

The initial burden is on the lender to establish that the debt is included in one of the four categories identified above.[367]

A debtor must normally file a complaint to determine dischargeability to bring the issue before the court.[368] However, the Supreme Court has sustained a discharge contained in a Chapter 13 plan where

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364. *See* D'Youville Coll. v. Girdlestone (*In re* Girdlestone), 525 B.R. 208, 210 (Bankr. W.D.N.Y. 2015). *But see* D'Youville Coll. v. Hardy (*In re* Hardy), 536 B.R. 528, 530 (Bankr. W.D.N.Y. 2015) (distinguishing *Girdlestone* because the note signed by debtor confirmed a contemporaneous agreement between D'Youville and Hardy to transfer services in exchange for the promise of future payment; debtor's obligation, therefore, satisfied the requirements of a loan).

365. 11 U.S.C. § 523(a)(8)(A). It has been held that the income of the non-obligated co-debtor is not to be considered in the undue hardship analysis, Cumberworth v. U.S. Dep't of Educ. (*In re* Cumberworth), 347 B.R. 652 (B.A.P. 8th Cir. 2006), but it also has been held that the total income of a debtor's household must be considered, Davis v. ECMC (*In re* Davis), 373 B.R. 241 (Bankr. W.D.N.Y. 2007); Wynn v. ECMC, 378 B.R. 140 (Bankr. S.D. Miss. 2007). It has also been held that the income of a non-debtor spouse must be considered in making the hardship determination. Gizzi v. Educ. Credit Mgmt. Corp., 364 B.R. 250 (N.D. W. Va. 2007). The hardship must exist prior to discharge. Zygarewicz v. Educ. Credit Mgmt. Corp. (*In re* Zygarewicz), 423 B.R. 909 (Bankr. E.D. Cal. 2010).

366. *See* Corletta v. Tex. Higher Educ. Coordinating Bd., 531 B.R. 647 (W.D. Tex. 2015) (section 523(a)(8) applies to unrelated co-signers, making no distinction between student debtors and non-student co-signors, whether related or not); Wells v. Sally Mae (*In re* Wells), 380 B.R. 652 (Bankr. N.D. N.Y. 2007).

367. Rumer v. Am. Educ. Servs. (*In re* Rumer), 469 B.R. 553, 561 (Bankr. M.D. Pa. 2012), and cases cited.

368. S*ee* Gorosh v. Posner (*In re* Posner), 434 B.R. 800 (Bankr. E.D. Mich. 2010) (co-borrower not entitled to bring action under section 523(a)(8)). If a debtor was unable to complete the program of study due to closure of the school not more than ninety days after debtor's withdrawal, debtor must first exhaust available administrative remedies. 34 C.F.R. § 682.402(d); Willis v. ECMC (*In re* Willis), 457 B.R. 829 (Bankr. D. Kan. 2011). *Contra* Cagle v. ECMC (*In re* Cagle), 462 B.R. 829 (Bankr. D. Kan. 2011). *See also* Gimbel v. U.S. Dep't of Educ. (*In re* Gimbel), 2018 WL 1229718, at *5 (Bankr. D.N.M. Mar. 8, 2018) (holding that a six-year delay between the debtor's Chapter 7 discharge and the commencement of this adversary proceeding did not require dismissal of the debtor's complaint).

the creditor had adequate notice that discharge of the debt was sought.[369]

The Bankruptcy Code lacks a definition of "undue hardship." Courts require more than temporary financial adversity, but they do not require "utter hopelessness."[370]

The so-called *Brunner* test has been widely adopted.[371] Under *Brunner*, the debtor must establish:

(1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans;[372]

(2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans;[372.1] and

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369. United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260 (2010).

370. Tenn. Student Assistance Corp. v. Hornsby (*In re* Hornsby), 144 F.3d 433, 437 (6th Cir. 1988).

371. Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 756 (S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (per curiam); *see, e.g.*, Tetzlaff v. Educ. Credit Mgmt. Corp., 794 F.3d 756 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 803 (2016); Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1319 (10th Cir. 2004); U.S. Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 91 (5th Cir. 2003); Hemar Ins. Corp. v. Cox (*In re* Cox), 338 F.3d 1238, 1241 (11th Cir.), *cert. denied*, 541 U.S. 991 (2004); Ekenasi v. Educ. Res. Inst. (*In re* Ekenasi), 325 F.3d 541, 546 (4th Cir. 2003); United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108, 1114 (9th Cir. 1998); Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 306 (3d Cir. 1995), *cert. denied*, 518 U.S. 1009 (1996); *In re* Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993); Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382 (6th Cir. 2005) (in which the Sixth Circuit abandoned its hybrid-*Brunner* test and adopted the *Brunner* test); *see also* Hubbard v. U.S. Dep't of Educ. (*In re* Hubbard), 529 B.R. 250, 256 (Bankr. E.D. Tenn. 2015), in which the debtor failed to demonstrate a level of "hopelessness" necessary to meet the second prong of the *Brunner* test as set forth in *Oyler*, 397 F.3d at 386. The second prong of the test requires a debtor to demonstrate "that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans."

