January 2007

Collier Bankruptcy Case Update

CURRENT BANKRUPTCY CASES ANALYZED

January 2, 2007 Issue 1

Cases of Particular Interest in This Issue

Debtor's former attorney ordered to disgorge fees due to failure to comply with BAPCPA provisions for Bankruptcy Truthfulness Notice or fee agreements.
In re Gutierrez (Bankr. N.D. Cal. December 1, 2006) **0107-004**

BAPCPA provision violates First Amendment rights by barring truthful as well as false and deceptive advertising.
Milavetz, Gallop & Milavetz PA v. United States (D. Minn. December 7, 2006) **0107-005**

Vehicles purchased for personal use were treated as fully secured despite partial use to transport foster children.
In re Wilson (Bankr. D. Kan. December 5, 2006) **0107-007**

Corporation's aiding and abetting fraud by lender did not justify equitable subordination of its claims in lender's bankruptcy.
Henry v. Lehman Comm'l Paper, Inc. (In re First Alliance Mortgage Co.) (9th Cir. December 8, 2006) **0107-013**

For the latest bankruptcy news, click on the links below
Bankruptcy Practice Area Page at lexis.com

LexisNexis

QUESTIONS OR COMMENTS ABOUT THIS PUBLICATION?

For questions about the Editorial Content appearing in this publication or reprint permission, please call:
Jeffrey Canning, Esq. ..... 1-800-252-9257 (ext. 2243)
Julia Steele Reid ..... 1-800-252-9257 (ext. 2579)
or e-mail us at ..... CollierCaseUpdate@lexisnexis.com

For assistance with subscriptions, shipments, billing or other customer service matters, please call:
Your account manager or 1-800-833-9844
Outside the United States and Canada, please call 518-487-3000

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks, and Michie is a trademark of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc. Collier on Bankruptcy is a registered trademark of Matthew Bender & Company, Inc.

Copyright © 2007 Matthew Bender & Company, Inc., a Member of the LexisNexis Group. All rights reserved.

No copyright is claimed in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material exceeding fair use, 17 U.S.C. § 107, may be licensed for a fee of $1 per page per copy from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, MA 01923, telephone (978) 750-8400.

For more information, click on this link to visit the **LexisNexis™ Bookstore**.

For more information on ***Collier on Bankruptcy***, click on the banner below.

The most trusted name in bankruptcy law research –
Collier on Bankruptcy®
Available exclusively from LexisNexis™

POST-2005 ACT CASES IN THIS ISSUE

7th Circuit

§ 362(c)(3)(B) Chapter 13 debtors' motion to impose stay as to all creditors denied as untimely and due to failure to rebut presumption of bad faith.
In re Garrett (*Bankr. C.D. Ill. December 7, 2006*)..... 0107-001

8th Circuit

§ 362(d) Stay in debtor's third chapter 13 case annulled to allow validation of foreclosure sale held during pendency of debtor's second case.
In re Campbell (*Bankr. W.D. Mo. December 11, 2006*)..... 0107-002

§ 526 BAPCPA provision requiring "debt relief agencies" to give advice favoring creditors over debtor clients violated duty of loyalty as applied to attorneys.
Milavetz, Gallop & Milavetz PA v. United States (*D. Minn. December 7, 2006*)..... 0107-003

§ 528 BAPCPA provision violates First Amendment rights by barring truthful as well as false and deceptive advertising.
Milavetz, Gallop & Milavetz PA v. United States (*D. Minn. December 7, 2006*)..... 0107-005

9th Circuit

§ 526(c) Debtor's former attorney ordered to disgorge fees due to failure to comply with BAPCPA provisions for Bankruptcy Truthfulness Notice or fee agreements.
In re Gutierrez (*Bankr. N.D. Cal. December 1, 2006*)..... 0107-004

§ 707(b)(3)(A) Case dismissed with prejudiceand 180-day filing bar due to debtor's willful and intentional abusive and fraudulent credit usage prior to filing.
In re Mitchell (*Bankr. C.D. Cal. December 5, 2006*) 0107-006

