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DISCHARGE AND DISCHARGEABILITY

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Beem v. Ferguson, 713 F. App'x 974 (11th Cir. Feb. 6, 2018) (per curiam) (unpublished) ("For creditors asserting that a debt is non-dischargeable, the Federal Rules of Bankruptcy Procedure provide that the proper means to achieve a non-dischargeability determination is through an adversary proceeding. *See* Fed. R. Bankr. P. 7001(6). An adversary proceeding is commenced by the filing of a complaint, which usually must be done with the same court that is handling the bankruptcy petition. *See* Fed. R. Bankr. P. 5005(a)(1); 7003.").

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McDermott v. St. George (In re St. George), Nos. 16–8017/8018, 2017 WL 1379321 (B.A.P. 6th Cir. Apr. 17, 2017) (United States Trustee's second request for additional 75-days to file a complaint objecting to discharge should have been denied when UST failed to exercise diligence. "'[E]xtensions of the deadline to challenge a debtor's discharge should be rarely granted and . . . cause for such a request should be narrowly construed. . . .' . . . . [Here], the key factor is the UST's failure to exercise diligence. . . . The UST attended the meeting of creditors and questioned the debtor extensively. The meeting of creditors was adjourned based on the trustee's need for additional documentation to be provided. . . . The UST's first motion for additional time was filed . . . , presumably because the UST was [ ] waiting on the production of these documents. The second motion for additional time was filed four days before the first extension deadline or 116 days after the initial meeting of creditors. It was at this time that the UST filed its 2004 examination motion as well. The UST provided no definitive explanation why no action occurred during the first extension of 60 days. . . . [T]he UST failed to explain why nothing was done during the 29 days between the second motion for additional time and the date of the hearing. . . . [T]he UST did not present any evidence to support the second request to extend the deadline, even though it was the UST's burden to defend against the debtor's objection and to show cause for the request.").

3. Effect of notice or knowledge

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D. Complaint and Service of Process

1. Service of process

a) Errors in service of process

Domingo v. Portugues-Santana, BAP No. NV-17-1135-BHTa, 2017 WL6601773 (B.A.P. 9th Cir. Dec. 26, 2017) (unpublished) (Judgment of nondischargeability is void for lack of personal jurisdiction when debtor not served with summons and complaint in accordance with Fed. R. Civ. P. 4. "A federal court is without personal jurisdiction over a defendant unless the defendant has been served in accordance with Civil Rule 4. . . . 'Neither actual notice, nor simply naming the person in the caption of the complaint, will subject defendants to personal jurisdiction if service was not made in substantial compliance with Rule 4.' . . . Because [debtor] was not served with the summons and original complaint in accordance with Civil Rule 4, the bankruptcy court lacked personal jurisdiction over him. As a result, the nondischargeability judgment is void.).

b) Who must be served?

2. Amending complaint after filing deadline

a) Allowing amendment

Beem v. Ferguson, 713 F. App'x 974 (11th Cir. Feb. 6, 2018) (per curiam) (unpublished) (Complaint related back pursuant to Fed. R. Bankr. P. 7015 to plaintiff's motion to dismiss or for determination of nondischargeability that was filed before expiration of dischargeability deadline. "Bankruptcy Rule 7015 incorporates Federal Rule of Civil Procedure 15. . . . We must first determine whether [plaintiff's] timely filed motion in the bankruptcy case functioned as an 'original pleading' to which the untimely adversary complaint related back. If it does, we must then address the merits and consider whether the complaint's non-dischargeability allegations 'arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading.' . . . First, Rule 15(c), . . . applies only to 'pleadings.' . . . [A] motion is not a 'pleading' permitted by Bankruptcy Rule 7007 . . . . [U]nder Bankruptcy Rule 7003, an adversary proceeding must be commenced by the filing of a complaint. . . . [But] Bankruptcy Rule 7008 provides that Federal Rule of Civil Procedure 8, which sets forth the pleading standard for a complaint, applies in adversary proceedings. . . . We have previously held that certain documents and filings were sufficient to constitute a 'complaint' under Rule 8, even though they were not labeled as such. . . . We apply the same Rule 8 analysis here in determining whether [plaintifff's] motion should be treated as the functional equivalent of a complaint. In doing so, we join the Ninth Circuit and several bankruptcy courts across the country that have applied the same analysis. . . . [Plaintiff's] timely filed "Motion to Dismiss or for Determination of Non-Dischargeability of His Debt" satisfied the Rule 8 pleading requirements for a complaint. . . . These allegations, although contained in a 'motion,' clearly gave [debtor] 'fair notice of what [plaintiff's] claim [was] and the grounds upon which it rest[ed].' . . . Because [plaintiff's] motion was the functional equivalent of a complaint, his adversary proceeding should be deemed commenced on the date which he filed the motion in the main bankruptcy action. . . . [Debtor] argues that relation back is impermissible because the adversary proceeding is not the same proceeding as the bankruptcy case in which [plaintiff] timely filed his motion. . . . [T]he adversary proceeding between [plaintiff] and [debtor] was part of the same 'case' as [debtor's] larger bankruptcy case. This raises no barrier to relation back. . . . Because [plaintiff's] motion functioned as an original adversary complaint, we must next determine whether the allegations described in his later-filed complaint 'arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading.' Fed. R. Civ. P. 15(c)(1)(B). . . . [Plaintiff's] later-filed complaint contains nearly-identical factual allegations regarding non-dischargeability as those in his timely motion. . . . Thus, the same issue was clearly raised in the original pleading and the complaint may relate back to [plaintiff's] timely filing. . . . [Plaintiff's] complaint for non-dischargeability under 11 U.S.C. § 523(a)(6) was timely under the relation back doctrine provided by Bankruptcy Rule 7015.").

Whitcomb v. Smith (In re Smith), 572 B.R. 1 (B.A.P. 1st Cir. Sept. 6, 2017) (Bankruptcy court sua sponte amended plaintiff's § 523(a)(6) complaint to include action under § 523(a)(2)(A). "[T]he court reasoned that '[w]hen issues not raised in the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.' . . . Under such circumstances, the court elaborated, the court may amend the pleadings sua sponte '[i]n the absence of a motion from the plaintiff.' The court pointed primarily to Fed. R. Civ. P. 15(c) and 54(c) for support.").

b) Not allowing amendment

Fustolo v. The Patriot Group, LLC (In re Fustolo), 896 F.3d 76 (1st Cir. July 16, 2018) (Bankruptcy court abused discretion when it granted plaintiff's post-trial motion to amend pleadings to conform with evidence of new claim for denial of discharge and denied debtor's discharge. "Rule 15(b)(2) states, in relevant part, that '[w]hen an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings.' . . . Implied consent occurs by either 'treating a claim introduced outside the complaint "as having been pleaded, either through [the party's] effective engagement of the claim or through his silent acquiescence"; or by acquiescing during trial 'in the introduction of evidence which is relevant only to that issue."' . . . Engagement or acquiescence to the litigation of an unpleaded claim may occur through a party's failure to object once it becomes clear that the asserted claim is being incorporated into the pleadings. . . . However, '[t]he introduction of evidence directly relevant to a pleaded issue cannot be the basis for a founded claim that the opposing party should have realized that a new issue was infiltrating the case.' . . . It is 'the defendant's inalienable right to know in advance the nature of the cause of action being asserted against him,' . . . , and thus '[i]t is not enough that an issue may be inferentially suggested by incidental evidence in the record; the record must demonstrate that the parties understood that the evidence was aimed at an unpleaded issue[]' . . . . Finally, while the court has the discretion to allow late amendments, it may do so only if the non-moving party will not suffer undue prejudice. . . . 'At a bare minimum . . . a defendant must be afforded both adequate notice of any claims asserted against him and a meaningful opportunity to mount a defense.' . . . When evidence presented is relevant to a claim actually pleaded, and not solely to a new issue, the non-moving party is not provided adequate notice that the new claim is being litigated. . . . The bankruptcy court found that [debtor] was put on notice of the infiltration of a § 727(a)(6)(A) claim in the [joint pretrial statement], through the court's allowance of the judicial notice request, during [plaintiff's] opening statement, and when [plaintiff] questioned [debtor] at trial. We disagree, and find that none of these instances clearly indicated [plaintiff's] intention to litigate a § 727(a)(6) claim such that [debtor] could have 'understood that the evidence was aimed at an unpleaded issue.' . . . While a lack of consent constitutes sufficient grounds for denying amendment, . . . , there remains another reason why the bankruptcy court's judgment allowing the motion to amend must be reversed. [Plaintiff's] request to amend its pleadings was first noted two months after trial in its post-trial brief, and a formal Motion to Conform the Pleadings to the Evidence was not filed until almost three months after the trial's conclusion. 'We think that prejudice is an almost inevitable concomitant in situations where, as here, the late amendment attempts to superimpose a new (untried) theory on evidence introduced for other purposes.' . . . Here, [plaintiff's] justification for its delay is not based on any newly discovered facts or changes in the law. . . . We do not intend to imply that a plaintiff must move to amend immediately after the non-movant is put on notice of a new claim; for that matter, Rule 15(b)(2) explicitly contemplates that a motion to amend can occur 'even after judgment,' which, by its nature, occurs after the non-moving party had notice of the new claim through evidence introduced at trial. Nonetheless, a moving party must provide a sufficient justification to excuse its delay. . . . Because we find that [debtor] did not have fair notice of the unpleaded claim and was prejudiced by its addition, we hold that the bankruptcy court's allowance of [plaintiff's] motion to conform its pleadings under Fed. R. Civ. P. 15(b)(2) was an abuse of discretion.").

Privitera v. Curran (In re Curran), 855 F.3d 19 (1st Cir. Apr. 20, 2017) (False financial statement action under § 523(a)(2)(B) could not be amended to include misrepresentation action under § 523(a)(2)(A) when facts pleaded would not support either. "[T]he bankruptcy court denied the plaintiff's motion for leave to amend on futility grounds. Where, as here, a party seeks leave to amend before any discovery has occurred, a reviewing court assays futility with reference to the Rule 12(b)(6) pleading criteria. . . . An attempt to amend is regarded as futile if the proposed amended complaint fails to state a plausible claim for relief. . . . In her proposed amended complaint, the plaintiff claims that the debt is exempt from discharge under section 523(a)(2)(A), as well as section 523(a)(2)(B). . . . The circumstances here do not imply a particular set of facts that the debtor knew to be untrue. . . . Seen in this light, the plaintiff's section 523(a)(2)(A) claim fails for much the same reason that her section 523(a)(2)(B) claim fails: she has not pleaded facts sufficient to make out a plausible claim that the debtor either operated under false pretenses or made a false representation.").

3. Counterclaims
4. Intervention; substitution
5. Declaratory relief
6. Motions to alter or amend or for relief from judgment; motions for new trial
7. New evidence or issues on appeal

II. General Considerations

A. Jurisdiction, Standing, Immunity and the Like

1. Jurisdiction, concurrent jurisdiction and abstention

Weil v. Elliott, 859 F.3d 812 (9th Cir. June 14, 2017) (One-year filing deadline imposed by 11 U.S.C. § 727(e)(1) is a nonjurisdictional claim processing rule: Debtor waived one-year limitation by not raising § 727(e)(1) defense in bankruptcy court. "The time limit imposed by § 727(e)(1) is not a 'jurisdictional' constraint. It is an ordinary, run-of-the-mill statute of limitations, specifying the time within which a particular type of action must be filed. . . . The provision merely states that the trustee 'may request a revocation of a discharge' within the prescribed time limit. . . . That language creates a plain-vanilla statute of limitations, with none of the trappings necessary to rank it as jurisdictional. . . . 'Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional.' . . . Congress granted bankruptcy courts jurisdiction to adjudicate requests for revocation of discharge in Title 28, in provisions entirely separate from the filing deadline found in Title 11. . . . This jurisdictional grant is not conditioned on compliance with the time limit specified in § 727(e)(1), and indeed the two sets of provisions are not linked together in any way. . . . A non-jurisdictional time bar is an affirmative defense that may be forfeited if not timely raised, and [debtor] forfeited the defense by failing to raise it in the bankruptcy court.").

AY McDonald Indus. v. McDonald (In re McDonald), 590 B.R. 506 (B.A.P. 8th Cir. Oct. 3, 2018) (After determining that debtor committed defalcation in a fiduciary capacity under § 523(a)(4), bankruptcy court lacked jurisdiction over plaintiff's contract claims for injunctive and declaratory relief that sought to preclude debtor's revocation of a power of attorney through which plaintiff was to recover misappropriated funds.)

2. Entry of final judgment by bankruptcy court

Saenz v. Gomez (In re Saenz), 899 F.3d 384 (5th Cir. Aug. 7, 2018) (Finding that "all parties consented to the bankruptcy court's issuance of the final judgment" that liquidated a state law claim that was excepted from discharge, Fifth Circuit declined to address *Stern* issues or the bankruptcy court's constitutional authority. "The Supreme Court has recognized 'allowing bankruptcy litigants to waive the right to Article III adjudication of *Stern* claims does not usurp the constitutional prerogatives of Article III courts.' . . . Such consent may be either express or implied, so long as it is knowing and voluntary; the determination whether a party consented to the bankruptcy court's jurisdiction requires 'a deeply factbound analysis of the procedural history' in the proceeding. . . . The bankruptcy court undertook that analysis, relying on facts such as Appellants' (1) submission of a pre-trial statement in which they listed no jurisdictional issues; (2) representation by experienced bankruptcy counsel; and (3) voluntary participation in the proceedings, including seeking affirmative relief by filing Rule12(b)(6) motions and not expressing any limitations on its consent throughout the trial. We . . . find no error in the conclusion that all parties gave implied consent, thus vesting the bankruptcy court with jurisdiction to issue a final judgment.”).

3. Standing

Rosenfeld v. Rosenfeld (In re Rosenfeld), 698 F. App’x 300 (6th Cir. Oct. 6, 2017) (Former spouse whose only claims against debtor would be nondischargeable under § 523(a)(5) or (a)(15) lacked standing to seek bar to overall discharge under § 727(a) because he could assert no dischargeable claim or other injury. “[T]o have standing, a plaintiff must allege an actual or imminent injury that is traceable to the defendant and likely to be redressable by the court. . . . [Plaintiff’s] claim that creditors at large, the federal judiciary, or the American people have an interest in denying [debtor] a discharge is a hornbook example of a generalized grievance [not redressable by the court]. . . . [Plaintiff’s] argument that he has standing because of the punitive purpose underlying 11 U.S.C. § 727 is also misplaced. Even when a federal statute allows a private individual to bring an action against a party for violating the statute . . . the plaintiff must still have suffered a concrete and particularized injury in order to have standing to sue. . . . Thus, even if [debtor’s] . . . discharge is barred under 11 U.S.C. § 727, and even if the purpose of denying a discharge under § 727 is punitive, [plaintiff] lacks standing to assert that statute against her.”).

Abraham v. Stuart (In re Abraham), 693 F. App’x 59 (2d Cir. July 17, 2017) (unpublished) (Debtor’s objection to plaintiff’s proof of claim did not negate plaintiff’s standing to object to discharge under § 727(a)(4)(A).).

4. Jury trial in discharge and dischargeability proceedings

5. Eleventh amendment immunity and sovereign immunity

B. *Res Judicata* and Collateral Estoppel

1. *Res judicata* or “claim preclusion” generally not available in discharge

Garrett v. Erkelens (In re Erkelens), 742 F. App’x 477 (11th Cir. Sept. 12, 2018) (per curiam) (unpublished) (Attorney precluded from relitigating dischargeability of debt that former client assigned in payment of legal fees when assigned debt had been declared dischargeable in prior bankruptcy case. “[Prior] bankruptcy court’s order was a dismissal for failure to prosecute under Rule 41(b) . . . the dismissal of [the] adversary proceeding for failure to prosecute followed by entry of the discharge order precludes [plaintiff-assignee] from relitigating the dischargeability of the money judgment. . . . [T]here is no dispute that the [prior] bankruptcy court had subject matter jurisdiction over [debtor’s] bankruptcy case and [the] adversary proceeding against him. Second, the dismissal of [the] adversary proceeding . . . served as a final judgment on the merits because dismissals for failure to prosecute may serve as judgments with preclusive effect. . . . Third, the ‘identical parties’ element is satisfied here as a result of privity: . . . [plaintiff] is in privity with [his former client] as a result of her assignment to him of 50% of the money judgment. . . . Fourth, the same ‘cause of action’ was at issue in [the] adversary proceeding as is at issue here. . . . By filing a proof of claim in [debtor’s current] bankruptcy, [plaintiff] was attempting to enforce the money judgment against [debtor]. The same was true in [the] adversary action against [debtor in the prior case] in which [plaintiff’s client] sought to have the money judgment declared non-dischargeable. In ‘substance,’ then, this appeal arises from the same ‘cause of action’ that [plaintiff's client] raised in her adversary proceeding. Because all four requirements of claim preclusion are met here, the bankruptcy court did not err in disallowing [plaintiff's] claim.").

2. Collateral estoppel or "issue preclusion" may be available in discharge and dischargeability proceeding

a) *In general*

(1) First Circuit

(2) Second Circuit

(3) Third Circuit

(4) Fourth Circuit

(5) Fifth Circuit

(6) Sixth Circuit

Trost v. Trost (In re Trost), No. 17-1877, 2018 WL 2437200 (6th Cir. May 30, 2018) (unpublished) (Federal court judgment for common law conversion collaterally estopped debtor from defending discharge under § 523(a)(6). "Collateral estoppel . . . 'precludes relitigation of issues of fact or law actually litigated and decided in a prior action between the same parties and necessary to the judgment, even if decided as part of a different claim or cause of action.' . . . The bankruptcy court rightly invoked collateral estoppel to bar [debtor] from relitigating certain factual issues determined in the conversion suit. And it correctly concluded that those prior factual determinations showed [debtor] caused a willful and malicious injury, rendering his debt nondischargeable under bankruptcy law. . . . As the bankruptcy court noted at the outset of its analysis, despite the 'technical distinction' between conversion's intentional act requirement and § 523(a)(6)'s intentional injury requirement, 'collateral estoppel precludes religitation of factual issues that were actually and necessarily determined in the prior action.' . . . [T]he bankruptcy court correctly determined [the conversion judgment] resolved the key factual question at issue in the § 523(a)(6) dispute—namely, whether [debtor] knew that [plaintiff] owned the property. . . . [T]he 'evidence in the District Court action . . . conclusively established that [debtors] were aware that [plaintiff] owned the assets.' . . . [T]he factual question of whether [debtor] knowingly took [plaintiff's] property has been litigated. . . . [A]s a general matter, one can be liable for conversion under Michigan law on showing only an intent to act, without an accompanying intent to injure. But when we 'look at the entire record of the [conversion] proceeding, not just the judgment,' . . . it is evident the judgment against [debtor] depended on finding much more. The jury instructions are especially revealing here. . . . In the civil trial, the jury was instructed that it could find [debtor] liable only if [plaintiff] proved by a preponderance of the evidence that [debtor] obtained her property through deceit or false representations. . . . Implicit in the jury's verdict against [debtor] . . . is a finding that [he] knew [plaintiff] owned the property and that he acted deceitfully to obtain it. . . . The evidence shows that [debtor's] actions were 'willful' in that he knew [plaintiff] owned the property when he did not return it, and that they were malicious in that he acted in clear disregard for [plaintiff's] superior rights. . . . And if the record is equivocal on whether [debtor] wanted 'to cause the consequences of [his] act'—[plaintiff] losing her property—it is clear that he knew 'those consequences [were] substantially certain to result from it.' . . . [W]e agree with the bankruptcy court that the 'factual record' in the conversion case 'mandates the factual and legal conclusion that the . . . conversion of [plaintiff's] property' was both willful and malicious.").

