

# 2018 DAYTON CHAPTER 13 SEMINAR

## VIEWS FROM THE BENCH

**Hon. Beth A. Buchanan**  
**Hon. Guy R. Humphrey**



## ETHICS, PROFESSIONALISM & CIVILITY

### ► Professionalism & Civility

- Email – Time & place for it – don't use email for emotionally charged situations.
- Phone - Pick up phone and call and return calls.
- Discuss clients' positions respectfully and explore all solutions with opposing counsel.
- Take the high road!



## Rule 11/BR 9011 Obligations

### ▶ RULE 11 APPLIES TO BANKRUPTCY FILINGS

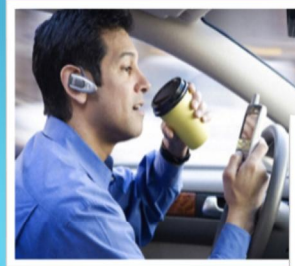
- ▶ Read what you are going to file - does it make sense in the context? Is it complete?



- ▶ Boilerplate –
  - Don't use boilerplate that makes no sense for the context.
  - Clash between use of boilerplate to be cost-effective and efficient vs. obligations under BR 9011.
- ▶ Use proper explanations for mods, motions to use tax refunds and insurance money and SS payments, workers comp, etc.

## Telephone Conferences

- ▶ Be available at the designated time – don't make courtroom deputy track you down.
- ▶ Use landlines whenever possible.
- ▶ Never participate when driving in a car.
- ▶ Participate from a quiet location.
- ▶ Do not conduct settlement discussions when judge is on the line.



## CHAPTER 13 GENERAL PRACTICE

### ▶ Don't Make Us the Maytag Repairman and Repairwoman

- Don't be afraid to raise and bring issues before us.



## How to Conduct a Hearing or Trial

- ▶ Be prepared

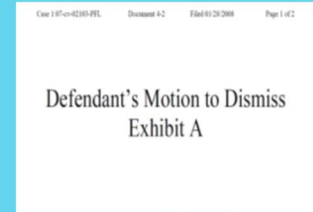


- ▶ Outline your opening statements, arguments, and examinations of witnesses in advance of the hearing or trial.
- ▶ Be prepared to address any evidentiary issues at the hearing (e.g. hearsay, etc.).



# E X H I B I T S

- ▶ Be prepared to use a document camera for all of your exhibits at the hearing or trial.
- ▶ Exchange all exhibits in advance of the hearing or trial.
- ▶ Make sure all of your exhibits are as “readable” and clear as possible.
- ▶ Do not put exhibit labels over or punch holes through text or images on your exhibits.
- ▶ Provide the courtroom deputy and opposing counsel with hard copies of all of your exhibits (labeled in advance of the hearing) prior to the commencement of the hearing or trial.
- ▶ Use stipulations as to admitted exhibits – preferably prepared in writing in advance of the hearing.
- ▶ Move for admission of your exhibits at the conclusion of your case.



## PRESENTATIONS

- ▶ Make your appearance and introduce your witnesses.
- ▶ Make all verbal presentations and examinations of witnesses from the lectern.
- ▶ Always stand when addressing the court.
- ▶ All persons should be formally addressed by their surnames.
- ▶ Be respectful to all counsel and all parties and witnesses, including pro se parties.
- ▶ All arguments and objections should be directed to the court.





## PRESENTATIONS (CONT.)

- ▶ Do not speak over opposing counsel or witness (except to make timely evidentiary objection).
- ▶ If you or a witness need a break, ask for a break.
- ▶ If you need to call a witness out of order, work it out with counsel and let the court know.
- ▶ Be confident in your arguments and don't apologize for them.





## PUT IT IN WRITING!!!!

- ▶ We can only know what is provided to us in writing.
- ▶ Give us the information we need to make an informed decision.





- ▶ *ESPINOSA* – COURT’S SUA SPONTE RESPONSIBILITY REGARDING CHAPTER 13 PLANS
- ▶ *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1378-81 (2010):
  - Bankruptcy courts are only to confirm “those plans that comply with ‘the . . . applicable provisions’ of the Code”
  - “[T]he Code makes plain that bankruptcy courts have the authority – indeed, the obligation – to direct a debtor to conform his plan to the requirements of [the Code].”