372. *See* Miller v. Sallie Mae, Inc. (*In re* Miller), 409 B.R. 299, 312 (Bankr. E.D. Pa. 2009), in which the court stated that "[t]he essence of the minimal standard of living requirement of the *Brunner* Test is that a debtor, after providing for his or her basic needs, may not allocate any of his or her financial resources to the detriment of their student loan creditor(s)." *Id*. at 312 (citing *In re* Mitcham, 293 B.R. 138, 144 (Bankr. N.D. Ohio 2003)). In a reopened case, the court need not limit its consideration to facts existing prior to closing. Roundtree-Crawley v. Educ. Credit Mgmt. Corp. (*In re* Crawley), 460 B.R. 421 (Bankr. E.D. Pa. 2011).

372.1. *See* DeVos v. Price (*In re* Price), 583 B.R. 850 (E.D. Pa. 2018), *rev'g* Price v. DeVos (*In re* Price), 573 B.R. 579, 606 (Bankr. E.D. Pa. 2017) (holding that, notwithstanding a debtor's potential eligibility for an extended term student loan repayment program, "if a debtor chose not to enter such a

(3) that the debtor has made good-faith efforts to repay the loans.[373]

The debtor has the burden of establishing all three elements by a preponderance of the evidence.[374] Moreover, courts have strictly construed the test, rejecting equitable considerations or extraneous factors.[375] With respect to the second element, the Third Circuit has stated that the debtor "must prove 'a total incapacity . . . in the future to pay [her] debts for reasons not within [her] control,'" and it emphasized that the second *Brunner* element is "a demanding requirement."[376]

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program in good faith, the repayment period under the second *Brunner* prong is the remaining contractual term of the debtor's loan."). The debtor has filed an appeal to the U.S. Court of Appeals for the Third Circuit from the decision of the district court.

373. *Brunner*, 831 F.2d at 396. Good faith is reviewed for clear error. *See* Hedlund v. Educ. Res. Inst., Inc., 718 F.3d 848, 854 (9th Cir. 2013); *see also* Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882, 884 (7th Cir. 2013) ("[The good faith] standard combines a state of mind (a fact) with a legal characterization (a mixed question of law and fact). Findings of fact must stand unless clearly erroneous, and . . . mixed questions likewise are treated as factual in nature.").

374. Educ. Credit Mgmt. Corp. v. Mosley (*In re* Mosley), 494 F.3d 1320, 1324 (11th Cir. 2007); Brightful v. Penn Higher. Educ. Assistance Agency (*In re* Brightful), 267 F.3d 324, 327–28 (3d Cir. 2001) ("If one of the elements of the [Brunner] test is not proven, . . . the student loans cannot be discharged.").

375. *Brightful*, 267 F.3d at 328; Hemar Ins. Corp. of Am. v. Cox (*In re* Cox), 338 F.3d 1238, 1243 (11th Cir. 2003), *cert. denied*, 541 U.S. 991 (2004).

376. *Brightful*, 267 F.3d at 328 (quoting Penn. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 307 (3d Cir. 1995)). The Ninth Circuit has observed that "the debtor cannot purposely choose to live a lifestyle that prevents her from repaying her student loans. Thus, the debtor cannot have a reasonable opportunity to improve her financial situation, yet choose not to do so." Educ. Credit Mgmt. Corp. v. Nys (*In re* Nys), 446 F.3d 938, 946 (9th Cir. 2006); *see also* ECM v. Acosta-Conniff (*In re* Acosta-Conniff), 686 F. App'x 647, 650, 2017 WL 1396164, at *3 (11th Cir. 2017), *rev'g* 550 B.R. 557 (M.D. Ala. 2016) (rejecting the district court's conclusion that "[a]lthough Conniff admittedly finds herself in undesirable financial difficulties, she ultimately must bear the consequences of her decision to obtain loans in order to pursue her multiple educational goals," and holding that "the second prong is a forward-looking test that focuses on whether a debtor has shown her inability to repay the loan during a significant portion of the repayment period. It does not look backward to assess blame for the student debtor's financial circumstances."). On remand, the district court in *Acosta-Conniff* determined, among other things, that the bankruptcy court committed legal error when it failed to address the debtor's Income Contingent Plan eligibility as part of the first *Brunner* prong, and remanded the case for further findings of fact and conclusions of law. ECMC v. Acosta-Conniff, 2018 WL 315294, at *3 (M.D. Ala. Jan. 5, 2018).