Couch v. Panther Petroleum, LLC (In re Couch), 704 F. App'x 569 (6th Cir. Nov. 6, 2017) (unpublished) (Citing *Bay Area Factors v. Calvert (In re Calvert)*, 105 F.3d 315 (6th Cir. 1997), and *Anderson v. Fisher (In re Anderson)*, 520 B.R. 89 (B.A.P. 6th Cir. 2014), a "penalty default judgment" has preclusive effect in § 523(a) litigation because it would be preclusive under Tennessee law. "'It is not necessary to have a trial for a judgment to be on the merits; rather, if the parties had an opportunity to be heard, and there are no technical defects, the judgment is on the merits, although there was no actual hearing or argument on the facts of the case.'" Debtor retained counsel (who later withdrew) to defend Tennessee state court complaint, answered, filed a counter-complaint, and failed to comply with discovery order which led to entry of default.).

(7) Seventh Circuit

(8) Eighth Circuit

(9) Ninth Circuit

Sturgeon-Garcia v. Cagno, 740 F. App'x 144 (9th Cir. Oct. 18, 2018) (unpublished) (Stipulated judgment on complaint that included fraudulent inducement claim not given preclusive effect. "California courts sometimes find issue preclusion if the parties have manifested an intent to be bound by a consent judgment's terms. . . . [The parties here] did not manifest such an intent; indeed, their counsel agreed on the record in the state-court proceedings that the 'damages reflected in the stipulated judgment do not relate to any claim of fraud.'").

Lopez v. Raicevic (In re Lopez), 728 F. App'x 747 (9th Cir. June 25, 2018) (unpublished) (California state court fraud judgment is nondischargeable under § 523(a)(2)(A). "Under California law, . . . a final judgment on the merits can preclude a party from relitigating issues actually litigated and necessarily decided by that judgment. . . . It is undisputed that [debtor] was a party to the California state court proceedings, in which a final judgment was entered against him on the merits. It also cannot reasonably be disputed that the elements of fraud were actually litigated and necessarily decided by the judgment. Finally, the elements necessary to prove fraud under California law are identical to those necessary to prove nondischargeability under 11 U.S.C. § 523(a)(2)(A). . . . [I]ssue preclusion was available. Even where issue preclusion is available, later courts have discretion to decide whether applying issue preclusion in a given case will further the public policy underlying the doctrine. . . . The bankruptcy court recognized its discretion not to give preclusive effect to the state court judgment, but concluded that applying issue preclusion would further the public policy underlying the doctrine. . . . We [ ] find no abuse of discretion in the bankruptcy court's decision to apply issue preclusion in this case.").

Delannoy v. Woodlawn Colonial, L.P. (In re Delannoy), BAP No. CC-17-1334-SKuL, 2018 WL 4190874 (B.A.P. 9th Cir. Aug. 31, 2018) (unpublished) (Trustee's sale to plaintiff of estate's appeal rights in state court action did not constitute a waiver of debtor's discharge in violation of § 524(c) even if plaintiff intended to assert the preclusive effect of the state court's findings in discharge litigation against the debtor. "Dismissal of the state court appeal is in no way the functional or legal equivalent of a waiver of discharge. Issue preclusion and exceptions to discharge are distinct legal doctrines with drastically different legal standards. . . . The standards of both doctrines would need to be satisfied before the bankruptcy court could declare [plaintiff's] judgment debt nondischargeable. . . . While issue preclusion generally can be applied in nondischargeability actions, . . . it does not obviate the requirement that the plaintiff establish all of the elements of nondischargeable conduct. . . . [D]ismissal of the state court appeal is only one of many steps [plaintiff] would need to take to successfully assert issue preclusion.").

Bouzaglou v. Haworth (In re Bouzaglou), BAP No. CC-17-1253-SKuF, 2018 WL 4062299 (B.A.P. 9th Cir. Aug. 13, 2018) (unpublished) (California jury's fraud judgment is nondischargeable under § 523(a)(2)(A). Jury specifically found each element necessary for a fraud judgment under California law. The elements for fraud under § 523(a)(2)(A) are identical. Debtor was not prevented from pursuing an appeal; debtor voluntarily relinquished control of that appeal by filing a Chapter 7 petition. "[T]he jury verdict was more than sufficient to demonstrate that [debtor] had been found liable for fraud. The verdict not only included an affirmative finding for each element of fraud, but also identified fraud as the sole ground for the relief granted. Thus, fraud was necessarily decided by the jury. . . . Most jurisdictions, including California, recognize an exception to issue preclusion when the party against whom issue preclusion is sought had no opportunity, as a matter of law, to appeal or otherwise obtain judicial review of the adverse ruling. . . . But this exception does not apply when the party against whom issue preclusion is sought voluntarily relinquishes the opportunity to appeal. . . . Here, [debtor] chose to file a chapter 7 petition and thereby voluntarily relinquished to the chapter 7 trustee the right to pursue, or not pursue, the appeal from the state court judgment.").

Zeppinick v. Ramirez (In re Zeppinick), BAP No. CC–16–1293–LKuF, 2017 WL 1457944 (B.A.P. 9th Cir. Apr. 24, 2017) (unpublished) (Findings of California Labor Commissioner that plaintiff was an employee of debtor, not an independent contractor, and that debtor should have known he had no right to offset alleged damages against an employee's wages were preclusive in employee's action under § 523(a)(6). "[Debtor] argues that there was an insufficient record to determine the issues litigated before the Labor Commissioner because no record of the hearing was introduced into evidence . . . . [T]here is no requirement that the entire record of the underlying proceedings be produced if the issues can be ascertained from the documents presented. . . . Here, the Labor Commissioner explicitly found that [plaintiff] was an employee and not an independent contractor, noting that [debtor] had 'produced no written evidence whatsoever despite admitting that records were in fact maintained' to support his contention that Ramirez was a subcontractor. . . . It is undisputed that the Judgment based on the Labor Commissioner's Order was appealable; [debtor's] failure to avail himself of this remedy does not change the preclusive effect of the judgment.").

Tomkow v. Barton (In re Tomkow), 563 B.R. 716 (B.A.P. 9th Cir. Jan. 5, 2017) (California trial court judgment for conversion and fraud was entitled to collateral estoppel effect in dischargeability actions under § 523(a)(2)(A) and (a)(6) even though on appeal judgment was affirmed only on conversion theory. "Based on . . . , [*DiRuzza v. County of Tehama*, 323 F.3d 1147 (9th Cir. 2003),] . . . 'even if the appellate court refrains from considering one of the grounds upon which the [trial court's] decision . . . rests, an affirmance of the decision below extends legal effects to the whole of the lower court's determination, with attendant collateral estoppel effect.' . . . Consequently, . . . issue preclusion . . . was available with respect to the fraud claim based on the state court judgment . . . . Under California law, an award of punitive damages under California Civil Code [ ] § 3294 requires a finding of fraud, malice, or oppression. Only fraud and one aspect of malice, as that term is defined for the purposes of the California punitive damages statute, satisfy the willful injury requirement of § 523(a)(6). . . . Appellants contend that the bankruptcy court erred in determining that the fraud finding in the punitive damages award of the state court judgment established the willful and malicious injury requirements necessary for nondischargeability under § 523(a)(6). . . . [T]hey contend that the bankruptcy court erred because the California Court of Appeal 'did not carry the [state court judgment's] conjunctive findings [of fraud, malice, and oppression] forward into its [d]ecision.' Instead, the California Court of

Appeal's decision 'affirmed the award of punitive damages based solely on the finding of there being substantial evidence of "malice and deceit" with no reference to fraud.' . . . [T]he state court's ruling on conversion and punitive damages satisfied § 523(a)(6)'s requirement of an underlying tort and 'malicious' injury. And there is no dispute that this aspect of the state court judgment was affirmed by the California Court of Appeal. Conversion under California law does not per se establish the necessary state of mind for § 523(a)(6) nondischargeability because intent is not a necessary element. But there is no question that it establishes a tort that can support a § 523(a)(6) nondischargeability claim and a wrongful act that necessarily causes injury as required for a finding of § 523(a)(6) malicious injury. And there is also no question that the acts of conversion were intentional and without just cause or excuse. . . . [W]e similarly conclude that the bankruptcy court appropriately gave issue preclusive effect to the state court's punitive damages award, which was based on findings of fraud, malice, and oppression; this satisfies § 523(a) (6)'s willfulness requirement. . . . That [one debtor's] conduct was less egregious than [the other's] is reflected in the reduced amount of punitive damages assessed individually . . . . This distinction, however, does not change the analysis of the § 523(a)(6) willful injury requirement.").

(10) Tenth Circuit

Terrell v. IRS (In re Terrell), BAP No. WO-16-007, 2017 WL 656275 (B.A.P. 10th Cir. Feb. 17, 2017) (unpublished) (Criminal conviction for tax fraud collaterally estopped debtor in dischargeability litigation under § 523(A)(1)(C). "[Debtor] signed and filed his 1997 federal income tax return under penalty of perjury, reporting $10,000 as his total income for that tax year when his income exceeded $130,000; (2) [debtor] was charged with, and pleaded guilty to, filing a false income tax return; (3) in the Plea Agreement, [debtor] admitted he acted willfully in filing the false tax return and he signed and filed his 1997 tax return with knowledge the return was not true as to all material matters; [and] (4) [debtor] admitted he knew his income was in excess of $130,000 and he deliberately filed the incorrect tax return[.] . . . [B]ankruptcy court did not err in determining the doctrine of collateral estoppel barred [debtor] from disputing facts material to the determination of dischargeability of the Tax Liability and did not err in determining the Tax Liability to be nondischargeable pursuant to § 523(a)(1)(C).").

(11) Eleventh Circuit

Beem v. Ferguson, 713 F. App'x 974 (11th Cir. Feb. 6, 2018) (per curiam) (unpublished) (Florida state court judgment for abuse of process collaterally estopped relitigation of willful and malicious injury in § 523(a)(6) action. "Under Florida law, a claim for abuse of process has three elements: '(1) the defendant made an illegal, improper, or perverted use of process; (2) the defendant had an ulterior motive or purpose in exercising the illegal, improper, or perverted process; and (3) the plaintiff was injured as a result of defendant's action.' . . . Florida courts have further explained that an action for abuse of process consists of a 'willful and intentional misuse of process for some wrongful and unlawful object or collateral purpose.' . . . In . . . § 523(a)(6) . . . '[w]illful' . . . means 'a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury.' . . . 'Malicious' means 'wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill will.' . . . To establish malice 'a showing of specific intent to harm another is not necessary.' . . . [T]he state court judgment for abuse of process and the requirements of non-dischargeability for knowing and willful injury under § 523(a)(6) are sufficiently identical for collateral estoppel purposes. Abuse of process contains an express requirement of willfulness or intent, just like § 523(a)(6). . . . It also requires an ulterior motive or purpose, . . . , which closely mirrors the lack of just cause requirement for malice.”).

Aamodt v. Narcisi (In re Narcisi), 691 F. App’x 606 (11th Cir. July 26, 2017) (unpublished) (State court judgment for breach of consignment agreement did not collaterally estop debtor’s defense in § 523(a)(4) action because state court did not determine that debtor acted in a fiduciary capacity. State court concluded debtor had breached consignment agreement by “‘(i) selling items on days other than the scheduled date of the auction without notice to the parties; (ii) commingling [plaintiffs’] property with other items for sale; and (iii) conducting the auction in “a less than vigorous manner.”’ . . . The judgment stems from the state court’s determination that [debtor] breached the express terms of a contract, not that he had acted as a fiduciary and violated his duty. The state court’s judgment likewise does not mean that [debtor] committed fraud, because that ordinarily requires a finding of intent.”).

b) Consent judgment

Sturgeon-Garcia v. Cagno, 740 F. App’x 144 (9th Cir. Oct. 18, 2018) (unpublished) (Stipulated judgment on complaint that included fraudulent inducement claim not given preclusive effect. “California courts sometimes find issue preclusion if the parties have manifested an intent to be bound by a consent judgment’s terms. . . . [The parties here] did not manifest such an intent; indeed, their counsel agreed on the record in the state-court proceedings that the ‘damages reflected in the stipulated judgment do not relate to any claim of fraud.’”).

Johnson v. W3 Inv. Patners, LP (In re Johnson), BAP No. SC–17–1194–LBF, 2018 WL 1803002 (B.A.P. 9th Cir. Apr. 16, 2018) (unpublished), *appeal filed* No. 18-60025 (9th Cir. May 1, 2018) (Stipulated judgment in settlement of state court litigation was not an unenforceable waiver of discharge and can be preclusive in nondischargeability litigation. “Ordinarily, stipulated judgments are not given preclusive effect because the issues were not actually litigated and thus this element could not be satisfied. . . . Where the record or judgment evidences an intent by the parties for a stipulated judgment to be preclusive, however, a court may give effect to that judgment. . . . Where a party admits liability in a stipulated judgment, that party may be precluded from relitigating that liability. . . . Debtors contend that the bankruptcy court should not have given issue preclusive effect to the [state court] Form Judgment because it and the other settlement documents constituted an unenforceable prepetition waiver of the discharge. While Debtors are correct that the settlement documents contain language that could be so construed . . . , they also contain language deeming admitted the fraud allegations . . . . The bankruptcy court correctly disregarded the general nondischargeability language but found that the Debtors’ deemed admission of the facts establishing fraud liability was entitled to preclusive effect. . . . [P]repetition waiver of discharge is unenforceable as against public policy. . . . But a party may stipulate to facts that the bankruptcy court can apply in a nondischargeability action. . . . [T]he salient question is whether the circumstances surrounding the settlement or the judgment itself evidence the parties’ intent for the Stipulated Judgment to have preclusive effect. . . . [T]he bankruptcy court did not err in concluding that the Stipulated Judgment was not an unenforceable prepetition waiver of the discharge but was instead evidence that the Debtors intended the findings incorporated into that judgment to have preclusive effect in any future bankruptcy case. Accordingly, the actually litigated requirement was met. Although the bankruptcy court did not explicitly address the ‘necessarily decided’ requirement, the record reflects that this element was also met. The Form Judgment explicitly states that the judgment arose solely from Debtors’ fraudulent conduct as described . . . . [T]he bankruptcy court did not err in applying issue preclusion to the state court judgment.”).

c) *Default judgment*

Couch v. Panther Petroleum, LLC (In re Couch), 704 F. App’x 569 (6th Cir. Nov. 6, 2017) (unpublished) (Citing *Bay Area Factors v. Calvert (In re Calvert)*, 105 F.3d 315 (6th Cir. 1997), and *Anderson v. Fisher (In re Anderson)*, 520 B.R. 89 (B.A.P. 6th Cir. 2014), a “penalty default judgment” is given preclusive under Tennessee law and therefore estopped debtors from contesting issues of fraud and willful and malicious injury under § 523(a)(2)(A) and (a)(6). “‘It is not necessary to have a trial for a judgment to be on the merits; rather, if the parties had an opportunity to be heard, and there are no technical defects, the judgment is on the merits, although there was no actual hearing or argument on the facts of the case.’” Debtor retained counsel (who later withdrew) to defend state court complaint, answered, filed a counter-complaint, and failed to comply with discovery order which led to entry of default.).

d) *Arbitration and other “quasi-judicial” proceedings*

Lunsford v. Process Techs. Servs., LLC (In re Lunsford), 848 F.3d 963 (11th Cir. Feb. 15, 2017) (Arbitrator’s determination that debtor violated state securities laws resulted in judgment “for a violation” of securities laws that was nondischargable under § 523(a)(19). “In adopting the arbitrator’s award, the [bankruptcy] court adopted the facts that the arbitrator found. The bankruptcy court could not have applied section 523(a)(19)(A) without first finding a violation because the section applies only if there exists a ‘violation’ of securities laws that a ‘debt . . . is for.’”).

e) *Guilty plea; criminal conviction*

f) *Plea of no contest*

g) *Summary judgment*

3. Judicial estoppel

4. Equitable estoppel

5. “Quasi-estoppel” and “judicial admissions”

C. Damages and Settlements

1. Enhanced damages and costs

a) *Punitive damages are dischargeable*

b) *Punitive damages are nondischargeable*

Bouzaglou v. Haworth (In re Bouzaglou), BAP No. CC-17-1253-SKuF, 2018 WL 4062299 (B.A.P. 9th Cir. Aug. 13, 2018) (unpublished) (California jury’s award of $8,000,000 in exemplary damages was nondischargeable. “[A]ll debts arising from a debtor's fraudulent conduct, including punitive damages, are nondischargeable. . . . [Debtor] contends that the amount of exemplary damages awarded was so unreasonable and so disproportionate to the amount of compensatory damages incurred that the exemplary damages award was unconstitutional. This argument needed to be addressed, if at all, in a direct challenge of the judgment in state court. [Debtor] was not entitled to collaterally attack in the exception to discharge action the amount of the exemplary damages finally determined in the prior state court action.”).

Tomkow v. Barton (In re Tomkow), 563 B.R. 716 (B.A.P. 9th Cir. Jan. 5, 2017) (State court award of punitive damages in fraud and conversion judgment was nondischargeable under § 523(a)(2)(A) and (a)(6) based on findings of fraud, malice and oppression.).

c) Treble damages

d) Attorney fees, interest, other damages and costs

Zenovic v. Crump (In re Zenovic), 727 F. App'x 369 (9th Cir. June 18, 2018) ("[N]ondischargeable claim would bear prejudgment interest at the California state law rate of seven percent, . . . rather than at the federal rate. . . . '"[T]he award of pre-judgment interest in a case under federal law is a matter left to the sound discretion of the trial court."' . . . Moreover, '[t]he federal prejudgment interest rate applies to actions brought under federal statute, such as bankruptcy proceedings, unless the equities of the case require a different rate.' . . . Here, . . . the bankruptcy court did not abuse its discretion when it awarded prejudgment interest at the California rate of seven percent per annum. . . . [Debtor] filed his bankruptcy petition shortly before the fraud claim would have been tried in the California courts, and the elements for fraud in California are much like the elements that must be shown in a nondischargeability proceeding. . . . [T]he use of the federal interest rate in this action would not accord with considerations of fairness and uniformity among the various parties.").

Hamilton v. Elite of Los Angeles, Inc. (In re Hamilton), 584 B.R. 310 (B.A.P. 9th Cir. Apr. 17, 29018) (Plaintiff entitled to postjudgment interest on nondischargeable claim at the state rate for entire period following entry of state court judgment. "State and federal law both provide for postjudgment interest, but at dramatically different rates. . . . Due to credit market conditions, the federal rate has been far less than the [California] state rate of ten percent for many years. . . . The Supreme Court has held that interest is an 'integral part' of a nondischargeable debt. . . . Section 523(a)(6) permits the court to determine whether a debt is dischargeable. It does not permit the court to relieve the debtor of some of the interest that is an integral part of a nondischargeable debt or to adjust the amount of a debt determined by a valid prepetition state court judgment because the bankruptcy court thinks that the state interest rate is too high. Our precedents indicate that interest on a nondischargeable judgment debt should continue to accrue at the state rate, even after the bankruptcy court determines the nondischargeability of the debt. . . . [I]n cases like this one, where there is a valid prepetition state court judgment[,] [t]he Nondischargeability Judgment was not a new money judgment under federal law. It simply determined that the State Court Judgment was not dischargeable. As such, the bankruptcy court lacked authority to override the state court's award of interest. This case is distinguishable from cases where there is no prior state court judgment. In such a case, the bankruptcy court needs to determine both the existence of a debt and its dischargeability. The bankruptcy court may then issue a money judgment for the debt, and federal law would govern pre- and postjudgment interest. . . . [Here, plaintiffs] did not request that the bankruptcy court enter a money judgment; they only asked the bankruptcy court to determine the nondischargeability of the State Court Judgment. . . . Accordingly, because the bankruptcy court did not enter a new money judgment, the bankruptcy court should not have eliminated or reduced any of the interest that is an integral part of the State Court Judgment. . . . [T]he bankruptcy court did not have discretion to deny or adjust the accrual of interest at the state rate after entry of the State Court Judgment.").

e) Other damages and costs

2. Prebankruptcy settlement or novation

Johnson v. W3 Inv. Patners, LP (In re Johnson), BAP No. SC–17–1194–LBF, 2018 WL 1803002 (B.A.P. 9th Cir. Apr. 16, 2018) (unpublished), *appeal filed* No. 18-60025 (9th Cir. May 1, 2018) (Stipulated judgment in settlement of state court litigation was not an unenforceable waiver of discharge and admissions in that judgment are preclusive of fraud in subsequent nondischargeability litigation.).

