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In an 8-1 decision, in *Ransom v. FIA Card Services, N.A.*, 2011 WL 66438 (Jan. 11, 2011) (Kagan, J.), the Supreme Court decided the narrow question of whether a Chapter 13 debtor who does not have a car loan or lease payment may take the vehicle ownership deduction in determining the debtor's projected disposable income. The debtor owned his car outright and sought to claim an allowance for car-ownership costs, thereby reducing the amount he would pay to creditors. A creditor objected to the debtor's Chapter 13 plan, arguing that it did not direct all of the debtor's disposable income to unsecured creditors.

Relying on the "text, context, and purpose" of the Bankruptcy Code, the Court held that a debtor who does not make loan or lease payments may not take the car-ownership deduction. In particular, the Court focused on the phrase "applicable monthly expense amounts," which is part of the "means test" of § 707(b)(2)(A)(ii)(I). Section 707(b)(2)(A)(ii)(I) provides that "applicable monthly expense amounts" are determined by referencing the IRS's National and Local Standards. These Standards contain separate categories for vehicle "Ownership Costs" and "Operating Costs." The Court found that "Ownership Costs" refers to payments on a loan or lease relating to a vehicle. Because such payments are not actually incurred by debtors who own their vehicles outright, these debtors only are eligible for the "Operating Costs" deduction.

Thus, a deduction is appropriate only if a debtor has actual costs corresponding to the deduction. According to the Court, any other conclusion would render the word "applicable" in the phrase "applicable monthly expense amounts" superfluous. In addition, the Court noted that this outcome aligned with the applicable "statutory context." The Bankruptcy Code defines a debtor's disposable income as "current monthly income" minus "amounts reasonably necessary to be expended," which are determined in accordance with the means test: "Because Congress intended the means test to approximate the debtor's reasonable expenditures on essential items, a debtor should be required to qualify for a deduction by actually incurring an expense in the relevant category." Finally, the Court observed that its holding comported with the purpose of the Bankruptcy Code of requiring debtors to pay creditors the "maximum they can afford."

As a lone dissenter, Justice Scalia read the word "applicable" in the phrase "applicable monthly expense amounts" to mean the expense amounts applicable to the number of cars a debtor owns, not to whether the expense was for Ownership Costs or Operating Costs: "In my judgment the 'applicable monthly expense amounts' for operating costs 'specified under the . . . Local Standards,' are the amounts specified in those Standards for either one car or two cars, whichever of those is applicable."

BANKRUPTCY COURT MUST CONSIDER TRUSTEE'S RIGHTS AS A BONA FIDE PURCHASER IN POTENTIAL SALE OF PROPERTY

The failure to address a chapter 7 trustee's right and power as a lien creditor pursuant to 11 U.S.C. § 544(a) to step into the hypothetical shoes of a bona fide purchaser of real property and avoid the extra contributions of a non-debtor, co-owner of property warranted remand according to the Eighth Circuit's BAP in *Lovald v. Tennyson* (*In re Theodore Stephen Wolk, d/b/a Ted Wolk Apartments*), No. 10-6050 (8th Cir. BAP, Oct. 14, 2010), even though the trustee raised the issue for the first time on appeal.

The debtor and his wife owned a single-family residence in Rapid City, South Dakota as tenants in common. The couple was in the process of dissolving the marriage when debtor filed his bankruptcy petition. The debtor claimed no homestead exemption in the home.

The trustee sought to sell the property pursuant to § 363(h), which authorizes the sale of both the estate's and the co-owner's interests in property in which the debtor has an undivided interest as a tenant in common, joint tenant, or tenant by the entirety. The trustee argued under § 363(h) that a partition in kind was impractical, the sale of only the estate's interest would realize significantly less than a sale free and clear of the co-owner's interest, and that the benefit of the sale to the estate outweighed any detriment to the co-owner (the fourth element – that the property is not used for energy production – was not at issue).

The bankruptcy court determined that because South Dakota law permits tenants in common to rebut the presumption that each co-owner holds an equal share, and because the evidence at trial established that the spouse contributed more of the purchase price of the home and had made all of the payments on the first mortgage, all of the equity in the property was attributable to the spouse's financial input and would accrue to her upon sale. Accordingly, the estate had nothing to gain from its sale and the bankruptcy court denied the trustee's request.

The trustee appealed, arguing § 544(a) invests in him with the rights and powers of a hypothetical judicial lienholder or bona fide purchaser. As a result, he alleged, the equal ownership presumption could not be rebutted, as South Dakota law recognizes that, as to bona fide purchasers and creditors, co-owners hold in accordance with recorded title. Since the co-owner's contribution argument was inapplicable to the sale of the property to a third party, the trustee argued the property should be sold and the proceeds split between the co-owner and the estate.

The BAP recognized that one of the tools available to the trustee is the power afforded under § 544(a) and reasoned that it is broadly conferred because this authority underpins the trustee's ability to use § 363(h) to maximize the estate's liquidation of assets to be used to pay creditors.

The BAP was troubled that the issue was newly raised on appeal. However, the BAP concluded that a trustee's rights in property must be addressed in any proposed sale to accurately determine exactly what can be sold and it was concerned that failure to consider the trustee's rights could leave the incorrect impression that trustees must take some affirmative action to acquire the status of a bona fide purchaser.