## CASH COLLATERAL IN CHAPTER 13 CASES



- ▶ § 363 -- THERE IS SUCH A THING AS CASH COLLATERAL IN CHAPT. 13
- ▶ 11 U.S.C. § 363(c)(2) & § 1304(b)
- ▶ *In re Kleather*, 208 B.R. 406 (Bankr. S.D. Ohio 1997) (J. Clark)
- ▶ *Lyons v. Federal Sav. Bank (In re Lyons)*, 193 B.R. 637 (Bankr. D. Mass. 1996)

## CASH COLLATERAL (CONT.)

- ▶ *Magee v. Weller*, 2013 U.S. Dist. LEXIS 136700 (S.D. Ohio 2013), *aff'g In re Magee*, Case No. 12-35335, June 13, 2013 (Doc. 95) (J. Walter)

(Determined Ohio does not recognize an absolute assignment of rents, only that rents subject to an assignment of rents provision are cash collateral which may be used by the debtor with the lender's consent or with an order of the bankruptcy court authorizing use of cash collateral.)

- ▶ When is there likely to be Cash Collateral in a 13?
  - **When the debtor owns 1 or more rental properties!**
  - When debtor owns an unincorporated business and has bank financing.
- ▶ Significance of Existence of Cash Collateral
  - **Must obtain consent of lender or court to use cash collateral!!**



## Applications to Employ Special Counsel & 9019 Motions

- ▶ **Who files** – Trustee or Debtor’s counsel – **not special counsel**
- ▶ **When to file Application for Retention** – front end, **not back end**
  - at time case filed if counsel is already employed
  - at time counsel employed if employed after case filed
  - **not when matter is settled**
- ▶ 9019 Motion also to be filed by 13 Trustee or Debtor’s counsel
- ▶ Inclusion of request to retain funds within 9019 motion???

## Motions to Retain Funds

### ▶ When –

- at time case filed if counsel is already employed
- at time counsel employed if employed after case filed
- **not when matter is settled**

### ▶ What –

- explain what the funds are needed for and provide appropriate documentation at time counsel employed if employed after case filed
- amend schedules if necessary

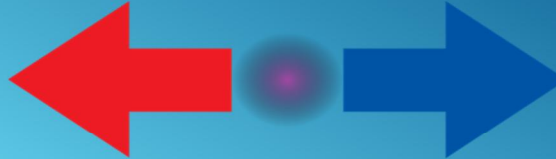


## Motions to Modify Plans

- ▶ **What & Why** — explain what the modification is and why need to modify
- ▶ **Avoid Boilerplate as Explanation**
- ▶ **Appropriate Modification?**
  - In re Hill, 386 B.R. 670 (Bankr. S.D. Ohio 2008) (J. Humphrey) (plan may be modified to increase or reduce payments on claims, extend or reduce time for payments, & to alter amt of distributions)
  - Chrysler Fin. Corp. v. Nolan, 232 F.3d 528 (6th Cir. 2000) & Ruskin v. DaimlerChrysler Servs. N. Am., 425 F.3d 296 (6th Cir. 2005) (cannot modify to surrender collateral & pay defic. as unsecured)
  - Americredit Fin. Servs. v. Nichols, 440 F.3d 850 (6th Cir. 2006) (mod approved which resulted in modifying payments to car lender) (only available for non-910 car)



## Splitting a Joint Case vs. Converting One Joint Debtor



- ▶ **Use “Motion to Split Case” docketing event**
  - If severing a joint case and both debtors’ individual cases will remain under the same chapter as the joint case.
  - Filing Fee is required and is equal to the amount of the filing fee for the chapter under which the joint case was commenced.
- ▶ **Use “Motion Converting One Joint Debtor” docketing event**
  - If severing a joint case and converting one debtor’s individual cases to a different chapter.
  - Filing Fee is required for the converted case and is the same as the fee for filing a new case under that chapter.

## Fee Applications

- ▶ Include appropriate descriptions of the work done.
- ▶ Do not include the contents of communications with clients.
- ▶ Include a notation for each item as to who is doing the work.
- ▶ Include the amount of time spent for each itemized entry.
- ▶ Include a description of the results achieved.
- ▶ Assess value of work and adjust if appropriate.
- ▶ File fee app when case is dismissed prior to confirmation – LBR 2016-1(b)(5).



