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Collier Bankruptcy Case Update

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November 20, 2006 Issue 3

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§ 109(h)(1) Who May Be a Debtor; Mandatory Credit Counseling; Approved Nonprofit Agency.

1106-071 **Reconsideration of dismissal for failure to comply with credit counseling requirements of BAPCPA denied.** (*Bankr. N.D. W. Va.)*

PROCEDURAL POSTURE: Debtor, *pro se*, filed a motion to reconsider the court's order dismissing his chapter 13 case based on his failure to obtain a prepetition, budget and credit counseling briefing, and based on his ineligibility to obtain a postponement or waiver of that requirement.

OVERVIEW: Debtor argued that reconsideration was proper because a chapter 7 debtor was not required to obtain prepetition credit counseling. The court stated that reconsideration of its order was not proper because debtor had not articulated any applicable basis to alter or amend its ruling. Moreover, in order to be a debtor under title 11 of the U.S. Code, an individual had to receive a credit counseling briefing from an approved nonprofit budget and credit counseling agency within the 180-day period preceding the date of filing of the petition, 11 U.S.C. § 109(h)(1). Regarding a temporary exemption, the requirements in section 109(h)(3) were mandatory. The court had no discretion to waive the credit counseling certificate requirement or to grant an exemption and extension unless a certification satisfying all three requirements was filed by the debtor. The court also stated that the credit counseling requirement pertained to individuals who filed under chapter 7, as well as chapter 13. Debtor was not eligible to be a debtor under chapter 13 or chapter 7 based on his failure to obtain the credit counseling prior to filing his petition.

In re Lackey*, 2006 Bankr. LEXIS 2764 (Bankr. N.D. W. Va. September 14, 2006) (Flatley, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.09[1]**

§ 330(a) Compensation of Officers; Determination of Amount.

1106-072 **Court increased minimum fee and established fixed fee amont for chapter 13 debtors' attorneys.** (*Bankr. S.D. Tex.)*

PROCEDURAL POSTURE: Chapter 13 trustee filed a motion seeking to increase the maximum amount of fixed fees that could be awarded to chapter 13 debtors' attorneys. The bankruptcy judge convened an *en banc* hearing, which considered evidence and arguments from nine attorney who regularly appeared in chapter 13 cases.

OVERVIEW: The court granted relief by allowing chapter 13 debtors' counsel to be compensated on a fixed fee or on an hourly fee basis. The maximum fee amount that could be charged was $3085. That amount included general expenses but not filing fees. Absent exceptional circumstances, the fixed fee included all work through 120 days after confirmation of the chapter 13 plan. The maximum fixed fee was reduced to $2700 for cases that were dismissed before confirmation or within 120 days after confirmation. Counsel was allowed to elect to perform the following services for a fixed fee, including all hourly charges and expenses: respond to motions for relief from the stay or motions to dismiss the bankruptcy case that were filed after 120 days after confirmation for an additional fixed fee of $275 and prosecute motions to modify confirmed plans for an additional fixed fee of $450 if the motion was filed after the expiration of 120 days. All debtors' counsel were to remain debtors' counsel throughout the chapter 13 case unless relieved of that duty by order of the court.

In re Chapter 13 Applications*, 2006 Bankr. LEXIS 2710 (Bankr. S.D. Tex. October 3, 2006) (Isgur, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:330.**

§ 349(a) Effect of Dismissal; Subsequent Filings.

1106-073 **Case dismissed without prejudice where debtor's counsel failed to electronically file required signature pages due to scanner malfunction.** (*Bankr. N.D. Ind.)*

PROCEDURAL POSTURE: The debtors filed a motion to reinstate their bankruptcy case after its dismissal.

OVERVIEW: The debtors' bankruptcy case was dismissed because they failed to file a scanned copy of the originally signed signature pages as required by the court's order authorizing electronic case filing. Their motion to reinstate the case represented that the failure to file was due to a "technical glitch" involving counsel's scanner, which prevented some of the signature pages from being contained within the documents submitted for filing. The court denied the motion. The court held that the failure to file the required signature pages did not constitute excusable neglect under Fed. R. Civ. P. 60(b) because the reason for the delay was within the reasonable control of the debtors' counsel. The court held that counsel's failure to review the documents he was sending and any "technical glitch" with the equipment used did not constitute excusable neglect. The court noted that the dismissal was without prejudice, pursuant to 11 U.S.C. § 349(a), and, thus, that the debtors were free to refile at any time without any restrictions, save those which were automatically associated with filing multiple cases within a 12-month period, pursuant to 11 U.S.C. § 362(c)(3) and (4).

***In re Hargrove**, 2006 Bankr. LEXIS 2679 (Bankr. N.D. Ind. October 3, 2006) (Grant, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:349.01[1]**

§ 544 Trustee as Lien Creditor and as Successor to Certain Creditors and Purchasers.

1106-074 **Debtors could not avoid lien that hypothetical lien creditor could not have avoided under state law.** (*Bankr. D.S.C.)*

PROCEDURAL POSTURE: Debtors, a married couple who filed a chapter 11 bankruptcy proceeding, objected to an amended proof of claim filed by claimant, a lender which was relying on a mortgage executed by debtors in its favor in filing a proof of secured claim. At issue was the effect, if any, of a defect in the manner in which the mortgage was acknowledged on the claimant's interests and rights.

OVERVIEW: Though debtors agreed that they had signed the note and mortgage and had received funds thereunder, they argued that the defective execution of the mortgage meant that claimant was not a secured creditor. The court overruled the objection. After noting that a signed and filed proof of claim was *prima facie* evidence of the claim's validity and amount per Fed. R. Bankr. P. 3001(f) and that it was debtors' burden to negate the claim's validity, the court rejected claims of a unilateral mistake based on debtors' claim that they did not know that they had signed a promissory note. After pointing out that debtors were well-educated and possessed above average intelligence, the court cited to the South Carolina rule that a signer of a document was responsible for reading it and that a failure to do so did not vitiate its enforceability. Second, the court held that even if the mortgage was improperly witnessed because it had not been acknowledged as required by S.C. Code Ann. § 30-5-30, the mortgage remained enforceable as between the parties. Finally, as a hypothetical lien creditor could not have avoided it under state law as per 11 U.S.C. § 544, debtors could not avoid it here.

***In re Spencer**, 2006 Bankr. LEXIS 2658 (Bankr. D.S.C. September 12, 2006) (Duncan, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:544.01**

§ 547(b) Preferences; Avoidable Transfers.

1106-075 **Debtor's motion to avoid lien as preference denied as debtor could not exempt portion of real property equity to which lien attached.** (*Bankr. E.D. Va.)*

PROCEDURAL POSTURE: Debtor, an individual who had filed a chapter 13 bankruptcy, filed a motion to avoid a judgment lien docketed against her real property by a creditor. At issue was whether debtor was entitled to step into the shoes of the trustee and avoid the lien as a preference as permitted by 11 U.S.C. § 547(b).