The BAP did not simply remand for consideration of the trustee's rights; indeed, it also ruled that a full § 363(h) analysis should be completed, including review of the estate's benefit vis-à-vis the co-owner's detriment.

CREDITOR WHO FAILS TO FILE UCC FINANCING STATEMENT IN PROPER JURISDICTION IS UNABLE TO AVOID PREFERENCE CLAIM

In *Lange v. Inova Capital Funding, LLC and Inova Capital Funding, Inc.* (*In re Qualia Clinical Serv., Inc.*), No. 10-6021 (8th Cir. BAP, Jan. 14, 2010), the debtor, Qualia, a Nevada corporation with its principal place of business in Omaha, Nebraska, entered into an "Invoice Purchase Agreement" with Inova, a California corporation, on December 11, 2007.

The contract provided that Inova would purchase Qualia's accounts receivable below face value and provided for an ongoing security interest in Qualia's property such as its accounts, inventory, instruments, records, and general intangibles, to protect Inova from any chargeback of disputed or unpaid invoices or accounts or any liability resulting from a breach of Qualia's warranties. A UCC financing statement was filed with the Nebraska Secretary of State.

Inova last gave new value to Qualia on Feb. 9, 2009, when it purchased invoices. On Feb. 19, 2009, Inova filed another UCC financing statement with the Nebraska Secretary of State and another with the Nevada Secretary of State.

Qualia filed a chapter 11 bankruptcy petition in Nebraska on March 18, 2009, and the case was later converted to one under chapter 7. Thereafter, the appointed trustee initiated this adversary proceeding against Inova, alleging the invoice purchase agreement was a financing arrangement and he sought to void as a preference the lien Inova received by filing its Feb. 19, 2009 financing statements.

Both Inova and the trustee moved for summary judgment. The bankruptcy court denied Inova's motion, granted the trustee's motion, and voided the Feb. 19, 2009 UCC filing as a preferential transfer. Inova appealed, alleging that 11 U.S.C. § 547(c)(5) does not require a security interest in receivables to be perfected at the beginning of the preference period.

The BAP affirmed the bankruptcy court, holding that application of § 547 depended on whether the receivables were bought or pledged through the December 2007 agreement – if bought, no interest was transferred when Inova filed its security interest within the preference period, but if pledged then the filing of the security interest constituted perfection and brings it within the scope of § 547, perhaps constituting a preference. Because the invoice purchase agreement shifted all risk of collectability to Qualia the BAP held it was a disguised loan rather than a true sale and that the transfer could constitute a preference.

The remaining issue was whether Inova's interest was perfected within the preference period. Because the California Commercial Code provides that a security interest is perfected by filing a financing statement where the debtor is organized, all Nebraska filings were ineffective. And because the Nevada filing, which was properly perfected, occurred within 90 days of Qualia's bankruptcy filing, the BAP concluded that the transfer constituted a preference.

EXCUSABLE NEGLECT STANDARD FOR MISSED DEADLINES

In *Fokkena v. Goodwin (In re Rodney Nathan Goodwin, d/b/a Goodwin Family Farms)*, No. 10-6027 (8th Cir. BAP, Oct. 13, 2010), the BAP reversed the Iowa bankruptcy court's order extending the time for the debtor to appeal a ruling in favor of the creditor.

In two separate adversary cases, after a consolidated trial, the bankruptcy court denied the debtor's discharge and ordered that a specific debt owed to a creditor was non-dischargeable. After the 14-day statutory appeal period had expired for both orders, the debtor filed identical motions in both adversary cases requesting that the court extend the time for the debtor to file a notice of appeal. The bankruptcy court granted Debtor's motions and extended the deadline to appeal because the orders were originally given orally from the bench.

The BAP, however, reversed the bankruptcy court's extension of the appeal period because the bankruptcy court failed to make findings showing the debtor's excusable neglect as required by the bankruptcy code. Under Federal Rule of Bankruptcy Procedure 8002, if the 14-day time period for appeal has already expired, the movant must prove excusable neglect to be granted a motion to extend the deadline to appeal. The United States Supreme Court, in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, lays out the excusable neglect standard, including four factors to consider: 1) the danger of prejudice to the nonmovant, 2) the length of the delay and its potential impact on the proceedings, 3) the reason for the delay and whether it was within the reasonable control of the movant, and 4) if the movant acted in good faith. The BAP noted that the only excuses the debtor made for missing the 14-day appeal period were that the orders were given orally from the bench so the debtor was waiting for a transcript of the trial, and the debtor's counsel was not familiar with bankruptcy specific procedural law. Both these excuses, however, bear only on the excusable neglect factor regarding the reason for delay, and neither excuse was persuasive to the BAP. The bankruptcy court orders, while given orally from the bench, were also followed-up by written orders filed the same day. And even if the debtor was waiting for a transcript of the trial, this would not prohibit the debtor from moving for an extension of the appeal period prior to the expiration of the appeal period. And the Pioneer case held that "inadvertence, ignorance of the rules, or mistakes concerning rules do not usually constitute 'excusable' neglect."

The BAP went on to analyze the remaining factors for excusable neglect and found that the length of the delay would be minimal and that the debtor appeared to have acted in good faith. But since the debtor failed to address the creditor's concern that a delay would prejudice the creditor, and the debtor failed to offer any evidence to prove excusable neglect, the BAP held that the bankruptcy court abused its discretion by granting the debtor's motion to extend the deadline to appeal its adverse orders. Consequently, the debtor's appeals of the bankruptcy court orders were untimely, and the debtor's debt remains non-dischargeable.

