THINGS THAT GO BUMP IN THE NIGHT:
DISMISSAL AND DISCHARGE ISSUES TO KEEP DEBTORS' ATTORNEYS AWAKE

I. Tax issues

A. Remember, late filed returns may not be dischargeable. 11 U.S.C. § 1328(a)(2).

1. Section 1328(a)(2) excepts from discharge those debts specified in 11 U.S.C. § 523(a)(1)(B).

2. Section 523(a)(1)(B) excepts from discharge those returns which were not filed or given, or those that were late within the two years prior to the filing. For instance, your client failed to file the 2009 tax return and he completes and files it immediately preceding the bankruptcy filing in 2016. While the 2009 tax liability may not qualify as a priority status and therefore may not be paid in full in a Chapter 13 case, it may also not be dischargeable.

3. There may be other considerations for a Chapter 7 case. 11 U.S.C. §§ 523(a)(1)(A) and 507(a)(8). Section 507(a)(8) may include those returns on extension.

4. The hanging paragraph in 11 U.S.C. § 523(a) now defines what constitutes a return. Be aware that under state law a late filed return may never qualify as a return for purposes of § 523. *McCoy v. Miss. State Tax Comm'n* 666 F.3d 924 (5th Cir. 2012). Virginia may have a similar statute. 23 Va. Admin. Code. § 10-110-240.

5. Consider resources to sort through these issues. Flow charts or online services www.taxdischargedeterminator.com.

B. Unfiled returns

1. Remember that 11 U.S.C. § 521(e)(2) requires the Debtor provide the trustee with the most recently filed tax return seven days prior to the § 341 meeting. Failure to provide may result in automatic dismissal unless the debtor can show the failure was beyond the control of the debtor. 11 U.S.C. § 521(e)(2)(B). *In re Casey*, 2008 WL 1765265, (3rd Cir. April 18, 2008); *In re Walker*, 06-10879, 2006 WL 4671832 (Bankr. D. Md. July 20, 2006).

2. Remember in Chapter 13 the Debtor must file the tax returns for the four tax periods ending prior to the filing of the case. 11 U.S.C. § 1308(a). If the debtor fails to do this, 11 U.S.C. § 1308(b) sets out the process by which the debtor may comply. *In re Mascoll*, 08-70288-SSM, 2008 WL 1869293 (E.D. Va. April 24, 2008). What happens if the returns are not provided? 11 U.S.C. § 1307(e) requires dismissal or conversion of the case.

II. Post-petition mortgage defaults may result in a denial of discharge. *In re Evans*, 543 B.R. 213 (E.D. Va. 2016).

A. General facts of the case show the debtor was your average run-of-the-mill debtor.

1. She filed her case in 2010 and as of the petition she owed only $400.00 in prepetition mortgage arrears. The prepetition arrears had been paid in full and through case administration during the term of the Plan.
2. During the term of the Plan the debtor obtained a loan modification in 2014 which reduced her monthly mortgage payment.
3. During 2015 it appears the debtor's financial situation took a turn for the worse as she lost hours at work and family moved in with her increasing her household expenses. As a result she not only fell behind on mortgage payments accumulating a post-petition arrearage of $6,344.08 but also failed to maintain her property and the homeowner's association assessed a lien for $14,000.00 to $15,000.00 for repairs it had to make to her property.
4. The debtor paid all amounts to the trustee, i.e., the "base."

B. Court construed 11 U.S.C. § 1328(a). "Subject to subsection (d), as soon as practicable after completion by the debtor of all payments *under the plan*,…the court shall grant the debtor a discharge…"

1. Debtor's arguments
   - I) Phrase "under the plan" must be referenced to other Code sections and Rules and it must mean that it does not refer to payments where the Debtor acts as the disbursing agent.
   - II) The debt is excepted from discharge.
   - III) The form plan references the deed of trust and incorporates the terms of the deed of trust which is between the debtor and the creditor.
   - IV) Because the deed of trust will exceed the maximum five year term the deed of trust payments cannot be "under the plan."
2. Court rejected the debtor's arguments based on a plain reading of § 1328 and placed emphasis on the word "*all* payments under the plan."

I) Whether the trustee or the debtor acts as the disbursing agent makes no difference as both types of payments are payments under the plan. *In re Evans*, 543 B.R. at 222 (citing *In re Heinzle*, 511 B.R. 69, 83 (Bankr. W.D. Tex. 2014).

II) The concept of "outside the plan" dates back to the Bankruptcy Act of 1898 where secured creditors' payments provided through case administration had to vote on the plan. Thus, a secured creditor paid outside the plan didn't vote and a debtor would not have to worry about its approval or disapproval to achieve confirmation. *In re Heinzle*, 511 B.R. at 77-8.

III) The Supreme Court reasoned that if a plan provides for a claim, it is a claim provided for by the plan. *Rake v. Wade*, 508 U.S. 464, 474 (1993).

C. What next?

1. *Evans* is on appeal to the district court.

2. For prospective clients, do you pay through the plan or not? Some postulate footnote 17 in the opinion suggests payments should be made through the plan.

3. For open cases, do you surrender the home in the 59th month of the plan? If you do not formally amend the amend the Plan to surrender the collateral, do you have discharge issues if the last confirmed Plan still provides for the creditor under § 1322(b)(5)? Do you convert or dismiss the case in the 59th month of the plan? If you dismiss, will you have a bar under § 109(g)(2)? In the subsequent refiling will the extension of the automatic stay be more difficult to obtain? Is the second petition filed in good faith?