OVERVIEW: Debtor filed a bankruptcy after the creditor had won a $12,000 state court judgment. The amount thereof was later reduced though the reason for the reduction was not given. In debtor's proposed plan, the creditor's resulting claim was treated as an unsecured claim and was paid *pro rata* with other unsecured claims on the ground that the judgment lien was an avoidable preference. In order to make her proposed plan confirmable, debtor then sought an order that the lien was an avoidable preference, but the court denied relief. After reviewing 11 U.S.C. §§ 547(b) and 522(h), which allowed a debtor to "step into the trustee's shoes" to avoid a transfer, the court held that while all five elements of an avoidable preference were shown, the portion of the lien that might be set aside was only that part that attached to equity that debtor could have claimed as exempt but for the lien. Adopting the broader reading of that provision and reviewing exemptions already claimed by debtor, the court held that because debtor could not exempt that portion of the equity to which the lien attached, she was not entitled to avoid the lien as a preference.

In re Dyson*, 2006 Bankr. LEXIS 2744 (Bankr. E.D. Va. July 28, 2006) (Mitchell, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:547.03**

§ 707(b)(2) Dismissal of a Case or Conversion to a Case Under Chapter 11 or 13; Substantial Abuse; Presumption of Abuse.

1106-076 **Increased workload under BAPCPA justified higher attorneys' fees.** (*Bankr. D. Kan.)*

PROCEDURAL POSTURE: The standing trustee objected to confirmation of three chapter 13 plans. At issue was whether the amount sought to be paid as fees to counsel for the debtors, which fees were higher than the "presumptive" amount previously approved by the court, was properly charged and the impact on that determination of changes in counsel's responsibilities resulting from enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").

OVERVIEW: Counsel, experienced bankruptcy lawyers, sought an award of $2500 in fees in connection with each of three chapter 13 cases. They claimed that the cost of preparing and filing such suits had been increased by the passage of BAPCPA and that they were properly paid more. The trustee objected to confirmation of three chapter 13 plans, all of which reflected the increased fee. The court overruled the trustee's objections and granted confirmation of the plans. In so ruling, the court considered counsel's presentations as to the increased difficulty of representing chapter 13 debtors under BAPCPA, and it concluded that a larger fee was justified by the increased workload and related responsibilities of such counsel. Specifically, the court credited counsel's claim that it took between 12 and 15 hours to prepare an initial petition, especially for debtors whose current monthly income as determined by 11 U.S.C. §§ 707(b)(2) and 1325(b)(3) was above the median income level. Based both on counsel's presentations and its own inherent knowledge of the increased difficulty under BAPCPA, the court overruled the trustee's objections and granted confirmation of the plans.

In re Mayer*, 2006 Bankr. LEXIS 2671 (Bankr. D. Kan. October 2, 2006) (Nugent, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[2]**

§ 1325(a) Confirmation of Plan; Conditions for Confirmation.

1106-077 **Assignee of motor vehicle debt held an allowed secured claim for the total amount of principle and interest due.** (*Bankr. D. Nev.)*

PROCEDURAL POSTURE: Bankruptcy debtors purchased a motor vehicle which was financed by the seller, and the seller assigned the debt which was secured by the vehicle. The debtors sought confirmation of their chapter 13 plan which proposed to bifurcate the assignee's claim into a secured claim and an unsecured claim under 11 U.S.C. § 506, but the assignee asserted that the unnumbered, hanging paragraph under 11 U.S.C. § 1325(a) precluded bifurcation.

OVERVIEW: The debtors contended that 11 U.S.C. § 506 was the sole means of determining whether the assignee had an allowed secured claim, and thus the inapplicability of section 506 pursuant to the hanging paragraph under 11 U.S.C. § 1325(a) precluded the assignee from having an allowed secured claim. The debtors also argued that, even if the assignee had an allowed secured claim, the assignee did not have a purchase-money security interest ("PMSI") as required under the hanging paragraph since the seller's PMSI did not transfer to the assignee. The bankruptcy court first held that the assignee held an allowed claim secured by a lien and, thus, that the assignee's claim qualified as an allowed secured claim

without reference to 11 U.S.C. § 506. Therefore, absent the availability of bifurcation under section 506, the assignee had an allowed secured claim for the total amount of its claim which required the debtors to pay the claim over the life of their plan. Further, the seller's reservation of a security interest in the debtors' vehicle clearly created a PMSI, and the nature of that interest as a PMSI did not change due to the assignment.

In re Trejos, *2006 Bankr. LEXIS 2788 (Bankr. D. Nev. September 25, 2006) (Markell, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

§ 1325(b) Confirmation of Plan; Objections.

1106-078 **Plan was not confirmable as debtor's income was above median income but proposed applicable commitment period was for three rather thanthe required five years.** (*Bankr. N.D. Iowa)*

PROCEDURAL POSTURE: The debtors moved for confirmation of their chapter 13 plan. The unresolved issue for confirmation was whether the plan length was to be for three years, as proposed in the debtors' plan, or for five years, as indicated on Official Bankr. Form B22C and 11 U.S.C. §§ 1322 and 1325.

OVERVIEW: The debtors and the chapter 13 trustee stipulated that the debtors' income was above the applicable median income. Therefore, under 11 U.S.C. § 1325(b)(4)(A)(ii), the applicable commitment period was five years. Based on the plain language of the Bankruptcy Code, the plan could not be confirmed unless it provided that all of the debtors' projected disposable income during that five-year period would be applied to make payments to unsecured creditors under the plan. The bankruptcy court noted that it was not necessary to choose between whether the "applicable commitment period" was a temporal versus a monetary requirement. The debtors' plan was not confirmable, regardless of which interpretation was correct.

In re Zirtzman, *2006 Bankr. LEXIS 2721 (Bankr. N.D. Iowa October 4, 2006) (Kilburg, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08**

28 U.S.C. (Post-2005 Act)

§ 1334(c) Bankruptcy Cases and Proceedings; Abstention.

1106-079 **Bankruptcy court abstained from proceeding to determine if debtor was acting as agent of insurance company when recommending improper investments.** (*Bankr. D.S.D.)*

PROCEDURAL POSTURE: Defendants, the personal representatives of estates of various deceased persons (estates), asked the court to abstain from exercising jurisdiction over a two-count complaint filed by plaintiff insurance company, which request was made pursuant to 28 U.S.C. § 1334(c)(1) or (2). The company later withdrew its first cause of action. At issue was whether abstention was proper.

OVERVIEW: Prior to debtor's bankruptcy filing, the estates sued him and the company in state court while other related parties filed a separate state court suit. Both suits charged that debtor was working for the company when he recommended improper investments. Debtor then filed bankruptcy. When the company filed an adversary proceeding to determine if debtor had been acting in the scope of his agency when he provided the advice, the estates sought abstention. Applying a 12-factor analysis, it held that abstention per 28 U.S.C. § 1334(c)(1) was proper because the litigation of the issues in state court would have no impact on the administration of the debtor's estate; the state court suits were ready for trial; the state law issues were best determined by a state court; the estates were under state court control; diversity jurisdiction existed; the remaining claim had no direct relationship to the bankruptcy; there was no core proceeding; severance was not indicated; state court resolution was more expeditious; no forum shopping occurred; the state law claims were properly heard by a jury; and the state court suits involved many non-debtor parties. Thus, abstention was proper.