# Form Motions/Filings



## USE COURT'S FORM MOTIONS OR OTHER FORM MOTIONS WHEN APPROPRIATE

- ▶ Reduces mistakes & helps insure you have needed information

Online Forms & Orders:

(<https://www.ohsb.uscourts.gov/local-form-motions-and-orders>)

\*The court hopes to soon be adding a form motion and order under BR 5009 to effect the release of liens upon completion of the Chapter 13 Plan.

# CHAPTER 13 LIEN AVOIDANCE

## ▶ Different Types of Liens

The image shows a UCC-1 Financing Statement form. It is a yellow document with black text and lines for filling in information. The form is titled 'UCC-1 FINANCING STATEMENT' and includes sections for 'CREDITOR INFORMATION', 'DEBTOR INFORMATION', 'COLLATERAL', and 'SECURITY AGREEMENT'. It also has a section for 'SIGNATURES' and a date field.

- Mortgage
- Security Agreement/UCC
  - a. Purchase Money Security Interest/PMSI
  - b. Non-Purchase Money Security Interest
- Certificate of Judgment/CJ – Judgment Lien



## DIFFERENT TYPES OF LIENS (CONT.)

- Statutory Liens
  - a. Tax Liens
  - b. Mechanic's Lien
- Vehicle Liens (noted on Title)

The image shows a screenshot of a 'Notice of Federal Tax Lien' form from the Department of the Treasury, Internal Revenue Service. The form is titled 'Form 688(Y) Notice of Federal Tax Lien' and is for 'Small Business / Self-Employed - Area 0'. It includes fields for 'Date of Issue' (07/20/19), 'Assessment Number' (578329119), and 'Name of Taxpayer' (Crown Plaza Corporation, Inc., Alter Ego of Association of Community Organizations for Reform Now, Inc.). The address is listed as 2030 Canal Street, 4th Floor, New Orleans, LA 70119. The form also contains a barcode and a section for 'RECORDING OFFICE INFORMATION'. At the bottom, there is a table with columns for 'Date of Tax', 'Tax Period', 'Assessment Number', 'Date of Lien', 'Last Day for Payment', and 'Unpaid Balance'.



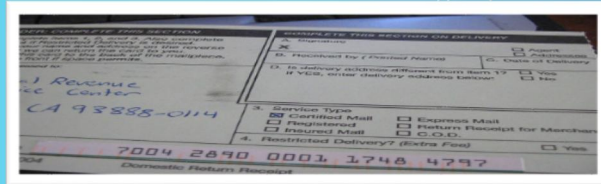
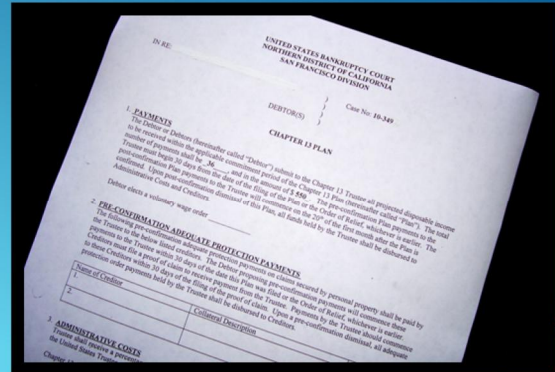
## Avoidance Provisions & Theories

- ▶ § 522(f) – Judgment Lien’s Impairment of an Exemption
- ▶ § 522(f) – Non-PMSI – Impairment of an Exemption
- ▶ § 506 – Lane – Wholly Unsecured Liens
- ▶ § 547 – Preference
- ▶ § 548 – Fraudulent Conveyance
- ▶ § 549 – Unauthorized Post-Petition Transfer



# Method of Avoidance

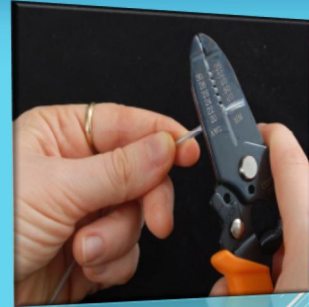
- ▶ PLAN
- ▶ MOTION OR ADVERSARY PROCEEDING
  - Need to provide for filing of motion or AP in Plan
- ▶ 7004 SERVICE
  - Whether avoiding/cramming down in plan or by motion or AP, need 7004 service on the creditor
- ▶ 5009 MOTION & ORDER