OBTAINING AN ORDER FOR PROTECTION AGAINST THE DEBTOR WAS NOT A VIOLATION OF THE AUTOMATIC STAY

In the case of *Marino vs. Seeley (In re Marino*), No. 10-6022 (8th Cir. BAP Oct. 25, 2010), the BAP held that obtaining an order for protection against the debtor was not a violation of the automatic bankruptcy stay.

The debtor, Marino, was renting a room from the Defendant Seeley. On April 13, 2009, Marino filed for Chapter 7 bankruptcy. When Marino told his live in girlfriend he filed for bankruptcy a conversation took place that somehow prompted the involvement of Seeley, who, on April 14, 2009, got an order for protection against Marino because he had been threatened by Marino during the course of that conversation.

Marino filed an adversary in bankruptcy court alleging that Seeley violated the automatic stay by seeking an order for protection. The bankruptcy court dismissed Marino's complaint because it found that he had not met his burden of proof and Marino appealed.

The BAP held that the bankruptcy court correctly concluded that Seeley did not violate the automatic stay by seeking an order for protection, because the filing of a bankruptcy petition does not stay the commencement of or the continuation of a civil action or proceeding regarding domestic violence. 11 U.S.C. § 362(b)(2)(A)(v)

The BAP held that an order for protection pursuant to the Minnesota Domestic Abuse Act did fall under the definition of a proceeding regarding domestic violence, and therefore Seeley did not violate the automatic stay because he commenced a civil proceeding regarding domestic violence which is permitted under 11 U.S.C. § 362(b)(2)(A)(v).

The court found that issue was dispositive of Marino's appeal, and as such did not consider the other issues up for appeal. The BAP affirmed the bankruptcy court's judgment dismissing Marino's adversary.

THE PROOF IS IN THE CONTRACT: A LOAN IS NOT AN ADVANCEMENT UNDER AN UNAMBIGUOUS CONTRACT

In the case *VanCura v. Hanrahan (In re Meill)*, No. 10-6019 (8th Cir. BAP Dec. 30, 2010), a creditor appealed an order of the Iowa bankruptcy court granting the motion of the chapter 7 trustee to sell real estate purchased by the debtor from the creditor on contract free and clear of liens.

In 2002, the creditor sold a parcel of real property to the debtor. The sale contract allowed the creditor to made advancement for unpaid taxes, special assessments and insurance or to make necessary repairs to the property, and to add the amount advanced to the principal amount secured under the contract. Subsequently, the creditor loaned the debtor an additional $130,000.00. A portion of the $30,000 was allegedly used by the debtor to pay the real estate taxes on the property. The creditor alleged that the $30,000.00 loan should be considered an advancement for the payment of real estate taxes and secured by its lien on the real property.

The trustee filed a motion to sell the real property free and clear of the creditor's lien. Although the assessed value of the real property was $338,281, the trustee proposed to sell the real property for $225,000. The estate held more than 461 parcels of real estate and the trustee testified that she extensively marketed the property but received no offers greater than $225,000 for the real property. At this price, if the creditor's lien secured the $30,000 loan, the estate would gain no funds after payment of the liens on the real property. If the $30,000 loan was not secured by the real property, the estate would retain net equity from the sale.

The bankruptcy court granted the trustee's motion to sell. According the bankruptcy court, $30,000 loan was not secured by the creditor's lien, and the court found the sale to be in "good faith and for a fair and reasonable price in the circumstances."

On appeal, the BAP first considered if the bankruptcy court correctly held that the $30,000 loan was not an advancement under the sale contract. The sale contract stated that the creditor "may, but need not, pay such taxes" on the real property and "such sums so advanced may, at the election of the [creditor], be added principal amount" of the secured debt. The creditor admitted that he did not pay the taxes, but the debtor used the $30,000 loan to pay the real estate taxes. According the BAP, the contract was unambiguous and did not allow for a advancement to be made under those circumstances. In any event, the B.A.P was unable to ascertain proof that the debtor actually used the $30,000 loan to pay the real estate taxes.

The BAP then considered if the bankruptcy court's approval of the sale was proper. The creditor alleged the sale should not have been approved because the sale price was "significantly below the fair market value." Recognizing the bankruptcy court's wide discretion with respect to sales of assets of a bankruptcy estate, the BAP rejected the creditor's argument that the trustee unfairly flooded the market and drove down the price for the real property. The fact that the sale price was less than the appraised value does not render the sale unreasonable.

In addition, approval of the sale allowed the benefits to accrue to the estate as a whole, rather than solely to the creditor. According to the BAP, the sale price was greater than the liens on the real property and the bankruptcy court properly determined that the trustee could sell the real property free and clear of liens.

REMAND REQUIRED WHEN BANKRUPTCY COURT LACKED JURISDICTION

In *The Nat'l Benevolent Ass'n of the Christian Church and State of Missouri v. Weil, Gotshal & Manges, LLP*, Nos. 09-6084, 09-6084 (8th Cir. BAP Oct. 8, 2010), the BAP reviewed an order of a Missouri bankruptcy court dismissing a state-court petition that was removed to the bankruptcy court. The BAP concluded bankruptcy court lacked subject matter jurisdiction over malpractice, negligence and breach of fiduciary duty claims by a former debtor against its bankruptcy counsel, and that the petition should have been remanded to state court, rather than dismissed.