3. Settlement of discharge and dischargeability litigation

DeepRockVenture Partners, L.P. v. Beach (In re Beach), 731 F. App'x 322 (5th Cir. May 22, 2018) (per curiam) (unpublished) (Approval of settlement of fraudulent conveyance and discharge complaints that waived debtor's discharge under § 727(a)(10) was not an abuse of discretion.).

D. Miscellaneous General Considerations

1. Exceptions to discharge and dischargeability are narrowly construed

Andrews v. Michigan Unemployment Ins. Agency, 891 F.3d 245 (6th Cir. May 29, 2018) (Applying *Cohen v. de la Cruz*, 523 U.S. 213, 118 S. Ct. 1212, 140 L. Ed. 2d 341 (1998), penalties assessed for fraudulently obtained unemployment benefits were nondischargeable under § 523(a)(2) in Chapter 13 case. The principle that "exceptions to discharge are to be strictly construed against the creditor" fails to save debtors because the court may not ignore *Cohen*. "That § 523(a)(2) debts are excepted from discharge under § 1328(a) reflects a congressional decision that those who commit fraud are not to be given the same 'fresh start' as 'honest but unfortunate debtor[s].'").

Privitera v. Curran (In re Curran), 855 F.3d 19 (1st Cir. Apr. 20, 2017) ("[A] discharge is available . . . only to the 'honest but unfortunate debtor.' . . . To this end, the bankruptcy code exempts some debts—especially those rooted in fraud and deceit—from discharge. . . . These exemptions are construed stringently and creditors must show that a debt 'comes squarely' within a particular exemption.").

2. Exceptions to dischargeability apply to individual debtors only

3. Individual debtor's Fifth Amendment privilege

4. Exceptions to discharge and community property

5. Other statutes of limitation

6. Default judgments in discharge and dischargeability litigation

Halper v. Twin Palms Lending Grp., LLC (In re Halper), BAP No. CC–17–1171–FSTa, 2018 WL 1354431 (B.A.P. 9th Cir. Mar. 13, 2018) (unpublished) (Not an abuse of discretion to grant default judgment for discovery abuse in action under § 523(a)(2)(A). Debtor avoided being deposed in two related adversary proceedings for over five years, invoking her Fifth Amendment privilege against self-incrimination, citing a family illness, and claiming her own illness. After plaintiffs requested terminating sanctions under Rule 37 for discovery abuses, bankruptcy court gave debtor a final opportunity to comply, "ordering her to pay $40,000 (a portion of her adversaries' attorneys' fees) and appear for her deposition. When she failed to comply, the bankruptcy court granted default judgment[.] . . . Default judgment is governed by Civil Rule 55 . . . . [W]hen a defendant is in default and the plaintiff seeks a default judgment under Civil Rule 55, the defendant has no right to challenge any of the facts properly alleged in the complaint. . . . While the court ha[d] discretion to require further proceedings, the court need not do so. . . . The complaints, the Motion for Default Judgment, and the [plaintiffs'] declarations attached thereto adequately laid out the [plaintiffs'] claims and covered all of the elements of § 523(a)(2)(A). It was not an error to accept the allegations as true. . . . [T]he bankruptcy court did consider a less severe sanction. . . . [T]he court gave [debtor] one more chance to sit for her deposition and ordered her to pay a portion of the [plaintiffs'] attorneys' fees caused by her prior abuses. The bankruptcy court acknowledged [debtor's] concerns by revising the proposed payment schedule. . . . The combination of the monetary sanction and the order to sit for a deposition was a 'less drastic sanction' that gave [debtor] a chance to avoid the terminating sanction. But when [debtor] failed to make the second installment payment, the 'less drastic sanction' failed, and the court then imposed the terminating sanction that the [plaintiffs'] requested . . . . We see no abuse of discretion.").

Stein v. Stubbs (In re Stubbs), 565 B.R. 115 (B.A.P. 6th Cir. Mar. 9, 2017) (Bankruptcy court abused its discretion when it refused to grant Chapter 7 trustee a default judgment in action to revoke discharge under § 727(d)(3) after debtor failed to appear at post-discharge Rule 2004 examination initiated by trustee to obtain a postpetition tax return.).

III. Litigation of Dischargeability Complaints: 11 U.S.C. § 523

A. Standard of Proof

B. 11 U.S.C. § 523(a)(1)

1. Counting and tolling of time periods

2. Dummy, substitute and unsigned returns

Giacchi v. United States (In re Giacchi), 856 F.3d 244 (3d Cir. May 5, 2017) (Applying *Beard v. Commissioner*, 82 T.C. 766, 777 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986), tax Forms 1040 filed after IRS made assessment of liability do not constitute "returns" for purposes of 11 U.S.C. § 523(a)(1)(B). "Section 523(a)(1)(B)(i) . . . excepts from discharge 'any . . . debt for a tax . . . with respect to which a return, or equivalent report or notice, if required, . . . was not filed or given.' . . . In 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) . . . added, for the first time, a definition of 'return' to the Bankruptcy Code. The definition reads, in pertinent part, '[f]or purposes of this subsection, the term 'return' means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements).' . . . Several of our sister circuits have interpreted 'applicable filing requirements' to include filing deadlines so that late-filed forms cannot be 'returns.' . . . We need not reach the question of whether the [so-called] 'one-day-late rule' is correct. Instead, we join our sister circuits in applying *Beard* . . . which sets forth 'the requirements of applicable nonbankruptcy law[.]'. . . Under *Beard*, a document must meet four requirements to be a tax return: (1) it must purport to be a return, (2) it must be executed under penalty of perjury, (3) it must contain sufficient data to allow calculation of tax, and (4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law. . . . Forms filed after their due dates and after an IRS assessment rarely, if ever, qualify as an honest or reasonable attempt to satisfy the tax law. . . . This is because the purpose of a tax return is for the taxpayer to provide information to the government regarding the amount of tax due. . . . If a taxpayer does not file a return, the IRS is required to independently assess the taxpayer's liability, as it did [here] . . . . Once the IRS assesses the taxpayer's liability, a subsequent filing can no longer serve the tax return's purpose, and thus could not be an honest and reasonable attempt to comply with the tax law. . . . [T]he Eighth Circuit's holding in [*Colsen v. United States (In re Colsen)*, 446 F.3d 836 (8th Cir. 2006),] that the 'honest and reasonable attempt' inquiry focuses on the content of the form, not the circumstances of its filing [is rejected]. . . . We . . . agree with the weight of authority that the timing of the filing of a tax form is relevant to determining whether the form evinces an honest and reasonable attempt to comply with tax law. . . . [Debtor's] belated filings are merely self-serving bids to reduce his tax liabilities, rather than attempts to comply with the requirements and objectives of prompt self-reporting and self-assessment. . . . Although '[c]ircumstances . . . might demonstrate that the debtor, despite his delinquency, had attempted in good faith to comply with the tax laws [,]' [debtor's] 'emotional state' during the tax years in question is not one of them. . . . [Debtor's] belated filings after assessment are not an honest and reasonable effort to comply with the tax law under the *Beard* test and, as such, the filings do not constitute returns.").

3. Trust fund, excise or gross receipts tax

4. Failure to file a return, equivalent report or notice

5. Fraudulent return or willful attempt to evade

Terrell v. IRS (In re Terrell), BAP No. WO-16-007, 2017 WL 656275 (B.A.P. 10th Cir. Feb. 17, 2017) (unpublished) (Criminal conviction for tax fraud collaterally estopped debtor from discharging tax debt under § 523(a)(1)(C). "[Debtor] signed and filed his 1997 federal income tax return under penalty of perjury, reporting $10,000 as his total income for that tax year when his income exceeded $130,000; (2) [debtor] was charged with, and pleaded guilty to, filing a false income tax return; (3) in the Plea Agreement, [debtor] admitted he acted willfully in filing the false tax return and he signed and filed his 1997 tax return with knowledge the return was not true as to all material matters; [and] (4) [debtor] admitted he knew his income was in excess of $130,000 and he deliberately filed the incorrect tax return[.] . . . [B]ankruptcy court did not err in determining the doctrine of collateral estoppel barred [debtor] from disputing facts material to the determination of dischargeability of the Tax Liability and did not err in determining the Tax Liability to be nondischargeable pursuant to § 523(a)(1)(C).").

6. Dischargeability of interest and penalties

7. "Responsible person" liability

8. Subrogation

9. Miscellaneous § 523(a)(1) cases

C. 11 U.S.C. § 523(a)(2)

1. Standard of proof

2. Elements of proof under § 523(a)(2)(A)

a) Extension, renewal or refinancing of credit

Selenberg v. Bates (In re Selenberg), 856 F.3d 393 (5th Cir. May 8, 2017) (Promissory note given by debtor/attorney to former client that induced client not to file malpractice action was an "extension of credit" for purposes of § 523(a)(2)(A). "'[A]n extension, within the meaning of § 523(a)(2), is "an indulgence by a creditor giving his debtor further time to pay an existing debt."' . . . [T]he Bankruptcy Code 'protects the creditor who is deceived into forbearing collection efforts.' . . . [T]he promissory note that [debtor] executed had its intended effect of giving [debtor] more time to pay. . . . [Debtor] gave [plaintiff] the promissory note in order to induce her to forego any attempts to pursue a malpractice claim against him. . . . [Debtor] received an extension of credit from [plaintiff] when she agreed to accept the promissory note.").

b) To the extent obtained by fraud

Andrews v. Michigan Unemployment Ins. Agency, 891 F.3d 245 (6th Cir. May 29, 2018) (Applying *Cohen v. de la Cruz*, 523 U.S. 213, 118 S. Ct. 1212, 140 L. Ed. 2d 341 (1998), penalties assessed for fraudulently obtained unemployment benefits were nondischargeable under § 523(a)(2). "The [ ] question . . . is whether the penalty portion of the debt falls under § 523(a)(2). The Supreme Court addressed a similar issue in *Cohen* when it analyzed how to classify treble damages and attorney's fees and costs arising from fraud in a Chapter 7 bankruptcy case. . . . The Court . . . ultimately concluded that '[w]hen construed in the context of the statute as a whole, then, § 523(a)(2)(A) is best read to prohibit the discharge of any liability arising from a debtor's fraudulent acquisition of money, property, etc., including an award of treble damages for the fraud.' . . . This decision demonstrates that the penalties associated with fraud should be regarded as essentially the same as the fraud itself and are to be included under the § 523(a)(2) exception from discharge, as debt arising from fraud. Debtors argue that *Cohen* is inapplicable because it concerned private parties and not a government agency, but they offer no citation or persuasive reasoning as to why that changes the analysis.").

c) Actual fraud, not constructive or statutory fraud

d) Fraud must be pleaded with particularity

Bennett v. Lindsey (In re Lindsey), No. 17-50746, 2018 WL 3409995 (5th Cir. July 11, 2018) (per curiam) (Allegations of fraud in § 523(a)(2) complaint were insufficient to meet heightened pleading requirement under Fed. R. Civ. P. 9(b); denial of motion for leave to amend was not an abuse of discretion. Rule 9(b) requires "that a plaintiff allege 'the nature of the fraud, some details, a brief sketch of how the fraudulent scheme operated, when and where it occurred, and the participants.' . . . [P]laintiff must lay out 'the who, what, when, where, and how' of the alleged fraud. . . . [P]laintiff must allege 'more than an unadorned, the defendant-unlawfully-harmed-me accusation.' . . . '"[N]aked assertion[s]" devoid of "further factual enhancement"' do not suffice. . . . [Plaintiff's] averment that [debtor] 'falsely swore . . . that each [subcontractor] had been paid in full . . . when in fact other persons were still owed . . .' does not adequately explain how [debtor's] fraudulent scheme operated to the detriment of [plaintiff]. [Plaintiff's] barebones assertion, made without any explanation for his belief that certain subcontractors were not paid, or, more importantly, any explanation of how [debtor's] actions harmed [plaintiff], is conclusory. . . . [Plaintiff] alleged only that he 'relied upon the false misrepresentations . . . and as a proximate result ha[s] sustained injuries.' [Plaintiff's] complaint does not meet the heightened pleading requirements of Rule 9(b) and Bankruptcy Rule 7009; therefore, dismissal under Rule 12(b)(6) was proper.").

e) Express, affirmative misrepresentations of existing facts (other than financial condition)

Selenberg v. Bates (In re Selenberg), 856 F.3d 393 (5th Cir. May 8, 2017) (Debtor/attorney made false representation for purposes of § 523(a)(2)(A) by failing to inform former client—as required by state law—of desirability of seeking independent legal counsel in connection with settlement of potential malpractice action. Debtor "'concocted [an] agreement or settlement that bought him almost two years of time without being sued by [former client].' Because there was 'absolutely no evidence that [debtor] ever advised [his former client], either orally or in writing, to seek independent counsel' prior to entering this agreement, the court held that Selenberg failed to fulfill his duty to disclose under [state rules of professional conduct] and thereby made 'a false representation[.]'").

Dewitt v. Stewart (In re Stewart), BAP No. NH 17-038, 2018 WL 5726990 (B.A.P. 1st Cir. Nov. 1, 2018) (per curiam) (Debtor explicitly misrepresented—through his solely owned corporation—that he would complete plantiffs' home remodel within their budget, that deposits would be used exclusively on their project, and that milestone payments would be used to pay subcontractors. "[Plaintiffs] were clear and consistent regarding their renovation budget—$700,000 to $1,000,000. . . . [Debtor] not only assured [plaintiffs] that [his business] could complete the renovation within their budget but, according to his own testimony, he also helped [plaintiff's] establish that budget. [Plaintiffs] were unaware at this time—and [debtor] did not disclose—that [his company] was already coming 'unraveled' and the situation was 'dire'; nor did [debtor] reveal that any of his relationships with subcontractors were strained. Instead, [debtor] described his business as 'booming.' . . . [A]fter receiving the deposit, Stewart presented the [plaintiffs] with a contract for . . . $1,649,936, and then proceeded to use that deposit for purposes other than [plaintiffs'] project. . . . [C]onstruction . . . did not begin until a couple of months later and, by that time, the first deposit had been significantly dissipated. . . . [Debtor] misrepresented [his company's] ability to complete [plaintiffs'] renovation within budget and the purpose of the first deposit, in order to extract the deposit from them and to induce them to engage [his company]. . . . [Debtor] did not use the entire [second] deposit for [plaintiffs'] project and, much like the first deposit, the second was largely consumed by the time work on the site commenced. . . . [T]he second deposit was procured through [debtor's] fraudulent misrepresentations. . . . It is well established that an overt representation is not required by § 523(a)(2)(A). . . . An implied misrepresentation of conduct intended to create a false representation constitutes a false pretense for § 523(a)(2)(A) purposes. . . . [T]he bankruptcy court should have considered whether, in representing to [plaintiffs] that they would 'fund' their own project and that their milestone payments and deposits would be used to 'leverage subcontractors,' [debtor] was, at a minimum, impliedly representing that their monies would be used exclusively on their project. We conclude that even if [debtor] did not explicitly represent he would apply [plaintiffs'] monies exclusively to their project, the record, viewed as a whole, supports a conclusion that he impliedly made such false representations.").

Whitcomb v. Smith (In re Smith), 572 B.R. 1 (B.A.P. 1st Cir. Sept. 6, 2017) (In § 523(a)(2) action by daughter and son-in-law against mother for failing to transfer property, mother never intended to perform, elevating breach of contract to misrepresentation. Misrepresentation includes a false representation of intention to act in the future. Debtor's agreement to transfer real property to daughter and son-in-law in return for their assistance to debtor and her failing husband was a ruse to induce plaintiffs to contribute money and services to debtor. "'A representation of the maker's own intention to do . . . a particular thing is fraudulent if he does not have that intention at the time he makes the representation . . . . [A] promise made without the intent to perform it is held to be a sufficient basis for an action of deceit. On the other hand, if, at the time he makes a promise, the maker honestly intends to keep it but later changes his mind or fails or refuses to carry his expressed intention into effect, there has been no misrepresentation. This is true even if there is no excuse for the subsequent breach. A debtor's statement of future intention is not necessarily a misrepresentation if intervening events cause the debtor's future actions to deviate from previously expressed intentions. The test may be stated as follows. If, at the time he made his promise, the debtor did not intend to perform, then he has made a false representation (false as to his intent) and the debt that arose as a result thereof is not dischargeable (if the other elements of § 523(a)(2)(A) are met). If he did so intend at the time he made his promise, but subsequently decided that he could not or would not so perform, then his initial representation was not false when made.' . . . 'Thus, if a debtor enters into a contract with the intent not to pay, the contract may provide a basis for an exception to discharge on the grounds of fraud if the other remaining elements are established.' . . . 'However, a debtor's "mere failure to perform is not sufficient evidence of scienter nor is subsequent conduct contrary to the original representation necessarily indicative of fraudulent intent."'").

f) Financial condition of debtor or insider

Lamar, Archer & Cofrin, LLP v. Appling, ___ U.S. ___, 138 S. Ct. 1752, 201 L. Ed. 2d 102 (June 4, 2018) (Statement about value or availability of a single asset can be a "statement . . . respecting the debtor's . . . financial condition" within meaning of § 523(a)(2)(B) which must be in writing to be excepted from discharge. "This case is about what constitutes a 'statement respecting the debtor's financial condition.' Does a statement about a single asset qualify, or must the statement be about the debtor's overall financial status? The answer matters to the parties because the false statements at issue concerned a single asset and were made orally. So, if the single-asset statements here qualify as 'respecting the debtor's financial condition,' § 523(a)(2)(B) poses no bar to discharge because they were not made in writing. If, however, the statements fall into the more general category of 'false pretenses, . . . false representation, or actual fraud,' § 523(a)(2)(A), for which there is no writing requirement, the associated debt will be deemed nondischargeable. The statutory language makes plain that a statement about a single asset can be a 'statement respecting the debtor's financial condition.' If that statement is not in writing, then, the associated debt may be discharged, even if the statement was false. . . . [A] statement is 'respecting' a debtor's financial condition if it has a direct relation to or impact on the debtor's overall financial status. A single asset has a direct relation to and impact on aggregate financial condition, so a statement about a single asset bears on a debtor's overall financial condition and can help indicate whether a debtor is solvent or insolvent, able to repay a given debt or not. Naturally, then, a statement about a single asset can be a 'statement respecting the debtor's financial condition.'").