Another line of cases looks to the "totality of the circumstances" to make the determination.[377] The Eighth Circuit has stated that

> In evaluating the totality-of-the-circumstances, our bankruptcy reviewing courts should consider: (1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and her dependent's reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case.[378]

Several courts of appeals have held that section 105 permits a bankruptcy court "to take action short of total discharge,"[379] although other courts adopt an "all or nothing" approach.[380]

Income-contingent repayment plans may be available on some student loans that may be a viable alternative to debtors.[381] Counsel should examine any offer made to a debtor under these plans as some

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377. *See, e.g.*, Walker v. Sallie Mae Serv. Corp. (*In re* Walker), 650 F.3d 1227 (8th Cir. 2011); *see also* Educ. Credit Mgmt. Corp. v. Jesperson, 571 F.3d 775 (8th Cir. 2009); Piccinino v. U.S. Dep't of Educ. (*In re* Piccinino), 577 B.R. 560 (B.A.P. 8th Cir. 2017); Educ. Credit Mgmt. Corp. v. Bronsdon (*In re* Bronsdon), 435 B.R. 791 (B.A.P. 1st Cir. 2010).

378. Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003).

379. Saxman v. Educ. Credit Mgmt. Corp. (*In re* Saxman), 325 F.3d 1168 (9th Cir. 2003); *Hornsby*, 114 F.3d at 440; *see also* Miller v. Pa. Higher Educ. Assistance Agency (*In re* Miller), 377 F.3d 616 (6th Cir. 2004); Hemar Ins. Corp. v. Cox (*In re* Cox), 388 F.3d 1238 (11th Cir. 2003), *cert. denied*, 541 U.S. 991 (2004). "The majority of courts have held that the language of § 523(a)(8) allows for a 'partial' discharge of student loan debt." Rumer v. Am. Educ. Servs. (*In* re Rumer), 469 B.R. 553, 564 n.12 (Bankr. M.D. Pa. 2012). In Bard-Prinzing v. Higher Educ. Assistance Found. (*In re* Bard-Prinzing), 311 B.R. 219 (Bankr. N.D. Ill. 2004), the bankruptcy court ruled the student loan debt was non-dischargeable but stayed the effective date of its ruling, indicating that it would "reserve jurisdiction to reopen the case and judgment and review the facts under the 'likely to persist' standard should she [the debtor] suffer any new material financial difficulties due to health, employment, or otherwise, and to review whether she remains in good faith by considering her ability and willingness to apply for one of the repayment plans available." *Id*. at 230.

380. *See, e.g., In re* Conway, 495 B.R. 416 (B.A.P. 8th Cir. 2013) (bankruptcy court could not modify terms of student loan or grant partial discharge, but should look at each loan separately); *In re* Taylor, 223 B.R. 747, 753 (B.A.P. 9th Cir. 1998).

381. *See* Educ. Credit Mgmt. Corp. v. Jesperson, 571 F.3d 775 (8th Cir. 2009), in which the Eighth Circuit framed the issue as follows:

> [W]hether a recent law school graduate who is reasonably likely to be able to make significant debt repayments in the foreseeable future, and who qualifies for the Department of Education's twenty-five year Income Contingent Repayment Plan, is entitled

are "back end loaded" and might be difficult for the debtor down the road.[382] It is not a requirement that debtors always must agree to an

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> to an undue hardship discharge because, as the bankruptcy court put it, it is unlikely that his "shockingly immense" student loan debts [$350,000] will be totally repaid and therefore, "without the relief of discharge now, the debtor would, in effect, be sentenced to 25 years in a debtors' prison without walls."

Id. at 778. The Eighth Circuit, in reversing the district and bankruptcy courts, stated:

> On this record, we conclude that, with the aid of an income contingent repayment plan, [the debtor] can presently make student loan payments without compromising a minimal standard of living, and he has the potential of repaying at least a substantial portion of his student loan debts during the ICRP repayment period. When a debtor is eligible for the ICRP, the court in determining undue hardship should be less concerned that future income may decline. The ICRP formula adjusts for such declines, without regard to the unpaid student loan balance, which in most cases will avoid undue hardship.

Id. at 782–83; *see also* Bronsdon v. Educ. Credit Mgmt. Corp. (*In re* Bronsdon), 435 B.R. 791 (B.A.P. 1st Cir. 2010); *In re* Straub, 435 B.R. 312 (Bankr. D.S.C. 2010).