## AVOIDANCE/STRIP OFF vs. CRAMDOWN/STRIP DOWN

### ▶ STRIP OFF/AVOIDANCE

Avoiding a lien in its entirety is “stripping off” the lien. *Bank of Am., N.A. v. Caulkett*, 192 L. Ed. 2d 52, 56 (2015)



### ▶ STRIP DOWN/CRAM DOWN

Limiting the lien to the value of the collateral is stripping down or cramming down the lien. *Dewsnup v. Timm*, 502 U.S. 410, 417 & 429 (1992)  
*Till v. SCS Credit Corp.*, 541 U.S. 465, 468 (2004)





## AVOIDING LIENS OTHER THAN TAX & STATUTORY LIENS

Type of Lien	Strip Off/Avoid or Cram Down Or Stretch Out	Statutory Avoidance § Or Case Authority	Plan §	Avoidance/ Modification Procedures
Mortgage With Equity Redeem Only by Refinance	None	§ 1322(a)(2) Devising Redemption	5.1.1 Or 8	None
Residential Mortgage With Equity	Avoid	Long: 580 U.S. 443 § 504(a)(1) § 504(a)	5.4.1	Plan or Motion
Residential Mortgage With Equity	Stretch Out	§ 1322(a)(2) & § 1322(a)(1B)	5.1.1	Plan
Of Non-Residential Mortgage & 13 (Mortgage, Secured Debt, & Other Prop.)	Avoid Or Cram Down	§ 1322(a)(2) & § 504	5.1.2	Plan or Motion
Judgment Lien	Avoid or Cram Down	3225(1)(9A)	5.4.2	Plan or Motion
Vendor Lien FMSI - FIO	None	§ 504 § 1322(a)(2) § 1322(a) Paragraph 1	5.1.3	None
Vendor Lien FMSI - NOT FIO	Cram Down	§ 504 § 1322(a)(2)	5.1.4	Plan or Motion
Vendor Lien FMSI - FIO & non-FIO Interest Rate	Cram Down	§ 1322(a)(1B)	5.1.3 (FIO) 5.1.4 (non-FIO) SPP	Plan
Security Interest Non-Possessory, Non-FMSI	Cram Down Or Avoid	§ 3227(1)(1)(B)	5.4.3	Plan or Motion
UCC Avoidable or Preference, Fraudulent Conveyance, or Post-Petition	Avoid	§ 541, § 548, § 549 § 544/CRCA	5.4.4 SPP	Adv. Proceeding

## AVOIDING TAX & STATUTORY LIENS

Type of Lien	Strip Off/Avoid Or Strip Down/Cram Down Or Stretch Out	Statutory Avoidance § Or Case Authority	Plan §	Avoidance/ Modification Procedures
<b>Tax Lien*</b>	Strip Off/Avoid	§ 522(c)(2)(B) § 1322(b)(2) § 506	5.4.1; SPP	Adv. Proceeding
<b>Statutory** Non-Tax Lien</b>	Strip Off/Avoid	§ 545 § 546(b)	SPP	Adv. Proceeding

\* The Court does not take a position in these materials and for purposes of this seminar as to whether a tax lien may be avoided or stripped off in a Chapter 13 case under §§ 1322(b)(2) and 506(d). However, if such a tax lien avoidance is sought, this is the method the court prefers be used to seek such a result. A tax lien is not avoidable using § 522 (see § 522(c)(2)(B)), nor in Chapter 7 (See *Dewsnup v. Timm*, 502 U.S. 410 (1992) and *Bank of Am., N.A. v. Caulkett*, 135 S. Ct. 1995 (2015)). Nor may the tax lien be stripped down or crammed down in a Chapter 13. See *Nobelman v. American Sav. Bank*, 508 U.S. 324 (1993).

\*\* 11 U.S.C. § 545 provides situations in which a statutory lien may be avoided and § 546(b) places certain limits on a trustee's ability to avoid liens, including when applicable law permits post-petition perfection of an interest in property.