A former debtor, a non-profit corporation primarily located in Missouri, filed an adversary proceeding against bankruptcy counsel in the bankruptcy court in Texas after confirmation of its plan of reorganization following its Chapter 11 case in Texas. The lawsuit alleged legal malpractice, negligence and breach of fiduciary duty in connection with its pre-petition and post-petition services. The Texas bankruptcy court granted the bankruptcy counsel's motion for summary judgment on *res judicata* and estoppel grounds, and the district court affirmed.

On appeal the Fifth Circuit Court of Appeal affirmed the lower courts' decision to dismiss that case, due to the former debtor's lack of standing in federal court resulting from the absence of an unequivocal retention of pre-petition causes of action in the confirmed Chapter 11 plan.

The former debtor, joined by the State of Missouri, then commenced an action alleging the same claims against its bankruptcy counsel with respect to its pre-petition services in Missouri state court. The bankruptcy counsel removed the case to federal bankruptcy court in Missouri and filed a motion to dismiss. The bankruptcy court dismissed the action because the claims were derivative of the debtor's claims that had already been ruled upon by the Fifth Circuit.

The BAP affirmed the Missouri bankruptcy court's decision that the court lacked subject matter jurisdiction over the claims by reason of *res judicata* and collateral estoppel. However, according to the BAP, 28 U.S.C. § 1447(c) applied to the case and requires remand if the district court lacks subject matter jurisdiction. In applying the plain language of the statute, the BAP found that the entire Missouri adversary should have been remanded to the state court in lieu of the dismissal. The BAP recognized the potential judicial economy to be served by the dismissal of the case, but ultimately held that the statute required remand of the entire case to the state court.

STUDENT LOAN UNDUE HARDSHIP EVALUATION TAKES INTO CONSIDERATION THE DEBTOR'S UNDEREMPLOYMENT, HER BOYFRIEND'S ECONOMIC CONTRIBUTIONS AND THE AVAILABILITY OF THE INCOME CONTINGENT REPAYMENT PLAN

In *Sederlund v. Educ. Credit Mgmt. Corp. (In re Sederlund)*, 10-6017 (8th Cir. BAP Nov. 1, 2010), the BAP affirmed Judge Dreher's holding that a debtor's student loans should not be discharged pursuant to 11 U.S.C. § 523(a)(8) if the debtor had failed to prove undue hardship. The debtor was in her forties, had no physical, mental, or psychological disability, held a bachelor of arts in psychology, had worked on and off at law firms and in the food service industry since graduating college, and owed approximately $47,000 in student loans. Also, the debtor had lived with her boyfriend in a relatively stable relationship for the last six years, and her boyfriend paid more than half of their household expenses.

The BAP began by noting that the Eighth Circuit has adopted a totality-of-the-circumstances test in evaluating undue hardship in student loan cases which ultimately inquires whether the debtor has reasonable future financial resources to pay the student loan debt while still providing for a minimum standard of living. In upholding the bankruptcy court's decision, the BAP focused on the three findings.

First, the debtor's boyfriend's contributions to household expenses should be taken into account when calculating whether the debtor could pay her loans while maintaining a minimum standard of living. The BAP confirmed that, though not married, the debtor's long-term relationship with her boyfriend constituted the equivalent of a marital relationship. Once the boyfriend's contributions were considered as part of the debtor's household income, the debtor could not prove undue hardship.

Second, the debtor was voluntarily underemployed. The bankruptcy court had found that the debtor was "pretty sophisticated," had held well-paid jobs at law firms, and did not demonstrate that she continued to lose jobs because of a lack of performance or inability to work. Because the debtor was capable of obtaining full-time employment, the BAP upheld the bankruptcy court's conclusion that she was voluntarily underemployed. As stated by the Eighth Circuit, "[a] debtor is not entitled to an undue hardship discharge of student loan debts when [her or] his current income is the result of self-imposed limitations, rather than lack of job skills." Even without considering the boyfriend's contributions to the debtor's household expenses, the debtor could not prove undue hardship.

Third, the debtor was eligible for an income contingent repayment plan under which she would have been able to maintain a minimal standard of living. Relying on Eighth Circuit case law, the BAP confirmed that the bankruptcy court appropriately considered the availability of this plan as an important factor in evaluating the totality of the circumstances. Taken together, the BAP affirmed the bankruptcy court's holding that the debtor's student loans should not be discharged pursuant to 11 U.S.C. § 523(a)(8) because the debtor had failed to prove undue hardship.

RETENTION OF SOCIAL SECURITY INCOME IS INSUFFICIENT TO WARRANT A FINDING OF BAD FAITH UNDER 11 U.S.C. § 1325(a)(3)

In the case *Fink v. Thompson, et al.* (*In re Thompson*), No. 10-6018 (8th Cir. BAP Sept., 16, 2010) (C.J. Kressel, J. Schermer and J. Mahoney), Richard Fink appealed an order confirming a Chapter 13 plan in his capacity as Chapter 13 trustee. The trustee argued that the debtors' plan should not have been confirmed because it did not devote all of the debtors' social security income to the payment of creditors. As a result, the trustee argued, the debtors' plan failed to satisfy the good faith standard set forth under 11 U.S.C. § 1325(a)(3).