American Investors Life Ins. Co. v. Salinas (In re Salinas), *2006 Bankr. LEXIS 2656 (Bankr. D.S.D. July 21, 2006) (Duncan, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 1:3.05**

11 U.S.C. (Pre-2005 Act)

§ 324 Removal of Trustee or Examiner.

1106-080 **Creditor's motion for replacement of trustee in involuntary case brought by the creditors denied.** (*Bankr. D.S.C.)*

PROCEDURAL POSTURE: Movant, a creditor, sought orders of the court replacing the trustee who had previously been appointed in an involuntary bankruptcy proceeding instituted by other creditors of debtor. Movant also asked the court to determine who was "in charge" of certain trusts. The trustee opposed the motions and cross-moved for sanctions.

OVERVIEW: After debtor was put into an involuntary chapter 7, movant, both a creditor and debtor's brother, sought removal of the trustee and an order identifying the persons "in charge of" certain trusts. The court denied relief. It found no basis on which to remove the trustee, pointing out that removal was governed by 11 U.S.C. § 324 and was available only for cause. Moreover, while movant's failure to comply with procedural rules would authorize the court to refuse to rule on the motion altogether, its consideration of the motion on its merits disclosed that movant had failed to adduce any evidence supporting his attack on the trustee. As for movant's request that the court identify who was "in charge of" certain trusts, the court held that the request was improper, that no case or controversy was raised by the motion, and that it was properly denied. Finally, though the court denied the trustee's cross-motion for sanctions and reminded the trustee that he had to comply with certain reporting requirements, the court explicitly warned movant not to attempt any further *ex parte* contact. It also warned movant that he had to comply with all pleading requirements in the future.

***In re Nettles**, 2006 Bankr. LEXIS 2657 (Bankr. D.S.C. August 2, 2006) (Duncan, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:324.01**

§ 362(c)(2)(C) Automatic Stay; Duration; All Other Acts; Until Discharge Granted or Denied.

1106-081 **Post-confirmation assessment of tax liability was erroneously invalidated by district court.** (*11th Cir.)*

PROCEDURAL POSTURE: Plaintiff United States appealed from the District Court for the Northern District of Georgia, challenging the invalidation of its assessment of a tax liability against defendant debtor following confirmation of the taxpayer's chapter 11 bankruptcy plan.

OVERVIEW: This case involved application of 11 U.S.C. § 362(c)(2)(C). The discharge of the debtor here was effected by confirmation of the plan pursuant to 11 U.S.C. § 1141(d)(1)(A). The district court held that the IRS assessment of the debtor's tax liability was void because it was made while the debtor enjoyed an automatic stay against collection of the tax. The instant court first concluded that once confirmation had been entered, and a discharge granted, holders of non-dischargeable debts could seek repayment from the debtor for the original amount. Next, the plan did not contain provisions explicitly stating that the discharge would take place after confirmation, but it did say that it would take effect 60 days after the order of confirmation could no longer be appealed. However, the plan's identification of a post-confirmation effective date was not sufficient to delay the grant of discharge. The IRS did not take any action against the property of the estate but only made an assessment against the debtor; thus, 11 U.S.C. § 362(c)(1) was inapplicable. Finally, the debtor did not disprove willfulness, and the assessment was not erroneous.

***United States v. White**, 2006 U.S. App. LEXIS 25363 (11th Cir. October 11, 2006) (Anderson, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.06[2]**

§ 363 Use, Sale, or Lease of Property.

1106-082 **Insurance proceeds from totalled vehicle were not property of the estate and could not be used to purchase replacement vehicle without creditor's consent.** (*Bankr. W.D. Mich.)*

PROCEDURAL POSTURE: Before bankruptcy debtors' chapter 13 plan was confirmed, the debtors' vehicle which was subject to a security interest was in an accident and declared a total loss. After the plan was confirmed, the bankruptcy trustee received an insurance settlement check, payable to both the

debtors and the secured creditor, and the debtors moved for leave to use the insurance proceeds to purchase a replacement vehicle.

OVERVIEW: The debtors' confirmed plan provided for payment of a creditor's claim which was secured by the vehicle, and the debtors proposed to purchase a new vehicle with the insurance proceeds and grant the creditor a lien in the new vehicle as substitute collateral. The debtors contended that 11 U.S.C. § 363 allowed the debtors to use estate property to the same extent as the trustee, and thus the debtors could compel the creditor to accept the substitute collateral. The bankruptcy court held, however, that the insurance proceeds were not property of the debtors' estate and therefore section 363 did not authorize the debtors' use of the proceeds without the creditor's consent. The debtors' plan expressly and properly provided that all property of the estate vested in the debtors upon confirmation of their plan, and such vesting constituted an absolute conveyance of the estate's property back to the debtors.

***In re Van Stelle**, 2006 Bankr. LEXIS 2706 (Bankr. W.D. Mich. October 4, 2006) (Hughes, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:363.01**

§ 363(b) Use, Sale, or Lease of Property; Notice and Hearing.

1106-083 **Trustee's motion to sell assets free and clear of liens granted over objection of debtor's attorneys.** (*Bankr. N.D. Iowa)*

PROCEDURAL POSTURE: The chapter 7 trustee filed a motion to sell assets free and clear of liens, encumbrances and other interests. The trustee proposed to sell the debtor's interest in a wholly-owned subsidiary, including its title to real estate.

OVERVIEW: The law firm that represented the debtor objected to the trustee turning over accounts receivable, unpaid management fees, and stock transfer interests. It believed these were valuable assets of the bankruptcy estate. The firm requested a finders fee if more funds become available to the estate, or compensation for its "pro bono" work in the case. The evidence showed that the trustee was diligent in efforts to market the property. She received no other offers. The trustee's proposed sale was in the best interests of the bankruptcy estate. There was no indication of bad faith on the part of trustee or of the purchaser. Considering the type of assets being sold and possible difficulties with clearing title, the amount offered was fair and reasonable.

***In re CRI, Inc.**, 2006 Bankr. LEXIS 2742 (Bankr. N.D. Iowa September 13, 2006) (Kilburg, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:363.02**

§ 503(b)(1)(A) Allowance of Administrative Expenses; Types of Expenses Allowed; Estate Expenses; Preservation of the Estate.

1106-084 **Creditor lessor was allowed administrative expense for sale of vehicle of which debtor had assumed lease.** (*Bankr. E.D. Mich.)*

PROCEDURAL POSTURE: Bankruptcy debtors assumed a vehicle lease under their confirmed chapter 13 plan, but the debtors subsequently defaulted on the lease. With bankruptcy court approval the lessor sold the vehicle, and the lessor moved for allowance of an administrative claim for the deficiency balance plus attorney fees.