382. *See, e.g.*, Durrani v. Educ. Credit Mgmt. Corp. (*In re* Durrani), 311 B.R. 496, 508 (Bankr. N.D. Ill. 2004), *aff'd*, 320 B.R. 357 (N.D. Ill. 2005) (discussing the William D. Ford Program Income Contingent Repayment Plan (ICRP) administered by the U.S. Department of Education, and the tax burden associated with participation in the ICRP, which provides that any portion of the debt that is not paid will be discharged at the end of twenty-five years, resulting in income that would have to be recognized for tax purposes); Cheney v. Educ. Credit Mgmt. Corp. (*In re* Cheney), 280 B.R. 648 (N.D. Iowa 2002). The availability of an ICRP has been held to be a factor to be considered in evaluating dischargeability. *See* Roth v. ECMC (*In re* Roth), 490 B.R. 908, 919 (B.A.P. 9th Cir. 2013); Nielsen v. Educ. Credit Mgmt. Corp. (*In re* Nielsen), 473 B.R. 755, 761–62 (B.A.P. 8th Cir. 2012); Educ. Credit Mgmt. v. Bronsdon, 421 B.R. 27 (D. Mass. 2009); Lee v. Regions Bank Student Loans (*In re* Lee), 352 B.R. 91 (B.A.P. 8th Cir. 2006); Brooks v. Educ. Credit Mgmt. Corp. (*In re* Brooks), 406 B.R. 382, 394–95 (Bankr. D. Minn. 2009); Educ. Credit Mgmt. Corp. v. Curiston, 351 B.R. 22, 32 (D. Conn. 2006). Failure to take advantage of an ICRP shows a failure of good faith under the *Brunner* test. *In re* L.K., 351 B.R. 45, 55 (Bankr. E.D.N.Y. 2006). *Contra* Krieger v. ECMC, 713 F.3d 882 (7th Cir. 2013); Hooker v. ECMC, 368 B.R. 502, 505 (W.D. Va. 2007). Some judges will enter "necessary and appropriate" orders granting debtor a prospective discharge of whatever debt remains at the end of participation in an ICRP. *See, e.g.*, Stevenson v. Educ. Credit Mgmt. Corp. (*In re* Stevenson), 463 B.R. 586 (Bankr. D. Mass. 2011), *aff'd*, 475 B.R. 286 (D. Mass. 2012). *See also* Erbschloe v. U.S. Dep't of Educ. (*In re* Erbschloe), 502 B.R. 470, 483–84 (Bankr. W.D. Va. 2013).

income contingent repayment plan and forgo a discharge of student loan debt.[383]

The issue of religious tithing often arises in student loan proceedings.[384]

Some courts hold that the issue of the discharge of student loan debts may not be ripe for adjudication early in a Chapter 13 case.[385] In addition, an arbitration clause in a student loan agreement may be enforced by some courts.[385.1]

So-called HEAL may only be discharged:

(1) if the discharge is granted after the expiration of the seven-year period beginning on the first date when repayment of the loan is required, exclusive of any period of suspension of payments;

(2) the exception to discharge would be unconscionable; and

(3) upon condition that the Secretary shall not have waived the Secretary's right to apply 42 U.S.C. § 292f(f) to the borrower and the discharged debt.[386]

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383. *See* Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882, 884 (7th Cir. 2013); *see also* Lamento v. U.S. Dep't of Educ. (*In re* Lamento), 520 B.R. 667, 679 (Bankr. N.D. Ohio 2014).

384. *See, e.g.*, McLaney v. Ky. Higher Educ. Assistance Auth. (*In re* McLaney), 375 B.R. 666 (M.D. Ala. 2007) (discussing the Religious Liberty and Charitable Donation Protection Act of 1998); *Durrani*, 311 B.R. at 503–04; *see also* Allen v. Am. Educ. Serv. (*In re* Allen), 329 B.R. 544, 552 (Bankr. W.D. Pa. 2005).

385. *See* Educ. Credit Mgmt. Corp. v. Coleman (*In re* Coleman), 560 F.3d 1000 (9th Cir. 2009) (discussing cases). *Contra* Cassim v. Educ. Credit Mgmt. Corp. (*In re* Cassim), 594 F.3d 432, 440 (6th Cir. 2010).

385.1. Williams v. Navient Sols., LLC (*In re* Williams), 564 B.R. 770, 783 (Bankr. S.D. Fla. 2017) (holding that "enforcement of the parties' Arbitration and Class Action Waiver Agreement does not inherently conflict with the underlying purposes of sections 523(a)(8) or 524(a)(2)" and relying upon Belton v. GE Capital Consumer Lending, Inc. (*In re* Belton), 2015 WL 6163083 (S.D.N.Y. Oct. 14, 2015), "because it is better aligned with the federal policy favoring arbitration."). In *Williams*, the court noted that the debtor had received a discharge in her Chapter 7 bankruptcy case prior to the commencement of the adversary proceeding so that arbitration of her claims would not interfere with or affect the distribution of the estate or an ongoing reorganization. In addition, she sought to adjudicate the issue on behalf of a class. *Contra* Farmer v. Navient Sols., LLC (*In re* Farmer), 567 B.R. 895 (Bankr. W.D. Wash. 2017) (because debtor's claims were core, court had discretion to refuse to compel arbitration).

386. 42 U.S.C. § 292f(g). This exception to discharge is not codified in the Bankruptcy Code.

[G] Claims Arising from Driving Under the Influence of Drugs or Alcohol

A claim arising from death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft while intoxicated from "alcohol, a drug, or another substance" is non-dischargeable.[387] While a judgment would be the best evidence to establish of non-dischargeability under this provision, a criminal conviction is not essential.[388] It would seem to be the better practice for a creditor having such a claim to file a complaint to determine the non-dischargeability of the debt based on, for example, drunk driving, and this is so for at least three reasons:

(1) The debt is not of the same nature as alimony and support or a student loan, which on their face evidence their non-dischargeability;

(2) The debtor is unlikely to have scheduled the claim with a notation that it arose as a result of drunk driving; and

(3) The bankruptcy court must be presented with some verification of the entry of the decree or judgment of a court of record, showing that liability was incurred by the debtor as a result of driving while intoxicated.

