



Office of the Chapter 13 Trustee—Akron Ohio  
Keith L. Rucinski—Trustee

## Chapter 13 Quarterly Newsletter December 2011

### 1. Seasons Greetings and Happy New Year

The Chapter 13 office wishes to extend Seasons Greetings and Best Wishes for a Happy New Year to the bankruptcy community! The past year has continued to be a difficult one given the sluggish economy and the increasing number of people filing for bankruptcy in our area. Many of these cases have been difficult as people have struggled to make a Chapter 13 plan work. The number of cases which do reach a successful conclusion is a testament to the continued professionalism and dedication of all parties in the bankruptcy system. It cannot be said often enough that all parties, the United States Bankruptcy Court, the Clerks office, debtors' counsel, creditors' counsel, the United States Trustee, and staff of the Chapter 13 Trustee work diligently throughout the year to help as many people as possible. Given the workload and stress of our profession, it is important that we all take time out to spend time with our friends and family this holiday season to recharge our batteries and prepare for 2012.

Please note that the Chapter 13 office will be closed for the holidays on December 22, 23, 26, 27, and January 2.

### 2. Personal Financial Management Instructional Course Monday, March 12, 2012

The Chapter 13 office will hold its next Personal Financial Management Instructional Course on Monday, March 12, 2012, from 5:30 PM to 8:00 PM at the main library in downtown Akron. As counsel are aware, if debtors fail to take the course, they will not be eligible for a Chapter 13 discharge. Without the discharge, creditors can reinstitute penalties and interest from the date of filing, keep all money paid through the Chapter 13 plan and initiate new garnishments against the debtors' income for the unpaid balances of claims.

At any given point in time, there are nearly 1,000 active Chapter 13 cases filed in Akron where there is no Personal Financial Management Instructional Course certificate on file. The Trustee would ask all counsel to continue to review their files and work with their clients to get them to take a course, either through the Chapter 13 program or through a program of counsels' choosing, which will allow the debtors to fulfill this important requirement for discharge. The Chapter 13 office has been conducting these classes since March 2008. There has been a steady increase in the percentage of debtors who have earned a discharge. It does appear that by educating the debtors about the process early in the program will increase their chances of ultimately being successful and earning the discharge.

The Chapter 13 office will continue the tradition of filing all certificates with the Court for debtors who take the Personal Financial Management Instructional Course through the Chapter 13 office.

**In an effort to accommodate debtors who may not know their particular work schedule until the last minute, the Trustee has begun allowing unregistered debtors to participate in the course provided that they are at the library timely and have proper photo identification. It does take a little longer to complete the paperwork for debtors who do not register early but the Chapter 13 office understands that many debtors do not know their work schedules until the last minute.**

From March 2008 through December 2011, there have been 2,737 debtors who have taken the personal financial management program through the Chapter 13 office. The program is presented four times a year including one Saturday program for debtors who cannot attend during the week.

**A copy of the flyer for the March 12, 2012, class is attached to this newsletter for counsel to share with their clients.**

### **3. Statistics for Chapter 13 plans filed in Akron**

For the last fiscal year, October 1, 2010-September 30, 2011, the following statistics represent Chapter 13 plans filed in Akron:

Number of New Chapter 13 Cases Filed: 1,141  
Total Number of Cases Closed: 963  
Total Number of Cases Closed Earning Discharge: 454  
Number of Cases Closed with a Hardship Discharge 29  
Percentage of plans earning a discharge: 47%

Average unsecured dividend: 36%  
Total funds paid to unsecured creditors: \$7,644,592

Total funds paid through Chapter 13 plans: \$22,612,365  
Attorney fees paid through Chapter 13 plans: \$2,134,929

### **4. Attorney Fees and Administrative Order 08-04**

Attached to this newsletter for review is the current administrative order for the standard Chapter 13 fees of \$3,000 per plan and a listing of the “no look” fees for post-petition work.

An increasing number of counsel have begun to increase the amount of the “no look” fee for post-petition work but not filing appropriate itemizations with the motion and/or application for additional fees. The following are the current “no look” fee amounts for Akron:

- For a post-confirmation plan modification, up to \$350;
- For a motion for authority to buy, sell or refinance real property, up to \$350;

- For a motion to incur debt, such as the purchase or lease of a motor vehicle, up to \$200;
- For defense of additional motions for relief from stay, beyond those listed in paragraph 4, up to \$350;
- For motions for authority to settle insurance claims and/or use or distribute insurance proceeds, up to \$350; and
- For a motion to reinstate the automatic stay, each one up to \$200.

While there was some discussion at the June 2011 town hall meeting about an increase in the “no look” fee, to the knowledge of the Trustee, the local commercial and bankruptcy section has not made a proposal to the Court for the Court’s review and consideration.

While some of the increases in these fees have been minor they are becoming more numerous. The Trustee would ask counsel to stick to the “no look” fee schedule so that orders may be timely processed. Where counsel feels additional fees are needed then an attached itemization is required.

Lastly, some counsel believe an increase in the “no look” fee is warranted. Those attorneys should work with the Akron Bar Association’s Commercial and Bankruptcy Section to make an appropriate proposal to the Court for consideration.

#### **5. Please state interest rate on proof of claim**

To expedite the processing of claims, the Chapter 13 office asks all counsel, especially those representing creditors, to expressly state the annual interest rate on the front of the proof of claim. Please remember that just because an interest rate is stated in the Chapter 13 plan, the interest rate will not be paid unless the creditor expressly requests interest. As a reminder to counsel representing debtors, the Chapter 13 office, pursuant to the Order Confirming Plan, will pay claims as filed. Therefore, if an interest rate is claimed on a proof of claim which is higher than the amount stated in the plan, it is the responsibility of debtors counsel to file appropriate pleadings opposing the interest rate.

The Trustee takes no position whether or not interest rates stated either in plans or stated on proofs of claims is reasonable, the Trustee will leave that determination to the respective parties.

#### **6. Proper Disclosures Concerning Potential Causes of Action**

There appears to be an increase in the number of cases which do not properly disclose potential causes of action (personal injury actions, automobile accidents, etc) either on Schedule B or as part of the Statement of Financial Affairs. At the time of filing, it is often impossible to know the exact amount of a potential cause of action. Counsel need to ask their clients whether there is any pending or expectant legal claims which will give rise to state court litigation for possible causes of action. At a minimum, these causes of action should be listed on petition schedule B (if not yet initiated) and on both petition schedule B and the Statement of Financial Affairs (if the action has initiated prior to the bankruptcy filing). The amount of the recovery should be listed as “undetermined.” Counsel should also claim the appropriate potential exemptions for any cause of action on Petition Schedule C.

To assist counsel and their clients to allow the state court litigation to continue without interruption, the Chapter 13 office will continue to work with counsel to prepare an appropriate

consent entry to modify the automatic stay. The consent entry modifies the automatic stay to allow the action to continue in state court. The consent entry allows the recovery and payment of state court counsel, costs associated with the state court litigation and the debtor's appropriate exemption. Please note the contingency percentage for state court counsel must be calculated after expenses (cost of the litigation).

Amounts recovered after attorney fees, costs, and exemptions must be paid into the Chapter 13 plan for the benefit of creditors.

Questions concerning the consent entry should be directed to Attorney Joseph Ferrise at the Chapter 13 office. Mr. Ferrise may be contacted at 330-762-6335 ext 231 or [jferrise@ch13akron.com](mailto:jferrise@ch13akron.com).

## **7. The Means Test is Not Irrelevant**

In Hamilton v. Lanning, 129 S. Ct. 2820 (2009), the United States Supreme Court ruled that the Means Test provides a rebuttable presumption on whether or not the unsecured creditors can be paid the amount listed on Line 59 of the Means Test. If the debtor has incurred a change of circumstances at the time of filing (new job, promotion, loss of job, layoff) then the debtor can rebut the presumption and is not bound by the Means Test calculation and can rely on petition schedules I and J.

However, in order to rebut the Means Test requires that the test first be completed correctly. Some local counsel have interpreted the decision in Lanning to mean that the Means Test is irrelevant and can be ignored. This is incorrect and often leads to necessary amendments to avoid locking the debtors into a repayment plan the debtors cannot afford. An increasing number of Means Tests are being filed which leave several important lines blank and do not claim all deductions the debtor is eligible to claim. In essence, by not allowing the debtor to take all appropriate deductions on the Means Test may lock the debtor into a high percentage and high payment plan which the debtor cannot afford. The Trustee notes the following items which are often left blank on the Means Test:

- Line 55, Repayment of Retirement Loans and Contributions: This amount is allowed in a Chapter 13 plan and should be expressly stated on Line 55 especially if the debtor is repaying a 401(k) loan at the time of the Chapter 13 filing.
- Lines 32 and 39, Life Insurance and Medical Insurance: This line is often being left blank and should reflect the amount of the monthly co-payments that many debtors are paying for their life insurance and medical insurance.
- Line 60: Items which are not listed elsewhere on the Means Test and can be deducted include the monthly automobile insurance amount and the monthly property tax and property insurance amount if said insurance and property taxes are not included in the monthly mortgage payment.

Most debtors will benefit by a properly completed Means Test as the final number will often be low or negative and not force the debtors into an unrealistic plan payment.

**NOTE: Most counsel rely on their computer programs to complete the Means Test. It does appear that some software programs are not placing appropriate amounts on the Means Test for retirement and medical insurance. The Trustee is asking all counsel to review the Means Test before filing.**

## **8. New Proof of Claim Forms Effective December 1, 2011**

On December 1, 2011, new bankruptcy forms were put into use in compliance with revised Bankruptcy Rule 3001. Please find attached a copy of the new proof of claim form to be used by creditors. Also attached are the supplemental proofs of claim necessary for mortgage holders to file with the Bankruptcy Court regarding a change in the debtor's monthly mortgage payment and further a notice of post-petition mortgage fees, expenses and charges when a post-petition mortgage claim is filed.

Often times, bankruptcy practitioners get used to forms and it takes a while to implement the changes. As a New Years resolution, it is important for all parties in the bankruptcy community to spend some time to review the attached forms and become familiar with the new proofs of claim and supplemental information to be filed with the Court.

## **9. Trustee's Request for Discharge**

For about two years, the Chapter 13 office in Akron has been filing a Request for Discharge at the conclusion of the Chapter 13 case. This notice is filed with the Court and served on all parties who have filed claims to let them know that Chapter 13 payments have concluded and unless a party in interest requests a hearing, the Court will undertake issuing the appropriate discharge within 30 days of the request being filed.

This type of pleading is now mandatory by revised Bankruptcy Rule 3001, effective December 1, 2011. The mandatory nature of the form is to allow debtors to file motions to deem their mortgage current so that at the conclusion of the Chapter 13 plan they would know the amount due on their mortgage loan. This type of pleading is also useful for all other creditors so that they have an opportunity to review their records to make sure that they have received all funds for which they are due.

As the Akron Court does not require mandatory conduit mortgage payments, if debtors' counsel believes a motion to deem the mortgage current to be appropriate at the end of the Chapter 13 case, then within 30 days of the Request for Discharge being filed said counsel should file an appropriate pleading with the Court.

It is the position of the Chapter 13 office that the attached Request for Discharge form used in Akron is in compliance with Bankruptcy Rule 3001 as of December 1, 2011. However, as stated above, new forms often require a learning curve for us all and if any changes are made to this form said changes will be documented in future newsletters.

## 10. Case Law

United States v. Storey, 640 F.3d 739 (6th Cir. Ohio 2011).

Storey filed federal tax returns for the years between 1994 through 1997, and there was no dispute that she did so timely and accurately. She did fail to pay the taxes she owed for those years. Storey filed a Chapter 7 bankruptcy case in 2002 and received a discharge, as the United States never formally disputed the dischargability of their tax claims. Then in 2007, the United States brought the present suit to reduce to judgment the income tax liabilities for the years 1994 through 1997 as well as foreclose on its tax liens.

The U.S. District Court for the Northern District of Ohio, at Toledo, entered judgment for the United States, finding that Storey had willfully attempted to evade paying taxes, preventing discharge of the obligations through her bankruptcy filing. Storey appealed.

The judgment of the district court was reversed by the 6<sup>th</sup> Circuit Court of Appeals, and the case was remanded to the district court for entry of partial judgment in favor of Storey with respect to her tax obligations for years 1994 through 1997. The 6<sup>th</sup> Circuit held that unless Storey's non-payment was "knowing and deliberate," the tax obligations were discharged in her Chapter 7 bankruptcy case. The United States failed to offer sufficient evidence to rebut the presumption that the tax obligations were discharged in her bankruptcy proceedings, or that she was anything other than an honest but unfortunate debtor. There was no evidence that she lived lavishly during the years she did not pay her taxes, or that she chose to engage in recreational or philanthropic activities instead of paying her taxes, and the bankruptcy court's findings on her student loans demonstrated only that she would soon have the ability to repay her student loans, it did not touch upon whether she voluntarily and intentionally avoided paying her taxes.

**The Chapter 13 Trustee's Office in Akron makes no representations regarding the below case and makes no representations whether any court in the Northern District of Ohio will follow this decision. The case is being offered for educational purposes on current issues facing the Chapter 13 community nationwide.**

In re Fisette, 2011 WL 3795138 (8<sup>th</sup> Cir. Aug. 29, 2011)

The Debtor, Fisette, filed a Chapter 13 bankruptcy case after already having received a Chapter 7 discharge less than one year earlier. Thus Fisette was ineligible for the traditional Chapter 13 discharge based on his prior filing. According to Fisette's schedules, his home was worth less than the amount he owed on his first mortgage. Fisette also had two junior mortgages that he intended to strip off through the Chapter 13 case.

The Minnesota Bankruptcy Court denied confirmation of Fisette's proposed plan on the basis that the current law in the 8<sup>th</sup> Circuit would not allow the debtor to strip the junior mortgages secured only by a lien on the debtor's homestead. The Court reasoned that the anti-modification protections enumerated in Section 1322(b)(2) were based on the creditor's status as the holder of the claim secured by the residential mortgage, not by the secured status of the claim as determined by Section 506.

Fisette then appealed to the 8<sup>th</sup> Circuit Bankruptcy Appellate Panel who reversed and remanded the bankruptcy court's decision. The Panel expressly noted that every circuit that had addressed this same issue to date had ruled Section 1322(b)(2) does not prevent Chapter 13 debtors from stripping off wholly unsecured liens on their homes. The Panel first looked to Section 506(a) to determine whether the junior mortgage creditors held a secured claim. Because both junior mortgages were wholly unsecured pursuant Section 506(a), the anti-modification protections of Section 1322(b)(2) could not be applied.

The 8<sup>th</sup> Circuit BAP also weighed in on the issue of whether Chapter 13 debtors, such as Fisette, who are ineligible for discharge may still avoid wholly unsecured residential mortgages. On this issue, the Panel held that the stripping of the junior mortgages is effected upon the debtor's completion of obligations under the plan and is not contingent on receiving the Chapter 13 discharge. The Panel noted that Section 1325(a)(5) does not apply to wholly unsecured junior mortgages, as there is no value in the collateral to support the lien holder's claim and the confirmation conditions otherwise required in Section 1325 do not apply. On remand back to the bankruptcy court, the BAP stated that the allowance of the junior lien stripping was not tantamount to allowing the entry of a discharge in the case and also stated the plan should not be recommended for confirmation until other necessary changes were made.

## **CALL FOR ARTICLES**

**The Chapter 13 Office in Akron has been asked to serve on the Editorial Staff for the National Association of Chapter 13 Trustee Quarterly Magazine. If you have an article on a bankruptcy topic you would like to submit for consideration, please send your article (in word and PDF format) to:**  
**[krucinski@ch13akron.com](mailto:krucinski@ch13akron.com)**

**Please put in the subject line of your e-mail: NACTT Article Submission**

## **SAVE THE DATE**

**White Williams Seminar  
Hartville Kitchen  
June 22, 2012**



**Personal Financial Management Instructional Course**  
**March 12, 2012**

Phone: (330) 762-6335  
Fax: (330) 762-7072  
Web: www.chapter13info.com

**Office Of**  
**The Chapter 13 Trustee**  
Keith L. Rucinski, Trustee

One Cascade Plaza  
Suite 2020  
Akron, Ohio 44308

December 9, 2011

**Personal Financial Management Instructional Course**

Pursuant to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, all people filing for bankruptcy after October 17, 2005, must take a Personal Financial Management Instructional Course in order to earn a discharge of their case. A discharge means a successful completion of the plan and creditors paid through the plan may not seek further payment from you. This course is in addition to the Credit Counseling Course that you took to file your Chapter 13 case. If you have already taken both courses you may disregard this notice.