OVERVIEW: The debtors contended that the lessor's administrative claim should be disallowed because the lease assumption conferred no benefit upon the bankruptcy estate as required for the allowance of an administrative claim under 11 U.S.C. § 503(b)(1)(A). The bankruptcy court held, however, that the lessor was allowed an administrative expense claim for the deficiency balance, but not for the attorney fees which were not expenses of preserving the estate. After their bankruptcy petition was filed, the debtors acted in an administrative capacity in assuming the unexpired lease, and the debtors' subsequent default on the lease entitled the lessor to administrative expense priority for its claim arising from the default.

***In re Enderle**, 2006 Bankr. LEXIS 2693 (Bankr. E.D. Mich. October 5, 2006) (Rhodes, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:503.06**

§ 522(b) Exemptions; Choice Between Federal and State Law.

1106-085 **Debtor allowed to amend Schedule C to elect state rather than federal exemption scheme absent bad faith or concealment.** (*Bankr. E.D. Mich.)*

PROCEDURAL POSTURE: On Schedule C, debtor elected exemptions under 11 U.S.C. § 522(b)(1), the federal exemption scheme. At a hearing on cross motions for summary judgment, the trustee argued the exemption for entireties property provided in section 522(b)(2)(B) under the state exemption scheme did not appear in the federal exemption scheme. The next day, debtor filed an amended Schedule C, electing the state exemptions per section 522(b)(2)(B). The trustee filed an objection.

OVERVIEW: The trustee objected to the amendment of Schedule C under the doctrine of laches, claiming that debtor failed to act with diligence and that lack of diligence resulted in prejudice to the trustee. Debtor argued that debtors could, as a matter of right, amend their schedules prior to the closing of the case unless there was a finding that a debtor had acted in bad faith or concealed property and, because debtor had not acted in bad faith, debtor was entitled to amend his exemptions. The court agreed with debtor. The binding law applicable in the Sixth Circuit was, excepting bad faith or concealment of assets, a debtor could amend his or her schedules at any time before the case was closed as a matter of course, and courts had no discretion to reject such amendments. The trustee here did not allege either bad faith or concealment of assets as a grounds for disallowing the exemptions. The court did not have discretion to disallow amendments to exemptions when the sole ground for objection was prejudice to the trustee. In the absence of bad faith or concealment of assets, the equitable doctrine of laches was not grounds for disallowing amended exemptions.

***In re Iwasko**, 2006 Bankr. LEXIS 2687 (Bankr. E.D. Mich. October 4, 2006) (McIvor, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:522.**

§ 522(f)(1) Exemptions; Liens Impairing Exempt Property; Avoidance.

1106-086 **Debtors could not exempt assets from properly filed state tax lien.** (*Bankr. N.D. Ga.)*

PROCEDURAL POSTURE: The State of Georgia filed a proof of claim in debtors' chapter 13 case for income taxes and related interest and penalties for several tax years, asserting that its claim was secured to the extent of the value of debtors' property pursuant to 11 U.S.C. § 506(a). Debtors objected to allowance of any part of the claim as secured.

OVERVIEW: Debtors' schedules reflected that they owned otherwise unencumbered personal property and motor vehicles, which were exempt. The State claimed that its tax lien attached to all of the assets. Debtors sought to avoid the tax lien under 11 U.S.C. § 522(f)(1) because it impaired their exemption in their personal property. The court held that debtors' estate had an interest in the motor vehicles and personal property. The court held that the State had an allowed secured claim to the extent of the value of the debtors' assets pursuant to 11 U.S.C. § 506(a), and that debtors could not, pursuant to 11 U.S.C. § 522(c)(2)(B), exempt the assets from a properly filed tax lien. The court held that denial of debtors' objection was without prejudice to the filing of another objection or other proceeding seeking disallowance of the claim or avoidance of the lien based on grounds different than those that the court ruled on or based on a showing of specific facts and legal authority in support of a contention that notice of the tax lien was not properly filed.

***Downey v. Georgia**, 2006 Bankr. LEXIS 2737 (Bankr. N.D. Ga. September 27, 2006) (Bonapfel, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:522.11**

§ 523(a) Exceptions to Discharge; Types of Debt Excepted.

1106-087 **Debt arising from legal malpractice due to inexperience rather than fruad or wilful, malicious conduct was dischargeable.** (*Bankr. S.D. Iowa)*

PROCEDURAL POSTURE: Plaintiff judgment creditors commenced an adversary proceeding to determine the dischargeability of a state court judgment against the debtor pursuant to 11 U.S.C. § 523(a) arising from a malpractice action.

OVERVIEW: Despite his inexperience, the debtor represented the creditors in litigation for breach of a collective bargaining agreement, but he did not review or explain settlement documents to them. In addition, he created fictitious pleadings and forged a judge's signature in a debt collection matter. The creditors succeeded in a state malpractice claim, but in the adversary bankruptcy proceeding, the court dismissed the creditors' complaint. The debt arising from malpractice did not come within the provisions for fraud or defalcation by a fiduciary in section 523(a)(4) solely by reason of the debtor's fiduciary duty as an attorney when the creditors made no claim that the debtor had been entrusted with any property. In analyzing the fraud claims under section 523(a)(2)(A), the court determined that the state court decision established the debtor's fraud in the debt collection matter but that the creditors failed to show justifiable reliance to their detriment. In the union litigation settlement, the creditors did not prove that the debtor's conduct was done with the actual intent of causing injury necessary to sustain a claim for willful and malicious injury.

Davis v. Rickabaugh (In re Rickabaugh)*, 2006 Bankr. LEXIS 2723 (Bankr. S.D. Iowa September 28, 2006) (Edmonds, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.01**

1106-088 **Oral misrepresentations of wealth by debtor to friend who extended loan did not render debt nondischargeable.** (*Bankr. N.D. Tex.)*

PROCEDURAL POSTURE: Chapter 7 creditor filed an adversary complaint against debtor objecting to the dischargeability of certain debt pursuant to 11 U.S.C. §§ 523(a)(2) and 523(a)(6).

OVERVIEW: Creditor and debtor were close friends. Creditor loaned debtor $150,000, which was not repaid. Debtor lived a lifestyle and put forth a demeanor that suggested wealth. He told creditor that he could repay the loans after his divorce became final because he had money hidden from his wife. In reality, debtor was in financial trouble. Debtor had a home foreclosed upon and three cars repossessed and was planning to file bankruptcy. After debtor filed a chapter 7 petition, creditor alleged that the debt owed to her was not dischargeable because debtor devised a scheme to portray himself as a wealthy man in order to con her into loaning him monies he knew he could not possibly repay. The court held that debtor's false representations did not fall within the ambit of section 523(a)(2)(A) because they concerned debtor's financial condition. The court also held that, because the representations were all oral, the debt could not be excluded from discharge under section 523(a)(2)(B). The court further held that, although debtor acted recklessly, the injury to creditor was not intentional and, therefore, was not willful under section 523(a)(6).