On appeal, the Eighth Circuit BAP rejected the trustee's arguments and affirmed confirmation of the debtors' plan. In its decision, the BAP first clarifies that the plain language of the Bankruptcy Code excludes Social Security income from required payments under a Chapter 13 plan. The BAP bases this conclusion on the definition of "disposable income" provided by 11 U.S.C. § 1325, and on Section 1325's incorporation of the concept of "current monthly income." Specifically, the BAP notes that 11 U.S.C. § 101(10A)(B) explicitly excludes Social Security benefits from the definition of "currently monthly income."

The BAP then addresses the trustee's argument that the debtors did not satisfy Section 1325(a)(3)'s good faith requirement and rejects the trustee's argument on multiple grounds. The BAP first concludes that, because the application of Section 1325(b)'s "ability to pay test" clearly shows that Social Security income need not be included in Chapter 13 plan payments, it would be "duplicative" to analyze the same issue again in the context of Section 1325(a)(3). The BAP next applies a "totality of the circumstances" test and determines that, on its own, the retention of Social Security income is insufficient to warrant a finding of bad faith absent other factors.

Finally, the BAP opinion references a recent decision by the Eighth Circuit Court of Appeals in which the Court of Appeals ruled that all past and future Social Security benefits should be excluded from bankruptcy estates. *See Carpenter v. Ries (In re Carpenter)*, 614 F.3d 930, 937 (8th Cir. 2010). Considering the Court of Appeals' decision, the BAP reasons that it would be inconsistent to require debtors to devote Social Security income to Chapter 13 plan payments when such income should not be considered part of the estate in the first instance.

MARRIED CHAPTER 13 DEBTORS MUST COMBINE THEIR CURRENT MONTHLY INCOME TO DETERMINE THE LENGTH OF THEIR PLAN, REGARDLESS OF WHETHER THEY MAINTAIN SEPARATE HOUSEHOLDS

In *Harman v. Fink (In re Harman)* No. 10-6025 (8th Cir. BAP Sept. 3, 2010), the BAP examined whether the court was correct in holding that joint debtor spouses who maintain separate households must submit a single statement of current monthly income to determine the applicable commitment period for a chapter 13 plan. The BAP affirmed the bankruptcy court.

The debtors filed a joint chapter 13 petition and plan of reorganization. Because the debtors were married but maintained separate households, however, they each filed a separate statement of current monthly income. The plan proposed payments from the debtors' future earnings for 36 months. The chapter 13 trustee objected to the plan on numerous grounds, including the fact that the debtors filed separate statements of current monthly income. At the initial confirmation hearing, all of the objections were resolved except for the objection to the debtors' separate statements of current monthly income. The parties focused on this issue because they incorrectly believed that the particular form of statement of current monthly income determined whether the debtors must commit three or five years of future earnings to the plan. Pursuant to 11 U.S.C. § 1325, a chapter 13 plan may not be confirmed over the objection of the trustee or a secured creditor, unless the creditors receive payment in full under the plan or the plan provides that all of the debtor's projected disposable income is paid in the applicable commitment period. The test for the applicable commitment period is set forth in 11 U.S.C. § 1325(b)(4), which provides that it shall be three years or not less than five years if the income of the debtor and the debtor's spouse combined is not less than the median family income for the applicable state. The court granted the trustee's motion and concluded that the income of both debtors must be combined, and when doing so, the debtors were above the median family income for their applicable state. Therefore, the court concluded that the debtors could not confirm a 36-month plan.

Shortly thereafter, the debtors filed both a joint statement of current monthly income and a new plan. Based upon their combined incomes, the debtors were above the median income and required to fund a plan for 60 months. As a result, both the trustee and the debtors objected to that plan. The debtors filed an amended plan, to which the trustee objected and the court denied confirmation. The debtors filed a second amended plan and then an objection to the second amended plan, while the trustee filed a motion to deny confirmation. The court overruled the debtors' objection and denied the trustee's motion. Eventually, the court confirmed the debtors' plan for payment of disposable income for 55 months, which is the subject of the appeal.

The BAP first examines whether it is the statement of current monthly income form or 11 U.S.C. § 1325(b)(4) that determines the applicable commitment period and concludes that the statute dictates the commitment period for each chapter 13 debtor. Next, the BAP analyzes whether the debtor must include his or her spouse's current monthly income when calculating the applicable commitment period. Section 1325(b)(4) requires the current monthly income of both the debtor and the debtor's spouse. Because the debtors filed a joint bankruptcy petition, the debtors are required to combine their current monthly income for calculating the applicable commitment period, regardless of whether or not the debtors maintain separate residences. Therefore, the BAP affirms.

A DEBTOR'S FAILURE TO REMIT EMPLOYEES' CONTRIBUTIONS UNDER ERISA PLAN IS A BREACH OF HIS FIDUCIARY DUTY AND GROUNDS FOR DENYING HIS DISCHARGE OF THAT DEBT

In *Moore and McGough, as Trustees of the Twin City Carpenters Vacation Fund and Their Successors v. O'Connell (In re O'Connell)* No. 10-3140 (Bankr. D. Minn. Jan. 7, 2011), Judge O'Brien granted the plaintiff's motion for summary judgment and ordered the debt owed by the debtor to plaintiff be excepted from discharge.