The Chapter 13 Office in Akron, Ohio will be offering the Personal Financial Management Instruction Course on **Monday, March 12<sup>th</sup>, 2012**, at the Akron-Summit County Public Library, 60 S. High Street, Akron, Ohio 44308. Pickup of course materials and seating for the class begins at 5:30 p.m. The course runs from 6:00 p.m. to 8:00 p.m. A parking deck is located next to the library and parking is free. **You must register for the course and may do so by calling 330-475-7500, or by email to edclass@ch13akron.com. PLEASE MAKE SURE TO LEAVE YOUR NAME AND CASE NUMBER WHEN CALLING TO MAKE YOUR RESERVATION. Space is limited so please make your reservation as soon as possible. The deadline to register for the class is March 9<sup>th</sup>, 2012.** A photo I.D. will be necessary in order to take the course. If you require a Sign Language interpreter send your request to edclass@ch13akron.com. The instructor will be Keith Rucinski. Mr. Rucinski is a CPA and Attorney and serves as Trustee for the Chapter 13 Office. For the past decade he has taught college courses and has been a frequent speaker at local and national seminars.

*This free course will not be offered again, until June 2012 (Date to be announced at a later date)*

This course is only being offered to individuals who have filed Chapter 13 with the U.S. Bankruptcy Court in Akron, Ohio. The course is being offered without regard to an individual's ability to pay. There is no cost to individuals for taking the course sponsored by the Chapter 13 Office.

*You are not required to take this course through the Chapter 13 Office, but you must take a course which has been certified by the U.S. Department of Justice – U.S. Trustee Program. The other course providers may charge you a fee. The Chapter 13 Office in Akron does not pay or receive fees or other consideration for the referral of debtor students to or by the provider.*

Upon completion of the course the Chapter 13 Office in Akron will provide participants a certificate of course completion. This certificate must be filed with the U.S. Bankruptcy Court in Akron, Ohio in order to earn a discharge in your case.

# Main Library

is located at 60 S. High Street  
Akron, Ohio 44326  
in downtown Akron, OH  
330-643-9000.

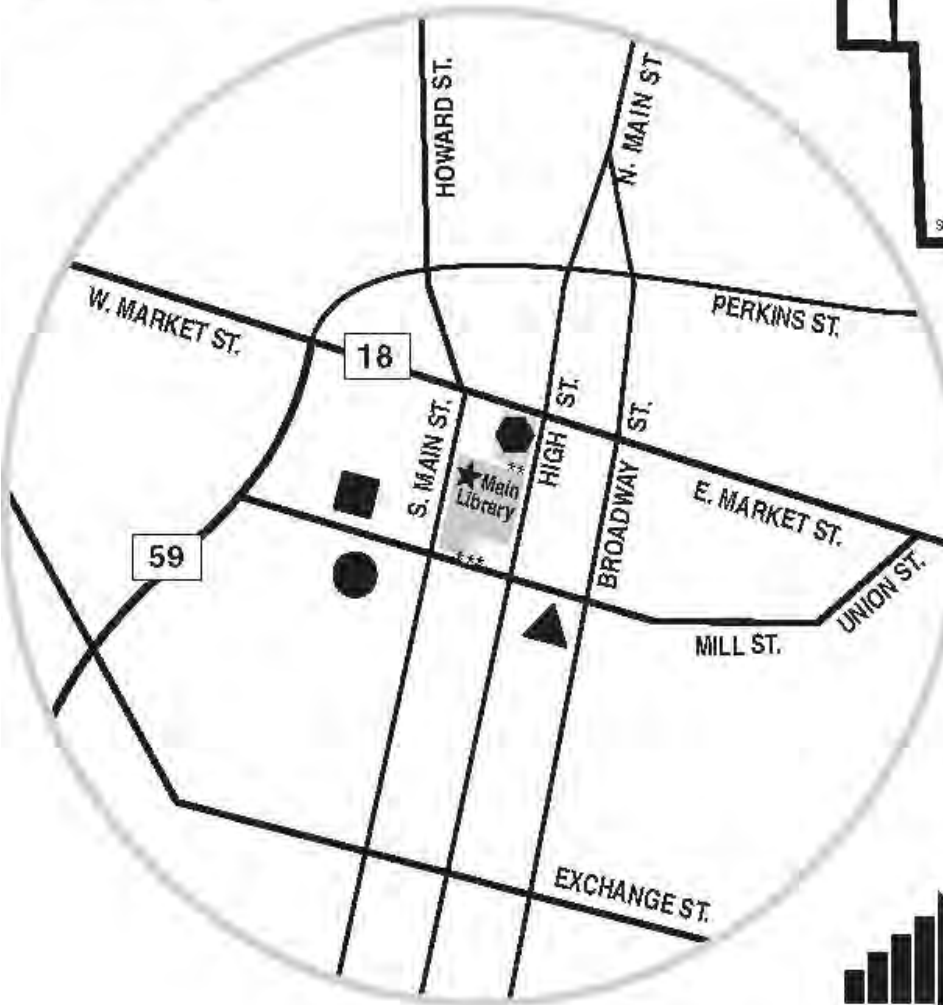
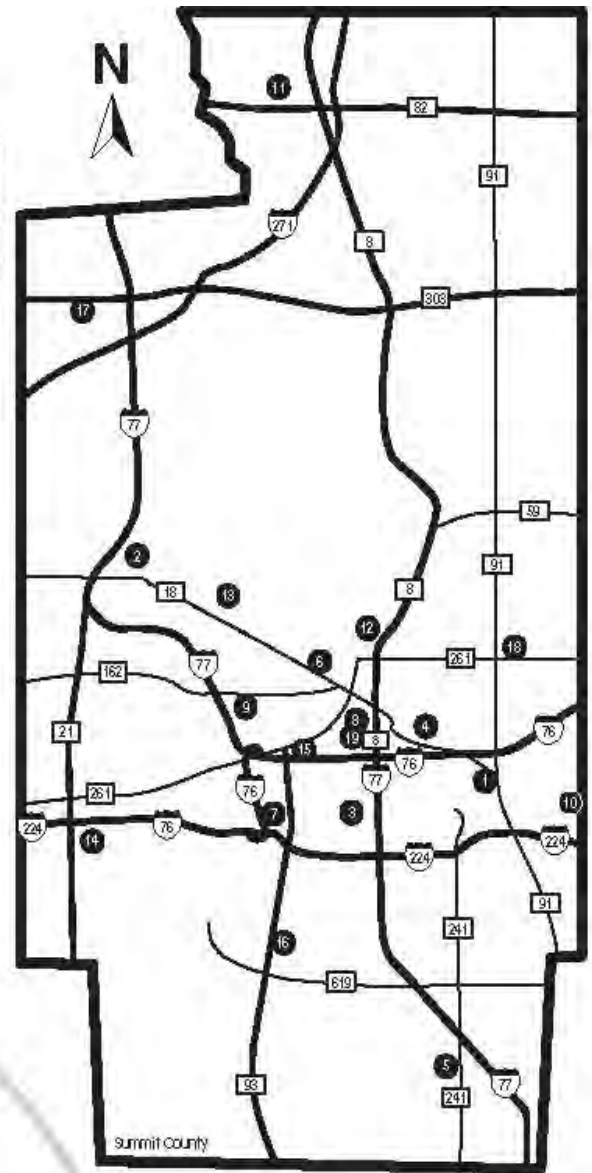


\*\*Drive-through window accessible  
from High Street between  
Main Library and the High & Market parking deck  
\*\*\*LOADING DOCK entrance is on Mill Street

- **From Cleveland:** From Interstate I-77 South, take exit 21C to merge onto Innerbelt/Martin Luther King Jr Fwy E/OH-59 E toward Downtown Akron. Turn right at N. High St.
- **From Canton:** From I-77 North, take the OH-59 W exit toward Perkins St/M.L. King Jr Blvd & Fwy. Turn left at Perkins St and continue on Martin Luther King Jr Blvd. Turn left at N High St.

## Convenient Parking for Main Library includes:

- - High & Market Deck (across from the Akron Art Museum and connects to the library)
- - Super Block Garage
- - Cascade Parking Garage
- ▲ - John S. Knight Center Parking



\*\*\* A PHOTO ID IS  
REQUIRED FOR  
ADMITTANCE TO THE  
SEMINAR

\*\*\* IF YOU PARK IN THE  
LIBRARY PARKING DECK  
MAKE SURE TO BRING  
YOUR TICKET WITH YOU  
FOR VALIDATION

Administrative Order No 08-04  
Payment of Attorney Fees

FILED

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U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
AKRON

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

IN RE:	)	
	)	Administrative Order No. 08-04
ORDER GOVERNING PROCEDURES FOR	)	
ALLOWANCE OF ATTORNEYS' FEES IN	)	
CHAPTER 13 CASES FILED ON OR AFTER	)	JUDGE MARILYN SHEA-STONUM
APRIL 21, 2008	)	

In order to continue to ensure the efficient and just determination of Chapter 13 cases and proceedings, this Administrative Order is issued concerning the allowance of attorneys' fees in Chapter 13 cases. The fee schedules in this Administrative Order are responsive to the observations of the Chapter 13 Trustee and the request by practitioners that the Court revisit fees allowable in Chapter 13 cases without the necessity of filing an individual fee application. The fee schedules are also consistent with the Court's experience reviewing Chapter 13 fee applications over the past thirteen and a half years.<sup>1</sup> In addition, the fees represent a recognition of the additional costs to and time spent on each case by Chapter 13 practitioners due to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").

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<sup>1</sup> The use of these fee schedules is intended to encourage uniformity and minimize the time and expense of the fee application process. However, attorneys are free to seek compensation by submitting detailed billing information under the traditional lodestar format, pursuant to FED. R. BANKR. P. 2016, 11 U.S.C. § 330 and the Guidelines for Compensation and Expense Reimbursement of Professionals (the "Guidelines"), prescribed under Local Rule 2016-1.

The Court is aware of criticism equating a “no look” fee schedule contemplated by this Administrative Order with “price fixing.” Notwithstanding such criticism and as has been noted on the record, the Court has observed that, despite the longstanding procedure for obtaining “no look” fees, the legal community servicing this Court location is ripe with healthy competition. Moreover, the Court has observed that, while the majority of counsel for debtor(s) do avail themselves of the procedures allowing for a “no look” fee, they do not do so on an indiscriminate basis but, instead, only when warranted by the situation presented by their debtor-client(s) and often times at rates well below the maximum “no look” fee then allowed.

Unless otherwise ordered by the Court, this Administrative Order governs the compensation of attorneys in Chapter 13 cases filed in this Court on and after April 21, 2008.

1. Counsel representing Chapter 13 debtors shall be the attorney of record from the filing of the petition until the close or dismissal of the case (including disposition of motions to reinstate), unless relieved of representation by motion and court approval, or by another attorney filing a notice of substitution of counsel.

2. Subject to all the other provisions of this Administrative Order, if an executed copy of the Rights and Responsibilities of Chapter 13 Debtors and their Attorneys, *see* Exhibit A, has been filed with the Court, counsel may reach agreement with debtor(s) for an initial total fee of up to \$3,000 (the “Initial Total Fee”) and be paid the Initial Total Fee during the administration of the case, as set forth below, without the necessity of filing an individual case fee application. The Initial Total Fee shall be disclosed to the Court and is to be paid at four separate stages of the case as follows:

A. Provided that the filing of the petition is accompanied by all of the necessary schedules and disclosure information, then prior to the filing of the case, counsel may collect from the client **25%** of the Initial Total Fee (e.g., if the amount to which the client has agreed is \$3,000, then \$750 may be collected at this stage) to be applied against the Initial Total Fee. If the filing is not a complete filing, in the sense that not all of the schedules and disclosures accompany the petition, counsel’s fee at this stage is limited to **15%** (in the case of a \$3,000 fee, then \$450 may be collected at this stage).

- B. Thereafter, counsel will be entitled to a distribution of an additional **35%** (\$1,050 in the example of the \$3,000 fee) of the Initial Total Fee to be paid as an administrative claim upon and after confirmation of the Chapter 13 plan.<sup>2</sup> In a case that was commenced without all necessary schedules and disclosures, this Administrative Order assumes that a confirmation will not occur until all of those matters have been addressed to the satisfaction of the Chapter 13 Trustee. In such case, counsel also will be entitled to collect the **10%** percent for which such counsel would have been eligible at the outset of the case had the filing been complete.
- C. Concurrent with payment of all secured and priority claims that have been allowed in the case, counsel may receive an additional **20%** distribution of the Initial Total Fee (\$600 in the example of the \$3,000 fee) from the Chapter 13 Trustee.
- D. Thereafter, concurrent with the payment of general unsecured claims, counsel may receive a final distribution from the Chapter 13 Trustee of **20%** of the Initial Total Fee (\$600 in the example of the \$3,000 fee).

The fees referred to in this paragraph may be allowed by the Court in the order confirming the Chapter 13 plan of debtor(s) based upon the compensation statement signed by counsel and without the filing of a fee application pursuant to 11 U.S.C. § 330 and FED. R. BANKR. P. 2016(a).

3. Counsel for debtor(s) may request fees and expenses exceeding the amount set forth in paragraph 2 upon (A) formal application under FED. R. BANKR. P. 2016(a) and in accordance with the Guidelines, after notice and a hearing; or (B) application under paragraph 5 of this Administrative Order for designated matters. Allowance of fees and expenses greater than the amounts specified in paragraph 2 or 5 of this Administrative Order shall be by separate order of the Court. Counsel may not receive a post-petition retainer or payment other than as specified in this Administrative Order without leave of court.

4. As a guideline, the Court considers that counsel for debtor(s) will perform the following services in exchange for the Initial Total Fee allowed under paragraph 2:

- A. Having a personal meeting with debtor(s) to (i) review the financial situation of debtor(s) and (ii) counsel debtor(s) regarding filing under either Chapter 7 or Chapter 13 and alternatives to filing bankruptcy and (iii) make disclosures now required by BAPCPA, *see generally* 11 U.S.C. § 527;
- B. Participating in all conferences with debtor(s) and timely responding to inquiries of debtor(s), either by telephone or in writing;

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<sup>2</sup> If counsel has not received any fees directly from his or her client(s) prior to the case filing as described in paragraph 2(A) of this Administrative Order, counsel will receive 60% of his or her fees at this stage as an administrative expense (\$1,800.00 in the example of a \$3,000.00 fee).

- C. Facilitating the credit counseling and personal financial management requirements imposed upon debtor(s) by BAPCPA. *see generally* 11 U.S.C. §§ 109(b) and 1328(g);
- D. Preparing the bankruptcy petition, schedules, statement of financial affairs, payment advices, “Means Test Form” (Official Form B22C) and the Chapter 13 plan, and assisting debtor(s) in understanding the nature of information that is to be provided and the good faith of the debtor(s) in assembling the information;
- E. Facilitating delivery of federal income tax returns or transcripts, proof of insurance (auto and home) and pay remittances to the Chapter 13 Trustee prior to the first date set for the meeting of creditors pursuant to 11 U.S.C. § 341 (the “341 Meeting”);
- F. Negotiating and communicating with priority and secured creditors, including the Internal Revenue Service;
- G. Representing debtor(s) at the initial 341 Meeting and any continued 341 Meeting;
- H. Responding to inquiries made by debtor(s) and/or the Chapter 13 Trustee in furtherance of the administration of the Chapter 13 case, in general, and the Chapter 13 plan, in particular;
- I. Preparing (and timely filing when necessary) documents and notices, including submissions based upon Chapter 13 Trustee recommendations, a suggestion of bankruptcy, routine objections to claims, amendments to schedules, voluntary dismissals and all case related correspondence;
- J. Responding to routine objections to plan confirmation, and when necessary, preparing, filing and serving an amended plan;
- K. Representing debtor(s) at the confirmation hearing, but not including an evidentiary hearing;
- L. Representing debtor(s) in connection with two particular Motions for Relief from Stay pursuant to 11 U.S.C. § 362 - one concerning the residence and one concerning a vehicle, but not including an evidentiary hearing on these matters;
- M. Representing debtor(s) on motions to avoid liens;
- N. Subject to the possible award of fees as a sanction against the respondent, representing debtor(s) on violations of the automatic stay and the post-discharge injunction;
- O. Representing debtor(s) on routine objections to claims;



- P. Representing debtor(s) on motions to dismiss, or, in the event that counsel has no objection, communicating with the Chapter 13 Trustee's office prior to the hearing on a motion to dismiss; and
- Q. Providing other legal services necessary for the administration of the case, including, but not limited to, continuing to assist debtor(s) by returning telephone calls, answering questions and reviewing and sending correspondence.