Baker v. Sharpe (In re Sharpe)*, 2006 Bankr. LEXIS 2678 (Bankr. N.D. Tex. September 28, 2006) (Jernigan, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.01**

§ 523(a)(1) Exceptions to Discharge; Types of Debt Excepted; Taxes.

1106-089 **Nondischargeability of debtor's liability for trust fund taxes upheld.** (*M.D. Fla.)*

PROCEDURAL POSTURE: The bankruptcy court granted summary judgment in favor of the creditor, the United States, in the debtor's adversary proceeding seeking a determination that he was not liable for trust fund penalties under I.R.C. 6672 and that any such liability was dischargeable under 11 U.S.C. § 523(a)(1)(A). The debtor appealed.

OVERVIEW: Because the debtor failed to timely respond to requests for admissions or to seek to withdraw those admissions that were deemed made, the requests were "admissions on file." While the debtor argued he should have been able to depose his brother who was allegedly in charge of taxes and two IRS employees, the suggested line of questioning them was not relevant to the debtor's actions after the date he learned his company's payroll tax obligations were delinquent. Willfulness was correctly found because the debtor continued to draw funds from the company's accounts to pay various creditors after he became aware of the delinquent payroll tax obligations. The debtor had made no effort to show that the company's funds were encumbered. He admitted that he was the company's president with authority and that he became aware that payroll taxes were not current. Nevertheless, he continued to write checks from the company's funds to creditors other than the IRS. The debtor failed to allege that he was legally obligated to use such funds for any purpose other than satisfying the payroll tax obligations. The funds paid to other creditors were unencumbered.

Paris v. United States (In re Paris), *2006 U.S. Dist. LEXIS 73795 (M.D. Fla. October 10, 2006) (Fawsett, C.D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.07**

1106-090 **Debtor's liability as responsible person for trust fund taxes was nondischargeable.** (*Bankr. W.D. Tex.)*

PROCEDURAL POSTURE: Plaintiff debtor, the primary limited partner of taxpayer, a limited partnership, challenged the claim of defendant IRS. At issue was a determination whether the debtor was a responsible person of the limited partnership for purposes of imposition of tax liability under 26 U.S.C. § 6672, and whether the taxes were nondischargeable under 11 U.S.C. §§ 507(a)(8) and 523(a)(1).

OVERVIEW: Debtor was timely assessed penalties pursuant to 26 U.S.C. § 6672, as an alleged responsible person. Debtor was a limited partner and at all times owned 33 percent of the limited partnership. The general partner was a limited liability company that owned 1 percent of the of limited partnership. Debtor was the president of the general partner. The court noted that debtor was much more than a simple construction job supervisor for the partnership, as he had the authority to sign checks and did so routinely. He had significant responsibilities and his counsel had stipulated prior to trial that the debtor was a responsible person. The issue thus was whether debtor acted wilfully in failing to pay over trust fund taxes within the meaning of 28 U.S.C. § 6672. Debtor had the burden to prove that he lacked discretion to use the accounts receivable and loan proceeds deposited to pay the accrued withholding taxes. The court found the evidence was overwhelming that debtor had substantial knowledge of and participation in the affairs of the limited partnership and that its funds were not encumbered during the periods for which the taxes were assessed.

Robertson v. IRS (In re Robertson), *2006 Bankr. LEXIS 2775 (Bankr. W.D. Tex. September 25, 2006) (Monroe, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.07**

§ 523(a)(4) Exceptions to Discharge; Types of Debt Excepted; Fiduciary Fraud, Embezzlement, or Larceny.

1106-091 **Debtor's liquidation of retirement account of which former spouse was entitled to one-half was fiduciary defalcation resulting in nondischargeable debt.** (*Bankr. W.D. La.)*

PROCEDURAL POSTURE: Plaintiff, the former spouse of defendant bankruptcy debtor, brought an adversary proceeding against the debtor, seeking a determination that a debt to the spouse from the debtor's liquidation of a retirement account was not dischargeable under 11 U.S.C. § 523(a)(4) based on fiduciary defalcation. The bankruptcy court conducted a trial.

OVERVIEW: The judgment of divorce of the spouse and the debtor terminated the community property regime and no action for the partition of the former community property was instituted. The spouse contended that she was entitled to half of the amount liquidated from the debtor's retirement account, and that the debt for such amount was not dischargeable in view of the debtor breach of his fiduciary duty to the spouse. The bankruptcy court held that the debt to the spouse was not dischargeable under section 523(a)(4) based on the debtor's defalcation while acting in a fiduciary capacity. Under state law, a fiduciary relationship was created between the spouse and the debtor at the time of the divorce, that relationship remained in effect because the community property was not divided, and the relationship included the spouse's entitlement to a portion of the debtor's retirement account. Further, the debtor's conduct constituted defalcation since the debtor, as an attorney, was clearly aware of the spouse's interest in the account and willfully liquidated the entire account.

Spicer v. Spicer (In re Spicer), *2006 Bankr. LEXIS 2665 (Bankr. W.D. La. June 26, 2006) (Schiff, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.10**

§ 523(a)(6) Exceptions to Discharge; Types of Debt Excepted; Willful and Malicious Injury to Another Entity or Property of Another Entity.

1106-092 **Only a portion of loan debt was nondischargeable due to conversion of collateral where creditor allowed debtor's business to continue post-default.** (*Bankr. D. Idaho)*

PROCEDURAL POSTURE: Plaintiff creditor, the assignee of loan debt from a lender, brought an adversary proceeding against defendant bankruptcy debtor, seeking a determination that the creditor's judgment debt on the loans against the debtor as guarantor was not dischargeable under 11 U.S.C. §

523(a)(6) because the debtor's conversion of the creditor's collateral constituted willful and malicious injury to the creditor. The bankruptcy court conducted a trial.

OVERVIEW: The debtor was the sole principal of a corporate architectural firm which obtained loans from the lender and granted the lender a security interest in essentially all identifiable assets of the firm. Upon the dissolution of the firm, the debtor used the firm's assets to pay debts to himself, his wife, and other creditors, but no payment was made to satisfy the loan debt. The creditor contended that the loan debt to the creditor was not dischargeable based on the debtor's willful conversion of the collateral. The bankruptcy court agreed that the conversion constituted a willful and malicious injury, but only a portion of the debt was not dischargeable. The debtor, as the principal of the firm, was liable for the tortious conversion of the collateral, since the debtor personally participated in the disposition of the firm's assets with knowledge of the security interest. However, the lender allowed the firm to use accounts and their proceeds in the firm's business despite the firm being in default; thus, injury to the lender was not substantially certain until the failure of the firm, and the creditor was entitled to claim only amounts in the firm's accounts after such failure.

Cadleway Props., Inc. v. Armstrong (In re Armstrong)*, 2006 Bankr. LEXIS 2689 (Bankr. D. Idaho October 3, 2006) (Myers, C.B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 4:523.12**

§ 523(a)(9) Exceptions to Discharge; Types of Debt Excepted; Liability For Driving While Intoxicated.