10th Circuit

§ 1325(a) Vehicles purchased for personal use were treated as fully secured despite partial use to transport foster children.
In re Wilson (*Bankr. D. Kan. December 5, 2006*)..... 0107-007

PRE-2005 ACT CASES IN THIS ISSUE

1st Circuit

§ 522(f) Voluntary sale of exempt homestead did not remove proceeds from protection of original exemption.
Pasquina v. Cunningham (In re Cunningham) (*D. Mass. November 28, 2006*) 0107-014

Rule 1009(a) Debtor could not amend schedules to claim exemptions for property that had been intentionally concealed.
In re Harris (*Bankr. D.N.H. December 1, 2006*)..... 0107-034

2d Circuit

§ 304 Creditor's objections to enforcement of Argentine court's order barred by *res judicata*.
Argo Fund Ltd. v. Board of Directors of Telecom Arg. (In re Board of Directors of Telecom Arg.)
(*S.D.N.Y. November 20, 2006*) 0107-008

§ 1109(b) Investors were not parties in interest and lacked standing to object to settlement between investment fund and creditors' committee.
Masonic Hall & Asylum Fund v. Official Comm. of Unsecured Creditors (In re Refco, Inc.) (*S.D.N.Y. November 26, 2006*) 0107-026

§ 1126(e) Court refused to designate creditors' votes for confirmation on grounds of bad faith absent highly egregious conduct.
In re Adelphia Communs. Corp. (*Bankr. S.D.N.Y. December 11, 2006*)..... 0107-027

28 U.S.C. § 157(d) Motion for withdrawal of preference proceeding in which creditor was entitled to jury trial denied without prejudice to renewal at time of trial.
Napolitano v. Hourigan (In re R.J. Patton Co.) (*D. Conn. November 30, 2006*)..... 0107-028

28 U.S.C. § 1334(b) Bankruptcy court lacked subject matter jurisdiction over proceeding for breach of arbitration agreement that would have no conceivable effect on bankruptcy.
Tower Automotive Mexico v. Grupo Proeza (In re Tower Auto, Inc.) (*Bankr. S.D.N.Y. December 7, 2006*)..... 0107-032

3d Circuit

§ 541(c)(2) Annuities with none of the indicia of a trust were properly ruled property of the estate.
Hill v. Dobin (*D.N.J. December 4, 2006*)..... 0107-020

28 U.S.C. § 157(d) Reference withdrawn as to adversary proceeding claiming predatory lending practices that could be consolidated with similar civil suit stayed by bankruptcy filing.
Davis v. Deutsche Bank Nat'l Trust Co. (In re Davis) (*E.D. Pa. November 20, 2006*)..... 0107-029

4th Circuit

§ 330 Contemporaneous time records were not required for lodestar analysis of supplemental attorneys' fee applications.
Boleman Law Firm, PC v. United States (*E.D. Va. November 28, 2006*)..... 0107-009

28 U.S.C. § 1334(b) Trespass action by park authority against debtor for unauthorized use of fiber optic utility line was not related to bankruptcy.
Northern Va. Reg'l Park Auth. v. Virginia Elec. & Power Co. (In re Elantic Telecom) (*E.D. Va. November 22, 2006*)..... 0107-031

5th Circuit

28 U.S.C. § 1334(b) Cause of action for postpetition breach of contract did not arise under Title 11.
Conmaco/Reactor LP v. Shaw & Sons Equip. Rental, Inc. (*E.D. La. November 27, 2006*) 0107-030

6th Circuit

§ 363(b)(1) Debtor's remainder interest in real property which merged with life interest postpetition was a fee simple interest fully subject to sale by trustee.
In re Oglesby (*Bankr. W.D. Ky. December 6, 2006*)..... 0107-011