5. Notwithstanding any other provision of this Administrative Order, for certain services not within the guidelines of this Administrative Order for the Initial Total Fee, to encourage uniformity and consistency, and to minimize the time and expense of the fee application process, the Court will approve the following fees (the "Additional Post-Petition Fees") using the "Application for Additional Post-Petition Fees," (the "Application") attached to this Administrative Order as Exhibit B, provided that, prior to filing the Application, counsel for debtor(s) has obtained, and attached to the Application, a consent (the "Debtor Consent") of debtor(s) to pay such fees:

- A. For a post-confirmation plan modification, up to \$350;
- B. For a motion for authority to buy, sell, or refinance real property, up to \$350;
- C. For a motion to incur debt, such as the purchase or lease of a motor vehicle, up to \$200;
- D. For defense of additional motions for relief from stay, beyond those listed in paragraph 4, up to \$350;
- E. For motions for authority to settle insurance claims and/or use or distribute insurance proceeds, up to \$350; and
- F. For a motion to reinstate the automatic stay, each one up to \$200.

6. The Application referenced in paragraph 5 must be filed separately from the underlying pleadings for which the Additional Post-Petition Fees are sought. Unless and until agreed to in writing by debtor(s) and specifically permitted in an order approving the Additional Post-Petition Fees, counsel are not to collect any such additional fees directly from debtor(s). Once approved by the Court, the Chapter 13 Trustee is authorized to process the Additional Post-Petition Fees as an administrative expense which will be paid as soon as practicable subject to adequate protection payments in the Chapter 13 plan and the standard administration fee of the Chapter 13 Trustee.

7. The Debtor Consent may be included within or attached to an Application and must (A) be signed by debtor(s) and (B) set forth the following:

I we, \_\_\_\_\_, understand that my/our attorney, \_\_\_\_\_ has performed additional legal services on my/our behalf in this Chapter 13 case that were not initially contemplated by him/her or me/us. I/we further understand that the additional charge for said

legal services, for which Court approval is now being sought, is \_\_\_\_\_ (\$ \_\_\_\_\_) and I/we approve of payment of same. I/we also understand that, unless a written agreement to the contrary has been reached, the additional legal fees now being sought will be paid to my/our attorney through our Chapter 13 plan.

I/we have been informed that I/we have a right to oppose the payment of those fees by appearing in Court on a date to be determined by the Court. I/we have determined that there is no need to exercise that right.

8. If counsel elects not to seek fees under this Administrative Order, then counsel shall file a formal application under FED. R. BANKR. P. 2002 and 2016 and in accordance with the Guidelines.

9. With respect to novel, complex, or non-routine matters, counsel may file a fee application in compliance with FED. R. BANKR. P. 2002 and 2016, setting forth, at a minimum, each activity for which a fee is requested, the identity of the person performing the services, the billing rate of the person, the services performed, the date of the services and the amount of time expended. Such applications must be accompanied by evidence that each debtor-client was informed of and agreed to the hourly rate that could be charged in the event that non-routine issues developed in a case. The best evidence of such agreement is a counter-signed engagement letter.

10. In the event that the Chapter 13 case is either converted or dismissed without reinstatement before confirmation of a Chapter 13 plan, the Chapter 13 Trustee shall pay to counsel for debtor(s), absent a contrary order and to the extent funds are available, an administrative claim equal to 25% of the unpaid balance of the Initial Total Fee.

11. This Administrative Order does not limit the rights of debtor(s), the Chapter 13 Trustee, the U.S. Trustee, or any creditor to object to any fee request, even if the amount sought falls within the fee schedules listed, and even if debtor(s) had previously consented in writing to pay the requested fees. The provisions of this Administrative Order excusing counsel from the preparation of detailed fee applications is a privilege extended to counsel who attend to their obligations to their debtor clients. This Court has specifically requested the Chapter 13 Trustee to inform the Court of counsel whose level of service to their clients may not justify such a privilege. Such referrals by the Chapter 13 Trustee to this Court will be set for show cause hearings. Additionally, a hearing (at which counsel for debtor(s) shall appear) will be scheduled by this Court in all of the following situations:

- A. If counsel for debtor(s) is seeking an Initial Total Fee in excess of the amount set forth in paragraph 2 of this Administrative Order;
- B. If counsel for debtor(s) is seeking Additional Post-Petition Fees in excess of the amounts set forth in paragraph 5 of this Administrative Order; and
- C. If counsel for debtor(s) has failed to comply with the requirements of paragraph 7 of this Administrative Order regarding the Debtor Consent.

12. The Court retains the authority to reduce and/or order disgorgement of fees for cause, after notice and a hearing, including but not limited to the reduction of fees by \$200 for the failure of counsel for debtor(s) to file an original Declaration Re: Electronic Filing within five working days after the petition is filed as is required under General Order 02-2.

13. Once counsel for debtor(s) withdraws or is relieved of his/her duties by replacement counsel, the Chapter 13 Trustee is no longer authorized under this Administrative order to make a distribution to such outgoing counsel on account of any balance of the Initial Total Fee then due. If outgoing counsel for debtor(s) seeks payment on account of any balance of the Initial Total Fee still due, such counsel shall file separate motion specifically seeking such distribution.

  
Marilyn Shea-Stonum  
U.S. Bankruptcy Judge

**EXHIBIT A**  
**TO ADMINISTRATIVE ORDER 08-04**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF OHIO

In Re:

Case No.

Debtor(s)

Chapter 13

JUDGE MARILYN SHEA-STONUM

**RIGHTS AND RESPONSIBILITIES OF  
CHAPTER 13 DEBTORS AND THEIR ATTORNEYS**

It is important for debtors who file a bankruptcy case under Chapter 13 to understand their rights and responsibilities. It is also important that debtors know what their attorney's responsibilities are and understand the importance of communicating with their attorney to make the case successful. Debtors should also know that they may expect certain services to be performed by their attorney. It is also important for debtors to know the costs of attorneys' fees through the life of the plan. In order to ensure that debtors and their attorney understand their rights and responsibilities in the bankruptcy process, the following guidelines provided by the Court are hereby agreed to by debtors and their counsel:

**A. BEFORE THE CASE IS FILED:**

**DEBTOR** agrees to:

1. Provide the attorney with accurate, and, to the best of debtor's ability, complete financial information.
2. Discuss with the attorney debtor's objectives in filing the case.
3. Keep all scheduled meetings and/or appointments, both with the attorney and with other parties to the case.
4. Respond to all attorney requests as soon as possible.
5. Provide the attorney with a working telephone number or other reliable method of communication.

**ATTORNEY** agrees to:

1. Personally meet with debtor to review debtor's assets, liabilities, income and expenses.
2. Counsel debtor regarding the advisability of filing either a Chapter 7 or Chapter 13 case, discuss with debtor both options as well as alternatives to filing for bankruptcy and answer debtor's questions.
3. Explain what payments will be made directly by debtor, such as mortgages and vehicle lease payments, and what payments will be made through the Chapter 13 plan.
4. Explain to debtor how, when and where to make the required Chapter 13 plan payments.
5. Explain to debtor how the attorney's fees and Chapter 13 Trustee's fees are paid, and provide an executed copy of this document to debtor.
6. Explain to debtor that the first plan payment must be made to the Chapter 13 Trustee not later than 30 days after the date that the plan is filed or the case is filed, whichever is earlier.
7. Advise debtor of the requirement to attend the § 341 Meeting of Creditors and to bring to the meeting a valid, unexpired picture identification and proof of social security number.
8. Advise debtor of the necessity of maintaining liability, collision and comprehensive insurance on vehicles owned or leased by debtor.
9. Advise debtor of the necessity of maintaining insurance on any real property that debtor may own.
10. Timely prepare and file debtor's petition, plan, statements, schedules, payment advices and "Means Test Form" (Official Form B22C) as well as any required amendments thereto.
11. Facilitate delivery of federal income tax returns or transcripts to the Chapter 13 Trustee prior to the first date set for the § 341 Meeting of Creditors.
12. Facilitate debtor's requirement to complete a pre-petition course in credit counseling.

**B. AFTER THE CASE IS FILED:**

**DEBTOR** agrees to:

1. Keep the Chapter 13 Trustee and the attorney informed as to debtor's current address and telephone number.
2. Timely make all Chapter 13 payments to the Chapter 13 Trustee.
3. Timely make all post-petition payments to the mortgage company and any other creditors that debtor has agreed to pay directly, and, if appropriate, maintain proper insurance coverage and pay post-petition tax obligations concerning the same in a timely fashion.
4. Cooperate with the attorney in preparing all pleadings and attending all hearings as required.
5. Prepare and file all delinquent federal, state, and local tax returns by not later than the first date set for the § 341 Meeting of Creditors.
6. Promptly inform the attorney of any wage garnishments or attachments of assets which occur or continue to occur after the filing of the Chapter 13 case.
7. Let the attorney know if debtor is sued at any time during the Chapter 13 case.
8. Contact the attorney regarding any changes in employment, increases or decreases in income or any other financial problems or changes.
9. Cooperate with the attorney and the Chapter 13 Trustee in timely producing any financial or supporting documents requested by the attorney or the Chapter 13 Trustee.
10. Contact the attorney to find out what approvals are required before buying, refinancing or selling real property, or before entering into any long-term loan or lease agreements.

**ATTORNEY** agrees to:

1. Continue to represent debtor through the conclusion of the Chapter 13 case, whether by dismissal or discharge.
2. Instruct debtor as to the date, time and location of the § 341 Meeting of Creditors, and appear at the § 341 Meeting of Creditors with debtor.
3. Respond to objections to plan confirmation, and, when necessary, prepare an amended plan.
4. Prepare, file and serve necessary plan modifications which may include suspending, decreasing or increasing plan payments.
5. Prepare, file and serve necessary amended statements and schedules in accordance with information provided by debtor.
6. Prepare, file and serve necessary motions to incur debt, or to buy, sell or refinance real property when appropriate.
7. Object to improper or invalid claims, if necessary, based upon documentation provided by debtor.
8. Be available to respond to debtor's questions throughout the pendency of the Chapter 13 case and the life of the plan.
9. Represent debtor in motions for relief from stay and motions to dismiss or convert.
10. Provide such other legal services as are necessary to the administration of the Chapter 13 case before the Bankruptcy Court, which include, but are not limited to, meeting with debtor, presenting appropriate legal pleadings and making necessary court appearances.
11. File an executed copy of this document with the Court, and provide executed copies of it to debtor and the Chapter 13 Trustee.
12. Facilitate debtor's requirement to complete a post-petition course in personal financial management.

**C. ATTORNEY FEES:**

The total fee charged debtor, exclusive of Court costs, is \$ \_\_\_\_\_ (the "Initial Total Fee"), of which \$ \_\_\_\_\_ was paid before the filing of the Chapter 13 petition (the "Initial Retainer"), with the balance of \$ \_\_\_\_\_ being paid by the Chapter 13 Trustee after confirmation of the Chapter 13 plan. The attorney may not demand or receive any additional fees directly from debtor, other than the Initial Retainer, unless a written agreement to the contrary has been reached and the Court so orders.

If the Chapter 13 case is either converted or dismissed before confirmation of a plan, absent contrary Court order, the Chapter 13 Trustee shall pay to the attorney for debtor, to the extent funds are available, an administrative claim equal to 25% of the unpaid balance of the Initial Total Fee that the debtor agreed to pay.

If the Initial Total Fee initially charged to debtor and ordered by the Court is not sufficient to compensate the attorney for legal services rendered in the case, the attorney agrees to apply to the Court for approval of additional fees. The following legal services are not covered by the Initial Total Fee initially charged debtor, and the attorney may apply to the Court for payment in the amount specified:

<b>Additional Fee, if any, Debtor Agrees to Pay Should Additional Service be Performed**</b>	<b>Description of Additional Legal Service Not Covered by Initial Total Fee</b>
\$ _____	For a post-confirmation plan modification
\$ _____	For a motion for authority to buy, sell or refinance real property
\$ _____	For a motion to incur debt, such as the purchase or lease of a motor vehicle
\$ _____	For defense of additional motions to lift stay, beyond one concerning debtor's residence and one concerning a vehicle, which are included within Initial Total Fee, but not including an evidentiary hearing
\$ _____	For a motions for authority to settle insurance claims and/or to use or distribute insurance proceeds
\$ _____	For a motion to reinstate the automatic stay

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\*\*\* Counsel requesting approval of fees in excess of the amounts stated in paragraph 2 or 5 of Administrative Order 08-04 must file a detailed fee application with the Court.



In addition, the attorney may need to provide legal services to debtor that are not covered by the Initial Total Fee. Such services include: (i) handling novel, complex or non-routine motions; (ii) oppositions to motions or objections to claims; (iii) representation in connection with an evidentiary hearing; or (iv) representation in adversary proceedings. These types of proceedings may be billed at reasonable hourly rates, and the attorney shall file a fee application in compliance with Bankruptcy Rules 2002 and 2016, setting forth, at a minimum, as to each activity for which a fee is requested, the identity of the person performing such services, the billing rate for such person, the services performed, the dates of the services and amount the of time expended. The attorney's current hourly rate is \$\_\_\_\_\_.

All post-petition attorney fees shall be paid through the Chapter 13 plan unless otherwise specifically agreed to in writing and permitted by an order of the Court. If debtor disputes the legal services provided or the fees charged by the attorney, debtor may file an objection with the Court and that matter will be set for hearing. The attorney may move to withdraw as counsel, for cause shown, or debtor may discharge the attorney at any time.

The Court may, *sua sponte*, or upon motion of an interested party, disallow all or part of requested attorney's fees or may order the disgorgement of all or part of already collected fees if the Court finds that the attorney failed to provide services in accordance with the guidelines set forth in this document.

DATED: \_\_\_\_\_

\_\_\_\_\_  
DEBTOR

DATED: \_\_\_\_\_

\_\_\_\_\_  
DEBTOR

DATED: \_\_\_\_\_

\_\_\_\_\_  
ATTORNEY FOR DEBTOR(S)

**EXHIBIT B**  
**TO ADMINISTRATIVE ORDER 08-04**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF OHIO

In Re:

Case No.

Debtor(s)

Chapter 13

JUDGE MARILYN SHEA-STONUM

**APPLICATION FOR ADDITIONAL POST-PETITION FEES**

1. In accordance with Administrative Order No. 08-04, the attorney for debtor(s) hereby requests additional compensation for services performed on behalf of debtor(s) as follows:

\_\_\_ Post-confirmation plan modification  
Date filed \_\_\_\_\_ Hearing Date(s) \_\_\_\_\_  
Amount requested \$ \_\_\_\_\_

\_\_\_ Motion for authority to buy, sell or refinance real property  
Date filed \_\_\_\_\_ Hearing Date(s) \_\_\_\_\_  
Amount requested \$ \_\_\_\_\_

\_\_\_ Motion to incur additional debt (purchase/lease vehicle, purchase residence etc.)  
Date filed \_\_\_\_\_ Hearing Date(s) \_\_\_\_\_  
Amount requested \$ \_\_\_\_\_

\_\_\_ Defense of additional motion for relief from stay, beyond one concerning debtor's residence and one concerning a vehicle, which are included in the Initial Total Fee  
Date filed \_\_\_\_\_ Hearing Date(s) \_\_\_\_\_  
Amount requested \$ \_\_\_\_\_

\_\_\_ Motion for authority to settle insurance claims and/or to use of distribute insurance proceeds  
Date filed \_\_\_\_\_ Hearing Date(s) \_\_\_\_\_  
Amount requested \$ \_\_\_\_\_

\_\_\_ Motion to reinstate the automatic stay  
Date filed \_\_\_\_\_ Hearing Date(s) \_\_\_\_\_  
Amount requested \$ \_\_\_\_\_

2. The undersigned represents to the Court that (a) the services indicated above have been completed and time records verifying the services have been kept, (b) the Debtor Consent (pursuant to ¶5 and ¶7 of Administrative Order 08-04) is being filed and served with this application and (c) additional compensation is requested in the amount of \$\_\_\_\_\_. Counsel further certifies that a copy of this application was served upon debtor(s), the Chapter 13 Trustee and the U.S. Trustee as set forth below.