Haler v. Boyington Capital Grp., L.L.C (In re Haler), No. 17-40229, 2017 WL 6729967 (5th Cir. Dec. 29, 2017) (per curaim) (unpublished) (Oral statements that corporation was in "'very fine legally [sic] financial shape'" and had "'plenty of cash to operate [the] business'" were statements respecting financial condition that had to be in writing under § 523(a)(2)(B). "The phrase 'statement respecting . . . financial condition' appears in subsections (A) and (B) of 11 U.S.C. § 523(a)(2) . . . . Section 523(a)(2)(A) generally renders debt obtained by false pretenses, false representations, or actual fraud non-dischargeable. . . . But it contains an exception: if the debt is obtained by a false oral statement respecting financial condition, then it is dischargeable. . . . In contrast, a false written statement respecting financial condition is non-dischargeable under § 523(a)(2)(B) . . . . In [*Bandi v. Becnel (In re Bandi)*, 683 F.3d 671 (5th Cir. 2012)], we held that statements respecting financial condition are 'those that purport to present a picture of the debtor's overall financial health.' . . . A representation regarding a specific asset 'says nothing about the overall financial condition of the person making the representation or the ability to repay debt.' . . . 'Ownership of specific assets does not mean that the assets are unencumbered or that other debts or liabilities of the owner do not exceed the value of the assets.' . . . [Debtor's] representations were general and intimated that the overall value of [the corporation's] property and income was greater than its debt and liabilities. . . . [Debtor'] statements represented that [the corporation] was overall financially sound. These oral representations were 'statement[s] respecting . . . financial condition' and thus did not render the debt non-dischargeable under § 523(a)(2)(A).").

g) Agency, master servant and spouses

Dewitt v. Stewart (In re Stewart), BAP No. NH 17-038, 2018 WL 5726990) (B.A.P. 1st Cir. Nov. 1, 2018) (per curiam) (Applying veil-piercing theory, debtor had personal liability for misrepresentations by and through corporation that was excepted from discharge under § 523(a)(2)(A). "[T]o succeed on their claim for a discharge exception against [debtor] under § 523(a)(2)(A), [plaintiffs] must show that [debtor] is personally liable to them for [his company's] obligation by piercing [the] corporate veil consistent with New Hampshire law. . . . [T]he record before us provides a sufficient basis to support a conclusion that [debtor] used the corporate identity of [his compay] to promote an injustice and/or a fraud on [plaintiffs]. . . . [Debtor] was the sole officer, director and shareholder of [his construction company]. From the inception of his relationship with [plainitffs], [debtor] used the corporate identity . . . to induce [plaintiffs] into doing business with him through [his company]. . . . [Debtor] represented that [his company] was well qualified to undertake a renovation project of the magnitude of [plaintiffs'], that [the company's] business was thriving, and that [the company] had the ability to retain subcontractors. On the basis of [the company's] purported professional and financial qualifications, [plaintiffs] entered into . . . Agreement[s] with [the company], and paid all of the milestone payments and deposits to [the company]. [Debtor] then deposited those monies into [the company's] general account and, instead of applying those sums solely to [plaintiffs'] project, he used a significant portion to satisfy the corporate obligations of [the company], to pay himself a salary, and to pay his wife's credit card debt. Thus, the record shows that [debtor] used [the company's] corporate form to promote an injustice against [plaintiffs]. Under these circumstances, the record supports piercing [the] corporate veil under New Hampshire law.").

h) Materially false

Thomas v. Kenmark Ventures, LLC (In re Thomas), 716 F. App'x 647 (9th Cir. Mar. 23, 2018) (unpublished) (Concealment of lower valuations for collateral pledged to plaintiff was material for purposes of § 523(a)(2)(A) "because a reasonable lender would have considered them important in agreeing to the loan. . . . [Debtor] had a duty to disclose those lower valuations because he selectively disclosed to [plaintiff] that the [collateral] had, at one point, been valued at an amount substantially greater than the amount of the loan.").

i) Debtor knew it was false

j) *Intent to deceive*

Thomas v. Kenmark Ventures, LLC (In re Thomas), 716 F. App'x 647 (9th Cir. Mar. 23, 2018) (unpublished) (Intent to deceive can be inferred from the fact that debtor knew of lower valuations of collateral but selectively disclosed only higher valuation to plaintiff.).

Selenberg v. Bates (In re Selenberg), 856 F.3d 393 (5th Cir. May 8, 2017) (Debtor/attorney who convinced former client to settle potential malpractice action without advice of independent counsel acted with required intent to deceive when the agreement served principally to buy debtor time and avoid a malpractice action. "'An intent to deceive may be inferred from "reckless disregard for the truth or falsity of a statement combined with the sheer magnitude of the resultant misrepresentation."' . . . [Debtor's] 'main concern was to convince [his former client] that taking the promissory note was her only option' and that his 'primary intent was to buy some time and to keep himself out of trouble.' . . . Although [debtor] was truthful with [his former client] about his financial situation at the time, he did not advise her of the desirability of seeking independent counsel. On the contrary, he only agreed to meet with [his former client] after being assured that she had not hired another attorney. . . . [Debtor] also led [former client] to believe he might be able to pay her in the future, even though that possibility was remote. These actions all suggest that [debtor] intended to deceive [his former client].").

k) *Justifiable reliance*

Saenz v. Gomez (In re Saenz), 899 F.3d 384 (5th Cir. Aug. 7, 2018) (Plaintiff established justifiable reliance on debtor's false income statement and misrepresentation that debtor was a corporate representative for franchisor with authority to enter into sales agreement with plaintiff. "The reliance element does not require a plaintiff to demonstrate reasonableness, yet a person may not justifiably rely on a representation if 'there are "red flags" indicating such reliance is unwarranted.' . . . Not only did [debtor] make credible representations, he also went to great lengths, including falsifying bank documents, to prevent [plaintiff] from questioning his authority to effectuate the franchise transfer.").

Thomas v. Kenmark Ventures, LLC (In re Thomas), 716 F. App'x 647 (9th Cir. Mar. 23, 2018) (unpublished) (Justifiable reliance may be presumed when debtor's concealment of lower valuations of collateral pledged to plaintiff was material for purposes of § 523(a)(2)(A).).

l) *Proximate cause*

Saenz v. Gomez (In re Saenz), 899 F.3d 384 (5th Cir. Aug. 7, 2018) (Proximate cause included evidence that false income statement and debtor's misrepresentations of his relationship with franchisor induced plaintiff's purchase of business that ultimately failed. "Under Texas law, proximate cause requires cause in fact and foreseeability. . . . Cause in fact is established if the injury would not have occurred 'but for' the wrongful act or omission. . . . Foreseeability 'requires that the injury [complained of] be of such a general character as might reasonably have been anticipated, and that the injured party should be so situated with relation to the wrongful act that injury to him . . . might reasonably have been foreseen.' . . . The bankruptcy court found proximate cause satisfied because had [plaintiff] seen the true numbers instead of the false ones on the income statement, he would not have closed the deal, and 'it was clearly foreseeable that providing a false income statement could induce someone to invest and subsequently lose the investment.' The bankruptcy court also found [debtor's] misrepresentation about his status at [the franchisor] was a 'critical factor' in [plaintiff's] decision to purchase the restaurant, and '[i]t was foreseeable that a misrepresentation designed to induce [plaintiff] into purchasing the restaurant could result in injury.' . . . The bankruptcy court made clear that but for the misrepresentations regarding the inflated profits in the income statements and [debtor's] corporate status with the franchisor, [plaintiff] would not have sought the loan . . . or completed the purchase of the restaurant.").

Selenberg v. Bates (In re Selenberg), 856 F.3d 393 (5th Cir. May 8, 2017) (When former client was convinced by debtor to accept settlement rather than pursue malpractice action, client sustained loss as a proximate result of debtor's misrepresentation. The former client "lost the opportunity to pursue her malpractice claim against [debtor] because she relied on [debtor's] advice that she would be more likely to recover if she bypassed a malpractice suit and sought to collect on the promissory note at a later date. . . . [Former client] sustained a loss as a proximate result of [debtor's] false representation.").

Ifeorah v. Flegal (In re Ifeorah), 683 F. App'x 621 (9th Cir. Mar. 20, 2017) (unpublished) (Debtor's misrepresentations to landlord about ownership of equipment and intent to pay rents proximately caused some but not all of landlord's damages for purposes of nondischargeability under § 523(a)(2)(A). Section 523(a)(2)(A) requires damage to the creditor proximately caused by reliance on debtor's statement or conduct. "[U]npaid rent accumulated between the default on the balloon payment and [landlord's] next attempt to evict [debtor] (about $35,000), was not directly caused by the fraud, because [landlord's] 'reluctan[ce] to evict [debtor] without a new tenant that could come in' was an intervening cause. . . . [Landlord's] delay [in evicting debtor] was most likely caused by that fact, rather than by [debtor's] fraud. . . . [I]t was clear error to include this category of damages in an exception to discharge under Section 523(a)(2). . . . When [debtor] later defaulted, [landlord] had to start the eviction process from scratch. This delay, . . . , gave [debtor] nearly an additional year in the rental property. Because the fraud enabled [debtor's] dilatory behavior, these damages . . . were proximately caused by the fraud. . . . [T]he loss of the kitchen was caused by the breach of [debtor's] promise to leave a turnkey kitchen if he defaulted on the settlement agreement. Damages resulting from a breach of contract, however, are dischargeable in bankruptcy. . . . [T]he BAP erred by awarding [landlord] an exception to discharge for the loss of the kitchen.").

m) Benefit to debtor; damages

3. Elements of proof under § 523(a)(2)(B)

a) Extension of credit

b) Materially false

Privitera v. Curran (In re Curran), 855 F.3d 19 (1st Cir. Apr. 20, 2017) (Omission of encumbrances in list of property was not a misrepresentation when context did not require that information from debtor. While romantically involved, plaintiff agreed to loan debtor $30,000 for his landscaping business. At plaintiff's request, debtor provided a list of property that "belonged" to him "either by title or by physical possession." Debtor's costs for the items were included, but not encumbrances. "Material falsity is an element of a claim under section 523(a)(2)(B). . . . A statement may be rendered materially false either by an affirmative misrepresentation, . . . or by omission . . . . To sink to the level of a misstatement by omission, the party privy to the omitted information must have been obligated to furnish it. . . . [P]laintiff does not assert that the debtor agreed to identify only unencumbered property when compiling the List. . . . [H]er complaint relates that she asked him to prepare a list of property that he either owned or possessed. Including encumbered property on the List was entirely consistent with her request. Moreover, when the debtor signed the Agreement, he vouchsafed only that he would not <u>further</u> encumber the enumerated items. . . . [P]laintiff's complaint does not aver that the debtor promised to provide a list of items sufficient to secure the loan fully. Without such a promise, the debtor may reasonably have believed that the unencumbered property on the List . . . , together with whatever equity he had in any encumbered property, . . . was sufficient for the plaintiff's purposes, so no further information was required. That the plaintiff's attorney subsequently titled the list 'List of Collateral,' annexed it to the Agreement, and had the debtor initial it did not—as the plaintiff suggests—transmogrify the debtor's representations into misrepresentations. . . . [E]ncumbered property can serve as collateral up to the value of the debtor's retained equity. . . . [W]ithout pleaded facts adequate to support a reasonable inference of material falsity, the plaintiff's section 523(a)(2)(B) claim does not cross the line from possible to plausible.").

c) Intent to deceive

d) Statement in writing respecting debtor's financial condition

Lamar, Archer & Cofrin, LLP v. Appling, ___ U.S. ___, 138 S. Ct. 1752, 201 L. Ed. 2d 102 (June 4, 2018) (Statement about value or availability of a single asset can be a "statement . . . respecting the debtor's . . . financial condition" within meaning of § 523(a)(2)(B) which must be in writing to be excepted from discharge. "This case is about what constitutes a 'statement respecting the debtor's financial condition.' Does a statement about a single asset qualify, or must the statement be about the debtor's overall financial status? The answer matters to the parties because the false statements at issue concerned a single asset and were made orally. So, if the single-asset statements here qualify as 'respecting the debtor's financial condition,' § 523(a)(2)(B) poses no bar to discharge because they were not made in writing. If, however, the statements fall into the more general category of 'false pretenses, . . . false representation, or actual fraud,' § 523(a)(2)(A), for which there is no writing requirement, the associated debt will be deemed nondischargeable. The statutory language makes plain that a statement about a single asset can be a 'statement respecting the debtor's financial condition.' If that statement is not in writing, then, the associated debt may be discharged, even if the statement was false. . . . [A] statement is 'respecting' a debtor's financial condition if it has a direct relation to or impact on the debtor's overall financial status. A single asset has a direct relation to and impact on aggregate financial condition, so a statement about a single asset bears on a debtor's overall financial condition and can help indicate whether a debtor is solvent or insolvent, able to repay a given debt or not. Naturally, then, a statement about a single asset can be a 'statement respecting the debtor's financial condition.'").

Haler v. Boyington Capital Grp., L.L.C (In re Haler), No. 17-40229, 2017 WL 6729967 (5th Cir. Dec. 29, 2017) (per curaim) (unpublished) (Oral statements that corporation was in "'very fine legally [sic] financial shape'" and had "'plenty of cash to operate [the] business'" were statements respecting financial condition that had to be in writing under § 523(a)(2)(B). "The phrase 'statement respecting . . . financial condition' appears in subsections (A) and (B) of 11 U.S.C. § 523(a)(2) . . . . Section 523(a)(2)(A) generally renders debt obtained by false pretenses, false representations, or actual fraud non-dischargeable. . . . But it contains an exception: if the debt is obtained by a false oral statement respecting financial condition, then it is dischargeable. . . . In contrast, a false written statement respecting financial condition is non-dischargeable under

§ 523(a)(2)(B) . . . . In [*Bandi v. Becnel (In re Bandi)*, 683 F.3d 671 (5th Cir. 2012)], we held that statements respecting financial condition are 'those that purport to present a picture of the debtor's overall financial health.' . . . A representation regarding a specific asset 'says nothing about the overall financial condition of the person making the representation or the ability to repay debt.' . . . 'Ownership of specific assets does not mean that the assets are unencumbered or that other debts or liabilities of the owner do not exceed the value of the assets.' . . . [Debtor's] representations were general and intimated that the overall value of [the corporation's] property and income was greater than its debt and liabilities. . . . [Debtor'] statements represented that [the corporation] was overall financially sound. These oral representations were 'statement[s] respecting . . . financial condition' and thus did not render the debt non-dischargeable under § 523(a)(2)(A).").

e) Reasonable reliance

f) Causation

4. 11 U.S.C. § 523(a)(2)(C): Luxury goods and cash advances

5. 11 U.S.C. § 523(d): Fees and costs

D. 11 U.S.C. § 523(a)(3)

Carns v. McNally (In re McNally), 731 F. App'x 814 (10th Cir. June 13, 2018) (unpublished) (Notice to plaintiff's attorney in state court litigation that gave rise to debt was adequate notice to plaintiff under § 523(a)(3). "A Chapter 7 debtor cannot discharge a fraud debt that is 'neither listed nor scheduled . . . in time to permit . . . [a creditor's] timely filing of a proof of claim and timely request for a determination of dischargeability of such debt . . . *unless [the] creditor had notice* or actual knowledge of the case in time for such timely filing and request.' . . . In other words, under § 523(a)(3)(B), 'when a debtor does not schedule debts so as to give creditors notice of the bankruptcy and time to permit filing of a proof of claim or dischargeability complaint, those debts are not discharged unless the creditor had notice or actual knowledge of the debtor's bankruptcy case.' . . . In a bankruptcy case, '[n]otice requires that a debtor use reasonable diligence under the circumstances to inform a creditor of the bankruptcy petition, but a bankrupt is not required to exhaust every possible avenue of information in ascertaining a creditor's address.' . . . And where, as here, 'an attorney is representing a creditor in order to collect a debt outside of the bankruptcy, notice of the bankruptcy petition sent to that attorney by the debtor can be imputed to the creditor.' . . . [Plaintiff] cites no evidence that [his attorney] did not receive the bankruptcy documents mailed to him. Nor does he cite any evidence showing a termination of their attorney-client relationship, which was premised on the default judgment that [debtor] sought to discharge. Although roughly four years passed from the time [plaintiff's attorney] took [debtor's] deposition in an attempt to satisfy the judgment and [debtor] filed for bankruptcy protection, [plaintiff] identifies no intervening event that should have caused [debtor] to question the use of [plaintiff's attorney's] address for notifying [plaintiff]. Indeed, [debtor] testified that [the attorney's] address was the only one he had for [plaintiff]. And while [debtor] might have ascertained [plaintiff's] address from the state court documents, reasonable diligence does not require the debtor to supply 'the best notice . . . to apprise creditors of a case.'").

E. 11 U.S.C. § 523(a)(4)

1. Fraud or defalcation

United States Dep't of Labor v. Harris (In re Harris), 898 F.3d 834 (8th Cir. Aug. 3, 2018) (Debtor, CEO of corporation, committed defalcation for § 523(a)(4) purposes when he paid personal debts and corporate expenses instead of remitting withheld healthcare premiums as required by ERISA. "Defalcation under § 523(a)(4) requires 'a culpable state of mind' with a 'knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior.' . . . '[W]here the conduct at issue does not involve bad faith, moral turpitude, or other immoral conduct, [defalcation] requires an intentional wrong.' . . . An intentional wrong includes 'not only conduct that the fiduciary knows is improper but also reckless conduct of the kind that the criminal law often treats as the equivalent.' . . . This necessarily includes 'reckless conduct of the kind set forth in the Model Penal Code.' [ ] 'Where actual knowledge of wrongdoing is lacking, we consider conduct as equivalent if the fiduciary "consciously disregards" (or is willfully blind to) "a substantial and unjustifiable risk" that his conduct will turn out to violate a fiduciary duty.' . . . A substantial and unjustifiable risk 'must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.' . . . [Debtor] knew he had an obligation to remit the withheld employee contributions to HealthPartners but instead chose to prioritize payments of corporate expenses and creditors, including payments on his own personal line of credit. . . . More specifically, [debtor] [did] not dispute[ ] the district court's factual finding that 'he directed . . . use the funds available in the checking account from which premiums were paid to make a . . . payment on his home equity line of credit' 'after speaking with [CFO] and determining that [corporation] would be unable to pay the full premium due to HealthPartners.' . . . [T]hese undisputed facts and unchallenged factual findings support the conclusion that [debtor] committed defalcation . . . when he chose to use plan assets to pay himself and other corporate expenses instead of remitting those assets to HealthPartners.").

2. Fiduciary capacity

a) In general

b) Partners and joint venturers

c) Officers, directors and shareholders

Pendergraft v. Network of Neighbors, Inc. (In re Pendergraft), No. 18-20045, 2018 WL 3803040 (5th Cir. Aug. 8, 2018) (per curiam) (unpublished) (Diversion of funds from nonprofit corporation to debtors through public relations firm after joining nonprofit's board was defalcation in fiduciary capacity for purposes of § 523(a)(4). "[T]he bankruptcy court did not pierce [the public relations firm's] corporate veil. Rather, [it] determined that the debt at issue was non-dischargeable because of the torts that the [debtors] personally committed. [The PR firm] was not a party to the proceeding and was not affected by the judgment[, and its] due process rights were [not] violated simply by a discussion in the bankruptcy court's opinion that it was a conduit for [debtors'] self-dealing. . . . [Debtors] fraudulently wrote checks on [the nonprofit's] account to [the PR firm] that the [debtors] ultimately received.").

United States Dep't of Labor v. Harris (In re Harris), 898 F.3d 834 (8th Cir. Aug. 3, 2018) (District court judgment that debtor violated ERISA by failing to remit healthcare premiums withheld from employees of corporation of which he was CEO was nondischargeable under

§ 523(a)(4). "'We have interpreted the term "fiduciary" in § 523(a)(4) to refer only to trustees of "express trusts."' *Hunter v. Philpott*, 373 F.3d 873, 875 (8th Cir. 2004) . . . . The statute 'uses the term fiduciary "in a 'strict and narrow sense,' and therefore does not embrace trustees of constructive trusts imposed by law because of the trustee's malfeasance.". . . We have rejected 'the simple determination tha[t] an individual is an ERISA fiduciary is enough to satisfy the requirements of § 523(a)(4).' . . . Rather, 'we look specifically at the property that is alleged to have been defalcated to determine whether [the debtor] was legally obligated to hold [the] specific property for the benefit of [the employee benefit funds].' . . . In *Hunter*, . . . [t]he CBA required the company to contribute to employee benefit funds and to pay contributions to the fund once per month. . . . 'The CBA did not include a provision that explicitly required [the company] to hold income earned as a result of the union member's labor in trust for the satisfaction of liabilities owed to the Funds.' . . . As a result, the debtor was 'not legally obligated to hold any particular property for the benefit of the Funds.' . . . . [W]e explained that '[s]imply possessing property to which an ERISA plan asserts a claim does not place one in a fiduciary relationship with the plan.'" . . . In *Hunter*, the debtor's debt to the employee benefit funds failed to preexist 'his failure to hold money to satisfy [the company's] owed contributions.' . . . [Here, debtor] does not challenge the district court's factual findings that (1) 'a plan asset was created once employee funds were withheld for insurance payments . . . and that, since [debtor] had authority regarding those assets, he was an ERISA fiduciary,' and (2) [debtor] 'exercised authority over the plan assets in March of 2009.' . . . *Hunter* is distinguishable. It falls into the category of 'cases involving debts for employer contributions . . . where courts found no fiduciary status under § 523(a)(4).' . . . This case falls into the category of 'cases involving employee contributions or amounts actually withheld from employee paychecks—where courts found the employers were fiduciaries under § 523(a)(4).'").

d) Attorneys

e) Contractors

f) Debtors and debtors-in-possession

g) Miscellaneous

3. Embezzlement or larceny

Cowin v. Countrywide Home Loans, Inc. (In re Cowin), 864 F.3d 344 (5th Cir. July 18, 2017) (Scheme to unlawfully deprive mortgage holders of excess foreclosure sale proceeds through use of tax transfer liens was nondischargeable larceny under § 523(a)(4); actions of co-conspirators were attributed to debtor for § 523(a)(4) purposes. "Under Texas law, after a foreclosure sale, tax-transfer liens take priority, junior liens are extinguished, and any excess funds are paid to the junior lienholders in seniority order. . . . [D]eeds of trust, which [debtor] prepared, omitted language requiring the Trustee to distribute 'any amounts required by law to be paid before payment to Grantor.' By omitting this language, the . . . [debtor] intended to divert the excess proceeds from the foreclosure sales away from the preexisting mortgage holders and to entities controlled by a co-conspirator. . . . [T]he intent and actions of [debtor's] co-conspirators is sufficient to support nondischargeability under § 523(a)(4). . . . Section 523(a)(4) excepts from discharge debts 'for . . . larceny.' The text adds no further criteria or qualifications. Like § 523(a)(2), a plain reading of the provision is that a debtor cannot discharge a debt that arises from larceny so long as the debtor is liable to the creditor for the larceny. . . . It is the character of the debt rather than the character of the debtor that determines whether the debt is nondischargeable under § 523(a)(4). . . . [Debtor] does not challenge the bankruptcy court's findings that he participated in the civil conspiracy to deprive Countrywide of excess proceeds from foreclosure sales or that he owes Countrywide a debt stemming from the resulting state law violations. Nor does [debtor] dispute the court's conclusion that together, [debtor] and his co-conspirators committed illegal acts constituting 'larceny' within the meaning of § 523(a)(4). . . . [Debtor's] debts to the Countrywide Plaintiffs . . . 'arise' from larceny and are nondischargeable in bankruptcy.").