1106-093 **Indemnification claim against debtor by bar held liable under dram shop act was nondischargeable.** (*Bankr. W.D. Mich.)*

PROCEDURAL POSTURE: Plaintiff bar requested that a judgment against defendant debtor be determined non-dischargeable pursuant to 11 U.S.C. § 523(a)(9). The judgment against the debtor was the result of an indemnification claim by the bar under the Michigan Dram Shop Act.

OVERVIEW: After drinking at the bar, the debtor caused an automobile accident, seriously injuring two people. In a negligence/dram shop action in state court, the accident victims recovered a judgment against the bar, which, as cross-plaintiff, recovered a judgment against the debtor under MCL 436.1801(6). The debtor argued that the judgment was dischargeable because it arose from a statutory right of indemnification, not from a claim for death or personal injury. The court concluded that the judgment was non-dischargeable, finding that the Michigan Dram Shop Act, 11 U.S.C. § 523(a)(9), and Michigan case law all held the intoxicated person ultimately financially responsible for his actions. The fact that the bar held a statutory right of indemnification as opposed to a contractual right of subrogation did not make a difference. Absent the personal injury, there would have been no debt to find its way back to the debtor as a matter of law.

Micon Wayside Bar & Grille, Inc. v. Delia (In re Delia)*, 2006 Bankr. LEXIS 2705 (Bankr. W.D. Mich. October 3, 2006) (Stevenson, C.B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 4:523.15**

§ 524 Effect of Discharge.

1106-094 **Discharge injunction modified to allow personal injury action by creditor who was not given proper notice of need to file proof of claim.** (*Bankr. D. Hawaii)*

PROCEDURAL POSTURE: Claimant individual sought relief from a discharge injunction to pursue his postpetition, pre-confirmation claim against the debtor. The individual also sought leave to file a claim against the debtor to preserve his right to collect any deficiency which remained unsatisfied by the debtor's liabilities carriers, through the claims administration process, or to seek declaratory relief on the nonapplication of the discharge injunction.

OVERVIEW: The individual had sustained a personal injury while flying on the debtor's airplane. The sole issue was whether the individual should have been given leave to file an administrative priority claim. The individual argued that his attorney's letter to the debtor, which stated that he was seeking to pursue remedies for injuries he allegedly received during the flight, constituted an informal proof of claim. The evidence showed that the individual had acted reasonably where, despite knowing of the individual's claim, the debtor failed to notify the individual of the need to file a proof of claim, passed the

claim on to its liability insurer, which proceeded to treat the claim as an ordinary event. Thus, the debtor had lulled the individual into believing that he needed to do nothing more to pursue his remedies. The debtor then sought to capitalize on its actions by seeking to bar the individual from participating as an administrative priority claimant. The court provisionally modified the discharge injunction to permit the individual to commence a civil action against the debtor for the purpose of recovering against the debtor's insurers and other non-debtor person or entities.

In re Hawaiian Airlines*, 2006 Bankr. LEXIS 2714 (Bankr. D. Hawaii October 3, 2006) (Faris, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:524.01**

§ 542(c) Turnover of Property to the Estate; Effect of Good Faith Transfer with No Knowledge of Case.

1106-095 **Payment of insurance proceeds directly to debtor violated stay where agent's knowledge of filing was imputed to company.** (*Bankr. N.D. Iowa)*

PROCEDURAL POSTURE: Plaintiff chapter 7 trustee filed an adversary proceeding against defendant insurance company to recover an amount paid directly to the debtor in a settlement agreement reached after the debtor had filed for bankruptcy. The trustee alleged that the insurance company's violation of the automatic stay was willful and sought to recover damages and attorneys' fees. The insurance company claimed that it never received notice of the bankruptcy.

OVERVIEW: The debtor had a claim for personal injury damages that arose from a prepetition car accident. This claim was property of the estate even though the debtor failed to disclose its existence in her chapter 7 petition and schedules. The insurance company asserted that it had neither actual notice nor actual knowledge of the commencement of the case, and invoked the protections afforded to good faith transfers under 11 U.S.C. § 542(c). The court found, however, that the insurance company did have actual knowledge of the bankruptcy proceedings prior to entering into the settlement agreement. The debtor had informed a claims processor about the case. Under the agency laws of the state of Iowa, the claims processor's knowledge was imputed to the insurance company. Having acquired knowledge of the chapter 7 proceedings, the insurance company had a duty and obligation not to transfer bankruptcy estate property to anyone but the trustee. Instead, the insurance company took purposeful action to settle the debtor's claim. Such action constituted a "willful" violation of the automatic stay.

Schnittjer v. Allied Props. & Cas. Ins. Co. (In re Huebbe)*, 2006 Bankr. LEXIS 2740 (Bankr. N.D. Iowa September 22, 2006) (Kilburg, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:542.04**

§ 548(a)(1)(B) Fraudulent Transfers and Obligations; Elements of Fraudulent Transfers; Avoidable Transfers; Transfers Presumed Fraudulent.

1106-096 **Duly noticed and conducted foreclosure sale for less than reasonable value was not a fraudulent transfer.** (*Bankr. W.D. Mich.)*

PROCEDURAL POSTURE: Defendant county treasurer foreclosed on debtor's property for non-payment of property taxes. The total consideration received was the outstanding tax obligation of $1,843.75. Debtor and the chapter 13 trustee filed an avoidance action under 11 U.S.C. § 548(a)(1)(B), claiming the value of the property was approximately $68,000, and thus the transfer by the treasurer constituted a fraudulent conveyance. The parties moved for summary judgment.

OVERVIEW: Debtor claimed that notices of the delinquent taxes were sent to her former husband who, at the time, was living at the home on the property. Her former husband failed to advise her of the potential forfeiture of the property for non-payment of the taxes. By the time debtor discovered the tax delinquency, a final judgment of foreclosure had been entered and the redemption period had expired. Under Sixth Circuit precedent, consideration received at a non-collusive, regularly conducted real estate foreclosure sale constituted a reasonable equivalent value under section 548(a)(2)(A). Per the Supreme Court, when a state's procedures were followed, the mere inadequacy of a foreclosure sale price was no basis for setting the sale aside. Here the county treasurer provided all notices required by Michigan law governing the foreclosure of property due to non-payment of taxes. Because the treasurer followed all procedural requirements, there were no due process violations, and no wrongful interference with

debtor's possessory interest. Both the treasurer and the person who purchased the foreclosed property obtained title by legal means, after following the notice provisions codified in the law.

***Fisher v. Moon (In re Fisher)**, 2006 Bankr. LEXIS 2704 (Bankr. W.D. Mich. October 4, 2006) (Stevenson, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:548.05**

§ 706(a) Conversion; By the Debtor.

1106-097 **Debtor could not convert chapter 7 case filed in one district court to a chapter 13 case filed in another district court.** (*7th Cir.)*

PROCEDURAL POSTURE: A chapter 13 debtor appealed after a Northern District of Illinois bankruptcy court denied his proposed chapter 13 plan and dismissed his bankruptcy case. The debtor sought further review after the District Court for the Northern District of Illinois affirmed the bankruptcy court's dismissal order and other interlocutory orders. The debtor raised error claims regarding the handling of his chapter 13 case.