3. Debtor(s), the Chapter 13 Trustee or any interested party may file a response or object to this application, within twenty days of service, with the Clerk of Courts of the United States Bankruptcy Court. A copy of the response or objection shall be served on debtor(s), the Chapter 13 Trustee and counsel for debtor(s). If no response or objection is timely filed, the Court may enter an order allowing the fees without a hearing.

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Counsel for Debtor(s)  
Signature Block

**Rule 3001**  
**New Proof of Claim Forms**

<b>UNITED STATES BANKRUPTCY COURT</b> _____ <b>DISTRICT OF</b> _____		<b>PROOF OF CLAIM</b>
Name of Debtor: _____		Case Number: _____
NOTE: <i>Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.</i>		
Name of Creditor (the person or other entity to whom the debtor owes money or property): _____		<b>COURT USE ONLY</b>
Name and address where notices should be sent: _____  Telephone number: _____ email: _____		<input type="checkbox"/> Check this box if this claim amends a previously filed claim.  <b>Court Claim Number:</b> _____ <i>(If known)</i>  <b>Filed on:</b> _____
Name and address where payment should be sent (if different from above): _____  Telephone number: _____ email: _____		<input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.
<b>1. Amount of Claim as of Date Case Filed:</b> \$ _____		
If all or part of the claim is secured, complete item 4.		
If all or part of the claim is entitled to priority, complete item 5.		
<input type="checkbox"/> Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.		
<b>2. Basis for Claim:</b> _____ (See instruction #2)		
<b>3. Last four digits of any number by which creditor identifies debtor:</b> _____	<b>3a. Debtor may have scheduled account as:</b> _____ (See instruction #3a)	<b>3b. Uniform Claim Identifier (optional):</b> _____ (See instruction #3b)
<b>4. Secured Claim</b> (See instruction #4) Check the appropriate box if the claim is secured by a lien on property or a right of setoff, attach required redacted documents, and provide the requested information.		<b>Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any:</b> \$ _____
<b>Nature of property or right of setoff:</b> <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other <b>Describe:</b> _____		<b>Basis for perfection:</b> _____
<b>Value of Property:</b> \$ _____		<b>Amount of Secured Claim:</b> \$ _____
<b>Annual Interest Rate</b> _____ % <input type="checkbox"/> Fixed or <input type="checkbox"/> Variable (when case was filed)		<b>Amount Unsecured:</b> \$ _____
<b>5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a).</b> If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.		
<input type="checkbox"/> Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).	<input type="checkbox"/> Wages, salaries, or commissions (up to \$11,725*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier – 11 U.S.C. §507 (a)(4).	<input type="checkbox"/> Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5).  <b>Amount entitled to priority:</b>
<input type="checkbox"/> Up to \$2,600* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7).	<input type="checkbox"/> Taxes or penalties owed to governmental units – 11 U.S.C. §507 (a)(8).	<input type="checkbox"/> Other – Specify applicable paragraph of 11 U.S.C. §507 (a)(____). \$ _____
*Amounts are subject to adjustment on 4/1/13 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.		
<b>6. Credits.</b> The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (See instruction #6)		

**7. Documents:** Attached are **redacted** copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. If the claim is secured, box 4 has been completed, and **redacted** copies of documents providing evidence of perfection of a security interest are attached. *(See instruction #7, and the definition of "redacted".)*

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

**8. Signature:** (See instruction #8)

Check the appropriate box.

- I am the creditor.       I am the creditor's authorized agent.       I am the trustee, or the debtor, or their authorized agent.       I am a guarantor, surety, indorser, or other codebtor. (Attach copy of power of attorney, if any.)      (See Bankruptcy Rule 3004.)      (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

Company: \_\_\_\_\_

Address and telephone number (if different from notice address above): \_\_\_\_\_

(Signature) \_\_\_\_\_ (Date) \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Telephone number: \_\_\_\_\_ email: \_\_\_\_\_

*Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.*

**INSTRUCTIONS FOR PROOF OF CLAIM FORM**

*The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, exceptions to these general rules may apply.*

**Items to be completed in Proof of Claim form**

**Court, Name of Debtor, and Case Number:**

Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor's full name, and the case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is at the top of the notice.

**Creditor's Name and Address:**

Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

**1. Amount of Claim as of Date Case Filed:**

State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

**2. Basis for Claim:**

State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.

**3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:**

State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

**3a. Debtor May Have Scheduled Account As:**

Report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

**3b. Uniform Claim Identifier:**

If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

**4. Secured Claim:**

Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate (and whether it is fixed or variable), and the amount past due on the claim.

**5. Amount of Claim Entitled to Priority Under 11 U.S.C. §507(a).**

If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

**6. Credits:**

An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

**7. Documents:**

Attach redacted copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

**8. Date and Signature:**

The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, attach a complete copy of any power of attorney, and provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicer as the company. Criminal penalties apply for making a false statement on a proof of claim.

## DEFINITIONS

## INFORMATION

**Debtor**

A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

**Creditor**

A creditor is a person, corporation, or other entity to whom debtor owes a debt that was incurred before the date of the bankruptcy filing. See 11 U.S.C. §101 (10).

**Claim**

A claim is the creditor's right to receive payment for a debt owed by the debtor on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

**Proof of Claim**

A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

**Secured Claim Under 11 U.S.C. §506(a)**

A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien.

A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

**Unsecured Claim**

An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

**Claim Entitled to Priority Under 11 U.S.C.****§507(a)**

Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

**Redacted**

A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor must show only the last four digits of any social-security, individual's tax-identification, or financial-account number, only the initials of a minor's name, and only the year of any person's date of birth. If the claim is based on the delivery of health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information.

**Evidence of Perfection**

Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

**Acknowledgment of Filing of Claim**

To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system ([www.pacer.psc.uscourts.gov](http://www.pacer.psc.uscourts.gov)) for a small fee to view your filed proof of claim.

**Offers to Purchase a Claim**

Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*), and any applicable orders of the bankruptcy court.

## Mortgage Proof of Claim Attachment

If you file a claim secured by a security interest in the debtor's principal residence, you must use this form as an attachment to your proof of claim. See Bankruptcy Rule 3001(c)(2).

Name of debtor: \_\_\_\_\_ Case number: \_\_\_\_\_  
 Name of creditor: \_\_\_\_\_ Last four digits of any number you use to identify the debtor's account: \_\_\_\_\_

### Part 1: Statement of Principal and Interest Due as of the Petition Date

Itemize the principal and interest due on the claim as of the petition date (included in the Amount of Claim listed in Item 1 on your Proof of Claim form).

1. Principal due (1) \$ \_\_\_\_\_

2. Interest due	Interest rate	From mm/dd/yyyy	To mm/dd/yyyy	Amount
	_____ %	___/___/___	___/___/___	\$ _____
	_____ %	___/___/___	___/___/___	\$ _____
	_____ %	___/___/___	___/___/___	+ \$ _____
Total interest due as of the petition date				\$ _____ Copy total here ▶ (2) + \$ _____

3. Total principal and interest due (3) \$ \_\_\_\_\_

### Part 2: Statement of Prepetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges due on the claim as of the petition date (included in the Amount of Claim listed in Item 1 on the Proof of Claim form).

Description	Dates incurred	Amount
1. Late charges	_____	(1) \$ _____
2. Non-sufficient funds (NSF) fees	_____	(2) \$ _____
3. Attorney's fees	_____	(3) \$ _____
4. Filing fees and court costs	_____	(4) \$ _____
5. Advertisement costs	_____	(5) \$ _____
6. Sheriff/auctioneer fees	_____	(6) \$ _____
7. Title costs	_____	(7) \$ _____
8. Recording fees	_____	(8) \$ _____
9. Appraisal/broker's price opinion fees	_____	(9) \$ _____
10. Property inspection fees	_____	(10) \$ _____
11. Tax advances (non-escrow)	_____	(11) \$ _____
12. Insurance advances (non-escrow)	_____	(12) \$ _____
13. Escrow shortage or deficiency (Do not include amounts that are part of any installment payment listed in Part 3.)	_____	(13) \$ _____
14. Property preservation expenses. Specify: _____	_____	(14) \$ _____
15. Other. Specify: _____	_____	(15) \$ _____
16. Other. Specify: _____	_____	(16) \$ _____
17. Other. Specify: _____	_____	(17) + \$ _____
18. Total prepetition fees, expenses, and charges. Add all of the amounts listed above.		(18) \$ _____



**Part 3. Statement of Amount Necessary to Cure Default as of the Petition Date**

Does the installment payment amount include an escrow deposit?

No

Yes. Attach to the Proof of Claim form an escrow account statement prepared as of the petition date in a form consistent with applicable nonbankruptcy law.

1. **Installment payments due**      Date last payment received by creditor         /    /   

Number of installment payments due      (1)                

2. **Amount of installment payments due**             installments @      \$           

       installments @      \$           

       installments @      + \$           

**Total installment payments due as of the petition date**      \$           

Copy total here ▶ (2) \$           

3. **Calculation of cure amount**      **Add** total prepetition fees, expenses, and charges

Copy total from Part 2 here ▶ + \$           

**Subtract** total of unapplied funds (funds received but not credited to account)      - \$           

**Subtract** amounts for which debtor is entitled to a refund      - \$           

**Total amount necessary to cure default as of the petition date**      (3) \$           

Copy total onto Item 4 of Proof of Claim form

# UNITED STATES BANKRUPTCY COURT

\_\_\_\_\_ District of \_\_\_\_\_

In re \_\_\_\_\_  
Debtor

Case No. \_\_\_\_\_

Chapter 13

## Notice of Mortgage Payment Change

If you file a claim secured by a security interest in the debtor's principal residence provided for under the debtor's plan pursuant to § 1322(b)(5), you must use this form to give notice of any changes in the installment payment amount. File this form as a supplement to your proof of claim at least 21 days before the new payment amount is due. See Bankruptcy Rule 3002.1.

Name of creditor: \_\_\_\_\_

Court claim no. (if known): \_\_\_\_\_

Last four digits of any number  
you use to identify the debtor's  
account: \_\_\_\_\_

Date of payment change:  
Must be at least 21 days after date of  
this notice \_\_\_\_\_/\_\_\_\_\_/\_\_\_\_\_

New total payment: \$ \_\_\_\_\_  
Principal, interest, and escrow, if any

### Part 1: Escrow Account Payment Adjustment

Will there be a change in the debtor's escrow account payment?

- No
- Yes. Attach a copy of the escrow account statement prepared in a form consistent with applicable nonbankruptcy law. Describe the basis for the change. If a statement is not attached, explain why:  
\_\_\_\_\_

Current escrow payment: \$ \_\_\_\_\_

New escrow payment: \$ \_\_\_\_\_

### Part 2: Mortgage Payment Adjustment

Will the debtor's principal and interest payment change based on an adjustment to the interest rate in the debtor's variable-rate note?

- No
- Yes. Attach a copy of the rate change notice prepared in a form consistent with applicable nonbankruptcy law. If a notice is not attached, explain why: \_\_\_\_\_

Current interest rate: \_\_\_\_\_%

New interest rate: \_\_\_\_\_%

Current principal and interest payment: \$ \_\_\_\_\_

New principal and interest payment: \$ \_\_\_\_\_

### Part 3: Other Payment Change

Will there be a change in the debtor's mortgage payment for a reason not listed above?

- No
- Yes. Attach a copy of any documents describing the basis for the change, such as a repayment plan or loan modification agreement. (Court approval may be required before the payment change can take effect.)

Reason for change: \_\_\_\_\_

Current mortgage payment: \$ \_\_\_\_\_

New mortgage payment: \$ \_\_\_\_\_

**Part 4: Sign Here**

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number if different from the notice address listed on the proof of claim to which this Supplement applies.

Check the appropriate box.

- I am the creditor.
- I am the creditor's authorized agent.  
(Attach copy of power of attorney, if any.)

I declare under penalty of perjury that the information provided in this Notice is true and correct to the best of my knowledge, information, and reasonable belief.

**X** \_\_\_\_\_ Date \_\_\_\_/\_\_\_\_/\_\_\_\_  
 Signature

**Print:** \_\_\_\_\_ Title \_\_\_\_\_  
 First Name Middle Name Last Name

Company \_\_\_\_\_

Address \_\_\_\_\_  
 Number Street

City State ZIP Code

Contact phone (\_\_\_\_) \_\_\_\_-\_\_\_\_ Email \_\_\_\_\_

# UNITED STATES BANKRUPTCY COURT

\_\_\_\_\_ District of \_\_\_\_\_

In re \_\_\_\_\_,  
Debtor

Case No. \_\_\_\_\_

Chapter 13

## Notice of Postpetition Mortgage Fees, Expenses, and Charges

If you hold a claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any postpetition fees, expenses, and charges that you assert are recoverable against the debtor or against the debtor's principal residence. File this form as a supplement to your proof of claim. See Bankruptcy Rule 3002.1.

Name of creditor: \_\_\_\_\_

Court claim no. (if known): \_\_\_\_\_

Last four digits of any number you use to identify the debtor's account: \_\_\_\_\_

Does this notice supplement a prior notice of postpetition fees, expenses, and charges?

- No
- Yes. Date of the last notice: \_\_\_\_/\_\_\_\_/\_\_\_\_

### Part 1: Itemize Postpetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges incurred on the debtor's mortgage account after the petition was filed. Do not include any escrow account disbursements or any amounts previously itemized in a notice filed in this case or ruled on by the bankruptcy court.

Description	Dates incurred	Amount
1. Late charges	_____	(1) \$ _____
2. Non-sufficient funds (NSF) fees	_____	(2) \$ _____
3. Attorney fees	_____	(3) \$ _____
4. Filing fees and court costs	_____	(4) \$ _____
5. Bankruptcy/Proof of claim fees	_____	(5) \$ _____
6. Appraisal/Broker's price opinion fees	_____	(6) \$ _____
7. Property inspection fees	_____	(7) \$ _____
8. Tax advances (non-escrow)	_____	(8) \$ _____
9. Insurance advances (non-escrow)	_____	(9) \$ _____
10. Property preservation expenses. Specify: _____	_____	(10) \$ _____
11. Other. Specify: _____	_____	(11) \$ _____
12. Other. Specify: _____	_____	(12) \$ _____
13. Other. Specify: _____	_____	(13) \$ _____
14. Other. Specify: _____	_____	(14) \$ _____

The debtor or trustee may challenge whether the fees, expenses, and charges you listed are required to be paid. See 11 U.S.C. § 1322(b)(5) and Bankruptcy Rule 3002.1.

**Part 2: Sign Here**

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number if different from the notice address listed on the proof of claim to which this Supplement applies.

Check the appropriate box.

- I am the creditor.
- I am the creditor's authorized agent. (Attach copy of power of attorney, if any.)

I declare under penalty of perjury that the information provided in this Notice is true and correct to the best of my knowledge, information, and reasonable belief.

**X** \_\_\_\_\_ Date \_\_\_\_/\_\_\_\_/\_\_\_\_  
 Signature

**Print:** \_\_\_\_\_ Title \_\_\_\_\_  
 First Name Middle Name Last Name

Company \_\_\_\_\_

Address \_\_\_\_\_  
 Number Street  
 City State ZIP Code

Contact phone (\_\_\_\_) \_\_\_\_-\_\_\_\_ Email \_\_\_\_\_

## Standard Request for Discharge

**THE UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO**

IN RE:	)	CHAPTER 13
	)	CASE NO: «print_casenum»
	)	
«debtor»	)	MARILYN SHEA-STONUM
«joint»	)	BANKRUPTCY JUDGE
Debtor(s)	)	
	)	TRUSTEE'S REQUEST FOR
	)	THE COURT TO ISSUE A
	)	DISCHARGE IN CHAPTER 13
	)	CASE

---

Now comes Keith L. Rucinski, Chapter 13 Trustee, and represents to the Court that the Debtor(s) in the above Chapter 13 case has/have submitted funds to complete payment to creditors under the Chapter 13 plan confirmed in this case on «dkt\_desc». Accordingly, the Trustee hereby requests that if no objection is timely filed, the Clerk of Court be authorized and directed to enter a discharge of Debtor(s) in this case.