F. 11 U.S.C. § 523(a)(5)

1. Procedure and jurisdiction

Missouri Dep't of Social Servs. v. Spencer (In re Spencer), 868 F.3d 748 (8th Cir. Aug. 22, 2017) (Disallowed portion of domestic support obligation is nondischargeable under § 523(a)(5) notwithstanding disallowance; collection does not violate discharge injunction. "[A] discharge injunction 'does not apply to a nondischargeable domestic support obligation, even the disallowed portion,' and therefore [State's] attempt to collect a prepetition DSO did not willfully violate the discharge injunction." The State "had a reasonable basis for believing that the disallowed portion of the support arrears debt would survive the Chapter 13 bankruptcy case. Even if [the State] was wrong on the merits, an issue that is not before us, its action did not warrant a contempt order and sanctions for bad faith abuse of the confirmation plan or the bankruptcy process.").

2. To spouse, former spouse or child

3. Separation agreement, divorce decree, order of a court of record, determination by government unit, property settlement

4. Alimony, maintenance or support

a) In general

b) State court labels

c) Attorney fees

d) Education expenses

Chamberlain v. Chamberlain (In re Chamberlain), 721 F. App'x 826 (10th Cir. Feb. 20, 2018) (unpublished) (Undergraduate college education expense provision in divorce degree that obligated debtor to pay tuition, room, board, books and other fees for three children was a nondischargeable domestic support obligation under §§ 523(a)(5) and 1328(a). "The bankruptcy court found that the parties had intended [debtor's] college expense obligation to constitute support because [1] this obligation was located in the part of the marital settlement agreement that addressed child support, alimony, and related matters, [2] the evidence established that [debtor] and [his ex-wife] had viewed a college education as an important part of their children's upbringing, [3] the couple had long intended to provide for the children's education, and [4] this intent could not be carried out at the time of the divorce, given the couple's relative financial capabilities, without [debtor] assuming this obligation. . . . The bankruptcy court [ ] properly considered the parties' intent as of their entry into the marital settlement agreement. . . . 'The critical question in determining whether the obligation is, in substance, support is the function served by the obligation at the time of the divorce.' . . . [T]he bankruptcy court reasonably determined that [debtor] was the only parent financially able to pay for the children's college education. Thus, the court was justified in regarding [debtor's] obligation, in substance, as support.").

e) "Divorce liens"

Trost v. Trost (In re Trost), No. 17-1877, 2018 WL 2437200 (6th Cir. May 30, 2018) (unpublished) (Federal court judgment for common law conversion was nondischargeable under § 523(a)(6). "The Supreme Court has explained that a nondischargeable 'willful and malicious injury' 'generally require[s] that the actor intend the consequences of an act, not simply the act itself.' We have further clarified that a willful and malicious injury occurs only if the debtor (1) desires 'to cause the consequences of this act' or (2) 'believes that the consequences are substantially certain to result from it.' . . . [T]he central question is whether [debtor] knew that he had encroached on [plaintiff's] property rights, thereby making his conversion willful and malicious. . . .' A judgment arising from the intentional tort of conversion may give rise to a nondischargeable debt under § 523(a)(6).' . . . But 'not every tort judgment for conversion[]' . . . 'is exempt from discharge.' Michigan defines common-law conversion as the wrongful exertion of domain over an owner's personal property in a manner that is inconsistent with the owner's rights. . . . [A] converter's actions are generally willful, unless the converter does not know about the owner's interest. . . . [W]e must 'consider the circumstances surrounding the conversion to determine if it falls within the scope of [the § 523(a)(6)] exception.' . . . [T]he bankruptcy court correctly determined [the conversion judgment] resolved the key factual question at issue in the § 523(a)(6) dispute—namely, whether [debtor] knew that [plaintiff] owned the property. . . . [T]he 'evidence in the District Court action . . . conclusively established that [debtors] were aware that [plaintiff] owned the assets.' . . . In the civil trial, the jury was instructed that it could find [debtor] liable only if [plaintiff] proved by a preponderance of the evidence that [debtor] obtained her property through deceit or false representations. . . . Implicit in the jury's verdict against [debtor] . . . is a finding that [he] knew [plaintiff] owned the property and that he acted deceitfully to obtain it. . . . The bankruptcy court [ ] properly held that the conversion case precluded [debtor] from contesting whether he knew [plaintiff] owned the property. . . . The evidence shows that [debtor's] actions were 'willful' in that he knew [plaintiff] owned the property when he did not return it, and that they were malicious in that he acted in clear disregard for [plaintiff's] superior rights. . . . And if the record is equivocal on whether [debtor] wanted 'to cause the consequences of [his] act'—[plaintiff] losing her property—it is clear that he knew 'those consequences [were] substantially certain to result from it.' . . . [T]he record here is replete with evidence regarding [debtor's] subjective intent. . . . [Debtor] knew he was not the rightful owner of the memorabilia, and that he nevertheless held onto it despite [plainitff's] repeated demands for its return. . . . [W]e agree with the bankruptcy court that the 'factual record' in the conversion case 'mandates the factual and legal conclusion that the . . . conversion of [plaintiff's] property' was both willful and malicious.").

Tomkow v. Barton (In re Tomkow), 563 B.R. 716 (B.A.P. 9th Cir. Jan. 5, 2017) (California trial court judgment for conversion and fraud with award of punitive damages was entitled to collateral estoppel effect in dischargeability action under § 523(a)(6). "Section 523(a)(6) excepts from discharge debts arising from a debtor's 'willful and malicious' injury to another person or to the property of another. . . . A 'malicious' injury requires: '(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse.' . . . The willful injury requirement speaks to the state of mind necessary for nondischargeability. An exacting requirement, it is satisfied when a debtor harbors 'either a subjective intent to harm, or a subjective belief that harm is substantially certain.' . . . The injury must be deliberate or intentional, 'not merely a deliberate or intentional act that leads to injury.' . . . Thus, 'debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6).' . . . Under California law, an award of punitive damages under California Civil Code [ ] § 3294 requires a finding of fraud, malice, or oppression. Only fraud and one aspect of malice, as that term is defined for the purposes of the California punitive damages statute, satisfy the willful injury requirement of § 523(a)(6). . . . [T]he state court's ruling on conversion and punitive damages satisfied § 523(a)(6)'s requirement of an underlying tort and 'malicious' injury. . . . Conversion under California law does not per se establish the necessary state of mind for § 523(a)(6) nondischargeability because intent is not a necessary element. But there is no question that it establishes a tort that can support a § 523(a)(6) nondischargeability claim and a wrongful act that necessarily causes injury as required for a finding of § 523(a)(6) malicious injury. . . . The California Court of Appeal as well as the trial court made clear findings that [debtors] harmed [plaintiff] intentionally, with malice, and through deceit. . . . [W]e similarly conclude that the bankruptcy court appropriately gave issue preclusive effect to the state court's punitive damages award, which was based on findings of fraud, malice, and oppression; this satisfies § 523(a)(6)'s willfulness requirement. . . . That [one debtor's] conduct was less egregious than [the other's] is reflected in the reduced amount of punitive damages assessed individually . . . . This distinction, however, does not change the analysis of the § 523(a)(6) willful injury requirement.").

5. Assault or battery
6. Professional "negligence"
7. Breach of contract
8. Other wrongful acts

Zeppinick v. Ramirez (In re Zeppinick), BAP No. CC–16–1293–LKuF, 2017 WL 1457944 (B.A.P. 9th Cir. Apr. 24, 2017) (unpublished) (Offsetting damages against an employee's wages was a willful and malicious injury under § 523(a)(6). Judgment of California Labor Commissioner that plaintiff was an employee and that debtor should have known he had no right to offset alleged damages against an employee's wages was nondischargeable under § 523(a)(6). "[C]reditor must prove that the debtor's conduct in causing the injuries was both willful and malicious. . . . Willfulness requires proof that the debtor deliberately or intentionally injured the creditor, and that in doing so, the debtor intended the consequences of his act, not just the act itself. . . . The debtor must act with a subjective motive to inflict injury, or with a belief that injury is substantially certain to result from the conduct. . . . And for conduct to be found malicious, the creditor must prove that the debtor: (1) committed a wrongful act; (2) that was done intentionally; (3) which necessarily causes injury; and (4) was done without just cause or excuse. . . . [Debtor] breached the parties' oral employment agreement by willfully failing to pay [plaintiff] his wages. A breach of contract alone, even an intentional one, will not generally give rise to a nondischargeable debt. But 'where an intentional breach of contract is accompanied by tortious conduct which results in willful and malicious injury, the resulting debt is excepted from discharge under § 523(a)(6).' . . . In California, 'conduct amounting to a breach of contract becomes tortious only when it also violates an independent duty arising from principles of tort law.' . . . And tort recovery for a bad faith breach of contract is permitted only when 'a defendant's conduct violates a fundamental public policy of the state.' . . . The prompt payment of wages due an employee is a fundamental public policy in California. . . . [T]he willful failure to pay wages is a misdemeanor under the California Labor Code . . . . Even where an employee owes a debt to his or her employer, the employer may not set off that debt against wages owed. . . . [T]the Ninth Circuit Court of Appeals in [*Petralia v. Jercich (In re Jercich*), 238 F.3d 1202, 1205 (9th Cir. 2001),] held that the debtor-employer engaged in tortious conduct meeting the willfulness requirement of § 523(a)(6) based on state court findings that the debtor knew he owed the wages, had the ability to pay the wages, and knew that injury to the plaintiff was substantially certain to occur if the wages were not paid but chose instead to use the money for his own personal benefit. . . . [Debtor] testified that he had the ability to pay [plaintiff] during the pertinent times but that he did not pay the wages because he asserted a right of setoff against [plaintiff]. . . . [T]he debtor is charged with the knowledge of the natural consequences of his actions, . . . denying [plaintiff] '$9,000 in wages and reimbursement of $12,495.74 paid out of pocket when one makes $4,000 in gross wages per month is clearly injurious.' . . . The bankruptcy court found that [debtor's] conduct was malicious because his failure to pay [plaintiff] was an intentional wrongful act done without just cause or excuse that necessarily caused injury.").

9. Agency, master-servant and imputed liability

Cocoma v. Nigam (In re Nigam), BAP No. CO-17-004 & CO-17-045, 2018 WL 3768990 (B.A.P. 10th Cir. Aug. 9, 2018) (unplublished) (Debtor was not a "direct participant" in conversion sufficient to support a finding of willful and malicious injury pursuant to § 523(a)(6) and was not vicariously liable for wrongful acts of her father merely due to membership, with her father, in a limited liability company. "[T]he plain language of § 523(a)(6), 'willful and malicious injury by the debtor,' requires a debtor to be a 'direct participant' in the willful and malicious act. . . . Debtor's vicarious liability, in and of itself, is not a substitute for Debtor willfully and maliciously injuring Appellants. . . . [While] 'Illinois, corporate officers are liable for torts if they participated in the conduct giving rise to that liability[]' . . . 'any participation in the tort does not necessarily subject an officer or director to individual liability. Personal liability for actions taken on behalf of the corporation attaches only when the officer or director is alleged to have taken part in the wrongful act initially giving rise to the corporation's liability.' . . . The bankruptcy court's factual findings expressly found Debtor did not initially cause or participate in either act. . . . Furthermore, while it is clear Illinois may impose personal liability on corporate officers or directors, the Illinois statutes expressly provide that a member shall not be liable for obligations of a limited liability company solely based on membership. . . . 'There is no Illinois Supreme Court decision on whether piercing the corporate veil is applicable to limited-liability companies.' . . . [Section] 523(a)(6) . . . require[s] . . . a 'willful and malicious injury by the debtor.' . . . '[A]pplication of vicarious liability would effectively vitiate the § 523(a)(6) requirement that only debts resulting from willful acts committed by the debtor be nondischargeable.' . . . While courts have excepted debts from discharge under the theory of vicarious liability in proceedings under other subsections of § 523(a), this Court's research reveals no scenario where a debtor was held vicariously liable, resulting in denial of discharge pursuant to § 523(a)(6), and sees no reason to deviate from the prevailing view. . . . [T]he bankruptcy court did not err in finding Debtor was not a ‘direct participant’ in the conversion sufficient to support a finding of willful and malicious injury pursuant to § 523(a)(6).”).

H. 11 U.S.C. § 523(a)(7)

Andrews v. Michigan Unemployment Ins. Agency, 891 F.3d 245 (6th Cir. May 29, 2018) (Section 523(a)(7) is not the exclusive remedy available to a governmental agency when penalties come within scope of more than one exception to discharge: applying *Cohen v. de la Cruz*, 523 U.S. 213, 118 S. Ct. 1212, 140 L. Ed. 2d 341 (1998), penalties assessed for fraudulently obtained unemployment benefits are nondischargeable under § 523(a)(2).).

Medical Lien Mgmt, Inc. v. Dampier (In re Dampier), 722 F.App’x 855 (10th Cir. Feb. 14, 2018) (unpublished) (Debtor forfeited argument that relief under § 523(a)(7) was unavailable to employer that was not a governmental unit. Applying *Kelly v. Robinson*, 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216 (1986), and *Troff v. Utah (In re Troff)*, 488 F.3d 1237 (10th Cir. 2007), Colorado criminal restitution judgment related to debtor’s theft from employers was nondischargeable under § 523(a)(7).).

Armstrong v. Kaplon (In re Armstrong), 677 F. App’x 434 (9th Cir. Feb. 22, 2017) (unpublished) (Criminal restitution imposed under California law is nondischargeable under § 523(a)(7). That the California penal code provides for “restitution” and a “restitution fine” is of no import under *Kelly v. Robinson*, 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216 (1986), which “categorically held that criminal restitution orders are nondischargeable. . . . ‘[Section] 523(a)(7) preserves from discharge any condition a state criminal court imposes as part of a criminal sentence.’ . . . The Court’s holding did not hinge upon the specific language or structure of the state law at issue. Rather, it was based upon the desire not to interfere with state courts’ ‘unfettered administration of their criminal justice systems.’ . . . [T]hat the California statute provides that restitution is to be based on the amount of loss ‘claimed by the victim or victims’ is irrelevant, for ‘such [is] the nature of restitution.’ . . . [T]hat restitution ‘may be determined by reference to the amount of harm caused by the offender . . . does not alter its penal character.’”).

Medical Lien Mgmt., Inc. v. Dampier (In re Dampier), BAP No. CO–16–020, 2017 WL 1327634 (B.A.P. 10th Cir. Apr. 11, 2017) (Applying *Kelly v. Robinson*, 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216 (1986), and *Troff v. Utah (In re Troff)*, 488 F.3d 1237 (10th Cir. 2007), restitution ordered as part of criminal sentence for theft was nondischargeable under § 523(a)(7) notwithstanding that it would be paid to victims. Debtor pleaded guilty to theft. State criminal court ordered debtor to pay restitution to his employers. In *Kelly*, the Supreme Court held “‘that § 523(a)(7) preserves from discharge any condition a state criminal court imposes as part of a criminal sentence,’ . . . . *Kelly*’s holding reaches beyond its facts, . . . but the Supreme Court clearly explained the basis for its decision. It noted that its interpretation of the Code ‘must reflect . . . a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings. The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States.’ . . . The *Kelly* Court observed that restitution differs from traditional fines in two major ways: restitution (1) is forwarded to the victim, and (2) may be calculated based on the harm the defendant has caused. . . . But the Supreme Court concluded that these two differences make no difference under § 523(a)(7)—section 523(a)(7) does not allow the ‘discharge of a criminal judgment that takes the form of restitution.’ . . . Unlike obligations that arise out of contractual, statutory or common law duties, restitution is ‘rooted in the traditional responsibility of a state to protect its citizens . . . and to rehabilitate an offender.' . . . Although restitution orders may result in compensation to victims, they are not assessed for that purpose; they are assessed because of the penal and rehabilitative interests of the state. . . . And those interests are what 'place restitution orders within the meaning of § 523(a)(7).' . . . [Debtor] argues that *Kelly* and *Troff* are not binding because Colorado's restitution laws are different. He contends that under a strict plain meaning reading of the statute, the Restitution Order is expressly excluded from § 523(a)(7). [ ] '[T]he Supreme Court's decision in *Kelly* makes clear that we must look beyond such a reading to federalism concerns and to the history of this statute.' . . . And like the *Troff* Court, we are bound by the Supreme Court's holdings and dicta and are not free to disregard *Kelly*. . . . Under Colorado law, restitution is defined as compensation for actual pecuniary loss . . . [T]hat a restitution order may be enforced by victims or may result in compensation to victims does not change the fundamental nature and purpose of the restitution. . . . The Restitution Order here is a penalty, payable to the State of Colorado, not for its actual pecuniary loss, but to benefit the State in its effort to protect its citizens and to rehabilitate [the debtor]. Although [debtor's victims] may ultimately receive the restitution payments through their own collection efforts, that fact makes no difference. The Restitution Order focused on punishment and rehabilitation and is clearly within the meaning of § 523(a)(7), and [debtor's] 'attempt to discharge the debt is squarely within the cross-hairs of the Supreme Court's decision in *Kelly*.' . . .").

I. 11 U.S.C. § 523(a)(8)

1. Cosigners, guarantors and non-students

2. Government made, government guaranteed or funded by non-profit institution

Page v. JP Morgan Chase Bank (In re Page), No. 18-6011, 2018 WL 6055275 (B.A.P. 8th Cir. Nov. 20, 2018) (Bank failed to prove that The Educational Resources Institute, Inc. ("TERI"), a non-profit organization, "funded" educational loan for § 523(a)(8) purposes. "TERI merely provided an address to which applications could be delivered, and that [was] not sufficient to support the inference that TERI 'funded' th[e] loan program." "The widely-held view among courts considering this issue is that the definition of 'funded' should not require that actual money be placed in some type of account. . . . Instead, the test adopted by many courts is whether the nonprofit entity played any meaningful part in procurement of the loans under the program. . . . The cases applying the so-called 'meaningful part' test hinge on whether the non-profit entity committed financial resources to the loan program, or contributed something of value to make the program successful. . . . A number of courts have held that a non-profit institution's guarantee of the loans is sufficient to constitute a 'meaningful contribution' by the nonprofit. . . . The parties in this case disputed whether TERI in fact guaranteed this Loan. . . . The bankruptcy court declined to resolve the issue . . . . It concluded that TERI played a meaningful part in the program regardless of whether it guaranteed the Loan. The only role mentioned by the court was that 'TERI served in a plenary or near-plenary capacity as the sole entity to which loan documents were submitted to the Loan Program by regular mail or overnight delivery.' While the instructions for submitting the application provided a P.O Box Number and address for TERI, the facsimile number was not identified as TERI's. . . . [It is] not assert[ed] that it was TERI employees who processed the applications, merely that TERI spent money on the facilities where the processing occurred. . . . [T]he bankruptcy court's broad construction of the term 'funded' is inconsistent with Congress' intent that exceptions to discharge be narrowly construed. The evidence on which the bankruptcy court's conclusion that TERI funded the Loan is based is scanty . . . [and] is not sufficient to support the inference that TERI 'funded' this loan program. . . . [T]his issue [is remanded] to the [bankruptcy] court for that determination and its legal significance to the Loan's dischargeability.”).