[H] Debtor Previously Not Granted a Discharge

If the debtor previously was denied or waived a discharge in a prior bankruptcy, debts that were or could have been scheduled in the prior case may not be discharged.[389] The denial of discharge must have

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387. 11 U.S.C. § 523(a)(9). Vessels and aircraft were added effective October 17, 2005. Prior to the amendment, vessels were not covered. Ill. Marine Towing, Inc. v. Barnick (*In re* Barnick), 353 B.R. 233 (Bankr. C.D. Ill. 2006), *aff'd*, Ill. Marine Towing, Inc. v. Barnick, 2008 WL 2959776 (C.D. Ill. July 30, 2008). A horse and buggy is not covered by this provision. Young v. Schmucker (*In re* Schmucker), 376 B.R. 256 (Bankr. N.D. Ind. 2007), *aff'd*, 409 B.R. 477 (N.D. Ind. 2008).

388. Simons v. Hart (*In re* Hart), 347 B.R. 635 (Bankr. W.D. Mich. 2006).

389. 11 U.S.C. § 523(a)(10); *see In re* Hickman, 448 B.R. 769 (Bankr. C.D. Ill. 2011) (interpreting section 523(a)(10) and holding that creditor was not entitled to relief from the automatic stay based upon revocation of debtors' discharge in their prior case pursuant to section 727(d)(4)(B) based upon plain language of statute); McDermott v. Graft (*In re* Graft), 489 B.R. 65 (Bankr. S.D. Ohio 2013) (section 523(a)(10) does not apply where prior discharge revoked for reasons other than those in section 727(a)(2)–(7)). *See also* Walton v. McCutcheon (*In re* McCutcheon), 448 B.R. 863 (Bankr. N.D. Ga. 2011) (holding that debtor was not entitled to relief from waiver of discharge in prior case to enable him to discharge debts that could have been, but were not, listed in prior case).

arisen as a result of one or more of the bad acts specified in section 727(a)(2)–(7), or their equivalents under the old act.

[I] Loans from Retirement Plans

Claims owing to various types of retirement plans are not dischargeable.[390]

[J] Miscellaneous

Other grounds upon which creditors may seek to obtain a determination that a particular debt is not dischargeable include:

(1) debts arising from "any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution," provided the debt is evidenced by a final judgment, unreviewable order or decree;[391]

(2) debts for "malicious or reckless failure to fulfill any commitment . . . to a Federal depository institutions [sic] regulatory agency to maintain the capital of an insured depository institution";[392]

(3) debts "for payment of an order of restitution under title 18, United States Code";[393]

(4) debts "incurred to pay a tax to the United States that would be nondischargeable" pursuant to section 523(a)(1);[394]

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390. 11 U.S.C. § 523(a)(18).
391. *Id*. § 523(a)(11).
392. *Id*. § 523(a)(12).
393. *Id*. § 523(a)(13).
394. *Id*. § 523(a)(14); *see* Chase Bank USA, N.A. v. Mueller (*In re* Mueller), 455 B.R. 151, 153 (Bankr. W.D. Wis. 2011) (plaintiff must prove that: "(1) the debt was incurred to pay a tax owed to the United States; and (2) the tax owed to the United States would have otherwise been nondischargeable under § 523(a)(1)"). Subsections (14A) and (14B) make debts incurred to pay taxes owed to governmental units other than the United States or incurred to pay fines or penalties under federal elections laws, respectively, non-dischargeable. Attorney fees awarded in connection with a judgment under this subsection have been held not dischargeable when recoverable under state law. Fry v. Dinan (*In re* Dinan), 448 B.R. 775, 786 (B.A.P. 9th Cir. 2011). *But see* Van Dyn Hoven v. Bank of Kaukauna, 470 B.R. 822 (E.D. Wis. 2012) (fact that debtor may have been responsible person for his wholly owned corporation and benefited personally from bank's decision to honor overdrafts for checks written on account to pay company's payroll taxes was insufficient to prevent discharge of debtor's obligation to bank on his guarantee of corporate indebtedness as debt incurred to pay any otherwise non-dischargeable tax debt of debtor); White v. DDC & Assocs. (*In re* White), 455 B.R. 141 (Bankr. N.D. Ind. 2011).