**In accordance with 11 USC Section 102, unless a party in interest objects to the Trustee's Request for the Court to Issue a Discharge in this Chapter 13 case and files a written request for hearing before the Court within 30 days from the date in the below certificate of service, the Trustee's request shall be granted and the Court will issue an order of discharge. Objections must be served on all parties in the below certificate of service. Objections must be filed with the United States Bankruptcy Court at:**

**United States Bankruptcy Court  
2 South Main Street  
455 John F. Seiberling Federal Building  
Akron, OH 44308**

**CHAPTER 13**

Keith L. Rucinski  
Trustee  
1 Cascade Plaza  
Suite 2020  
Akron, Oh 44308  
\_\_\_\_\_  
(330) 762-6335  
Fax  
(330) 762-7072  
Email  
krucinski@ch13akron.com

Respectfully submitted,

/s/ Keith L. Rucinski

Keith L. Rucinski, Chapter 13 Trustee

Ohio Reg. No. 0063137

One Cascade Plaza, Suite 2020

Akron, OH 44308

Phone: 330.762.6335

Fax: 330.762.7072

Email: [krucinski@ch13akron.com](mailto:krucinski@ch13akron.com)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent to:

«debtor»

«joint»

«dbtr\_addr1»

«jdbr\_addr1»

«dbtr\_addr2»

«jdbr\_addr2»

«dbtr\_addr3»

«jdbr\_addr3»

(Via Regular Mail)

«attorney» (via ECF)

Keith L. Rucinski, Chapter 13 Trustee (via ECF)

Office of the US Trustee (via ECF)

All creditors per attached list (via Regular Mail)

Date of Service: **12/12/2011**

By: «user\_name»

Office of the Chapter 13 Trustee

**CHAPTER 13**

Keith L. Rucinski

Trustee

1 Cascade Plaza

Suite 2020

Akron, Oh 44308

(330) 762-6335

Fax

(330) 762-7072

Email

[krucinski@ch13akron.com](mailto:krucinski@ch13akron.com)



United States v. Storey, 640 F.3d 739 (6th Cir. Ohio 2011)

640 F.3d 739, 107 A.F.T.R.2d 2011-2267, 2011-1 USTC P 50,391, 65 Collier Bankr.Cas.2d 1274, 54 Bankr.Ct.Dec. 200

(Cite as: 640 F.3d 739)

H

United States Court of Appeals,  
Sixth Circuit.  
UNITED STATES of America, Plaintiff–Appellee,  
Beneficial Mortgage Corporation; State of Ohio, Department of Taxation; City of Toledo, Division of Taxation, Defendants–Appellees,

v.

Anyse J. STOREY, Defendant–Appellant.

No. 09–3848.

May 16, 2011.

Rehearing Denied June 30, 2011. <sup>FN\*</sup>

<sup>FN\*</sup> Judge [White](#) would grant for reasons stated in her opinion concurring in part and dissenting in part.

**Background:** United States brought action against taxpayer, seeking to reduce to judgment her tax liabilities for ten years during which she failed to pay taxes, and to foreclose on its tax liens placed on taxpayer's real property. The United States District Court for the Northern District of Ohio, [Jack Zouhary](#), J., entered judgment in favor of the United States. Taxpayer appealed.

**Holding:** The Court of Appeals, [Stephen J. Murphy, III](#), District Judge, sitting by designation, held that taxpayer's failure to pay her taxes was not knowing and deliberate, and, thus, bankruptcy discharge exception for willful tax evasion did not apply.

Reversed.

[Helene N. White](#), Circuit Judge, filed opinion concurring in part and dissenting in part.

West Headnotes

**[1] Federal Courts 170B**  776

[170B](#) Federal Courts

[170BVIII](#) Courts of Appeals

[170BVIII\(K\)](#) Scope, Standards, and Extent

[170BVIII\(K\)1](#) In General

[170Bk776](#) k. Trial de novo. [Most Cited](#)

[Cases](#)

The Court of Appeals reviews a district court's sua sponte entry of summary judgment de novo.

**[2] Federal Civil Procedure 170A**  2470

[170A](#) Federal Civil Procedure

[170AXVII](#) Judgment

[170AXVII\(C\)](#) Summary Judgment

[170AXVII\(C\)1](#) In General

[170Ak2465](#) Matters Affecting Right to

Judgment

[170Ak2470](#) k. Absence of genuine issue of fact in general. [Most Cited Cases](#)

**Federal Civil Procedure 170A**  2470.4

[170A](#) Federal Civil Procedure

[170AXVII](#) Judgment

[170AXVII\(C\)](#) Summary Judgment

[170AXVII\(C\)1](#) In General

[170Ak2465](#) Matters Affecting Right to

Judgment

[170Ak2470.4](#) k. Right to judgment as matter of law. [Most Cited Cases](#)

**Federal Civil Procedure 170A**  2543

[170A](#) Federal Civil Procedure

[170AXVII](#) Judgment

[170AXVII\(C\)](#) Summary Judgment

[170AXVII\(C\)3](#) Proceedings

[170Ak2542](#) Evidence

[170Ak2543](#) k. Presumptions. [Most](#)

[Cited Cases](#)

Summary judgment is proper if the evidence, taken in the light most favorable to the nonmoving party, shows that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law.

640 F.3d 739, 107 A.F.T.R.2d 2011-2267, 2011-1 USTC P 50,391, 65 Collier Bankr.Cas.2d 1274, 54 Bankr.Ct.Dec. 200

(Cite as: 640 F.3d 739)

### **[3] Federal Civil Procedure 170A** 2466

[170A](#) Federal Civil Procedure

[170AXVII](#) Judgment

[170AXVII\(C\)](#) Summary Judgment

[170AXVII\(C\)1](#) In General

[170Ak2465](#) Matters Affecting Right to Judgment

[170Ak2466](#) k. Lack of cause of action or defense. [Most Cited Cases](#)

Summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

### **[4] Bankruptcy 51** 3343.5

[51](#) Bankruptcy

[51X](#) Discharge

[51X\(C\)](#) Debts and Liabilities Discharged

[51X\(C\)1](#) In General

[51k3343](#) Particular Debts or Liabilities

[51k3343.5](#) k. Taxes and assessments.

[Most Cited Cases](#)

Taxpayer's failure to pay her taxes was not knowing and deliberate, and, thus, bankruptcy discharge exception for willful tax evasion did not apply so as to preclude discharge of her tax liabilities for ten years during which she failed to pay federal income taxes, where taxpayer filed federal tax returns for the years in question, and she did so timely and accurately. [11 U.S.C.A. § 523\(a\)\(1\)\(C\)](#).

### **[5] Bankruptcy 51** 3341

[51](#) Bankruptcy

[51X](#) Discharge

[51X\(C\)](#) Debts and Liabilities Discharged

[51X\(C\)1](#) In General

[51k3341](#) k. In general. [Most Cited](#)

[Cases](#)

Exceptions to the general rule that a debtor filing a petition for a Chapter 7 bankruptcy generally is granted discharge from all debts that arose before the filing of the petition are to be strictly construed in favor of the debtor. [11 U.S.C.A. § 727\(b\)](#).

### **[6] Bankruptcy 51** 3343.5

[51](#) Bankruptcy

[51X](#) Discharge

[51X\(C\)](#) Debts and Liabilities Discharged

[51X\(C\)1](#) In General

[51k3343](#) Particular Debts or Liabilities

[51k3343.5](#) k. Taxes and assessments.

[Most Cited Cases](#)

Discharge exception for willful tax evasion serves to limit the Bankruptcy Code's discharge of tax debts to the honest but unfortunate debtor. [11 U.S.C.A. § 523\(a\)\(1\)\(C\)](#).

### **[7] Bankruptcy 51** 3403(1)

[51](#) Bankruptcy

[51X](#) Discharge

[51X\(D\)](#) Determination of Dischargeability

[51k3401](#) Evidence

[51k3403](#) Presumptions and Burden of

Proof

[51k3403\(1\)](#) k. In general. [Most Cited](#)

[Cases](#)

### **Bankruptcy 51** 3405(14)

[51](#) Bankruptcy

[51X](#) Discharge

[51X\(D\)](#) Determination of Dischargeability

[51k3401](#) Evidence

[51k3405](#) Weight and Sufficiency

[51k3405\(12\)](#) Degree of Proof Re-

quired

[51k3405\(14\)](#) k. Particular cases.

[Most Cited Cases](#)

To establish the discharge exception for willful tax evasion, the government has the burden of demonstrating by a preponderance of the evidence that the debtor willfully attempted to evade the tax liability. [11 U.S.C.A. § 523\(a\)\(1\)\(C\)](#).

### **[8] Bankruptcy 51** 3343.5

[51](#) Bankruptcy

[51X](#) Discharge

[51X\(C\)](#) Debts and Liabilities Discharged

640 F.3d 739, 107 A.F.T.R.2d 2011-2267, 2011-1 USTC P 50,391, 65 Collier Bankr.Cas.2d 1274, 54 Bankr.Ct.Dec. 200

(Cite as: **640 F.3d 739**)

[51X\(C\)1](#) In General

[51k3343](#) Particular Debts or Liabilities

[51k3343.5](#) k. Taxes and assessments.

[Most Cited Cases](#)

To satisfy the conduct requirement of the discharge exception for willful tax evasion, the government must demonstrate that the debtor avoided or evaded payment or collection of taxes through acts of omission, such as failure to file returns and failure to pay taxes, or through acts of commission, such as affirmative acts of evasion. [11 U.S.C.A. § 523\(a\)\(1\)\(C\)](#).

**[9] Bankruptcy 51**  **3343.5**

[51](#) Bankruptcy

[51X](#) Discharge

[51X\(C\)](#) Debts and Liabilities Discharged

[51X\(C\)1](#) In General

[51k3343](#) Particular Debts or Liabilities

[51k3343.5](#) k. Taxes and assessments.

[Most Cited Cases](#)

Non-payment of tax alone is not sufficient to bar discharge of a tax obligation under the discharge exception for willful tax evasion, but it is a relevant consideration in the overall analysis. [11 U.S.C.A. § 523\(a\)\(1\)\(C\)](#).

**[10] Bankruptcy 51**  **3343.5**

[51](#) Bankruptcy

[51X](#) Discharge

[51X\(C\)](#) Debts and Liabilities Discharged

[51X\(C\)1](#) In General

[51k3343](#) Particular Debts or Liabilities

[51k3343.5](#) k. Taxes and assessments.

[Most Cited Cases](#)

Non-dischargeability under the discharge exception for willful tax evasion requires a voluntary, conscious, and intentional evasion. [11 U.S.C.A. § 523\(a\)\(1\)\(C\)](#).

**[11] Bankruptcy 51**  **3343.5**

[51](#) Bankruptcy

[51X](#) Discharge

[51X\(C\)](#) Debts and Liabilities Discharged

[51X\(C\)1](#) In General

[51k3343](#) Particular Debts or Liabilities

[51k3343.5](#) k. Taxes and assessments.

[Most Cited Cases](#)

To establish the discharge exception for willful tax evasion, the government must prove that the debtor: (1) had a duty to pay taxes; (2) knew she had a duty; and (3) voluntarily and intentionally violated that duty. [11 U.S.C.A. § 523\(a\)\(1\)\(C\)](#).

**\*741 ON BRIEF:** [Mark R. McBride](#), Toledo, Ohio, for Appellant. [John Schumann](#), [Thomas J. Clark](#), United States Department of Justice, Washington, D.C., Washington, D.C., [Suzana Kukovec-Krasnicki](#), Keith D. Weiner & Associates Co., LPA, Cleveland, Ohio, for Appellees.

Before: [GRIFFIN](#) and [WHITE](#), Circuit Judges; [MURPHY](#), District Judge. <sup>FN\*\*</sup>

<sup>FN\*\*</sup> The Honorable [Stephen J. Murphy, III](#), United States District Judge for the Eastern District of Michigan, sitting by designation.

[MURPHY](#), D.J., delivered the opinion of the court, in which [GRIFFIN](#), J., joined. [WHITE](#), J. (pp. 747–49) delivered a separate opinion concurring in part and dissenting in part.

## OPINION

[STEPHEN J. MURPHY, III](#), District Judge.

For ten years of a twelve-year period, Ansey Storey filed federal income tax returns that showed she owed taxes—but she failed to pay them. The United States brought an action to reduce to judgment Storey's tax liabilities for the ten years, and to foreclose on its tax liens placed on real property owned by Storey. Storey argued that her Chapter 7 bankruptcy petition discharged her tax liabilities for some of the years preceding the filing. The district court disagreed and entered judgment in favor of the United States, finding that Storey had willfully attempted to evade paying taxes for those years, preventing discharge of the obligations through her bankruptcy filing. Because the United States cannot carry its burden on the issue of willfulness, we **REVERSE**.

## I.

640 F.3d 739, 107 A.F.T.R.2d 2011-2267, 2011-1 USTC P 50,391, 65 Collier Bankr.Cas.2d 1274, 54 Bankr.Ct.Dec. 200

(Cite as: 640 F.3d 739)

During all times relevant to the present appeal, Storey was a practicing physician residing in Maumee, Ohio. For ten years out of a twelve-year span, she filed federal income tax returns that showed she owed federal income taxes, but she did not pay any of the taxes due. Specifically, Storey filed tax returns showing taxable income in 1994, 1995, 1996, 1997, 2000, 2001, 2002, 2003, 2004 and 2005, but has never paid any federal income tax for those years.

On March 15, 2002, Storey filed a Chapter 7 bankruptcy petition in the Northern District of Ohio. Neither Storey nor the United States filed an adversary complaint seeking a determination regarding the dischargeability of her federal income tax liabilities. In July 2002, the bankruptcy court entered an order of discharge pursuant to [11 U.S.C. § 727](#), and the bankruptcy case was closed on September 10, 2004.

Two and a half years later, on March 28, 2007, the United States brought the present action seeking to reduce to judgment Storey's federal income tax liabilities for the years 1994 through 1997 and 2000 through 2005, and to foreclose on its tax liens on real property acquired by Storey in 1994, referred to herein as "the Morningdew Property." The United States sued Storey and joined as defendants various other parties that might claim an interest in the Morningdew Property, a number of whom defaulted by not appearing in the action. Storey argued that her tax obligations for the years 1994, 1995, 1996, and 1997 were discharged in her bankruptcy proceedings.

The district judge held a telephonic status conference on November 5, 2007, at which all parties not in default were present. Following the conference, the district \*742 judge issued an order in which he ruled that Northern District of Ohio General Order No. 84 did not grant jurisdiction to the bankruptcy court on the dischargeability of debts in Storey's 2002 bankruptcy. The order also set a deadline of November 16, 2007 for Storey "to file a brief with respect to the applicability of the discharge exception under [Section 523](#)," and directed the United States to respond by December 14, 2007, with no replies permitted. R. 26.

Storey filed a brief identifying four issues she believed to be relevant to the proceedings: 1) whether the district court had jurisdiction over the action as it pertains to the bankruptcy discharge and its effect on the United States' ability to obtain a personal judg-

ment against Storey; 2) whether the income tax obligations owing at the time Storey filed her bankruptcy petition were discharged in the bankruptcy; 3) whether Storey had an obligation to file a complaint in the bankruptcy action to determine dischargeability of income tax obligations; and 4) whether the United States had violated the injunction in effect by virtue of the discharge in bankruptcy. Storey argued that her taxes for the years 1994 through 1997 were discharged by her 2002 bankruptcy under [11 U.S.C. § 507\(a\)\(8\)](#) because she timely filed tax returns, the obligation was more than three years old, and the Internal Revenue Service had not issued a notice of assessment within 240 days immediately preceding the filing of the bankruptcy petition. In response, the United States argued that the dischargeability of Storey's tax debts is governed not by [11 U.S.C. § 507\(a\)\(8\)](#), but rather by [11 U.S.C. § 523\(a\)\(1\)\(C\)](#), which provides that a discharge under [§ 727](#) is not allowed for a tax liability with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat the tax. The United States argued, without elaboration, that its position in the litigation was that Storey's tax liabilities for those years were not dischargeable based upon her willful attempt to evade or defeat her taxes.

After the government filed its brief, Storey sought leave to supplement her previously filed memorandum in support of discharge and for an enlargement of time. She argued that the district court should be afforded an opportunity to hear all arguments regarding whether the tax liabilities were discharged or are now dischargeable and what the appropriate forum should be for determining these issues. The district court denied Storey's motion in a marginal entry order and set the case for a telephonic status conference.