The debtor and his company were parties to union agreements that required both the corporation and the debtor, in his individual capacity, to withhold certain employee contributions from the employees' after tax wages and remit those contributions to the Twin City Carpenters Vacation Fund, an ERISA plan. For approximately nineteen months, the debtor and his corporation withheld employee contributions totaling $21,152.34, but did not remit them to the fund. The debtor said that the contributions were not remitted due to problems with the software used to calculate and track the employees' wages, withholding, deductions, and contributions.

Trustees for the fund obtained a judgment against the debtor in the Minnesota federal district court for defaulted payments due under the ERISA plan. Additionally, the trustees commenced this adversary case against the debtor seeking to except from discharge the amount owed for the employee contributions. Pursuant to 11 U.S.C. § 523(a)(4), "an individual debtor may not be discharged, pursuant to

Section 727, from any debt for money, property or services to the extent obtained by 'defalcation while acting in a fiduciary capacity….'" A defalcation is the misappropriation of trust funds or money held by a fiduciary, whether or not the fiduciary intended to misappropriate such funds. A fiduciary relationship arises from the imposition of an express or technical trust. The employee contributions to the fund are governed by ERISA, which defines a fiduciary as "one who 'exercises control respecting management or disposition of its assets'… or to the 'extent they exercise discretionary authority over plan assets.''' The court concluded that the debtor was a fiduciary of the employee contributions (ERISA plan assets). Therefore, the contributions totaling $21,152.34 are excepted from the debtor's discharge.

LIMITATIONS OF A DEBTOR'S EXEMPTION FOR PAYMENTS FOR PERSONAL BODILY INJURY

In *In re Keenan*, Bankr. No. 10-34521 (Jan. 7, 2011), Chief Judge Kishel analyzed the scope and limitations of a debtor's ability to exempt payments for personal bodily injury to a debtor under 11 U.S.C. § 522(d)(11)(D).

Prior to filing for bankruptcy, the debtor filed a civil suit in Minnesota state court against the Archdiocese of St. Paul and Minneapolis and the Dioceses of Winona alleging that a priest employed by the Defendants "engaged in unpermitted, harmful and offensive sexual contact" with the debtor many years ago. The undetermined award in this pending law suit was listed as exempt by the debtor pursuant to 11 U.S.C. § 522 (d)(11)(D) exempting payments made on account of "personal bodily injury" to the debtor. However, the bankruptcy trustee objected to the claimed exemption questioning whether or not the alleged wrong underlying the state court claim was within the class of claims meant to be protected by the statute. The bankruptcy court analyzed the evidence of the alleged wrongdoing in the state court complaint brought forth in the bankruptcy case, but the debtor only listed several psychological and emotional affects suffered as a result of the abuse. In bankruptcy court, the debtor stated that his claim stemmed from "actual physical abuse of a sexual nature" that resulted in "physical manifestations of emotion and psychological stress." But actual facts regarding a bodily injury were never alleged or specifically stated, and the impact to the debtor's body or the immediate effects of the sexual exploitation were not provided to the bankruptcy court.

Debtors have the burden to prove that certain claimed exemptions apply, and in this case, the bankruptcy court determined that the debtor did not meet his burden of illustrating how an award in his state court case would be payment made for a "personal bodily injury" as required by § 522(d)(11)(D). The Court held that the injury to a debtor must be a an actual "'injury' that was 'bodily' in nature" for § 522(d)(11)(D) to apply. While "bodily injury" is not defined in the bankruptcy code, it must be "something *physical* that is *serious*—caused by an impact that invades, disturbs, or alters the preexisting integrity of the human body and which is the proximate cause of a change in the form or function of a component of the body, its structure, or its functions." Damages due to non-physical harms such as emotional distress may fit in this definition, but only if the non-physical harms flow from an underlying *injury*.

In this case, the debtor's accusations against the priest and Defendants were only conclusory and the debtor listed only consequential psychological injuries. The debtor did not make accusations of actual injury or harm to his body. Thus, the § 522(d)(11)(D) exemption did not apply, and any damages awarded the debtor in his state court cases will not be exempt from creditors in his bankruptcy case.

CASE DISMISSED WHERE THE PURPOSE OF THE PLAN WAS TO MODIFY A STATE COURT DISSOLUTION DECREE

In the case of *In re Hofer*, No. 09-61468, (Bankr. D. Minn. Oct. 21, 2010) the debtor filed a Chapter 13 plan which was a proposed one hundred percent plan payable over 60 months. The debtor's ex-spouse Andreas Hofer objected to confirmation of her plan on the basis that it was not feasible and was proposed in bad faith. Judge O'Brien found that the sole purpose of the plan was to avoid complying with a portion of a judgment and decree of marriage dissolution entered by the state court, and thus denied confirmation and dismissed the debtor's case.

The court cited the U.S. Supreme Court case *Marshall v. Marshall* for the proposition that the federal bankruptcy court in this case did not have the jurisdiction to modify the debtor and her ex-spouse's divorce decree. 547 U.S. 293, 295, 126 S.Ct. 1735, 1739 (2006). The court in *Marshall* summarized past case law clarifying that divorce, alimony, and child custody decrees were outside the bounds of federal jurisdiction and that state courts were better suited to handle these matters.