(5) condominium or cooperative housing corporation fees that become due and payable post-petition, if the fee or assessment is payable for a period during which the debtor had a legal, equitable, or possessory ownership interest;[395] and

(6) fees imposed on a prisoner by a court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty.[396]

A provision added in 2002[397] makes non-dischargeable a debt that arises under a claim relating to certain activities from the purchase or sale of securities.[398] In some respects it may overlap earlier portions of the section insofar as it relates to "common law fraud, deceit, or

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395. 11 U.S.C. § 523(a)(16). This is substantially broader than the pre-Act language, which focused on the debtor's occupation or rental of the property. *See In re* Hijjawi, 471 B.R. 917, 923 (Bankr. N.D. Ill. 2012); *In re* Ames, 447 B.R. 680 (Bankr. D. Mass. 2011); Maple Forest Condo. Ass'n v. Spencer (*In re* Spencer), 437 B.R. 563 (Bankr. E.D. Mich. 2010).

396. 11 U.S.C. § 523(a)(17).

397. *Id*. § 523(a)(19); *see* SEC v. Sherman (*In re* Sherman), 658 F.3d 1009, 1018 (9th Cir. 2011), *abrogated on other grounds by* Bullock v. BankChampaign, N.A., 133 S. Ct. 1754 (2013) (holding that section 523(a)(19) "prevents the discharge of debts for securities-related wrongdoings only in cases where the debtor is responsible for that wrongdoing. Debtors who may have received funds derived from a securities violation remain entitled to a complete discharge of any resulting disgorgement order."); *see also* Okla. Dep't of Sec. *ex rel.* Faught v. Wilcox, 691 F.3d 1171 (10th Cir. 2012) (state-court judgments against defendants were not judgments "for the violation of securities laws," as would preclude discharge of judgment debts). *But see* Lunsford v. Process Techs. Servs., LLC (*In re* Lunsford), 848 F.3d 963 (11th Cir. 2017) (dischargeability exception for debts "for the violation of" federal securities laws or any state securities law was not limited in its application only to debts arising from debtor's own violation of federal or state securities laws).

398. In Terek v. Bundy (*In re* Bundy), 468 B.R. 916 (Bankr. E.D. Wash. 2012), the court determined the issue of whether section 523(a)(19) allows the bankruptcy court to determine dischargeability of a claim arising from a violation of securities laws only after an administrative or other judicial body has found a violation to occur or whether the bankruptcy court could make the determination that a violation occurred. The court held that the bankruptcy court could not make the determination that a securities law violation occurred, stating the "determination may be made pre-petition or post-petition, but it must be made by a tribunal other than the bankruptcy court. To conclude otherwise would render subpart (B) superfluous." *Id*. at 922; *see also* Sundaram v. James (*In re* James), 2012 WL 4849618 (Bankr. D. Colo. Oct. 11, 2012) (collecting cases). In Tripodi v. Welch, 810 F.3d 761 (10th Cir. 2016), the court determined that a default judgment issued in connection with violations of state and federal securities laws was non-dischargeable under section 523(a)(19)). *Accord* Cooley-Linder v. Behrends (*In re* Behrends), 660 F. App'x 696 (10th Cir. 2016) (where debtor failed to

manipulation in connection with the purchase or sale of any security."[399] An unearned portion of a military reenlistment bonus is nondischargeable.[400]

§ 9:9 Settlement of Section 523 and Section 727 Adversary Proceedings

It is not uncommon for an aggressive creditor to bring an adversary proceeding seeking both avoiding discharge of its particular claim and denial of the debtor's discharge in general. The rationale seems to be that the threat of the loss of the discharge will tend to make the debtor more amenable to settlement of the single claim. However, as noted below, settlement of the action may not be possible, or at least will be much more difficult, because of the inclusion of the section 727 count.[401]

§ 9:9.1 Settlement of Section 523 Proceedings

Settlement of a section 523 proceeding, by which the debtor agrees that the claim will not be discharged, or agrees to pay a sum to the creditor, does not involve any public policy issues, and the fact that the

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argue that the admitted facts were insufficient as a matter of law to establish the required securities law violations and an arbitration panel explicitly stated (tracking the language of section 523(a)(19)(A)) that it found numerous violations of federal and Colorado state securities laws, the debt was non-dischargeable); Meyer v. Rigdon, 36 F.3d 1375, 1382 (7th Cir. 1994) (finding any final judgment, including a default judgment, must be given preclusive effect under section 523(a)(11), which, like section 523(a)(19), requires proof of a final judgment); Voss v. Pujdak (*In re* Pujdak), 462 B.R. 560, 578–79 (Bankr. D.S.C. 2011) (finding a default judgment issued in connection with violations of the South Carolina Securities Act is non-dischargeable in bankruptcy under section 523(a)(19)).

399. 11 U.S.C. § 523(a)(19)(A)(ii).

400. 37 U.S.C. §§ 303a(e)(4) and 373(c); *see In re* Fagan, 559 B.R. 718, 720 (Bankr. E.D. Cal. 2016) ("The discharge exceptions at § 303a(e)(4) and § 373(c) are identical. Each excepts repayment debts under §§ 303a and 373(a) from any discharge order entered in a bankruptcy case within five years after the trigger date of the debt. Specifically, they provide "discharge in bankruptcy under title 11 does not discharge a person from such debt if the discharge order is entered less than five years after" termination of the service or the agreement on which the debt is based." (footnotes omitted)).