Following the off-the-record status conference, the district court issued an order ruling on the four points raised by Storey in her memorandum. On the question of whether Storey's income tax obligations were discharged in her 2002 bankruptcy, the district court held that [11 U.S.C. § 523\(a\)\(1\)\(C\)](#) exempts tax liabilities from bankruptcy discharge when a debtor "willfully attempts in any manner to evade or defeat such tax," that Storey's pattern of failing to pay income tax over a number of years was evidence of a willful attempt to defeat the tax, and that the taxes therefore were not discharged in her bankruptcy pro-

640 F.3d 739, 107 A.F.T.R.2d 2011-2267, 2011-1 USTC P 50,391, 65 Collier Bankr.Cas.2d 1274, 54 Bankr.Ct.Dec. 200

(Cite as: 640 F.3d 739)

ceeding. R. 35. The district court concluded that the case could proceed as to all tax years set forth in the complaint. On February 27, 2008, the district court entered a partial judgment in favor of the United States against Storey for unpaid federal tax liabilities for tax years 1994, 1995, 1996, 1997, 2000, 2001, 2002, 2003, 2004 and 2005 in the amount of \$319,698.76.

Storey timely appealed the district court's final judgment.

## II.

Storey challenges the district court's conclusion that her federal income tax obligations\*743 for the years 1994 through 1997 were not discharged in her 2002 bankruptcy proceedings. We agree with her position and reverse.<sup>FN1</sup>

<sup>FN1</sup>. Storey also challenges the district court's decision to resolve the dischargeability issue in a summary fashion without giving her notice of its intent to do so, as well as its decision not to refer the issue of dischargeability to the U.S. Bankruptcy Court of the Northern District of Ohio. Because we reverse on matters of substance, we do not reach the procedural challenges.

### A.

We address first the proper standard of review. The district court ruled in a summary fashion, but did not specify the procedural mechanism it used to do so. The order is titled "Order," and mentions no rule of procedure. There were no factual findings. The court simply stated that "Defendant's tax obligations were exempted under [§ 523\(a\)\(1\)\(C\)](#) and were not discharged in her bankruptcy proceeding," after concluding that Storey's "pattern of failing to pay income tax over a number of years is evidence of a willful attempt to defeat the tax." R. 35. The parties agree that the district court's decision resembles that of an entry of summary judgment sua sponte. This is a fair characterization of the decision given that there was no trial or findings of fact. Moreover, the parties agree that the material facts are undisputed and that whether Storey's tax obligations were discharged is a legal question.

<sup>[1][2][3]</sup> We agree that the proper way to view the district court's decision is as a sua sponte entry of

summary judgment. Accordingly, we will review the district court's decision de novo. See [Schreiber v. Moe](#), 596 F.3d 323, 329 (6th Cir.2010). "Summary judgment is proper if the evidence, taken in the light most favorable to the nonmoving party, shows that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (citation and internal quotation marks omitted). Summary judgment must be entered against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." [Celotex Corp. v. Catrett](#), 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

### B.

<sup>[4][5][6][7]</sup> A debtor filing a petition for bankruptcy under Chapter 7 of the Bankruptcy Code generally is granted discharge from all debts (including tax debts) that arose before the filing of the petition. [11 U.S.C. § 727\(b\)](#); see [Stamper v. United States \(In re Gardner\)](#), 360 F.3d 551, 557 (6th Cir.2004). Exceptions to the general rule do exist, however, and they are to be strictly construed in favor of the debtor. [United States v. Hindenlang \(In re Hindenlang\)](#), 164 F.3d 1029, 1034 (6th Cir.1999). Relevant here:

(a) a discharge under [section 727](#) ... of this title does not discharge an individual debtor from any debt—

(1) for a tax or customs duty—

...

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax

....

[11 U.S.C. § 523\(a\)\(1\)\(C\)](#). This exception "serves to limit the Bankruptcy Code's discharge of tax debts to the honest but unfortunate debtor." [Stamper](#), 360 F.3d at 557 (citing [\\*744 Grogan v. Garner](#), 498 U.S. 279, 286-87, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991)). The government has the burden of demonstrating by a preponderance of the evidence that the debtor willfully attempted to evade the tax liability.



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*Id.*

[8][9] The analysis under [§ 523\(a\)\(1\)\(C\)](#) has two components: a conduct requirement and a mental state requirement. *Id.* at 558. To satisfy the conduct requirement, the government must demonstrate that the debtor avoided or evaded payment or collection of taxes through acts of omission, such as failure to file returns and failure to pay taxes, or through acts of commission, such as affirmative acts of evasion. *Id.* at 557. Non-payment of tax alone is not sufficient to bar discharge of a tax obligation, but it is a relevant consideration in the overall analysis. *Myers v. IRS (In re Myers)*, 216 B.R. 402, 405 (6th Cir. BAP 1998), *aff'd sub nom. Meyers v. IRS (In re Meyers)*, 196 F.3d 622 (6th Cir.1999); *see also In re Birkenstock*, 87 F.3d 947, 951 (7th Cir.1996) (noting that “mere non-payment, without more, evidences not dishonesty but the defining characteristic of all debtors—honest and dishonest, alike—insufficient resources to honor all of one’s obligations” (citation, internal quotation marks, and alterations omitted)).

Here, non-payment of Storey’s tax obligations is the only evidence relevant to the conduct requirement. Storey filed federal tax returns for the years in question, and there is no dispute that she did so timely and accurately. She simply failed to pay the taxes she owed. This is not enough by itself to render her tax debt nondischargeable. Unless her non-payment was “knowing and deliberate,” the tax obligations were discharged in her bankruptcy. *See Stamper*, 360 F.3d at 557 (noting that “a ‘knowing and deliberate’ nonpayment provides the basis for determining that the tax debt is non-dischargeable”); *but see Haas v. IRS (In re Haas)*, 48 F.3d 1153, 1158 (11th Cir.1995) (holding that mere non-payment is not sufficient to satisfy the conduct element of [§ 523\(a\)\(1\)\(C\)](#), and thereby the government’s burden, without regard to debtor’s mental state), *overruled in part by Griffith v. United States (In re Griffith)*, 206 F.3d 1389, 1396 (11th Cir.2000) (en banc); *see also United States v. Fretz (In re Fretz)*, 244 F.3d 1323, 1328–29 (11th Cir.2001).<sup>FN2</sup> Accordingly, we turn now to the mental state requirement.

<sup>FN2</sup>. We recognize that our statement in *Stamper* regarding a knowing and deliberate non-payment is potentially dictum given that the debtor’s conduct in that case went beyond mere non-payment to include the use

of nominee bank accounts to conceal from the IRS large deposits of income. 360 F.3d at 559. Absent our statement in *Stamper*, we are left only with our holding in *Toti v. United States (In re Toti)*, 24 F.3d 806, 809 (6th Cir.1994), that a failure to pay taxes *coupled with a failure to file tax returns* can support a finding of non-discharge under [§ 523\(a\)\(1\)\(C\)](#). *See also Birkenstock*, 87 F.3d at 951–52. We have never squarely addressed in a published decision whether “voluntary, conscious, and intentional” non-payment (absent also a failure to file tax returns) is enough to prevent discharge of a tax obligation under [§ 523\(a\)\(1\)\(C\)](#). The Eleventh Circuit has, however, and concluded that willful non-payment is not enough. *See Haas*, 48 F.3d at 1155, 1158. We have addressed *Haas* in the past, but instead of agreeing or disagreeing with its holding, we distinguished it on its facts. *See Meyers*, 196 F.3d at 625 (“*Haas* is distinguishable from this case: Meyers did not file any tax returns for the years at issue, and claimed exemptions to which he was not entitled on his employer’s W–4 forms. Meyers did more than fail to pay.”). Rather than trying to determine whether our statement in *Stamper* was dictum, we assume here that it is not, because doing so does not change the end result in the case: since the United States has not carried its burden to show willfulness, *see infra*, Storey’s tax obligations were discharged in her bankruptcy even assuming her non-payment satisfied the conduct requirement. We find this approach preferable to creating dictum on the issue of whether non-payment by itself can satisfy [§ 523\(a\)\(1\)\(C\)](#)’s conduct requirement.

\*745 [10][11] Non-dischargeability under 523(a)(1)(C) requires a “voluntary, conscious, and intentional evasion.” *Stamper*, 360 F.3d at 557. The government must prove that the debtor 1) had a duty to pay taxes, 2) knew she had a duty, and 3) voluntarily and intentionally violated that duty. *Id.* at 558. Storey concedes that she had a known duty to pay taxes, but argues that there is no evidence that she voluntarily and intentionally violated that duty. Thus, only the third element of the willfulness requirement is at issue here.

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There is little evidence to support a finding that Storey voluntarily and intentionally violated her known duty to pay taxes. The only argument made to the district court on this issue was in response to the court's request for briefing, where the United States asserted: “[t]he United States maintains that Storey's tax liabilities are nondischargeable based upon her willful attempt to evade or defeat her taxes.” United States Resp. Br. 5 (R. 32). The United States alleged no facts to support its position, despite being yoked with the burden of proof on this issue. On appeal, the United States adds that Storey's purchase of the Morningdew Property in 1994—the very year she stopped paying taxes—demonstrates a voluntary and intentional choice to evade her tax obligations. Not so. There is no indication that the property is more lavish than Storey's previous residence or that the home was an unnecessary expense, purchased as an alternative to paying future tax obligations. Nor is there any evidence that when Storey purchased the home, she was even aware she would later become unable to pay her taxes. If the purchase were made in the years *after* Storey stopped paying taxes, there might be reason to suspect an intent to evade her tax obligations. See, e.g., [United States v. Mitchell \(In re Mitchell\)](#), 633 F.3d 1319, 1328 (11th Cir.2011). But the home was purchased at the *beginning* of (and perhaps *before*—we cannot be sure) Storey's financial difficulties. Without facts or evidence—materials the United States had the burden of producing—there is only speculation. “Mere speculation is insufficient to create a preponderance of the evidence.” [United States v. Burke](#), 252 Fed.Appx. 49, 54 (6th Cir.2007).

We note also that there is no evidence that Storey lived lavishly during the years she did not pay her taxes, or that she chose to engage in recreational or philanthropic activities instead of paying her taxes. See, e.g., [Mitchell](#), 633 F.3d at 1329 (“[W]illful intent is further shown by Mitchell's discretionary spending, which included purchasing vacation timeshares, purchasing stock, repaying a \$30,000 personal loan, and donating approximately \$81,000 to his church.”); [Stamper](#), 360 F.3d at 560–61 (finding willfulness where debtor engaged in twenty golfing and vacation trips over span of nearly three years, expending substantial sums, instead of paying taxes); [Volpe v. IRS \(In re Volpe\)](#), 377 B.R. 579, 589 (Bankr.N.D. Ohio 2007) (finding willfulness where debtor spent his money on vacations and private schooling for chil-

dren instead of paying taxes, noting that “when the debtor used his disposable income for leisure activities, knowing that he had a significant tax liability, the debtor made a voluntary decision to spend the money on himself rather than to pay his taxes”; “[t]he debtor's decision to spend his money on vacations and private school tuition weighs in favor of a finding that he willfully evaded his tax liability”).

The United States relies heavily on the decision of the bankruptcy court denying \*746 Storey's request for a discharge of her student loan obligations. The published decision was not expressly considered by the district court. The bankruptcy court set forth the following facts as undisputed:

The Debtor, who is presently 50 years of age, is a licensed physician. The Debtor has practiced medicine for the past 15 years, and presently specializes in the field of urology. At some time in the not too distant future, the Debtor will become “board certified” in this specialty. At the present time, the Debtor practices solo, employing three part-time staff.

[Storey v. Nat'l Enter. Sys. \(In re Storey\)](#), 312 B.R. 867, 870 (Bankr.N.D. Ohio 2004). The bankruptcy court further found that “the Debtor's present annual income is in the \$50,000.00 range. In the past, however, the Debtor earned as high as \$96,000.00 per year.” [Id.](#) at 873. It found that Storey had recently declined to take a job that paid \$110,000 per year, and Storey stated that she could work longer hours if needed. [Id.](#) at 872–73. The court also noted that Storey's husband lived with her but did not contribute significantly to the household expenses, choosing instead to maintain a separate residence for his own family members, where the members resided rent-free. [Id.](#) at 874. The bankruptcy court found that Storey was capable of earning at least double her then-current salary, but simply chose not to. [Id.](#) Finding that Storey had options available that would permit her to pay her student loan obligations, and that her present inability to pay her obligations would later subside, the court concluded that she had failed to meet her burden of demonstrating an “undue hardship” by a preponderance of the evidence. [Id.](#)

We think it inappropriate to consider the bankruptcy court's decision here. The treatment of student loans in bankruptcy is distinctive, and differs signifi-



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cantly from the treatment of tax obligations. For one, there is a presumption that student loan debts are non-dischargeable and therefore the burden of establishing a discharge of student loans is on the debtor, by a preponderance of the evidence. *Barrett v. Educ. Credit Mgmt. Corp. (In re Barrett)*, 487 F.3d 353, 358–59 (6th Cir.2007). On the other hand, in the case of pre-petition tax debts, the presumption is that such debts are dischargeable, and therefore the government bears the burden of establishing otherwise by a preponderance of the evidence. *Stamper*, 360 F.3d at 557. Additionally, in determining whether student loan debts are dischargeable, a court must determine whether repayment of the loans would cause undue hardship, which is forward-looking. See *Tenn. Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433, 437 (6th Cir.1998) (discussing the widely-accepted three-part test for undue hardship). On the other hand, the question of whether the failure to pay taxes was willful looks backwards in time to the conduct and state of mind of the debtor at the time he or she failed to pay the taxes. Storey's failure to carry her burden to show an undue hardship in the student loan context cannot create a windfall to the United States by establishing willful evasion as a matter of law.

But even indulging the United States' request that we consider the facts contained in the bankruptcy court's decision does not change the result here. While it was undisputed that Storey's income was in the \$50,000 range and that she had in the past made as much as \$96,000 per year, no evidence was offered regarding why or when her pay decreased. Storey declined the offer for a job paying \$110,000 per year, but did so because the job required relocation, to her son's detriment. Furthermore, no reason was provided for why Storey's husband did not contribute to \*747 the household. None of these undisputed facts contributes to a finding of willful evasion by a preponderance of the evidence. The bankruptcy court also concluded that Storey had options that would enable her to repay her student loans. *Civil Rule 52(a)(6)* does not require that we defer to this ultimate conclusion of fact since it is not the bankruptcy court's decision under review here. Regardless, the ultimate finding demonstrates only that as of July 29, 2004 (the date the decision issued) Storey would soon have the ability to repay her student loans. It does not touch upon what is relevant here: whether Storey voluntarily and intentionally avoided paying her taxes.

Thus, we conclude that the district court should not have effectively granted summary judgment to the United States on the dischargeability issue. The United States failed to offer sufficient evidence to rebut the presumption that the tax obligations were discharged in Storey's bankruptcy proceedings, or that she is anything other than “the honest but unfortunate debtor.” *Grogan*, 498 U.S. at 286–87, 111 S.Ct. 654 (citation and internal quotation marks omitted). Moreover, we see no reason to remand so the United States can offer additional evidence. For one, the United States has not requested a remand as an alternative to affirming. More importantly, by arguing on appeal that the district court provided both parties “a fair opportunity to present their positions on this critical legal issue,” United States Br. 24–25, the United States is foreclosed from arguing that the district court did not give the United States ample opportunity to meet its burden under § 523(a)(1)(C). See *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 476 (6th Cir.2010) (“The doctrine of judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.” (citation and internal quotation marks omitted)). We are permitted to presume that the United States can present no additional facts or evidence to support its position. A remand for discovery and a trial would therefore serve no purpose.

### III.

Evidence did not support the district court's entry of partial judgment against Storey on the issue of willful evasion of her federal income tax obligations for years 1994 through 1997. The record does not support a finding that Storey willfully attempted to evade or defeat her federal income taxes for these years. The presumption that the obligations were discharged in bankruptcy thus remains unrebutted. Accordingly, partial judgment must be entered in favor of Storey with respect to her tax obligations for years 1994 through 1997. We **REVERSE** and **REMAND** to the district court for proceedings consistent with this opinion.

HELENE N. WHITE, Circuit Judge (concurring in part and dissenting in part).

To render Storey's tax debt nondischargeable, the government must prove by a preponderance of the evidence that she attempted a “voluntary, conscious,

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and intentional evasion” of her responsibility to pay taxes. *Stamper v. United States (In re Gardner)*, 360 F.3d 551, 557 (6th Cir.2004) (citing *Toti v. United States (In re Toti)*, 24 F.3d 806, 809 (6th Cir.1994)); 11 U.S.C. § 523(a)(1)(C). I agree with the majority that the government has not established that it is entitled to summary judgment on this issue, and therefore concur in the reversal of the district court's judgment. I do not, however, agree that the government failed to meet its burden of showing that there is a genuine issue of \*748 material fact whether Storey willfully attempted to evade payment of the taxes. I would remand to allow the parties to present factual evidence and arguments.