3. Scholarship v. loan or educational benefit

Page v. JP Morgan Chase Bank (In re Page), No. 18-6011, 2018 WL 6055275 (B.A.P. 8th Cir. Nov. 20, 2018) (Commercial features of $30,000 loan—security interest, requirement of co-signers, substantial origination fee—made through the “Education One Undergraduate Loan” program did not disqualify loan from being an “educational laon” for purposes of § 523(a)(8). “Rather than focus on a loan’s features, courts routinely look to the purpose of a loan to determine whether it is ‘educational.’ . . . [T]he purpose test [looks to whether] the loan was part of a package that included scholarship and grant money toward completion of the debtor's education at the school, the promissory note was signed while the debtor was a student, the debtor had to be a student to be eligible for the loan, and the loan proceeds were deposited into the debtor’s student account at the school. . . . [T]he court made ample findings based on undisputed facts to support its conclusion that the Loan was an ‘educational loan’ within the meaning of § 523(a)(8)(A).”).

Kashikar v. Turnstile Capital Mgmt., LLC (In re Kashikar), 567 B.R. 160 (B.A.P. 9th Cir. Apr. 28, 2017) (As reconfigured by BAPCPA, student “loans” are not “funds received as an educational benefit” for purposes of nondischargeability under § 523(a)(8)(A)(ii). Case remanded to determine whether debt was nondischargeable under § 523(a)(8)(A)(i). Debtor attended St. Matthew’s University School of Medicine in Cayman Islands. Debtor paid SMU with third-party loans disbursed directly to SMU. “The bankruptcy court held that [debtor’s] student loan debt was nondischargeable under § 523(a)(8)(A) because the ‘funds received’ constituted an ‘educational benefit.’ While we agree that the ‘funds received’ requirement was met, we hold that her student loan was not an ‘educational benefit’ within the meaning of the statute. . . . Section 523(a)(8)(A)(ii) excepts from discharge ‘an obligation to repay **funds received** as an educational benefit . . . .’ The statute does not specify who must receive the funds. We recently construed this phrase in [*Institute of Imaginal Studies v. Christoff (In re Christoff)*, 527 B.R. 624 (B.A.P. 9th Cir. 2015)]. In that case, the debtor applied for admission to a for-profit private university. . . . The university offered her $6,000 of financial aid in the form of a tuition credit; she did not receive any money from the university. . . . The university argued that the debt was excepted under § 523(a)(8)(A)(ii); the bankruptcy court disagreed, holding that the debt ‘did not flow from “funds received” either by her as the student or by [the university] from any other source’ and was thus outside the scope of § 523(a)(8)(A)(ii). . . . It said that the university ‘simply agreed to be paid the tuition later . . . . It did not receive any funds, such as from a third party financing source.’ . . . [W]e affirmed. Relying on the plain language of the statute, we said that ‘[t]he phrase “funds received” has been interpreted . . . to require “that a debtor receive actual funds in order to obtain a nondischargeable benefit.”’. . . . We thus held that the debtor did not receive any funds, and her debt was not excepted from discharge under § 523(a)(8)(A)(ii). . . . However, *Christoff* is distinguishable . . . . In *Christoff*, the university extended the debtor educational credits. Neither she nor the university received any funds to pay for her education; rather, the university just agreed to be paid at a later date. . . . In the present case, however, [plaintiff], a third party, did disburse funds to SMU. In such a situation, the disbursed funds were ‘funds received.’ . . . [T]he statute does not require that the lender pay funds directly to the borrower; the funds may be paid to the educational institution on behalf of the borrower. . . . Accordingly, the bankruptcy court did not err in holding that ‘funds received’ includes funds received by SMU on behalf of [the debtor]. . . . The bankruptcy court ruled that [debtor’s] student loan is an ‘educational benefit’ contemplated by § 523(a)(8)(A)(ii). The court's expansive reading of the statute is not supported by relevant case law or the statute itself. Accordingly, we hold that [debtor's] loan from [plaintiff] was not an 'educational benefit' under § 523(a)(8)(A)(ii). . . . BAPCPA set off the "obligation to repay funds received" language from the other provisions of § 523(a)(8) in a new subsection. We agree with the bankruptcy court, that in restructuring the discharge exception in this fashion, Congress created "a separate category delinked from the phrases 'educational benefit or loan' in § 523(a)(8)(A)(i) and 'any other educational loan' in § 523(a)(8)(B)." **Put another way, "new" § 523(a)(8)(A)(ii), now standing alone, excepts from discharge only those debts that arise from "an obligation to repay funds received as an educational benefit," and must therefore be read as a separate exception to discharge as compared to that provided in § 523(a)(8)(A)(i) for a debt for an "educational overpayment or loan" made by a governmental unit or nonprofit institution or, in § 523(a)(8)(B), for a "qualified education loan."'**. . . In effect, [the university] argues that we should read § 523(a)(8)(A)(ii) to say "loans received" as opposed to "funds received." But this we must not do. . . . 'section] 523(a)(8)(A)(ii) is not a "catch-all" provision designed to include every type of credit transaction that bestows an educational benefit on a debtor.' . . . Therefore, we hold that a 'loan' is not an 'educational benefit' within § 523(a)(8)(A)(ii).").

4. Measurement of seven-year period

5. Undue hardship

ECMC v. Acosta-Conniff (In re Acosta-Conniff), 686 F. App'x 647 (11th Cir. Apr. 19, 2017) (per curiam) (Uncomfortable with district court's rejection of bankruptcy court's finding of undue hardship, Eleventh Circuit reversed and remanded with instructions to apply clear-error review to the bankruptcy court's factual findings as to each prong of the *Brunner* test and de novo review to any legal conclusions. Debtor was a 44 year-old single mother with two sons, working as public school teacher. Through a Ph.D in special education, debtor incurred $112,000 in student loan debt. "Under the [*Brunner v. New York State Higher Educ. Servs. Corp*., 831 F.2d 395 (2d Cir. 1987)], test, a debtor is entitled to discharge of her student debts if she proves all of the following: '(1) That the debtor cannot maintain, based on current income and living expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) That additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) That the debtor has made good faith efforts to repay the loans.' . . . This three-prong test looks at three different time periods. The first prong focuses on the present ability of the debtor to repay the debt. The second prong looks to the future to determine the unlikelihood that the debtor could become able to repay the loan. The third prong looks to the debtor's past conduct to determine whether her actions in the past have manifested a good faith effort to repay that which she owes. . . . [T]he district court disagreed with the bankruptcy court's conclusion that [debtor] had met her burden under [the second] prong of the *Brunner* test, and it reversed on that basis. . . . Because application of the *Brunner* test involves mixed questions of fact and law, . . . it is important that a reviewing court identify the standard of review it is applying in considering the various factual findings and legal conclusions reached by the bankruptcy court. A bankruptcy court's findings as to each of the three prongs of the *Brunner* test are factual findings that should be reviewed by the district court for clear error; not under a de novo standard of review. . . . The district court did not . . . indicate whether it was applying a clear error or a de novo standard of review . . . [and] we cannot confidently conclude that the court was applying a clear error standard. . . . [W]e remand the case to the district court with instructions to apply clear-error review to the bankruptcy court's factual findings as to each prong of the *Brunner* test and de novo review to any of the bankruptcy court's legal conclusions. . . . [I]n reaching its conclusion that [debtor] had not proven the second prong, the district court opined that [debtor] has only herself to blame for incurring student debt in the pursuit of multiple degrees that she should have known would not lead to an increase in income sufficient to cover the debt: 'Although she is not satisfied with the pay the advanced degrees ultimately have yielded, [debtor] chose to earn four degrees, funded primarily by student loans, in her preferred career path of education with a general understanding of the benefits she would obtain from the degrees versus the costs. She admits specifically that she decided to obtain another student loan to earn her pinnacle Ph.D in special education and agreed to repay it, knowing how the cost of the Ph.D compared with the increase in pay it would provide. . . . [Debtor] finds herself in circumstances largely of her own informed decision-making, which although not dispositive, is a consideration.' . . . [T]he district court concluded, . . . that '[a]lthough [debtor] admittedly finds herself in undesirable financial difficulties, she ultimately must bear the consequences of her decision to obtain loans in order to pursue her multiple educational goals.' . . . [T]he second prong is a forward-looking test that focuses on whether a debtor has shown her inability to repay the loan during a significant portion of the repayment period. It does not look backward to assess blame for the student debtor's financial circumstances. Thus, even if the court concludes that a debtor has acted recklessly or foolishly in accumulating her student debt, that does not play into an analysis under the second prong.").

Kemp v. United States Dep't of Educ. (In re Kemp), 588 B.R. 226 (B.A.P. 8th Cir. Aug. 24, 2018) (Thirty-six year old debtor,with a 13-year-old daughter, who voluntarily left full-time employment as a bank branch manager to work part-time at Lowes and run an in-home childcare business could not prove undue hardship under § 523(a)(8). "'While the debtor's eligibility for an income-based repayment program is not dispositive, it is a factor that weighs against the discharge of the debt.' . . . [T]he test requires consideration of a debtor's past, present, and reasonably reliable future financial resources. . . . The bankruptcy court noted more than once that [debtor's] present financial difficulties are not expected to be long-term and are entirely within her own control due to choices she has made. . . . [Debtor] had no problem making (and did make) full student loan payments when she was employed as a full-time bank branch manager. She voluntarily left that employment and chooses to stay in her current part-time employment status to allow for a more flexible schedule. She testified to having opportunities to again work full-time, whether back at the bank or at Lowe's. No medical evidence was presented to indicate that [debtor] is unable to work on a full-time basis. . . . [Debtor's] current financial restraints are the result of choices she has made and are not long term. . . . [Debtor] failed to meet her burden of proving an undue hardship under 11 U.S.C. § 523(a)(8).").

Chenault v. Great Lakes Higher Educ. Corp. (In re Chenault), 586 B.R. 414 (B.A.P. 6th Cir. July 5, 2018) (Debtor's status as a parolee was not sufficient to prove undue hardship under § 523(a)(8) because parolee status was not "beyond the debtor's control" as required by third prong of *Brunner* test. "The *Brunner* test requires a debtor to establish three elements to qualify for discharge of educational loans on the basis of undue hardship. The elements are: (1) that the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans. . . . 'The Bankruptcy Code does not provide a specific list of "additional circumstances" to be considered to indicate the persistence of a debtor's state of affairs. "Such circumstances must be indicative of a 'certainty of hopelessness, not merely a present inability to fulfill financial commitment.'" They may include illness, disability, a lack of useable job skills, or the existence of a large number of dependents. **And, most importantly, they must be beyond the debtor's control, not borne of free choice.**' . . . The only 'circumstances' the Debtor submitted to the bankruptcy court was proof of the terms of his parole. . . . Debtor did not articulate facts to support an allegation that his past criminal behavior has made it unlikely that he will find adequate employment in the future. Additionally, even if he did, his condition is one of his own making and does not qualify as the 'additional circumstances' required by the second and third prongs of the *Brunner* test.").

Fern v. FedLoan Servicing (In re Fern), 563 B.R. 1 (B.A.P. 8th Cir. Feb. 7, 2017) (Undue hardship discharge of $27,000 in student loan debt granted to 35 year-old single mother of three, earning less than $25,000 annually, plus food stamps, and rental assistance. Debtor had no savings or other sources of income. Debtor had made no payments. Having rejected the *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987), test, "the Eighth Circuit follows a more flexible approach under a totality of the circumstances test. [ ] Three factors are evaluated to determine undue hardship under this test: (1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and her dependent's reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case. . . . [Debtor's] monthly income from all sources totals $2,413. The family's monthly expenses are $2,475. Based upon these figures there is a shortfall of $62 each month to meet the family's living expenses. The record supports the Bankruptcy Court's conclusion that [debtor's] monthly expenses are reasonable, necessary, modest and commensurate with her income and weigh in favor of discharging the student loans for undue hardship. . . . [The final factor] permits evaluation of a wide range of facts and issues that may be relevant to determining undue hardship, including: '(1) total present and future incapacity to pay debts for reasons not within the control of the debtor; (2) whether the debtor has made a good faith effort to negotiate a deferment or forbearance of payment; (3) whether the hardship will be long-term; (4) whether the debtor has made payments on the student loan; (5) whether there is permanent or long-term disability of the debtor; (6) the ability of the debtor to obtain gainful employment in the area of the study; (7) whether the debtor has made a good faith effort to maximize income and minimize expenses; (8) whether the dominant purpose of the bankruptcy petition was to discharge the student loan; and (9) the ratio of student loan debt to total indebtedness.' . . . While the availability of repayment options is a relevant fact, it cannot be the only basis to consider in determining undue hardship. . . . Fern has never been required to make a payment, and under either the Income Contingent Repayment Program or PAYE this would still remain the case. . . . [A] monthly payment obligation in the amount of zero [cannot] automatically constitute[] an ability to pay. . . . [Consideration of debtor's] emotional burden related to the student loan obligations, the continued accrual of interest on the loans, the negative credit effect of the loans, and the potential tax obligation when [a] repayment plan [would] expire[] . . . simply served to supplement [bankruptcy court's] determination of undue hardship under the totality of the circumstances test.").

6. Partial, deferred and modified discharge?

J. 11 U.S.C. § 523(a)(9)

K. 11 U.S.C. § 523(a)(10)

Khounani v. Premier Capital Ltd. Liability Co. (In re Khounani), BAP No. 16-1233-NTaL, 2017 WL 460968 (B.A.P. 9th Cir. Feb. 2, 2017) (unpublished) (Denial of debtor's discharge under § 727(a)(2)(A), (a)(3), and (a)(4)(A) in prior Chapter 7 case, rendered judgment creditor's claim nondischargeable under § 523(a)(10) when creditor was scheduled in prior case and judgment had been repeatedly renewed. Section 523(a)(10) excepts from discharge any debt "that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the . . . was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title . . . " "Unlike many of the other discharge exceptions in § 523(a), § 523(a)(10) is not premised on the debtor's commission of a tort or on a marital or fiduciary relationship with the creditor. . . . [O]nly two straightforward elements are required: 1) that the claim at issue was a pre-petition claim in an earlier bankruptcy case, and 2) that the debtor either waived his discharge or was denied his discharge under certain subsections of § 727(a) in that prior case. . . . [Debtor] was denied his Chapter 7 discharge in 2003 under §§ 727(a)(2)(A), (a)(3) and (a)(4)(A). He [ ] listed [plaintiff's] Guarantee claim on his 2002 Bankruptcy Schedule F. These two facts render the Superior Court Judgment (in whatever amount it represents) non-dischargeable under § 523(a)(10). . . . [T]hat [plaintiff's] claim is now evidenced by the Superior Court judgment which includes substantial interest and attorneys' fees is irrelevant. . . .").

L. 11 U.S.C. § 523(a)(11)

M. 11 U.S.C. § 523(a)(12)

N. 11 U.S.C. § 523(a)(13)

O. 11 U.S.C. § 523(a)(14)

P. 11 U.S.C. § 523(a)(14A)

Q. 11 U.S.C. § 523(a)(14B)

R. 11 U.S.C. § 523(a)(15)

1. Standing

2. Burden of proof

3. Timing of decision

4. "Hold harmless" or similar language

5. Tests and standards

6. Income and property of debtor

7. Partial discharge?

8. Attorney fees

9. In general

S. 11 U.S.C. § 523(a)(16)

Goudelock v. Sixty-01 Ass'n of Apartment Owners, 895 F.3d 633 (9th Cir. July 10, 2018) (Postpetition association fees and assessments are prepetition debts that are dischargeable in a Chapter 13 case at completion of payments under § 1328(a). "Congress' decision not to add post-petition association assessments [under 11 U.S.C. § 523(a)(16)] to the exceptions listed in Section 1328(a) was purposeful. . . . This is not a case implicating a drafting error or a Congressional oversight. Rather, it is an instance where Congress confronted an issue of policy, and spoke by creating explicit exceptions to discharge in Section 1328(a) but did not include (as it did for other chapters) post-petition [condominium association] assessments . . . .").

Jackson v. Carlton House Condo. Unit Owners Ass'n of Cuyahoga Cty. (In re Jackson), No. 16-4021, 2017 WL 8160941 (6th Cir. Oct. 18, 2017) (Attorney fees incurred in connection with scheduling of sheriff's sale after discharge in a Chapter 7 case became "due and payable" post-petition and pursuant to § 523(a)(16) were not discharged.).

T. 11 U.S.C. § 523(a)(17)
U. 11 U.S.C. § 523(a)(18)
V. 11 U.S.C. § 523(a)(19)

Tradex Global Master Fund SPC LTD v. Chui, No. 16-16971, 2017 WL 5507669 (9th Cir. Nov. 17, 2017) (unpublished) (Securities and Exchange Commission "Order Instituting Administrative and Cease-and-Desist Proceedings" against debtor did not establish claim in favor of private plaintiff for § 523(a)(19) purposes. The order created a liability in favor of the SEC, not plaintiff.).

Lunsford v. Process Techs. Servs., LLC (In re Lunsford), 848 F.3d 963 (11th Cir. Feb. 15, 2017) (Perhaps disagreeing with Ninth and Tenth Circuits, arbitrator's determination that debtor violated state securities laws was nondischargable under § 523(a)(19) even if debtor's liability arose from securities violations by a third party. "[T]he statute applies irrespective of debtor conduct. The text and structure of section 523(a)(19)(A) unambiguously prevent discharge of debts 'for the violation' of securities laws irrespective of debtor conduct. . . . Section 523(a)(19)(A) employs the phrase 'debt that is for,' and section 523(a)(19)(B) employs the phrase 'debt that . . . results . . . from.' But 'debt for' is used in similar but undivided subparts of 523(a). . . . Congress did not materially alter the phrase 'debt for' when it inserted a pronoun and a linking verb, so 'debt that is for' retains the same meaning as 'debt for' and refers to debt caused by a violation of securities laws. . . . If Congress had wanted to limit section 523(a)(19)(A) based on debtor conduct, it could have done so as it did with other provisions in the statute. . . . Because Congress rendered discharge in some subsections dependent on debtor conduct but never did so for section 523(a)(19)(A), we infer that the limit does not extend to section 523(a)(19)(A). . . . The Tenth Circuit arrived at a contrary conclusion, [*Oklahoma Dep't of Sec. v. Wilcox*, 691 F.3d 1171 (10th Cir. 2012),] but even if we found its reasoning persuasive, its decision involved circumstances inapplicable here. . . . The Ninth Circuit also arrived at a contrary decision, [*Sherman v. SEC (In re Sherman)*, 658 F.3d 1009 (9th Cir. 2011),] but it too is unpersuasive. . . . The Ninth Circuit acknowledged that the plain language of section 523(a)(19)(A) did not limit application based on debtor conduct, but determined that the text was ambiguous in the light of circuit precedent that had held that similar portions of section 523 required inquiry into debtor conduct. . . . We depart from the Ninth Circuit because it grounded its decision on precedent that does not bind us and followed prescriptions of general statutory purpose over the text.").