The court then looked to the effect the debtor's plan would have upon the state court's dissolution judgment and decree, which would be to essentially modify it in federal court because she was unable to in state court, and held that it did not have the jurisdiction to do so.

Furthermore, the court held, even if it had jurisdiction, it would decline to exercise it because it would be in contradiction of the full faith and credit clause contained in 28 U.S.C. § 1738.

Based on the authority and the finding that the purpose of the debtor's plan was to avoid complying with the state court's dissolution judgment, the court denied confirmation of debtor's plan and dismissed her case.

FOR PURPOSES OF THE MEANS TEST, DEBTORS MUST CALCULATE THEIR TAX EXPENSES BASED ON CURRENT GROSS INCOME

In the case *In re Rudnik*, No. 10-30484 (D. Minn. Sept. 13, 2010), Judge O'Brien resolved a dispute between competing calculations of future tax expenses for purposes of the means test under 11 U.S.C. § 707(b). Section 707(b) of the Bankruptcy Code requires certain debtors to file a statement of their "means test" calculations. Such calculations have been incorporated into Official Form B22A. Paragraph 25 of Form B22A requires debtors to calculate and identify their monthly tax expenses.

In completing paragraph 25 of Form B22A, the debtors in *In re Rudnik* calculated their monthly tax expenses based on their pre-petition federal and state income tax withholding. In prior years, such withholding had resulted in substantial tax refunds for the debtors.

As a result of the debtors' calculation, they were left with a negative monthly disposable income of ($742.00). The Chapter 7 trustee, on the other hand, calculated the debtors' monthly tax expenses based on their gross income, and the trustee's calculation resulted in positive monthly income of $781.10.

The Court determined that Section 707 of the Bankruptcy Code requires debtors to calculate their tax expenses based on actual tax liability, and thus held that the trustee's calculation was the correct one. In addition, because the trustee's calculation resulted in disposable income sufficient to trigger the presumption of abuse under 11 U.S.C. § 707(b)(1), and the debtors could not rebut that presumption, the Court held that the debtors case would be dismissed unless they voluntarily converted to administration under Chapter 13 of the Bankruptcy Code within thirty days.

BANKRUPTCY COURT RULES THAT MOTION TO TRANSFER AVOIDANCE ACTIONS TO DISTRICT COURT PREMATURE

Although a defendant may have a right to a jury trial on a state law fraudulent transfer action, which may permit the right to transfer the action to federal district court, such rights may not be invoked until it is clear that the bankruptcy court would need to engage in fact finding to resolve the case.

In *Kelley v. Hofer (In re Petters Company, Inc. et. al.)*, Adv. No. 10-4221 (Bankr. D. Minn. Dec. 20, 2010), defendants in fraudulent transfer actions brought by the trustee Douglas A. Kelley filed a motion to transfer a number of adversary proceedings to United States District Court on the ground that the defendants had invoked a right to a jury trial and that they did not consent to a bankruptcy judge presiding over a jury trial. Although a bankruptcy judge has the power to conduct a jury trial under LOCAL R. BANKR. P. 1070-1, it may do so only with the "express consent of all of the parties," under 28 U.S.C. § 157(e). Local Rule 5011-3(a)(1) further provides that when the "court has determined that there is a right to trial by jury of the issues for which a jury trial has been timely demanded," the proceeding should be transferred to the district court.

Notwithstanding these principles, the court denied the motion, holding with citation to numerous authorities that even where a jury right has been invoked and transfer requested, the "bankruptcy judge will retain authority over the proceeding until – at the earliest – it is established that a trial is necessary – i.e., all possibility of resolution via summary adjudication under Rule 56 or otherwise has been exhausted."

In further support of its decision, the court noted the complexity in unraveling the Petters' fraudulent scheme and that it was a joint effort between a criminal proceeding, a civil receivership, and now the bankruptcy court. The court referred to a "Coordination Agreement" between the United States Department of Justice, and the "several stewards of receivership and bankruptcy alike," whereby the Justice Department waived its forfeiture rights and remedies to recover and distribute property transferred to third-parties, and agreed the bankruptcy trustee could undertake the process of avoidance and distribution in the bankruptcy court. The court further asserted that the bankruptcy court was best suited for handling pretrial matters of the large number of avoidance-related adversary proceedings, many of which involved common issues.

In conclusion, the court's retention of the cases would "make best use of the specialized expertise of the bankruptcy judiciary, in the substantive law of fraudulent and preferential transfers, the Bankruptcy Code's specific governance over its avoidance remedies, the law of unjust enrichment, and the analysis of record evidence and shifting burdens under Rule 56."

TRUSTEE'S CLAIMS AGAINST DEBTOR'S ATTORNEYS FOR BREACH OF FIDUCIARY DUTY DISMISSED FOR LACK OF CONCRETE EVIDENCE ON DAMAGES

Even at the summary judgment stage, a claim for breach of fiduciary duty against attorneys for the debtor must be supported by concrete evidence of damages to meet the "but-for" causation element. In *Moratzka v. Morris (In re Senior Cottages of America, LLC)*, Adv. No. 03-3132 (Bankr. D. Minn. Sept. 27, 2010), Chief Judge Kishel found insufficient evidence offered in the plaintiff's expert report to establish the "but-for" causation element on a professional malpractice claim.