As the majority observes, “[n]onpayment alone is insufficient to bar discharge of a tax obligation....” *Stamper*, 360 F.3d at 557; see also *Myers v. IRS (In re Myers)*, 216 B.R. 402, 405 (6th Cir. BAP 1998), *aff'd sub nom. Meyers v. IRS (In re Meyers)*, 196 F.3d 622 (6th Cir.1999); *In re Birkenstock*, 87 F.3d 947, 951 (7th Cir.1996). To render the tax debts nondischargeable, the government must make the additional showing that Storey had the requisite mental state: that she “voluntarily, consciously, and knowingly evaded payment.” *Stamper*, 360 F.3d at 558. There was little evidence or argument on this element in the proceedings below. The majority concludes that Storey's buying the Morningdew Property and the findings of the bankruptcy court in the student-loan-discharge matter are insufficient to raise a genuine issue of material fact regarding the mental-state element of § 523's tax-debt-discharge provision. I agree that the findings of the bankruptcy court in the student-debt-discharge decision are not preclusive here, but the same facts are enough to raise a genuine issue of fact as to Storey's intent in not paying her taxes. See *Storey v. Nat'l Enter. Sys. (In re Storey)*, 312 B.R. 867, 870 (Bankr.N.D. Ohio 2004). Similarly, the purchase of the Morningdew property is relevant evidence on the question of Storey's mental state, notwithstanding the timing of the purchase.

Cases construing § 523(a)(1)(C) look to all the circumstances surrounding the debtor's nonpayment of taxes to assess whether that nonpayment was voluntary, conscious, and intentional. Relevant considerations include whether the debtor attempted to conceal income and assets from the IRS, *Stamper*, 360 F.3d at 558 (debtor placed income and assets in the names of others); *Griffith v. United States (In re Grif-*

*fith)*, 206 F.3d 1389, 1396 (11th Cir.2000) (en banc) (debtor fraudulently conveyed property to wife); *Birkenstock*, 87 F.3d at 952–53 (debtors “attempted to attribute their personal income to their family trust”), whether the debtor spent excessively on non-essential expenses instead of paying taxes, *Stamper*, 360 F.3d at 558, 560 (“[T]he debtor lived lavishly during the period of time the IRS sought to collect the tax liability .... [including] twenty golfing and vacation trips upon which appellant lavished substantial sums.”); *United States v. Mitchell (In re Mitchell)*, 633 F.3d 1319, 1329 (11th Cir.2011) (“[W]illful intent is further shown by Mitchell's discretionary spending, which included purchasing vacation timeshares, purchasing stock, repaying a \$30,000 personal loan, and donating approximately \$81,000 to his church.”), whether the debtor had the ability to pay taxes, *Stamper*, 360 F.3d at 558; *Toti*, 24 F.3d at 809, and whether the debtor had the sophistication and wherewithal to understand her tax responsibilities, *United States v. Fretz (In re Fretz)*, 244 F.3d 1323, 1331 (11th Cir.2001) (“Put bluntly, someone who can control his drinking enough to perform medical procedures during twelve- to twenty-four hour shifts in an emergency room over a period of years can control his drinking enough to file tax returns and pay taxes during that same period. Instead of doing that, as Dr. Fretz himself put it, he ‘just totally ignored’ his tax responsibilities.”).

Because neither party established an entitlement to summary judgment, and the parties did not submit the case to the court for judgment on the facts, I would remand for further proceedings. The government should be permitted to present evidence of how much Storey earned and what she did with her earnings, as well as other evidence\*749 relevant to her mental state. Storey, in turn, should be permitted to put on evidence that she failed to pay her taxes only because she could not afford to. I would reverse the district court's order finding that Storey's tax obligations were not discharged by the bankruptcy proceeding and would remand for additional proceedings on issues relevant to Storey's mental state.

C.A.6 (Ohio),2011.

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**(Cite as: 640 F.3d 739)**

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In re Fisette, 2011 WL 3795138 (8<sup>th</sup> Cir. Aug. 29, 2011)



4 of 10 DOCUMENTS

**In re: Michael James Fisette, Debtor. Michael James Fisette, Debtor - Appellant, v. Jasmine Z. Keller, Trustee - Appellee.**

**No. 11-6012**

**UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE EIGHTH CIRCUIT**

*455 B.R. 177; 2011 Bankr. LEXIS 3178; Bankr. L. Rep. (CCH) P82,064*

**July 27, 2011, Submitted**

**August 29, 2011, Filed**

**PRIOR HISTORY:** [\*\*1]

Appeal from the United States Bankruptcy Court for the District of Minnesota.

**JUDGES:** Before SCHERMER, VENTERS, and NAIL, Bankruptcy Judges.

**OPINION BY:** SCHERMER

**OPINION**

[\*179] SCHERMER, Bankruptcy Judge

Debtor, Michael James Fisette (the "Debtor"), appeals from the bankruptcy court's February 10, 2011 order confirming his modified Chapter 13 plan, over his objection. We have jurisdiction over this appeal from the final order of the bankruptcy court. *See 28 U.S.C. § 158(b)*. For the reasons set forth below, we reverse and remand this matter to the bankruptcy court for further proceedings consistent with this opinion.

**ISSUES**

The issue on appeal is whether the bankruptcy court may confirm the debtor's plan which provides for the avoidance of two junior liens on the Debtor's principal residence. In particular, we consider whether: (1) *11*

*U.S.C. § 1322(b)(2)* prevents a debtor from modifying the rights of junior lienholders of liens on his principal residence if the value of the residence is less than the amount owed to the senior lienholder; and (2) if not, whether such modification is contingent upon the debtor's receipt of a Chapter 13 discharge.

**BACKGROUND**

Within one year before the filing of his Chapter 13 petition, the Debtor [\*\*2] had filed a Chapter 7 bankruptcy case, and the Debtor received a discharge in his Chapter 7 case. Due to the proximity in the time of the filing of his Chapter 7 and Chapter 13 cases, the Debtor was not eligible for a Chapter 13 discharge pursuant to *§ 1328(f) of Title 11 of the United States Code* (the "Bankruptcy Code").

On his Schedule A, the Debtor listed his homestead. He valued the property at \$145,000, indicating that the property was "appraised at" \$145,000. On his Schedule D, the Debtor listed the claim of the senior secured creditor holding a lien on the Debtor's homestead in an amount that exceeded the appraised value of the property. The Debtor also listed on his Schedule D two creditors holding second and third liens on the homestead.

The Debtor's originally filed Chapter 13 plan treated the claim of the senior lienholder as secured, but avoided

the liens of the second and third lienholders - treating their claims as wholly unsecured. It included nearly identical provisions for the "strip off"<sup>1</sup> of the second and third liens held by the two junior lienholders. In paragraphs 14 and 15 (combined below), it provided, in pertinent part, that:

Confirmation of this plan without objection [\*\*3] from [the second lienholder or the third lienholder], or its assignee, or over the objection of [the second lienholder or the third lienholder], or its assignee, shall constitute an acknowledgment and acceptance that there is no equity in the debtor's residential real property . . . , over and above the first mortgage . . . to which the lien of the [second or third] mortgage can attach. The order confirming the plan shall constitute a finding by the bankruptcy court that the fair market value of the real estate is [\*180] \$145,000; and that the balance owed to [the first lienholder] is \$176,312.00; therefore the claim of [the second lienholder or the third lienholder] or its assignee is wholly unsecured. The real estate . . . shall vest in the debtor free and clear of the [the second or third] mortgage upon completion of all payments due to the trustee under the plan. [The second lienholder or the third lienholder], or its assignee, shall cancel the [second or third] mortgage within 20 days after the trustee's final report to the court showing completion of the plan. If [the second lienholder or the third lienholder], or its assignee, fails to cancel the [second or third] mortgage, debtor may [\*\*4] obtain an order and judgment voiding the [second or third] mortgage, its claim, if any, shall be paid as an unsecured, nonpriority claim.

The Debtor's plan proposed to pay \$4,922.00, the exact amount listed on his Schedule F as owed to unsecured creditors other than the second and third lienholders, to unsecured creditors. The Debtor's counsel explained that the plan proposed to strip off the junior lienholders' liens. Their claims were included in the plan as claims that are unsecured, but they would not receive any part of the distribution to unsecured creditors.

1 "The term 'strip off' is colloquially used when, there being no collateral value for a mortgage, the entire lien is proposed to be avoided. The term 'strip down' is used when, there being insufficient collateral value for a mortgage, the lien is proposed to be reduced to the value of the collateral. *In re Mann*, 249 B.R. 831, 832 n.1 (B.A.P. 1st Cir. 2000) (citations omitted).

No written objections to the confirmation of the Debtor's original plan were filed and the Debtor's valuation of the property, which was based on an appraisal, was not contested during the plan confirmation process. The Debtor submitted a brief in support [\*\*5] of confirmation of his plan. After a hearing during which the Debtor's counsel argued in favor of confirmation of the plan that allowed for the strip off of the junior liens and the bankruptcy court commented that "the law in this jurisdiction clearly does not allow the debtor to strip the second or third mortgage secured only by a lien on the debtor's homestead," the court denied confirmation of the Debtor's plan. The Debtor sought leave to appeal from the bankruptcy court's interlocutory order denying confirmation of his plan, but the request was denied and the appeal was dismissed. The Debtor then filed an amended plan that provided that the junior lienholders would retain their liens and that treated their claims as secured. The bankruptcy court confirmed the amended plan over the Debtor's objection and this appeal ensued.

In this appeal, the Debtor asks us to decide that a Chapter 13 debtor may strip off a wholly unsecured junior mortgage lien on his principal residence, and that the strip off of such lien should be allowed in a case where a debtor is ineligible for a discharge. The Chapter 13 trustee disagrees with the Debtor on both issues, and amicus curiae TFC National Bank [\*\*6] filed its brief in support of the Chapter 13 trustee's position.

## STANDARD OF REVIEW

We review the bankruptcy court's conclusions of law *de novo*. *Green Tree Servicing v. Coleman (In re Coleman)*, 392 B.R. 767, 769 (B.A.P. 8th Cir. 2008) ("Statutory interpretation is a question of law that [appellate courts] review *de novo*." (quoting *Minn. Supply Co. v. Raymond Corp.*, 472 F.3d 524, 537 (8th Cir.2006)). The facts are not in dispute.

## DISCUSSION

As an initial matter, we note that the Debtor's appeal of the order confirming his plan was proper. *Zahn v. Fink (In re Zahn)*, 526 F.3d 1140, 1141 (8th Cir. 2008) (debtor was an "aggrieved party" with standing to appeal confirmation of her own plan).

#### [\*181] I. Strip Off of Wholly Unsecured Liens

A determination of whether the Bankruptcy Code allows the "strip off" of the junior liens on the Debtor's principal residence if they are wholly unsecured "involves the interaction of two provisions of the Bankruptcy Code - [§] 506(a) and [§] 1322(b)(2)." *Pond v. Farm Specialist Realty (In re Pond)*, 252 F.3d 122, 124 (3d Cir. 2001).

*Bankruptcy Code* § 506(a) governs classification of a claim. It provides, in pertinent part, that:

An allowed claim of a creditor secured by [\*\*7] a lien on property in which the estate has an interest, . . . , is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . , and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.

11 U.S.C. § 506(a).

With an exception, a Chapter 13 debtor may modify the rights of creditors, such as by avoiding their liens, through his plan. *Section 1322(b)(2) of the Bankruptcy Code* permits a Chapter 13 plan to "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims . . . ." 11 U.S.C. § 1322(b)(2).

In *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 113 S. Ct. 2106, 124 L. Ed. 2d 228 (1993), the Supreme Court examined the relationship between § 1322(b)(2) and § 506(a) with respect to an undersecured lienholder. *Bartee v. Tara Colony Homeowners Ass'n (In re Bartee)*, 212 F.3d 277, 285 (5th Cir. 2000) (citing *Nobelman*, 508 U.S. 324). It held that the debtor could not "strip down" the unsecured portion of the creditor's undersecured claim on the debtor's principal residence. [\*\*8] *Nobelman*, 508 U.S. at 332. The Court rejected the debtors' argument that § 1322(b)(2)'s antimodification clause should apply only

to the secured portion of the claim, and not to the unsecured portions of the undersecured claim. *Id.* at 328-332. The phrase "claim secured only by a security interest in real property that is the debtor's principal residence" in § 1322(b)(2) included both the secured and the unsecured portion of the *Nobelman* creditor's undersecured claim. *Id.* at 330-31. The Court explained that the debtors could not modify the payment and interest terms for the unsecured portion of the claim without modifying the rights of the creditor with respect to the secured portion of the claim, thus violating § 1322(b)(2). *Id.* at 331. "The decision in *Nobelman* then stands for the proposition that the antimodification clause of § 1322(b)(2) bars Chapter 13 debtors from stripping down a debtor's claim *when any portion of that claim is secured by the debtor's home.*" *Griffey v. U.S. Bank (In re Griffey)*, 335 B.R. 166, 168-69 (B.A.P. 10th Cir. 2005) (emphasis added).

The *Nobelman* court did not directly answer the question of whether a debtor could strip off a *wholly* unsecured lien on the [\*\*9] debtor's principal residence.

Before and after *Nobelman*, bankruptcy courts in Minnesota have held that a debtor may not strip off a wholly unsecured lien on his principal residence without violating the provisions of § 1322(b)(2). *See, e.g., In re Frame*, No. 09-41010 (Bankr. D. Minn. September 23, 2009); *In re Hughes*, 402 B.R. 325, 326 (Bankr. D. Minn. 2009); *In re Hussman*, 133 B.R. 490, 491-93 (Bankr. D. Minn. 1991). Overall, these courts interpret § 1322(b)(2) to mean that a debtor cannot modify the rights of *any* [\*182] creditor with a "claim secured only by a security interest in real property that is the debtor's principal residence." They believe that the type of the claimant is controlling, and that determination of the secured status of the claim under § 506(a) is irrelevant when applying § 1322(b)(2)'s antimodification clause. We respectfully disagree with these cases.

We agree with courts holding that § 1322(b)(2) does not bar a Chapter 13 debtor from stripping off a wholly unsecured lien on his principal residence, a position that has been adopted by all Circuit Courts of Appeal to address this issue. *See, e.g., Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); [\*\*10] *Lane v. W. Interstate Bancorp (In re Lane)*, 280 F.3d 663 (6th Cir. 2002); *Pond*, 252 F.3d at 127; *Tanner v. FirstPlus Fin., Inc. (In re Tanner)*, 217 F.3d 1357 (11th Cir. 2000);<sup>2</sup> *In re Bartee*, 212 F.3d 277 (5th Cir.

2000); *McDonald v. Master Fin. Inc. (In re McDonald)*, 205 F.3d 606 (3d Cir. 2000).<sup>3</sup> Bankruptcy appellate panels of the Tenth and First Circuits have agreed with this conclusion. *Griffey*, 335 B.R. 166; *In re Mann*, 249 B.R. 831 (B.A.P. 1st Cir. 2000).<sup>4</sup>

2 In *American Gen. Finance, Inc. v. Dickerson (In re Dickerson)*, 222 F.3d 924, 926 (11th Cir. 2000), the Eleventh Circuit explained that it was bound by its prior decision but, if it were to write on a clean slate, it would adopt the position that a wholly unsecured lien could not be avoided.

3 In two unpublished per curiam decisions, the Fourth Circuit affirmed decisions of the district court that allowed the strip off of wholly unsecured liens on debtors' residences. See *First Mariner Bank v. Johnson*, 411 B.R. 221, 225 (D.Md. 2009), *aff'd* 407 Fed. Appx. 713 (4th Cir.2011) (per curiam) (unpublished); *Suntrust Bank v. Millard (In re Millard)*, 414 B.R. 73 (D. Md. 2009), *aff'd* 404 Fed. Appx. 804 (4th Cir. 2010) (per [\*11] curiam) (unpublished).