OVERVIEW: The debtor filed a chapter 7 petition in New York after his brother, a judgment creditor, recorded a lien against a house that he owned. The chapter 7 petition was terminated after the New York bankruptcy court determined that the brother's judgment was a nondischargeable debt. The debtor filed the chapter 13 petition the next day. The Northern District of Illinois bankruptcy court denied the debtor's motion to "convert" his chapter 7 petition into his chapter 13 case pursuant to 11 U.S.C. § 706(a), rejected his proposed chapter 13 plan because it did not account for the brother's secured claim, and dismissed the chapter 13 case. The court found no error. The district court's judgment constituted a final, appealable order for 28 U.S.C. § 1291 purposes. All of the challenged orders were properly before it on appeal. The 11 U.S.C. § 706(a) conversion motion was properly denied because the chapter 7 petition was not before the Northern District of Illinois bankruptcy court; the chapter 7 petition had not been transferred to that forum pursuant to 28 U.S.C. § 1412. The Northern District of Illinois bankruptcy court did not abuse its discretion in making evidentiary rulings.

***In re Salem**, 2006 U.S. App. LEXIS 25288 (7th Cir. October 10, 2006) (Wood, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:706.02**

§ 707(b) Dismissal; Substantial Abuse Test.

1106-098 **Previously unemployed debtor spouse's post-petition employment was not grounds for dismissal for substantial abuse.** (*Bankr. W.D. La.)*

PROCEDURAL POSTURE: The United States Trustee filed a motion, pursuant to 11 U.S.C. § 707(b), to dismiss the debtors' chapter 7 bankruptcy case.

OVERVIEW: The debtor wife was unemployed for 12 months prior to the bankruptcy petition date but obtained employment 3 weeks postpetition. The trustee's motion to dismiss the chapter 7 case of the debtor husband and wife suggested that the facts after the meeting of creditors could be examined in determining whether the granting of relief was a substantial abuse under section 707(b). The court denied the motion, considering only the facts as of the date of filing in determining that substantial abuse did not exist. The court held that, based on the wife's unemployment and lack of income and the debtors' monthly expenses on the date of filing, the debtors did not have sufficient income to repay a significant portion of their debts through a chapter 13 plan. The court found no suggestion that the debtors manipulated the wife's employment opportunities to remain unemployed on the filing date because she had been actively seeking employment and had no inkling that the position she obtained postpetition was available or to become available.

***In re Huval**, 2006 Bankr. LEXIS 2670 (Bankr. W.D. La. June 21, 2006) (Schiff, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05**

§ 726(a)(6) Distribution of Property of the Estate; Order of Distribution; Debtor.

1106-099 **Debtor's motion to purchase cause of action from estate in closed case granted over objection of potential defendant.** (*Bankr. N.D. W. Va.)*

PROCEDURAL POSTURE: After bankruptcy debtors' case was closed, the debtors' former mortgagee filed an eviction action against the debtors and the debtors counterclaimed on the ground that the mortgagee engaged in improper debt collection activities. After the case was reopened, the trustee moved for leave to release the debtors' prepetition cause of action against the mortgagee to the debtors in exchange for a cash payment.

OVERVIEW: The debtors proposed to purchase the cause of action from the estate using funds obtained from a private loan which would fully satisfy the claims of creditors. The mortgagee asserted that assignment of the cause of action was against state public policy, that the amount offered by the debtors was insufficient to pay all claims in full, that the asset was subject to auction, and that the source of the funds was undisclosed. The bankruptcy court held that approval of the transfer of the cause of action to the debtors was warranted. The mortgagee lacked standing to challenge the assignment to which the mortgagee was not a party, and the transfer of the estate's interest in the debtor's claim back to the debtors did not implicate any state public policy. Further, an auction of the cause of action was unnecessary since allowed claims were less than the amount offered by the debtors and the debtors agreed to pay any amount necessary to pay all claims in full. Moreover, the source and terms of the postpetition loan to the debtors was irrelevant in their bankruptcy case, and the lender's security interest in any judgment obtained by the debtors violated no state public policy.

In re Brown*, 2006 Bankr. LEXIS 2761 (Bankr. N.D. W. Va. September 1, 2006) (Flatley, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:726.02[6]**

§ 727(a) Discharge; Grounds for Denial.

1106-100 **Bankruptcy court applied inappropriately restrictive standards in denying motion for compromise of objection to discharge.** (*N.D. Tex.)*

PROCEDURAL POSTURE: Plaintiff creditor appealed an order of the bankruptcy court denying the creditor's motion for approval of a proposed compromise between the creditor and defendant debtors.

OVERVIEW: The reason given by the bankruptcy court in the order denying the motion suggested that the bankruptcy court concluded that it had no authority to approve the proposed settlement solely because the only benefit to the bankruptcy estate and the other creditors would have been withdrawal of plaintiff creditor's claim against the estate. The instant court was concerned that the bankruptcy court took an inappropriately restrictive view of the circumstances when the bankruptcy court could, and should, approve settlement of an objection to a debtor's discharge brought pursuant to 11 U.S.C. § 727(a), whether or not joined with a claim pursuant to 11 U.S.C. § 523(a) challenging dischargeability of the debt. The instant court concluded that with the exception of certain questions mentioned relative to adequacy of notices and the possible need to clarify the terms of the settlement agreement, a showing of *prima facie* validity of plaintiff creditor's section 523 claim was all that should have been required for debtors and plaintiff creditor to gain approval of their settlement (assuming that no other creditor or the United States Trustee stepped in to prosecute the 11 U.S.C. § 727 claim).

William Cameron & Co. v. Gresham (In re Gresham)*, 2006 U.S. Dist. LEXIS 74286 (N.D. Tex. October 12, 2006) (McBryde, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.01**

§ 727(a)(2) Discharge; Grounds for Denial; Fraudulent Transfer or Concealment of Property.

1106-101 **Objection to discharge by debtor's mother who purchased note with proceeds of sale of her own residence, which was the collateral, overruled.** (*Bankr. M.D. Ga.)*

PROCEDURAL POSTURE: Plaintiff, the debtor-wife's mother, purchased the note of defendant debtors from a bank. She then filed a complaint objecting to discharge pursuant to 11 U.S.C. § 727(a)(2), (a)(3), (a)(4) and (a)(5).

OVERVIEW: A bank loaned the debtors money for their hair salon business, with the mother's home as collateral. The business failed, and the equipment and records were stored in various places, included the debtors' mobile home. The mobile home was repossessed and the debtor-wife was locked out. The debtors defaulted on the bank loan, and the mother sold her home to prevent foreclosure. She used the proceeds to buy the bank note, and the court found that there was no basis for limiting her rights as a creditor as she did not purchase the note to harass the debtors. There was no fraudulent transfer of property under 11 U.S.C. § 727(a)(2). The mobile home was repossessed following the breakup of the debtors' marriage, and they had nowhere else to store the equipment. The debtors' failure to preserve their records was justified under section 727(a)(3). The debtor-wife had no reason to believe that the storage locations were not safe. The inaccuracies on the schedules were the result of confusion, ignorance, and carelessness, not a knowing and fraudulent false oath under section 727(a)(4). The debtor-wife fully explained the loss of the assets; thus, the debt was not nondischargeable under section 727(a)(5).