Conway v. Heyl (In re Heyl), 590 B.R. 898 (B.A.P. 8th Cir. Oct. 18, 2018) (Defrauded investor could not bring action under § 523(a)(19) based on consent order that created civil penalty and costs payable to Missouri Securities Division of the Office of Secretary of State. "Under the statutory language, it is clear that two elements must exist to state a claim under § 523(a)(19): (A) a violation of securities law or fraud in connection with the sale of securities; and (B) a resulting debt that was memorialized in a judgment, settlement or decree. . . . The Consent Order was issued by the Enforcement Section of the Missouri Securities Division of the Office of Secretary of State in an administrative proceeding it commenced against debtor . . . . Appellants are not parties to or signatories on the Consent Order. . . . The only debt that resulted from the consent order is a debt from [debtor] and his company to the Enforcement Section for a civil penalty and costs. By its plain language, the Consent Order does not establish any debt owed to Appellants or anyone else. . . . Stated another way, Appellants may or may not have a claim against [debtor] that resulted from their investments in his company. But they have not established any such claim in any judicial or administrative proceeding.”).

W. 18 U.S.C. § 3613(e) and (f)

X. 37 U.S.C. § 302g(3)

Y. 11 U.S.C. § 523(b)

Z. 11 U.S.C. § 523(c)(1) and (2)

AA. 11 U.S.C. § 523(e)

IV. Litigation of Complaints to Bar Discharge: 11 U.S.C. § 727

A. In General

McDermott v. St. George (In re St. George), Nos. 16–8017/8018, 2017 WL 1379321 (B.A.P. 6th Cir. Apr. 17, 2017) (Denial of discharge reversed when bankruptcy court erred in granting United States Trustee’s second request for additional 75 days in which to file complaint; UST’s failure to exercise diligence was fatal to motion for additional extension of time.).

Um v. Spokane Rock I, LLC, 904 F.3d 815 (9th Cir. Sept. 14, 2018) (“Engage in business” for purposes of discharge in an individual Chapter 11 case under § 1141(d)(3)(B) does not mean just any employmenet. In an individual Chapter 11 case, “confirmation of a plan does not discharge a debtor if–(A) the plan provides for the liquidation of all or substantially all of the property of the estate; (B) the debtor does not engage in business after consummation of the plan; and (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.” 11 U.S.C. § 1141(d)(3). “[A]ssuming that § 1141(d)(3)(B) does not require that the debtor engage in a pre-petition business, it is not satisfied by mere employment in someone else’s business after consummation of a Chapter 11 plan.” “Reading § 1141(d)(3)(B) to include mere employment would create severe dislocations in the broader statutory scheme. As the Debtors concede, had they filed for protection under Chapter 7 of the Bankruptcy Code, 11 U.S.C. § 727(a) would have barred the discharge of the fraud judgment obtained by [plaintiff]. Interpreting § 1141(d)(3)(B) to allow a liquidating Chapter 11 debtor to obtain a discharge for debts incurred by fraud simply by accepting employment after plan consummation would effectively vitiate § 727(a). Knowing that any debts incurred through fraud would be discharged if they obtained any type of employment after plan consummation, debtors who intended to liquidate their assets would always choose Chapter 11 over Chapter 7. Put differently, a Chapter 7 debtor would be significantly disadvantaged relative to an identically situated Chapter 11 debtor. The former would continue to be responsible for fraudulently incurred debts after liquidating the property of the estate and accepting employment, while the latter would not. Therefore, whatever the precise boundaries of the phrase ‘engages in business’ in § 1141(d)(3)(B) may be, it cannot be interpreted to include mere employment in an enterprise owned and operated by others without creating anomalies in the Bankruptcy Code as a whole.”).

B. 11 U.S.C. § 727(a)(1)

C. 11 U.S.C. § 727(a)(2)

Rawson v. Cain (In re Rawson), 734 F. App'x 507 (9th Cir. Aug. 14, 2018) (unpublished) (Debtor's transfer of money from her checking account to her father's checking account so creditors "wouldn't take all the money that [she] was making" and "[b]ecause the [creditors] took all [her] money out of [her] . . . accounts" constituted intent to hinder or delay creditors sufficient to bar discharge under § 727(a)(2). Section 727(a)(2) is written in the disjunctive, therefore denial of discharge "'need not rest on a finding of intent to defraud.' . . . 'Intent to hinder or delay is sufficient.' . . . 'When a debtor admits that [s]he acted with the intent [to hinder or delay], there is no need for the court to rely on circumstantial evidence or inferences in determining whether the debtor had the requisite intent.' . . . Although [debtor] claims that she acted pursuant to the advice of her husband's bankruptcy attorney, attorney advice will not shield a debtor when the debtor 'knowingly acts to hinder or delay h[er] creditors.' . . . [Debtor] also claims that she acted with the purpose of assisting her ailing father. However, '[o]ur inquiry under section 727(a)(2)(A) is whether [debtor] intended to hinder or delay a creditor. If [s]he did, [s]he had the intent penalized by the statute notwithstanding any other motivation [s]he may have had for the transfer.'").

In re Kempff, 847 F.3d 444 (7th Cir. Jan. 30, 2017) (Transfer by debtor's accountant without debtor's knowledge to partially satisfy a tax levy would not support denial of discharge under § 727(a)(2) because § 727(a)(2) requires a knowing fraudulent transfer by the debtor. Bankruptcy judge accepted debtor's testimony that accountant made transfer without her knowledge or consent; creditor offered no contrary evidence.).

D. 11 U.S.C. § 727(a)(3)

Snyder v. Dykes (In re Dykes), 590 B.R. 904 (B.A.P. 8th Cir. Oct. 29, 2018) (Highly educated, sophisticated individuals with over $5 million in debt failed to maintain or preserve adequate records respecting many large transactions with a jeweler and liquidation of storage bins that contained contents of their foreclosed home. "Section 727(a)(3) does not require proof of intent. . . . The standard under § 727(a)(3) is one of reasonableness. . . . 'In order to determine if the failure was justified, the trial court must first determine what records someone in like circumstances to [the debtor] would keep.' . . . 'The debtor is required "to take such steps as ordinary fair dealing and common caution dictate to enable the creditors to learn what he did with his estate."' . . . The trustees and creditors must receive enough information 'to enable them to "trace the debtor's financial history; to ascertain the debtor's financial condition; and to reconstruct the debtor's financial transactions."' . . . Although there is not one required standard for record-keeping, 'courts and creditors should not be required to speculate as to the financial history or condition of the debtor, nor should they be compelled to reconstruct the debtor's affairs.' . . . The bankruptcy court appropriately decided that it was left without a way to determine the exact transactions between the Debtors and the jeweler. . . . The record showed that Mr. Dykes was involved with transactions concerning hundreds of thousands of dollars of items, but he kept almost no records of those transactions. . . . With respect to the contents of the three large storage bins, we see no error in the bankruptcy court's determination that the Debtors 'failed to provide any accounting of the other personal property that they had in the storage containers that was ultimately disposed of by [the storage company].' . . . The bankruptcy court properly considered the Debtors' education level and sophistication. . . . It pointed out the fact that the Debtors were 'very well educated, sophisticated individuals.' . . . High dollar transactions of sophisticated parties over a significant period of time including items transported over a large geographic area were involved. . . . [L]ogic dictated that the parties would have maintained far better records.”).

Lee v. Peeples (In re Peeples), BAP No. UT-18-003, 2018 WL 3424680 (B.A.P. 10th Cir. July 16, 2018) (unpublished) (Failure to preserve records related to online business that ceased opearting two years before bankruptcy was reasonable under the circumtances. Use of third-party records to ascertain financial condition of debtor was not inappropriate. “[T]he bankruptcy court explained that it was reasonable for the Debtors to rely on third parties (such as PayPal, Chase, and eBay) to maintain copies of various business and household accounts that the Debtors could, in turn, access via the internet ‘[g]iven the state of information technology and business practices.’ . . . [W]e agree with the bankruptcy court that in today’s electronic age, it is reasonable for a debtor to assume that relatively recent financial records can be easily accessed online without the need to simultaneously retain paper copies of those records. . . . [W]e reject the Plaintiff’s request for a holding that [debtor’s] failure to retain a ‘persistent backed-up copy’ . . . of such records required the bankruptcy court deny his discharge.”).

Chen v. United States Trustee (In re Chen), BAP No. WW-17-1067-KuFI, 2017 WL 4768104 (B.A.P. 9th Cir. Oct. 17, 2017) (unpublished) (On summary judgment, denial of discharge under § 727(a)(3) was appropriate when debtor failed to rebut trustee’s showing that it was impossible to ascertain financial condition because of inadequate record keeping. “Trustee met her burden of showing that [debtor] failed to maintain and preserve adequate records such that it was impossible to ascertain her financial condition. The burden then shifted to [debtor] to show that her failure to keep records was justified under the circumstances of her case. Such justification is measured by an objective standard—that of a normal, reasonable person in like circumstances. . . . In applying this objective standard, the court may consider: (1) the debtor’s education, experience, and sophistication; (2) the volume of the debtor’s business; (3) the complexity of the debtor’s business; (4) the amount of credit extended to the debtor in his business; and (5) any other circumstances that should be considered in the interest of justice. . . . [Debtor] dealt with substantial sums of cash keeping little or no verifiable records. . . . [Debtor] received and transferred substantial sums of money to third parties for which she provided no documentation. . . . [Debtor] admitted to frequently borrowing and loaning money to friends for gambling. . . . [Debtor] admitted that she failed to keep all documents that would show her gambling expenses. . . . Although she said she used the money [from the sale of her home] to pay gambling debts to Las Vegas casinos, she never produced documents showing the transfer of the sale proceeds to those entities . . . [Debtor’s] justifications for her failure to keep relevant and material records because ‘it was too depressing,’ ‘may have been considered insulting’ to her friends, or ‘she did not understand all the documents’ due to a language barrier, fail as a matter of law . . . . It is undisputed that [debtor] was educated and had a grasp of business and financial matters. She worked as an import agent, earned a bookkeeping certificate, and started her business . . . . [Debtor’s] alleged gambling addiction does not absolve her from keeping records. . . . This is the price [debtor] pays for seeking bankruptcy protection and the privilege of a discharge.”).

Martinez v. Sears (In re Sears), 565 B.R. 184 (B.A.P. 10th Cir. Mar. 24, 2017) (Debtor with substantial businesses failed to justify records that were not sufficient to enable trustee to trace and identify transactions for § 727(a)(3) purposes. Debtor ran hunting and cattle grazing businesses that generated over $9 million in income over seven years. Debtor maintained no personal bank account but relied on business draws and payment of personal expenses from business accounts. Business records were voluminous but insufficient to allow the trustee to trace transactions or make inquiries into transfers. ‘“The scope of the debtor’s duty to maintain records depends on the nature of the debtor's business and the facts and circumstances of each case.' . . . When a debtor carries on a business involving substantial assets, 'greater and better record keeping' is warranted. . . . The [ ] Records commingled personal and business expenses. . . . The Debtor and the Trustee were unable to identify the disposition of the Owner Draws or the sources of certain expenses using the [ ] Records. . . . The bankruptcy court recognized the Debtor had a seventh grade education, but did not find his relative lack of education mitigated his duty to maintain records. . . . The inadequacy of the Debtor's records related to his practice of failing to account for the frequent large cash withdrawals from the Companies. . . . [T]he bankruptcy court rejected the Debtor's attempts to justify his poor records because he employed an accountant[.]").

E. 11 U.S.C. § 727(a)(4)

Zizza v. Harrington (In re Zizza), 875 F.3d 728 (1st Cir. Nov. 15, 2017) (Debtor/lawyer's omission from schedules of two pending lawsuits in which she was a plaintiff barred discharge for false oath under § 727(a)(4)(A). Lawsuits were not revealed through meeting of creditors and amendment of schedules. Although "'an explanation by [debtor] that he had acted upon advice of counsel who in turn was fully aware of all the relevant facts generally rebuts an inference of fraud[,]' . . . 'even the advice of counsel is not a defense when it is transparently plain that the property should be scheduled.' . . . It should have been 'transparently plain' to [debtor], an experienced attorney, that she had an obligation to disclose the two lawsuits.").

Robinson v. Worley, 849 F.3d 577 (4th Cir. Feb. 28, 2017) (Valuation of minority interest in land trust—the only significant nonexempt asset—using capitalization rate, which resulted in significant undervaluation, was a material false oath for purposes of § 727(a)(4)(A) when debtor had an MBA and years of experience as a financial advisor. "A debtor's sworn representation to the value of an asset . . . counts as an 'oath' for the purposes of [§ 727(a)(4)(A)]. . . . [D]ebtor, estimated the value of his interest in a real estate investment company at just 4% of his initial capital contribution. . . . [Debtor] spent much of his adult life studying and working in the financial industry. In addition to earning a bachelor's degree in finance from the University of Florida and an MBA from Emory University, he worked at Edward Jones as a financial advisor for almost a decade. . . . A debtor acts with the requisite intent to deceive when his statement is 'incompatible with his own knowledge.' . . . [D]espite his extensive training, he applied an income- driven formula to an investment that generated only incidental revenue. Worley's course of conduct was also suspect. He . . . never confirmed his estimate with [others who would know]. . . . [He] proceeded with the $2,500 valuation and filed his bankruptcy petition as a 'no asset' case—suggesting an effort to persuade the trustee and creditors to abandon the property. . . . [N]othing in the Code allows a debtor one free falsehood on his schedules if such is knowingly and fraudulently made.").

Lardas v. Grcic, 847 F.3d 561 (7th Cir. Feb. 3, 2017) (Neither detriment to creditors nor benefit to debtor is necessary to deny discharge for false statements under § 727(a)(4)(A). Debtor "falsely represented that he had issued no financial statements to financial institutions within two years of his petition. [Debtor] also grossly undervalued his real property located in Mundelein, Illinois. He failed to identify a source of rental income, omitted a property located in Florida, and falsely asserted that he had relinquished all interest in another property following his divorce. He also omitted a vehicle and falsely represented that he had no contingent and unliquidated claims. The bankruptcy court found . . . that [debtor] knew these representations were false and that he made them with fraudulent intent. . . . [Debtor] concedes that he made multiple errors in his bankruptcy disclosures[, but] . . . contends that these errors were 'completely inconsequential and immaterial' because they worked neither to his benefit nor to the detriment of any creditor. That assertion is not plausible. . . . [M]ateriality in the bankruptcy context has a broad meaning: 'a fact is material "if it bears a relationship to the debtor's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of the debtor's property."' . . . The bankruptcy court was not required to find an affirmative detriment to [debtor's] creditors (or an affirmative benefit to [debtor]) in concluding that [debtor] made fraudulent statements within the meaning of § 727(a)(4)(A).").

In re Kempff, 847 F.3d 444 (7th Cir. Jan. 30, 2017) (Bankruptcy court's credibility determination that misstatements in statement and schedules were attributable to "simple negligence or innocent misunderstandings—by [debtor] or by her attorney" would not be disturbed when debtor's "explanations were not so self-evidently absurd or in tension with other evidence as to call that credibility finding into question." "[A]n 'intent determination often will depend upon a bankruptcy court's assessment of the debtor's credibility,' [and] the reviewing court's deference to the bankruptcy judge's ruling is particularly strong in this context. . . . The first misstatement relates to the [debtor's] divorce settlement. . . . [She] checked 'None' next to the space reserved for '[a]limony, maintenance, support, and property settlements to which the debtor is or may be entitled.' . . . [Debtor later] admitted that this statement was wrong: [ex-husband] technically owe[d] her more than $300,000 under various provisions of their divorce settlement agreement. . . . At trial [debtor] testified that she did not include the divorce settlement in her original filing because [ex-husband] hadn't paid her anything and she had no expectation that he would ever do so. The judge credited this testimony, considering it eminently reasonable for [debtor] to believe that the settlement agreement with her ex-husband—a disbarred, felonious fraudster who has yet to pay her 'one cent' of the amount he owes—was essentially worthless. The judge concluded that although [debtor] should have disclosed the settlement in her original filing, she did not omit this information with fraudulent intent. The second misstatement was a line item in [debtor's] amended Schedule F listing her creditors. . . . [Debtor] listed her parents as creditors in the amount of $1.4 million. . . . The bankruptcy judge discerned no fraudulent intent on [debtor's] part, concluding instead that this line item was the result of 'the inexplicable and I will say incompetent advice of [her bankruptcy attorney].' The third misstatement relates to [debtor's] estimates of the value of her clothing and jewelry . . . $500. . . . With no credible evidence about the actual value of [debtor's] clothing and jewelry, the judge found that [plaintiff] had failed to prove that [debtor's] estimate was false, much less intentionally and fraudulently so. The fourth misstatement pertains to [debtor's] estimate of her current income . . . . She originally reported $2,000 in monthly income in the form of gifts from her parents . . . . The bankruptcy judge concluded that the actual amount was closer to $4,500 per month. But again the judge concluded that [debtor's] lower estimate was an innocent mistake. The difference ($2,500 per month) reflected charges [debtor] made on her parents' credit cards, and a reasonable layperson 'would not necessarily think that charges made on somebody else's charge card should be included as income.' . . . The fifth and final misstatement is an item in [debtor's] amended Statement of Financial Affairs reporting payments made to inside creditors in the year before the bankruptcy petition. [Debtor] reported a $275.35 payment to her parents; the correct figure was $3,275.35. The judge chalked this up to a simple typographical error, not a fraudulent falsification.").

Murtaza v. Slaten (In re Murtaza), BAP No. CC–17–1153–SKuTa, 2018 WL 1599755 (B.A.P. 9th Cir. Apr. 2, 2018) (unpublished) (Multiple errors and omissions on schedules and SOFA that weren't corrected by amendment after discovery were a pattern of false oaths by debtor that demonstrated reckless indifference to the truth supporting finding of fraudulent intent under

§ 727(a)(4). Debtor did not, in good faith, rely on advice of counsel when her disclosures to counsel were incorrect or incomplete. "The errors and omissions in [debtor's] bankruptcy schedules and in her SOFA constitute false oaths for purposes of the statute. . . . [Debtor challenges only] whether she made the errors and omissions in her schedules and SOFA knowingly and fraudulently. The false oaths were made knowingly if [debtor] made them deliberately or consciously. . . . The false oaths were made fraudulently if [debtor]: (1) made them, (2) knowing at that time they were false, and (3) with the intent and purpose of deceiving her creditors. . . . To establish a § 727(a)(4)(A) claim for relief, constructive fraud is insufficient. . . . [P]laintiffs must prove actual fraudulent intent. [ ] But circumstantial evidence, and inferences drawn from the debtor's conduct, can be used to establish the requisite intent. . . . A pattern of conduct by the debtor demonstrating a reckless indifference to the truth can help support the bankruptcy court's fraudulent intent finding, but reckless indifference is not sufficient, by itself, to constitute fraudulent intent. . . . [Debtor] was well aware of her interest in, and claim for, her inheritance share at the time she reviewed and signed her bankruptcy schedules under penalty of perjury. The bankruptcy court also effectively found that [debtor's] various 'innocent' explanations for omitting the inheritance were not credible. . . . Considered in isolation, it is perhaps understandable (and credible) that the errors she initially made in reporting [her income, her expenses, her family contributions, and her household size] . . . were the result of some inadvertent mistake on her part or on the part of her counsel. Nonetheless, when considered against the fact that she did not amend her schedules to accurately report these items, and measured against the number of other errors and omissions, the record supports the bankruptcy court's determination that all of these errors and omissions were part of a pattern of false oaths made by [debtor] demonstrating [debtor's] reckless indifference to the truth. From this pattern and the other circumstances surrounding [debtor's] errors and omissions, the bankruptcy court reasonably could and did infer [debtor's] fraudulent intent. . . . When good faith is absent, such as when it is evident that the debtor's disclosures are incorrect or incomplete, the advice of counsel argument will not save the debtor from an adverse intent finding. . . . [Debtor] could not launder her errors and omissions to remove any stain of her intent to deceive by sharing with her counsel [ ] an incomplete and incorrect view of her assets and finances and then getting him to make the final decision as to how those assets and finances should be reported based on the erroneous view she knowingly and intentionally gave him.").