401. *See* Pennwell Printing Co. v. Stout (*In re* Stout), 262 B.R. 862, 864 n.2 (Bankr. D. Colo. 2001); S. Tr. Bank N.A. v. Parcus (*In re* Parcus), 269 B.R. 457, 458 (Bankr. N.D. Ala. 2001) ("It appears that counsel . . . was not aware of the consequences of joining a potentially frivolous cause of action under § 727 . . . with a complaint . . . under § 523 . . . the settlement agreement proposed by the parties is hereby approved with the warning that § 727 should not be used as a negotiation tactic.").

creditor may be receiving more than it would as a distribution were its claim discharged in the case is not a major consideration.[402]

§ 9:9.2 Settlement of Section 727 Proceedings

When a creditor seeks to have a debtor's discharge denied for one of the grounds stated in section 727, a minority of cases hold that the resulting adversary proceeding cannot be settled as a matter of law.[403] Courts taking this position hold that allowing these actions to be settled is tantamount to allowing the dishonest debtor to "buy" a discharge.[404] This view appears to fly in the face of the bankruptcy rule that permits dismissal of section 727 actions upon notice.[405]

The majority view starts with the proposition that section 727 actions can be settled so long as the terms are fair and equitable and in the best interests of the estate.[406] The majority courts hold that a settlement is not in the best interests of the estate when it results in the creditor receiving benefits for itself, rather than a benefit for the estate.[407] Some courts condition acceptance of benefits by the creditor upon the giving of an opportunity to the trustee or other creditors to substitute themselves as plaintiffs in the adversary proceeding.[408]

§ 9:10 Money Judgments

Prior to the Supreme Court's decision in *Stern v. Marshall*,[409] all circuit courts addressing the issue of whether bankruptcy courts could enter money judgments concluded that the bankruptcy courts had subject matter jurisdiction to liquidate state law claims in actions to

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402. *Id*.
403. *See, e.g.*, Cadlerock Joint Venture II, LP v. Salinardi (*In re* Salinardi), 307 B.R. 353 (Bankr. D. Conn. 2004) (discussing, inter alia, State Bank of India v. Chalasani (*In re* Chalasani), 92 F.3d 1300 (2d Cir. 1996)).
404. *In re* Bates, 211 B.R. 338, 345 (Bankr. D. Minn. 1997). *But see In re* Levine, 287 B.R. 683 (Bankr. E.D. Mich. 2002).
405. FED. R. BANKR. P. 7041.
406. McVay v. Perez (*In re* Perez), 411 B.R. 386 (D. Colo. 2009); Wolinsky v. Maynard (*In re* Maynard), 273 B.R. 369, 373 (Bankr. D. Vt.), *aff'd*, 290 B.R. 67 (D. Vt. 2002); Bankr. Receivables Mgmt. v. de Armond (*In re* de Armond), 240 B.R. 51, 56 (Bankr. C.D. Cal. 1999). Global settlement can include denial-of-discharge claims. *In re* Batt, 488 B.R. 341 (Bankr. W.D. Ky. 2013).
407. *Perez*, 411 B.R. at 386; *see also In re* Babb, 346 B.R. 774 (Bankr. E.D. Tenn. 2006); *Bates*, 211 B.R. at 346; Tindall v. Mavrode (*In re* Mavrode), 205 B.R. 716, 721 (Bankr. D.N.J. 1997).
408. *See* Absolute Fin. Serv., LP v. Kalantzis (*In re* Kalantzis), 2000 WL 33679401 (Bankr. D.N.H. Aug. 21, 2000).
409. Stern v. Marshall, 564 U.S. 462 (2011).

determine the dischargeability of debts.[410] After *Stern*, a number of circuit courts have determined that the bankruptcy courts have subject matter jurisdiction and constitutional authority to enter money judgments.[411] In *Siragusa v. Collazo (In re Collazo)*,[412] however, the U.S. Court of Appeals for the Seventh Circuit opined that on remand the bankruptcy court, which had not entered a money judgment because of uncertainty as to its constitutional authority, could consider two alternatives in view of its determination that the entry of a monetary judgment after a finding of non-dischargeability is "related to [a] case[ ] under title 11."[413] It stated:

> One is to determine whether the parties would consent to his adjudicating the claim. The other is to submit his proposed findings of fact and conclusions of law to the district judge to accept or reject. As an Article III judge, the district judge is empowered to decide a case governed by state law, in this case the state law that authorizes a suit to collect a debt induced by fraud. He doesn't need the parties' consent.[414]

A Texas bankruptcy court considered the issue of express and applied consent under *Wellness International Network, Ltd. v. Sharif*[415] and