The trustee for two senior living development companies asserted claims against their pre-petition counsel for recommending the transfer of substantially all of their assets to a newly-formed entity, Millennium Properties, LLC, including eleven housing projects, which would trigger housing tax credits to an owner. A common principal controlled the development companies (Senior Cottages) and Millennium. The allegations stated that Millennium assumed secured debt but did not otherwise pay any amount to Senior Cottages as consideration for the transaction. The trustee further alleged that the attorney "knew that the transfer was for inadequate consideration," that the attorney knew that the companies' principal was breaching his fiduciary duties in authorizing the transfer, and that the transfer caused damages of at least $4.8 million to Senior Cottages because it left the entities with no assets but substantial secured and unsecured debts.

The court resolved the case on the absence of a showing of damages resulting from the alleged asset stripping. The court found that in order to sustain its claims, plaintiff had to show that "but for the attorney's conduct, the client would have obtained a more favorable result in the transaction than the one actually obtained." Defendant's expert opined, based on his review of the debtor's financials and performance of a small number of completed projects, that even absent the transfers, "Senior Cottages would have had no chance to survive." Defendant's expert found that at the time the debtors were insolvent, their assets, contractual, and legal rights were worth less than the debts they owed, that they had only started construction on a "minority fraction of the projects on their books," that there was no equity in the companies, that management was poor, and initial financial projections were wayward, as demonstrated by the unprofitability of those small fraction of completed projects.

Defendant moved for summary judgment based on its expert's finding of no damages. The court looked to plaintiffs' expert to offer a rebuttal record to defendant's report but found the offering lacking in specificity. Specifically, the plaintiffs' expert opined that the projects *could* have been sold and that it was *possible* that sub-developers or purchasers of tax credit syndicates would be willing to further finance such projects. The court found the opinion failed to state that such investments would have in fact generated actual money for the debtor. The expert also relied heavily on pre-petition financial projections of prior management that had been criticized substantially by defendant's expert. Finally, the plaintiffs' expert added a $1,212,000 development fee on top of the project as a potential loss, but the court found such assertion was made "summarily and without analysis." The court ruled that nowhere does the plaintiff's expert "state that he relied on data or evidentiary input than the debtor's own projections and their underlying assumptions. It is all a curiously abstract showing, very much an accounting exercise but not much else."

The court ultimately concluded that plaintiff's expert offered insufficient concrete evidence to establish damages and thus dismissed plaintiff's claims.

EVIDENTIARY HEARING NOT NECESSARY WHERE MATERIAL FACTS ARE NOT IN DISPUTE

In *Cornerstone Bank v. Seaver (In re Hecker)*, No. 09-3645 (D. Minn. Aug. 30, 2010), Judge Tunheim affirmed Judge Kressel's approval of a settlement agreement relating to Denny Hecker's chapter 7 bankruptcy proceeding. The trustee negotiated a transaction whereby certain assets relating to a car dealership would be sold and potential preference claims against the holder of a first priority lien on the dealership's assets would be settled. Specifically, the lien holder agreed to release its liens from all assets of the dealership and to pay the trustee a portion of the proceeds from the dealership's sale as a settlement of preference claims against the creditor up to amount of proceeds paid to the trustee.

A creditor asserting a security interest in Hecker's general intangibles, including the dealership, objected to the settlement, claiming that the settlement proceeds were disguised as a preference in order to avoid the creditor's security interest. The bankruptcy court overruled the creditor's objection, finding that, based on the record, the preference action was legitimate, and that the settlement, taken as a whole transaction, benefited the debtor's estate.

The creditor appealed, arguing that the bankruptcy court abused its discretion for two reasons: first, in approving the settlement without analyzing whether the lien holder had a legitimate preference action; and second, in failing to hold an evidentiary hearing as to the creditor's security interest in the settlement proceeds. The trustee countered that the appeal was moot because the sale of the dealership had closed and non-adverse third-parties had made substantial economic commitments on account of the bankruptcy court's approval of the settlement.

The district court first established that it reviewed the bankruptcy court's decision for a clear abuse of discretion. The district court then held that the appeal was not moot: if the creditor prevailed, it could order the trustee to direct some of the bankruptcy estate's proceeds from the sale to the creditor.

Next, the district court took up the creditor's arguments. As an initial matter, the district court found that the bankruptcy court did not clearly err in finding that an actual preference occurred. The district court then found that the bankruptcy court appropriately weighed the four factors bankruptcy courts are to consider in reviewing settlements. As the bankruptcy court's conclusions were not based on an erroneous view of the law or a clearly erroneous assessment of the evidence, its approval of the settlement should be upheld. In particular, the district court noted that the value of the lien holder's first priority lien exceeded the value of the dealership's assets and property. Hence, there was no equity in the dealership's assets and property to which the creditor's claimed security interest could attach. As the bankruptcy court concluded, the transaction, when taken as a whole, benefited the debtor's estate.

Finally, turning to the creditor's second argument, the district court stated that bankruptcy courts have no discretion to enforce settlements where material facts are in dispute. If no material facts are in dispute, however, the approval of a settlement does not require an evidentiary hearing. As the disputed facts with respect to the preference action were not material given that the lien holder's first priority lien exceeded the value of the dealership's assets and property, an evidentiary hearing was not necessary.