4 See also *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997) (case decided prior to the time of the Ninth Circuit's decision in *Zimmer*)

As these courts have recognized, we first determine whether the creditor holds a secured claim by looking to § 506(a). The *Nobelman* Court classified the creditor's claim under § 506(a) as the first step in its analysis, noting that the debtors were "correct in looking to § 506(a) for a judicial valuation of the collateral to determine the status of the [creditor]'s secured claim." *Nobelman*, 508 U.S. at 328; *Bartee*, 212 F.3d at 286 (recognizing that the *Nobelman* Court "confirm[ed] that §506(a) is the starting point in the analysis. . .") (quoted in *Lane*, 280 F.3d at 667)). In accordance with the language of § 1322(b)(2), only if the creditor is the holder of a secured claim, meaning that its claim is at least partially secured *after* application of §506(a), will it be eligible for the protection of §1322(b)(2)'s antimodification provision. *Zimmer*, 313 F.3d at 1226 ("While it is clear that the term 'claim secured only by' in the antimodification clause is not limited to 'secured claims,' it is equally clear [\*12] that 'holders of secured claims' does refer to the term of art as defined in §506(a)."); *Lane*, 280 F.3d at 668 ("And the only apparent reason why the classification [of the claim] could make a difference is that the special protection

accorded by the antimodification provision extends to the rights of holders of 'secured claims' and does not extend to the right of holders of 'unsecured claims.'"). The creditor in *Nobelman* was "still the 'holder' of a 'secured claim'" after application of § 506(a) because its claim was partially secured by value in the collateral, and it was, therefore, entitled to have its rights protected under § 1322(b)(2). *Zimmer*, 313 F.3d at [\*183] 1224 (quoting *Nobelman*, 508 U.S. at 329).

The facts in *Nobelman* are distinguishable from the facts in this case. Here, the value of the Debtor's principal residence is less than the claim of the senior lienholder and there is, therefore, no value securing the junior lienholders, rendering their claims unsecured under § 506(a). Section 1322(b)(2)'s antimodification provision does not apply to them, and their rights may properly be modified under § 1322(b)(2). *Lane*, 280 F.3d at 668 ("Section 1322(b)(2) says, without qualification [\*13] and in the plainest of English, that a Chapter 13 plan 'may' modify the rights 'of holders of unsecured claims.'").

Contrary to the arguments of the Chapter 13 trustee and TFC National Bank, an explanation by the *Nobelman* Court that the language of § 1322(b)(2) focuses on the "rights" of holders of claims, instead of on the value of the claims, does not mean that a wholly unsecured lien on a debtor's principal residence is protected from modification. *Nobelman*, 508 U.S. at 328 (the debtors' "interpretation fails to take account of § 1322(b)(2)'s focus on 'rights'"). The Court in *Nobelman* pointed to certain rights protected by § 1322(b)(2) that were held by the partially secured creditor in that case, and stated that such rights were not "limited by the valuation of its secured claim." *Id.* at 329. However, the *Nobelman* Court did not examine the rights protected by § 1322(b)(2) until *after* it established that the creditor held a secured claim. See *Zimmer*, 313 F.3d at 1226 ("Finally, [\*14] and only after determining that the creditor was the holder of a secured claim and thus eligible for antimodification protection, the Court proceeded to the question of exactly what was entitled to such protection.") (citing *Nobelman*, 508 U.S. at 329-330); *Tanner*, 217 F.3d at 1360 ("only the rights secured by some remaining equity will be protected from modification"). Moreover, the rights identified by the *Nobelman* Court were those rights the creditor had under the mortgage instruments that were enforceable under state law.<sup>5</sup> As the holders of claims with no value to support their liens on the Debtor's



property, any rights afforded to the junior lienholders under state law would presumably be only empty rights in the sense that they would not provide the lienholders with a remedy. *See Lam, 211 B.R. at 40* (state law rights of an unsecured lienholder, if any, are empty rights).

5 The rights that existed under the applicable state law in *Nobelman* included:

[T]he right to repayment of the principal in monthly installments over a fixed term at specified adjustable rates of interest, the right to retain the lien until the debt is paid off, the right to accelerate the loan until the debt is paid [\*\*15] off, the right to accelerate the loan upon default and to proceed against [the] residence by foreclosure and public sale, and the right to bring an action to recover any deficiency remaining after foreclosure.

*Nobelman, 508 U.S. at 329* (citation omitted).

In *Lane*, the Sixth Circuit Court of Appeals provided a helpful summary of the position we follow in this case:

The message, to recapitulate, is this:

-- *Section 1322(b)(2)* prohibits modification of the rights of a holder of a secured claim if the security consists of a lien on the debtor's principal residence;

-- *Section 1322(b)(2)* permits modification of the rights of an unsecured claimholder;

-- Whether a lien claimant is the holder of a "secured claim" or an "unsecured claim" depends, thanks to § 506(a), on whether the claimant's security interest has any actual "value;"

[\*184] -- If a claimant's lien on the debtor's homestead has a positive value, no matter how small in relation to the total claim, the claimant holds a "secured claim" and the claimant's contractual

rights under the loan documents are not subject to modification by the Chapter 13 plan;

-- If a claimant's lien on the debtor's homestead has no value at all, on the other hand, the claimant [\*\*16] holds an "unsecured claim" and the claimant's contractual rights are subject to modification by the plan.

*Lane, 280 F.3d at 669.*

Having determined that a debtor may generally strip off a wholly unsecured lien on his principal residence, we now analyze whether such lien avoidance is available when the debtor is ineligible for a Chapter 13 discharge.

## II. Strip Off Where Debtor is Ineligible for a Discharge Under 11 U.S.C. § 1328(f)(1)

Commonly, a Chapter 13 debtor receives a discharge at about the same time he completes his obligations under his Chapter 13 plan. 11 U.S.C. § 1328(a) ("as soon as practicable after completion by the debtor of all payments under the plan . . . the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title"); *In re Okosisi, 451 B.R. 90, 94-95 (Bankr. D. Nev. 2011)* (explaining lien avoidance in a typical Chapter 13 case). In many lien stripping cases, the wholly unsecured lien is, thus, avoided at the time the debtor completes his plan payment and obtains his discharge. In this case, we consider whether a debtor may still avoid a wholly unsecured lien on his principal residence if he is not eligible [\*\*17] for a Chapter 13 discharge.

When a debtor obtains a Chapter 7 discharge and files a Chapter 13 case in such close proximity to his Chapter 7 case that he is ineligible for a Chapter 13 discharge under § 1328(f)(1), the situation is commonly referred to as a "Chapter 20."

A Chapter 7 debtor's discharge, standing alone, does not deprive a mortgagee of its right to collect its debt *in rem*. 11 U.S.C. § 524(a)(2) ("A discharge . . . operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a *personal liability* of the debtor") (emphasis added)); *Johnson v. Home State Bank, 501 U.S. 78, 84, 111 S. Ct. 2150, 115*

*L. Ed. 2d 66 (1991)* ("[A] bankruptcy discharge extinguishes only one mode of enforcing a claim - namely, an action against the debtor *in personam* - while leaving intact another - namely, an action against the debtor *in rem*"). In his Chapter 13 case, a Chapter 20 debtor who is ineligible for a discharge under § 1328(f)(1) may seek to strip off a mortgagee's lien that remained in place following his Chapter 7 discharge.<sup>6</sup>

6 In *Harmon v. U.S.*, 101 F.3d 574, 581-82 (8th Cir. 1996), the Eighth Circuit explained that even [\*\*18] in Chapter 7 cases, liens often do not pass through bankruptcy unaffected. In this case, the Debtor admits that the second and third liens on his home survived his Chapter 7 discharge.

The Debtor concedes that his Chapter 7 case was filed within 4 years of his Chapter 13 case, that he obtained a discharge in his Chapter 7 case, and that he is ineligible for a discharge in his Chapter 13 case. 11 U.S.C. §1328(f)(1).<sup>7</sup> He also admits that [\*185] the junior lienholders' liens survived his Chapter 7 discharge and that they were to receive no payment through his original Chapter 13 plan. Nevertheless, the Debtor argues that his ineligibility for a Chapter 13 discharge does not prevent him from stripping off the junior lienholders' liens.

7 Section 1328(f)(1) provides, in pertinent part, that:

(f) . . . the court shall not grant a discharge of all debts provided for in the plan or disallowed under section 502, if the debtor has received a discharge -

(1) in a case filed under chapter 7 . . . of this title during the 4-year period preceding the date of the order for relief under this chapter.

11 U.S.C. §1328(f)(1).

Courts disagree regarding whether a debtor's

ineligibility for a discharge bars him from [\*\*19] using § 1322(b)(2) to permanently strip off an otherwise wholly unsecured lien on his principal residence. Some courts say that a debtor's eligibility for a discharge is not a requirement for lien avoidance. *See, e.g., Jennings*, 454 B.R. 252, 2011 Bankr. LEXIS 2693, 2011 WL 2909888 (Bankr. N.D. Ga. July 11, 2011); *Okosisi*, 451 B.R. 90; *Fair*, 450 B.R. 853 (E.D. Wis. 2011); *In re Waterman*, 447 B.R. 324 (Bankr. D. Colo. 2011); *In re Tran*, 431 B.R. 230 (Bankr. N.D. Cal. 2010); *In re Hill*, 440 B.R. 176 (Bankr. S.D. Cal. 2010). Other courts say that a debtor cannot permanently strip off a lien on his principal residence if he is ineligible for a discharge. *See, e.g., In re Victorio*, 454 B.R. 759, 2011 Bankr. LEXIS 2704, 2011 WL 2746054 (Bankr. S.D. Cal. 2011); *In re Gerardin*, 447 B.R. 342 (Bankr. S.D. Fla. 2011); *In re Fenn*, 428 B.R. 494 (Bankr. N.D. Ill. 2010); *In re Mendoza*, No. 09-22395 HRT, 2010 Bankr. LEXIS 664, 2010 WL 736834 (Bankr. D. Col. Jan. 21, 2010); *In re Jarvis*, 390 B.R. 600, 604-06 (Bankr. C.D. Ill. 2008).

We hold that the strip off of a wholly unsecured lien on a debtor's principal residence is effective upon completion of the debtor's obligations under his plan, and it is not contingent on his receipt of a Chapter 13 discharge.

As some courts have [\*\*20] recognized, nothing in the Bankruptcy Code conditions a Chapter 13 debtor's ability to modify a wholly unsecured creditor's lien under § 1322(b)(2) on his eligibility for a discharge. *See, e.g., Tran*, 431 B.R. at 235 (citing various Bankruptcy Code provisions and concluding that the Bankruptcy Code does not "preclude[] a debtor that is not eligible for a discharge from filing a chapter 13 case, obtaining confirmation of a chapter 13 plan, and with the exception of the right to a discharge, from enjoying all the rights of a chapter 13 debtor, including the right to strip off liens."); *Waterman*, 447 B.R. at 328-29 (finding the reasoning and analysis in *Tran* and other cases allowing strip offs in no-discharge Chapter 13 cases to be "persuasive and compelling"). For example, §1325 does not include eligibility for a discharge as a requirement for confirmation of a plan. *Tran*, 431 B.R. at 235 ("[A]lthough § 1325(a) and (b) sets forth numerous requirements for confirmation of a chapter 13 plan, nothing in § 1325 conditions confirmation on the debtor being eligible for a discharge.").

As support for her position, the Chapter 13 trustee

cites to § 1325(a)(5), which provides, in pertinent part, [\*\*21] for confirmation of a Chapter 13 plan if:

(5) with respect to each *allowed secured claim* provided for by the plan -

(A) the holder of such claim has accepted the plan;<sup>8</sup>

(B)(i) the plan provides that -

(I) the holder of such claim retain the lien securing such claim until the earlier of -

[\*186] (aa) the payment of the underlying debt . . . ;  
or

(bb) discharge under section 1328. . . ; and

(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law. . . or . . .

(C) the debtor surrenders the property securing such claim to such holder.

<sup>8</sup> Even if § 1325(a)(5) applied to a wholly unsecured claim, in the Debtor's case, the junior lienholders did not object to confirmation of the Debtor's original plan that proposed to strip off their liens.

*11 U.S.C. § 1325(a)(5)* (emphasis added).

*Section 1325(a)(5)*, including its specific subsection that was cited by the Chapter 13 trustee, § 1325(a)(5)(B)(i)(I)(bb), does not apply in the case of a wholly unsecured lien on a debtor's principal residence. *Hill, 440 B.R. at 183* ("*Section 1325(a)(5)* has no applicability to unsecured claims. [\*\*22] . . ."). The requirements under § 1325(a)(5) only apply when there is value in the collateral to support the lienholder's claim; the plain language of that section specifies that it applies

to an "*allowed secured claim*." *11 U.S.C. § 1325(a)(5)* (emphasis added). As we explained, *Nobelman* instructs us to first look to § 506(a) to classify the claim as secured or unsecured. *See Nobelman, 508 U.S. at 328*. In *Nobelman*, "the bank [wa]s still the 'holder' of a 'secured claim,' *because petitioner's home retain[ed] \$23,500 of value as collateral*." *508 U.S. at 329* (emphasis added). Where the collateral retains no value to support the lienholder's claim, like in this case, a creditor does not have a secured claim and the requirements of § 1325(a)(5) do not apply. *See In re Frazier, 448 B.R. 803, 811 (Bankr. E.D. Cal. 2011)* ("A creditor entitled to assert the provisions of *11 U.S.C. § 1325(a)(5)* must be the holder of an "allowed secured claim." A "secured claim" is a term of art under the Bankruptcy Code, . . . and is the secured claim determined pursuant to § 506(a)."). The Eighth Circuit's analysis in *Harmon v. U.S., 101 F.3d 574, 583 (8th Cir. 1996)*, further supports our position. The court in [\*\*23] *Harmon* examined the phrase "allowed secured claim" in § 1225(a)(5), a Bankruptcy Code section containing language similar to the relevant language found in § 1325(a)(5), and "conclud[ed] that 'allowed secured claim' in § 1225(a)(5) must be interpreted by reference to the bifurcation of claims into secured and unsecured claims by § 506(a)." *101 F.3d at 583*.

As unsecured claimholders, the two junior lienholders are entitled to have their claims treated like the claims of other nonpriority unsecured claimholders in the Debtor's bankruptcy case. *See 11 U.S.C. § 1325(a)(4)*. The Debtor may strip off their liens upon completion of his plan, but he must still treat their claims. The second and third lienholders are, thus, entitled to a pro rata share of the distribution made to other unsecured creditors. *See Hill, 440 B.R. at 183* (creditor whose lien is stripped is a holder of unsecured claim under § 1325(b)(4), entitled to its pro rata share with other unsecured creditors); *Jennings, 2011 Bankr. LEXIS 2693, 2011 WL 2909888, at \*5* (creditors must be treated as unsecured claimholders where their claims were allowed and unsecured).

We see no merit in the argument made by the Chapter 13 trustee and cases saying that allowing [\*\*24] a strip off in a "no discharge" Chapter 20 case amounts to allowing the debtor a "de facto discharge." *See, e.g., Fenn, 428 B.R. at 500* (saying that allowing a permanent strip off of a junior mortgage lien after the debtor completes the plan in a case where the debtor is not

eligible for a discharge "results in a de facto discharge") (citation omitted); but [\*187] *see, e.g., Fair*, 450 B.R. at 857 ("[I]t is inaccurate to characterize lien stripping as a de facto discharge under the bankruptcy code."). By seeking to strip off a junior lien, a debtor seeks to do just that: avoid the lien. He does not seek a discharge.<sup>9</sup> In addition, nothing in § 1328(f)(1), the provision barring a Chapter 20 debtor's discharge, limits the debtor's rights under § 1322(b)(2). *See Okosisi*, 451 B.R. at 101 (§1328(f) only prohibits discharge and court would not read further restrictions into this section).

9 The strip off of a lien under § 1322(b)(2) is not the equivalent of receiving a discharge. As was previously explained, a discharge releases a debtor's *in personam* liability, but it does not affect the lien. *See 11 U.S.C. § 524(a)* and *Johnson*, 501 U.S. at 84. A strip off avoids the lien, thus extinguishing a creditor's [\*\*25] ability to proceed against the debtor *in rem*.

Our decision that: (1) the Bankruptcy Code permits a Chapter 13 debtor to strip off a wholly unsecured lien; and (2) a debtor's ability to strip off a lien is effective upon completion of his obligations under his plan, rather than on his receipt of a discharge, does not amount to a conclusion that the Debtor's original plan should have been confirmed. We instruct the Debtor to amend his plan to provide for proper treatment of the junior lienholders' claims as unsecured nonpriority claims. And it is for the bankruptcy court to consider whether the Debtor's plan complies with the additional requirements for confirmation.

### CONCLUSION

For the foregoing reasons, we REVERSE the decision of the bankruptcy court and REMAND this case to the bankruptcy court for further proceedings consistent with this opinion.