Amiri v. Ramos Oil Co. (In re Amiri), BAP No. NC–17–1061–TaBS, 2018 WL 989501 (B.A.P. 9th Cir. Feb. 13, 2018) (unpublished) (Omission from SOFA of four corporations of which debtor was an officer was material for purposes of § 727(a)(4). "A fact is material if: '["]it bears a relationship to the debtor's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of the debtor's property."' . . . An omission or misstatement that 'detrimentally affects administration of the estate' is material.' . . . The bankruptcy court explained why the omissions were highly relevant to the administration of Debtor's bankruptcy case and estate. It emphasized the nature of the corporations: small companies where Debtor's friends or family were in control; this appropriately suggested to the bankruptcy court that a chapter 7 trustee would have looked carefully for recovery opportunities and might have found them. . . . Debtor's counsel emphasized that the chapter 7 trustee did not pursue any actions related to the non-disclosed positions, suggesting that the omissions were de minimis and thus not material. This is disingenuous . . . . Further, even an omission of a non-asset is material if the omission negatively impacts a trustee's administration of the estate. . . . Debtor's argued interpretation that materiality in relation to a SOFA question 18 omission exists only where he was both an officer and the holder of at least a 5% equity interest is severely flawed. The bankruptcy court correctly concluded that 'the Code requires complete and thorough and uneditorialized disclosure of all these issues, including those in businesses that may not be equity interests.' . . . Neither § 727(a)(4) as written nor its caselaw developed elements have a 'property of the estate' component. . . . Debtor's omissions of his status as an officer or director of four corporations during the time period identified by SOFA question 18 were material.").

F. 11 U.S.C. § 727(a)(5)
G. 11 U.S.C. § 727(a)(6)
H. 11 U.S.C. § 727(a)(7)
I. 11 U.S.C. § 727(a)(8)
J. 11 U.S.C. § 727(a)(9)
K. 11 U.S.C. § 727(a)(10)
L. 11 U.S.C. § 727(a)(11)
M. 11 U.S.C. § 727(a)(12)
N. 11 U.S.C. § 727(b)
O. 11 U.S.C. § 727(c)

V. Revocation of Discharge: 11 U.S.C. § 727(d) and (e)

Seitz v. Miller (In re Miller), No. 17-3762, 2018 WL 4922828 (3d Cir. Oct. 10, 2018) (unpublished) (Debtor waived argument that complaint to revoke discharge was untimely. "The Supreme Court has 'repeatedly held that procedural rules, including time bars, cabin a court's power only if Congress has "clearly state[d]" as much.' . . . '[A]bsent such a clear statement, . . . courts should treat the restriction as nonjurisdictional.' . . . Congress did not clearly state that Section 727(e)'s deadline is jurisdictional. Instead, the language of the statute simply provides when '[t]he trustee, a creditor, or the United States trustee may request a revocation of discharge,' and does not speak to a court's power. . . . Therefore, we regard Section 727(e) as a 'quintessential claim-processing rule[ ]' that 'do[es] not deprive a court of authority to hear a case.' . . . Because [debtor] failed to raise this argument in any of the prior proceedings or in this proceeding until her appeal to the District Court, she cannot do so now.").

Carns v. McNally (In re McNally), 731 F. App'x 814 (10th Cir. June 13, 2018) (unpublished) (For purposes of revoking discharge under § 727(d), bankruptcy court plausibly found that undisclosed assets and transfers were either immaterial or not indicative of fraudulent intent. "Under 11 U.S.C. § 727(d)(1), the bankruptcy court must grant a creditor's request to revoke a Chapter 7 debtor's discharge where 'such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge.' This provision mandates revocation on fraud grounds that 'would have barred the discharge had the fraud been known.' . . . 'The bankruptcy court found that the monies transferred to . . . corporate entities associated with [debtor] originated from [a third party's] personal funds. As such, the court found [debtor's] failure to schedule those transfers was immaterial. Similarly, the court seems to have found that [debtor's] failure to list himself as an owner of [one corporate entity], rather than an employee, was immaterial given that the company had gone out of business . . . . [Plaintiff] argues that the bankruptcy court erred by equating materiality with profitability. Granted, the fact that an omitted asset is worthless has no bearing on whether the omission relates to a material matter. . . . The salient inquiry for materiality is whether the omission 'bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property.' . . . As the bankruptcy court noted, none of the items [debtor] omitted was a valuable asset. Thus, the court appropriately declined to infer fraudulent intent from [debtor's] failure to disclose the various worthless assets.").

Weil v. Elliott, 859 F.3d 812 (9th Cir. June 14, 2017) (Complaint to revoke discharge based on fraudulent concealment of house, filed 15 months after discharge, should not have been dismissed by BAP because one-year filing deadline in 11 U.S.C. § 727(e)(1) is nonjurisdictional claim processing rule and debtor waived the defense by failing to plead the limitation. "The time limit imposed by § 727(e)(1) is not a 'jurisdictional' constraint. It is an ordinary, run-of-the-mill statute of limitations, specifying the time within which a particular type of action must be filed. . . . A non-jurisdictional time bar is an affirmative defense that may be forfeited if not timely raised, and [debtor] forfeited the defense by failing to raise it in the bankruptcy court.").

Velde v. Thiel (In re Thiel), 587 B.R. 92 (B.AP. 10th Cir. July 26, 2018) (Revocation of discharge was appropriate when debtor knowingly and fraudulently failed to surrender 2014 income tax refunds to Chapter 7 trustee. Bankruptcy court's view of evidence was "permissible in light of the numerous contradictions and inconsistencies in Debtor's testimony. . . . [E]ven assuming Debtor's view is also permissible, . . . we cannot say the bankruptcy court's finding was clearly erroneous.").

Fitzhugh v. Birdsell (In re Fitzhugh), BAP No. AZ–17–1141–BLKu, 2018 WL 1789596 (B.A.P. 9th Cir. Apr. 13, 2018) (unpublished) (When trustee did not seek extension of time as permitted by 2011 amendment to Bankruptcy Rule 4004(b), trustee had to prove he was unaware of the alleged fraud at the time the discharge was entered to revoke discharge under § 727(d)(1) or (d)(2). "The bankruptcy court revoked [debtor's] discharge under § 727(d)(1) for his intentional failure to disclose assets and pending litigation, which could support a denial of discharge claim under § 727(a)(4) if the elements are met, and is a proper basis to revoke discharge under § 727(d)(1). The court revoked [debtor's] discharge under § 727(d)(2) for his knowing and fraudulent failure to report the [contingency claim] to Trustee, which could support a claim under § 727(d)(2). . . . [T]he court erred in applying the elements of § 727(d)(1) and (d)(2). Trustee had to also prove, under both statutes, that he was unaware of the alleged fraud at the time the discharge was entered. . . . The bankruptcy court applied the objection to discharge bar date . . . as the relevant date for revoking [debtor's] discharge under § 727(d)(1) and (d)(2), not the entry of discharge date . . . . The record shows that Trustee knew about [most if not all of the undisclosed claims before discharge was entered]. At oral argument before the Panel, Trustee seemed unaware that he could have sought an extension of time to object to [debtor's] discharge under Rule 4004 . . . even though the time for filing a [discharge] complaint had expired . . . . In 2011, Rule 4004(b) was amended to allow a party to request an extension of time to object to discharge after the time for objection has expired and before discharge is granted, if (A) the objection is based on facts that, if learned after the discharge, would provide a basis for revocation under § 727(d), and (B) the movant did not have knowledge of those facts in time to permit an objection. . . . The motion is to be filed promptly after the movant discovers the facts on which the objection is based. [ ] The 2011 amendment eliminated what was known as the 'gap period'—the time between the expiration of the time to object to discharge and the actual entry of discharge. Under former Rule 4004, any requests for extensions of time to object to discharge had to be made before the bar date. Thus, if a party did not learn of the debtor's fraudulent conduct until after the bar date, but before the discharge was entered, the party was precluded from bringing a § 727(d) complaint. . . . With the 2011 amendment to Rule 4004, . . . , the party must now utilize Rule 4004(b)(2) and obtain an extension of time to object to discharge or risk losing the ability to bring a complaint under § 727(d)(1) or (d)(2).”).

Stein v. Stubbs (In re Stubbs), 565 B.R. 115 (B.A.P. 6th Cir. Mar. 9, 2017) (Bankruptcy court abused its discretion when it refused to grant Chapter 7 trustee a default judgment in action to revoke discharge under § 727(d)(3) after debtor failed to appear at post-discharge Rule 2004 examination initiated by trustee to obtain a postpetition tax return. Debtor was served with Rule “2004 examination order and did not appear or respond in any way. The amended order was clear and definite. It required the production of the 2014 tax returns and [debtor’s] appearance for examination at a specific place and time. The [bankruptcy] court’s decision that this does not rise to the level to revoke [debtor’s] discharge pursuant to § 727(d)(3) is unsupported by the case law and the facts. . . . [Section] 727(a)(6)(A), read together with § 727(d)(3), provides for the revocation of a discharge if ‘the debtor has refused, in the case . . . to obey a lawful order of the court . . . .’ . . . Case law is divided as to whether ‘refused’ as used in § 727(a) (6) requires willfulness or intent to not comply with a court order. . . . Mistake or inadvertence could negate a finding of intent or willfulness. . . . Other courts, including many bankruptcy court decisions within the Sixth Circuit, follow the civil contempt standard. . . . In the Sixth Circuit, civil contempt is established by showing that ‘(1) the alleged contemnor had knowledge of the order which he is said to have violated; (2) did in fact violate the order; and (3) the order violated must have been specific and definite.’ . . . If these elements have been shown, the debtor can provide evidence of impossibility or inability to comply. . . . Under either standard, the court’s decision to deny default judgment is reversible error. . . . [T]he court never suggested [debtor] lacked knowledge of the 2004 examination order, or that she did not violate it, or that the order was anything but clear and specific. None of those issues were addressed at the default hearing.”).

VI. Discharge Injunction

IRS v. Murphy, 892 F.3d 29 (1st Cir. June 7, 2018) (per curiam) (IRS’s good faith belief that it has a right to collect a discharged debt is not relevant to determining whether it “willfully violated” the discharge order. “The IRS argues it does not ‘willfully violate’ an automatic stay or discharge order if it has a good faith belief that its actions do not violate the bankruptcy court’s order. . . . Section 7433(e) provides that: ‘If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service <u>willfully violates</u> any provision of section 362 (relating to automatic stay) or 524 (relating to effect of discharge) of title 11, United States Code (or any successor provision), . . . such taxpayer may petition the bankruptcy court to recover damages against the United States.’” . . . Section 7433(e) directly links the phrase ‘willfully violates’ to two pre-existing sections of the Bankruptcy Code: section 362, which addresses automatic stays, and section 524, which addresses discharges and discharge orders. . . . [W]e find the phrase ‘willful violation’ had an established meaning in the context of violations of automatic stays as of 1998: a creditor willfully violated the automatic stay if it knew of the automatic stay and took an intentional action that violated the automatic stay. A good faith belief in a right to the property was not relevant to determining whether the creditor’s violation was willful. . . . [W]e find that when Congress enacted § 7433(e), it sought to apply the same generally accepted standard to violations of both automatic stays and discharge orders. . . . and that Congress used that established meaning in § 7433(e) to set the standard for evaluating violations of both automatic stays and discharge orders. . . . The IRS remains free to ‘wait until the bankruptcy discharge is invoked as a defense to its collection efforts, and then prove a factual basis for the tax fraud exception in the collection proceedings.' . . . [W]e believe compelling policy justifications, embodied in § 7433(e), weigh against allowing the IRS to attempt to collect purportedly discharged debts without facing potential consequences. . . . Congress enacted § 7433(e) to protect taxpayers who invoked the bankruptcy process, providing them with a means of recovering damages if an employee of the IRS willfully violates either the automatic stay or the discharge order, the two foundational orders of the bankruptcy process.").

Lorensen v. Taggart (In re Taggart), 888 F.3d 438 (9th Cir. Apr. 23, 2018) (Good faith belief that discharge injunction did not apply—even if unreasonable—precluded award of contempt sanctions against creditor for violation of discharge injunction. "[B]ankruptcy court may hold a party in contempt for knowingly violating the discharge injunction. . . . '[T]o justify sanctions, the movant must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction.' . . . To satisfy the first prong, knowledge of the applicability of the injunction must be proved as a matter of fact and may not be inferred simply because the creditor knew of the bankruptcy proceeding. . . . [T]he creditor's good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable. . . . [Here] the Creditors possessed a good faith belief that the discharge injunction did not apply to their claims based on their contention that [debtor] had 'returned to the fray[]' . . . . [T]he Creditors relied on the state court's judgment that the discharge injunction did not apply to their claim for post-petition attorneys' fees. Although the Creditors . . . were ultimately incorrect, their good faith belief, even if unreasonable, insulated them from a finding of contempt.").

Jackson v. Carlton House Condo. Unit Owners Ass'n of Cuyahoga Cty. (In re Jackson), No. 16-4021, 2017 WL 8160941 (6th Cir. Oct. 18, 2017) (Assessment of attorney fees incurred in connection with post discharge scheduling of sheriff's sale could not violate discharge injunction because attorney fees became "due and payable" postpetition and pursuant to § 523(a)(16) were not discharged.).

Missouri Dep't of Soc. Servs. v. Spencer (In re Spencer), 868 F.3d 748 (8th Cir. Aug. 22, 2017) (State did not violate discharge injunction by collecting disallowed portion of nondischargeable domestic support obligation. The State "had a reasonable basis for believing that the disallowed portion of the support arrears debt would survive the Chapter 13 bankruptcy case. Even if [the State] was wrong on the merits, an issue that is not before us, its action did not warrant a contempt order and sanctions for bad faith abuse of the confirmation plan or the bankruptcy process." Whether the discharged debtor remained personally liable for the disallowed portions of the State's claim was not addressed by the Eighth Circuit.).

Banco Cooperativo de Puerto Rico v. Herrera (In re Herrera), 589 B.R. 444 (B.A.P. 1st Cir. Oct. 3, 2018) (Bankruptcy Rule 4004(c) does not permit delay in entry of discharge except as specified in the Rule. "Bankruptcy Rule 4004(c)(1) provides that, upon expiration of the deadline for objecting to discharge in a chapter 7 case, the bankruptcy court 'shall forthwith grant the discharge,' unless one of the enumerated exceptions in the rule applies. . . . Bankruptcy Rule 4004(c)(2) allows the court, 'on motion of the debtor,' to defer the entry of a discharge for up to 30 days or, upon a subsequent motion, for a longer (but not unlimited) period. Fed. R. Bankr. P. 4004(c)(2). However, only the debtor is authorized to request a deferral under this Rule. . . . [Plaintiff] could not seek to delay the entry of the Debtor's discharge under Bankruptcy Rule 4004(c)(2). There is slim authority in Bankruptcy Rule 4004(c)(1) to support a request by a creditor to postpone the entry of a discharge. Two parts of Rule 4004(c)(1) suggest that, under certain circumstances not present in this case, a creditor's actions may result in a delay in the entry of a discharge in a chapter 7 case. See Fed. R. Bankr. P. 4004(c)(1)(L) (providing that the bankruptcy court will not enter a discharge after expiration of the objection deadline if 'a motion is pending to delay discharge, because the debtor has not filed with the court all the tax documents required to be filed under § 521(f)'); Fed. R. Bankr. P. 4004(c)(1)(I) (providing that the bankruptcy court will not enter a discharge after expiration of the objection deadline if 'a motion to delay or postpone discharge under § 727(a)(12) is pending'). But, again, nothing in Bankruptcy Rule 4004(c)(1) would have entitled [creditor] to seek a delay in the entry of the Debtor's discharge . . . . There is also a dearth of case law discussing a creditor's ability to postpone the entry of a debtor's discharge outside of a request to extend the deadline for objecting to discharge under Bankruptcy Rule 4004(b) or one of the enumerated subsections in Bankruptcy Rule 4004(c)(1). . . . [C]ourts generally rule that the bankruptcy court has no authority to delay the entry of a discharge in the absence of one of the enumerated exceptions set forth in Bankruptcy Rule 4004(c).").

Ocwen Loan Servicing, LLC v. Marino (In re Marino), 577 B.R. 772 (B.A.P. 9th Cir. Dec. 22. 2017) (Ocwen assessed damages of $119,000 for years of repeated, intentional violations of discharge injunction including letters to debtors that included account statements, notices regarding force-placed insurance, escrow statements, and innumerable phone calls. "[T]here is no dispute that Ocwen knew that the discharge injunction was applicable to its claim and that it intentionally sent the letters and placed the phone calls. Rather, Ocwen argues that its contacts with the Marinos did not violate the discharge injunction. . . . The discharge has one important limit: it bars only efforts to collect debts 'as a personal liability of the debtor.' . . . This means that secured creditors can foreclose their liens after the discharge is entered. . . . This creates some tension. While the discharge generally prohibits creditors from communicating with discharged debtors in an effort to extract payment, lienholders usually must communicate with debtors in order to enforce their liens. . . . [A] foreclosure of a mortgage without notice to the mortgagor would likely be invalid even if the mortgagor were not personally liable for the mortgage debt. The way to reconcile this tension is to hold that a lienholder may communicate with a discharged debtor only to the extent necessary to preserve or enforce its lien rights, and may not attempt to induce the debtor to pay the debt. . . . '[T]he creditor may not use a contact to "coerce" or "harass" the debtor.' . . . Ocwen's communications went far beyond what was necessary to protect or enforce Ocwen's lien rights and [ ] they also were meant to induce the [debtors] to make payments post-discharge. The notices and statements gave the impression that the [debtors] were still liable for the mortgage payments, taxes, and force-placed insurance premiums. . . . [T]he disclaimer language contained in some of the notices [does not protect Ocwen] from liability. . . . [O]f the twenty-two letters [Ocwen] sent to the [debtors], seven had no disclaimer language whatsoever. . . . [T]hirteen of the fifteen letters with disclaimers spoke of bankruptcy as a hypothetical possibility [dispite that Ocwen knew of debtors' bankruptcy filing and discharge.] . . . [E]ven the small number of letters that acknowledged . . . that the [debtors] had obtained a discharge were internally contradictory. . . . In this modern age of information technology, Ocwen could and should prepare notices that are consistent with the known legal status of its borrowers. Ocwen's failure to do so must reflect either incompetence (which we doubt) or a deliberate effort to induce confused borrowers to pay discharged debts. . . . Ocwen's notices may have been proper had they been limited to the required information mandated by the statutes and regulations; however, Ocwen invariably included a demand for payment that the [debtors] were not legally obligated to make. Ocwen's inclusion of additional language not prescribed by the relevant statutes or regulations violated the discharge injunction. . . . [T]he bankruptcy court awarded compensatory damages for emotional distress, . . . [It was however] error for the bankruptcy court to preclude itself from considering an award of punitive damages. We . . . remand so that the bankruptcy court can consider whether to do so.”).

Rosado v. Banco Popular de Puerto Rico (In re Rosado), 561 B.R. 598 (B.A.P. 1st Cir. Jan. 4, 2017) (Failure to allege coercion or harassment was fatal to debtors’ action for violation of discharge injunction. Mortgagee’s continuation of foreclosure action post-discharge was not a violation of the discharge injunction when mortgagee did not seek personal liability. Mortgagee may have proceeded under wrong statute that did not limit recovery to in rem, but representation to local court that it would not proceed in personam negated any procedural error. “‘[P]rocedural impropriety or error in connection with [a] creditor’s action will not give rise to a violation of the discharge injunction if the objective effect is not to coerce payment of a discharged debt[.]’ . . . ‘We assess whether conduct is improperly coercive or harassing under an objective standard—the debtor’s subjective feeling of coercion or harassment is not enough.’ . . . An action is coercive when it is ‘tantamount to a threat,’ or places the debtor ‘between a rock and a hard place’ in which he would lose either way. . . . Thus, ‘“a secured creditor may take any appropriate action to enforce a valid lien surviving the discharge, as long as the creditor does not pursue in personam relief against the debtor.”’ . . . Although the Debtors stressed that Banco Popular continued to foreclose under the wrong state statute, they never alleged that its conduct constituted impermissible coercion or harassment. . . . What the record does reveal, however, is that Banco Popular unequivocally disavowed any intent to pursue the Debtors personally and that its collateral had significant value, sufficient to satisfy its claim in full. Thus, the record reveals post-discharge efforts by Banco Popular to recover the value of its collateral, and nothing more. We discern no ploy to extract payment from the Debtors personally. Missing here is the ‘very damning evidence’ necessary to overcome the legitimate economic purpose supporting Banco Popular’s actions. . . . Debtors simply did not meet their burden of establishing coercion or harassment clearly and convincingly.”).