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410. Gomez v. Saenz (*In re* Saenz), __ B.R. __, 2016 WL 9021733, at *3 (Bankr. S.D. Tex. Dec. 19, 2016) (citing Morrison v. W. Builders of Amarillo, Inc. (*In re* Morrison), 555 F.3d 473, 478 n.3 (5th Cir. 2009); Johnson v. Riebesell (*In re* Riebesell), 586 F.3d 782, 793–94 (10th Cir. 2009); Sasson v. Sokoloff, M.D. (*In re* Sasson), 424 F.3d 864, 868–69 (9th Cir. 2005) (holding that the liquidation of, and entry of a money judgment for, a debt claimed to be non-dischargeable falls within the bankruptcy courts' supplemental jurisdiction under 28 U.S.C. §§ 1334, 1367); Heckert v. Dotson (*In re* Heckert), 272 F.3d 253, 257 (4th Cir. 2001) ("Entry of such judgments has been allowed where there is an unliquidated claim that a party seeks to have determined in an adversarial dischargeability proceeding."); Cowen v. Kennedy (*In re* Kennedy), 108 F.3d 1015, 118 (9th Cir. 1997); Longo v. McLaren, 3 F.3d 958, 966 (6th Cir. 1993); N.I.S. Corp. v. Hallahan (*In re* Hallahan), 936 F.2d 1496, 1508 (7th Cir. 1991)).

411. *Saenz*, 2016 WL 9021733 at *3 (citing Deitz v. Ford (*In re* Deitz), 760 F.3d 1038, 1050 (9th Cir. 2014) ("[E]ven after *Stern*, the bankruptcy court had the constitutional authority to enter a final judgment determining both the amount of [the plaintiff's] damage claims against [the debtor], and determining that those claims were excepted from discharge."); Hart v. S. Heritage Bank (*In re* Hart), 564 F. App'x 773 (6th Cir. 2014); Cai v. Shenzhen Smart–In Indus. Co. (*In re* Cai), 571 F. App'x 580 (9th Cir. 2014); Islamov v. Ungar (*In re* Ungar), 633 F.3d 675, 679 (8th Cir. 2011)).

412. Siragusa v. Collazo (*In re* Collazo), 817 F.3d 1047 (7th Cir. 2016).

413. *Id*. at 1053.

414. *Id*. at 1053–54 (citing Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1939 (2015), and Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2170–72 (2014)).

415. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1948 (2015).

determined that the defendants impliedly consented to its jurisdiction and waived their objection to the issuance of a final judgment by seeking affirmative relief under Rule 12(b)(6) of the Federal Rules of Civil Procedure and joining in a pretrial statement without raising an jurisdictional issues.[416]

The Supreme Court has held that interest is an "integral part" of a non-dischargeable debt.[416.1] Section 523(a) permits the court to determine whether a debt is dischargeable, but it does not permit the court to relieve the debtor of some of the interest that is an integral part of a non-dischargeable debt or to adjust the amount of a debt determined by a valid pre-petition state court judgment because the bankruptcy court believes the state interest rate is too high.[416.2] Moreover, interest on the non-dischargeable judgment debt should continue to accrue at the state rate even after the bankruptcy court determines non-dischargeability.[416.3] Where there is no prior state court judgment, the bankruptcy court must determine both the existence of a debt **and** its dischargeability and then may issue a money judgment for the debt; federal law will govern pre- and post-judgment interest.[416.4]

Section 1961 of title 28 provides that "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court" and is to be calculated "from the date of the entry of the judgment" at a rate fixed in the statute.[417] Post-judgment interest is mandatory; the prevailing party is entitled to post-judgment interest even if the court makes no provision for its payment.[418] When a federal court adjudicates a state law claim, pre-judgment interest is generally a matter of state law.[419]

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416. *Saenz*, 2016 WL 9021733 at *5–6.

416.1. Bruning v. United States, 376 U.S. 358, 360 (1964).

416.2. Hamilton v. Elite of L.A., Inc. (*In re* Hamilton), 584 B.R. 310, 323 (B.A.P. 9th Cir. 2018).

416.3. *Id*.

416.4. *Id.* (citing Zenovic v. Crump (*In re* Zenovic), 2017 WL 431400 (9th Cir. B.A.P. Jan. 31, 2017) (awarding pre-judgment interest where it entered a money judgment on a disputed debt)). The court in *Hamilton* added: "[t]he bankruptcy court also may (but is not required to) issue a new money judgment where the bankruptcy court decides that the state court's judgment is invalid or that only part of the debt embodied in a state court judgment is dischargeable. *Id.* (citing Cottle v. Ariz. Corp. Comm'n (*In re* Cottle), 2016 WL 6081030 (9th Cir. B.A.P. Oct. 17, 2016)).

417. 28 U.S.C. § 1961; *see* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 835 (1990).

418. Redondo Constr. Corp. v. P.R. Highway & Transp. Auth. (*In re* Redondo Constr. Corp.), 700 F.3d 39 (1st Cir. 2012).

419. Redondo Constr. Corp. v. P.R. Highway & Transp. Auth. (*In re* Redondo Constr. Corp.), 678 F.3d 115, 125 (1st Cir. 2012).