***Luke v. Clegg (In re Clegg)**, 2006 Bankr. LEXIS 2735 (Bankr. M.D. Ga. October 2, 2006) (Walker, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.02**

§ 727(d) Discharge; Grounds for Revocation.

1106-102 **Discharge revoked due to debtor's nondisclosure of cause of action against mobile home manufacturer.** (*Bankr. W.D. La.)*

PROCEDURAL POSTURE: After an order of relief was entered on defendant debtors' petition for bankruptcy relief under chapter 7, plaintiff trustee filed a complaint seeking to revoke the debtors' discharge pursuant to 11 U.S.C. § 727(d)(1). The trustee moved for summary judgment.

OVERVIEW: In a previous ruling in a related case, the court had concluded that one debtor most certainly had an idea that he had some cause of action against a mobile home manufacturer for injuries he received due to a defect in a mobile home the debtors had purchased. Regardless of whether or not the debtor believed the cause of action was valid, he clearly had knowledge of the existence of some claim and had a duty to disclose that claim. Given that previous ruling and the evidence in that related case, the court was compelled to find that the debtors had obtained a discharge through fraud. Specifically, there was no genuine issue of material fact that the debtors knowingly failed to disclose the existence of their claim for damages against the mobile home manufacturer where immediately following the receipt of their discharge, they began pursuing that claim. Thus, the trustee was entitled to summary judgment.

***Young v. Broussard (In re Broussard)**, 2006 Bankr. LEXIS 2664 (Bankr. W.D. La. August 29, 2006) (Schiff, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.15**

§ 1325(b)(2) Confirmation of Plan; Objections; "Disposable Income" Defined.

1106-103 **Debtors and trustee ordered to repay sum improperly released by trustee for roof repairs and used by debtors' for gambling junkets.** (*Bankr. E.D. Ark.)*

PROCEDURAL POSTURE: After a chapter 13 trustee disbursed $10,000 to debtors allegedly to fund a roof repair on their home, the court issued an order to both the trustee and debtors to show cause why they should not be required to reimburse the estate for the entire sum. Debtors were also ordered to file an accounting showing how the funds were actually used.

OVERVIEW: In connection with a chapter 13 bankruptcy which culminated in the approval of their second modified plan, debtors asked for a "refund" of $9,094 from funds paid on a personal injury claim purportedly to fund the installation of a new roof. Based solely on an email from debtors' lawyer referring to a roof repair, the trustee disbursed $10,000. The court thereafter issued an order that both debtors and the trustee were to show cause why the estate should not be reimbursed. After a hearing, the court rejected, as meritless, claims that the sum was not disposable income that the trustee was entitled to disburse as support for debtors per 11 U.S.C. § 1325(b)(2). It also ruled that the plan did not allow a "refund," concluding that the plan language concerned emergencies and contemplated repayment. It also rejected a claim that disbursement was authorized by 11 U.S.C. § 1302(b)(4) because its terms did not vest discretion in the trustee to permanently divert funds. Finally, noting that debtors in fact used most of the money for gambling junkets and had perjured themselves by claiming otherwise, the court held that debtors and the trustee were liable to repay the entire sum.

***Morgan v. Goldman (In re Morgan)**, 2006 Bankr. LEXIS 2676 (Bankr. E.D. Ark. October 3, 2006) (Mixon, B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08[4]**

28 U.S.C. (Pre-2005 Act)

§ 1334 Bankruptcy Cases and Proceedings.

1106-104 **Bankruptcy court lacked subject matter jurisdiction over claims to escrowe funds that were abandoned by trustee.** (*Bankr. E.D. Pa.)*

PROCEDURAL POSTURE: Plaintiff bank filed a complaint seeking a declaratory judgment upholding the bank's mortgage lien and invalidating defendant creditors' judgment lien on defendant debtors' realty.

OVERVIEW: The trustee sold and abandoned the bankruptcy estate's interest in the debtors' realty pursuant to a settlement agreement with the bank and judgment creditors. The bank filed a complaint for declaratory relief, contending that its mortgage lien was entitled to priority over the creditors' judgment lien and, thus, that it was entitled to the net proceeds of sale held in escrow. The court lacked subject matter jurisdiction because the trustee abandoned all interest in those escrowed funds and, thus, they were not property of the estate. It was outside the jurisdiction of the court to issue a declaration of the interests of two competing secured creditors to abandoned, non-estate property. The court found that the outcome of the dispute would not affect the administration of the chapter 7 case by the trustee and, thus, was not a related proceeding under 28 U.S.C. § 1334 because the identity of the creditor whose secured claim was diminished by the amount of escrowed funds did not matter to the trustee.

***IndyMac Bank v. Kogan (In re Kogan)**, 2006 Bankr. LEXIS 2787 (Bankr. E.D. Pa. May 26, 2006) (Fox, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 1:3.01**

§ 1334(c)(2) Bankruptcy Cases and Proceedings; Abstention; Mandatory Abstention.

1106-105 **Bankruptcy court should have abstained from hearing claims under state wage payment and collection law.** (*W.D. Pa.)*

PROCEDURAL POSTURE: The Third Circuit reversed the instant court's previous opinion and order denying plaintiff's motion to abstain under 28 U.S.C. § 1334 and remanded the action for further consideration. The Third Circuit directed the instant court to consider whether, under section 1334(c)(2), the proceeding on plaintiff's state claim could be timely adjudicated in a state forum of appropriate jurisdiction.

OVERVIEW: As movant, plaintiff had the burden of demonstrating that his claims could be timely adjudicated in state court. After careful consideration, the court found that plaintiff discharged that burden. As to the "needs" of the Title 11 case, plaintiff provided transcript excerpts from the bankruptcy proceeding indicating that the bankruptcy judge concluded that plaintiff's claims under Pennsylvania's Wage Payment and Collection Law, 43 Pa. Stat. Ann. §§ 2601 et seq., would not impact the bankruptcy proceeding. The court found the bankruptcy judge's ruling in this regard persuasive on the issue of whether the "needs" of the Title 11 case would be better served if abstention were denied. Clearly, the bankruptcy court was not concerned with the length of time it would take to adjudicate plaintiff's claims. In the event that a state court proceeding did not resolve before the bankruptcy proceeding concluded, defendants would be protected by a provision in the reorganization plan which governed distribution after allowance. Accordingly, this factor weighed more heavily in favor of mandatory abstention. The court found that defendants' "needs" did not merit a denial of abstention.

***Stoe v. Flaherty**, 2006 U.S. Dist. LEXIS 73985 (W.D. Pa. October 11, 2006) (Ambrose, C.D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 1:3.05**