§ 553 Payments withheld by creditor for debtor's telephone services were not avoidable to the extent they consituted a setoff for overcharges.
Jahn v. U.S. Xpress, Inc. (In re Transcommunications Inc.) (*Bankr. E.D. Tenn. December 4, 2006*) 0107-022

§ 727(a)(2)(A) Discharge denied due to attorney debtor's deliberate concealment and misrepresentations.
Pinnacle Tech. Res., Inc. v. Spencer (In re Spencer) (*B.A.P. 6th Cir. December 8, 2006*)..... 0107-024

28 U.S.C. § 1412 Bankruptcy cases brought in improper venue must be either dismissed or transferred to a venue where the case could have been properly brought.
MacDonald v. Greenwood (In re MacDonald) (*W.D. Tenn. October 31, 2006*)..... 0107-033

Rule 9006(b)(1) Change in management of creditor's legal department did not establish excusable negect to allow filing of claim two years after bar date.
In re Jillian's Entertainment Holdings, Inc. (*Bankr. W.D. Ky. November 30, 2006*)..... 0107-035

7th Circuit

§ 506(c) Former chapter 11 trustee's counsel was not entitled to surcharge for services provided to perserve collateral prior to conversion to chapter 7.
Ungaretti & Harris, LLP v. Steinberg (In re Resource Tech. Corp.) (*Bankr. N.D. Ill. December 4, 2006*)..... 0107-012

§ 523(a) Default judgment for fraud and embezzlement by debtor in construction of creditor's house was dischargeable.
Cripe v. Mathis (In re Mathis) (*Bankr. C.D. Ill. December 6, 2006*)..... 0107-015

8th Circuit

§ 523(a)(4) Portion of debt owed by highway construction company to insurer under completion bond was nondischargeable on grounds of defalcation.
International Fidelity Ins. Co. v. Fox (In re Fox) (*Bankr. E.D. Ark. December 8, 2006*) 0107-016

§ 541(a)(1) Debtor's alienation of affection claim against former spouse was property of the estate and could not be set off against nondischargeable divorce decree obligations.
Jones v. Jones (In re Jones) (*Bankr. D.S.D. December 1, 2006*)..... 0107-018

9th Circuit

§ 362(b) Denial of parking permit and vehicle registration due to unpaid prepetition parking citations was within police powers exception to stay.
In re Thomas (*N.D. Cal. November 13, 2006*)..... 0107-010

§ 510(c) Corporation's aiding and abetting fraud by lender did not justify equitable subordination of its claims in lender's bankruptcy.
Henry v. Lehman Comm'l Paper, Inc. (In re First Alliance Mortgage Co.) (*9th Cir. December 8, 2006*)..... 0107-013

§ 541(a)(1) Unearned portion of debtor's attorney's retainer became property of the estate upon filing.
In re Hill (*Bankr. D. Or. November 30, 2006*)..... 0107-019

§ 727(a) Discharge denied due to debtor's concealment of proceeds of sale of home from creditors.
Locke v. Perpinan (In re Perpinan) (*Bankr. N.D. Cal. December 4, 2006*)..... 0107-023

10th Circuit

§ 523(a)(5) Award of former spouse's attorneys' fees in post-dissolution custody proceeding was in the nature of support and nondischargeable.
Blond v. Marsh (In re Marsh) (*Bankr. D. Kan. December 4, 2006*) 0107-017

§ 727(a)(4) False statements and omissions by elderly debtor due to confusion and poor memory were not grounds for denial of discharge.
United States Trustee v. Keck (In re Keck) (*Bankr. D. Kan. December 4, 2006*)..... 0107-025

11th Circuit

§ 542 Debtor's cause of action for turnover of standby letter of credit proceeds was property of the estate.
Two Trees v. Builders Transp., Inc. (In re Builders Transp., Inc.) (*11th Cir. December 5, 2006*) 0107-021

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

§ 362(c)(3)(B) Automatic Stay; Duration; Cases Refiled Within One Year of Dismissal of Single Prior Case; Extension.

0107-001 **Chapter 13 debtors' motion to impose stay as to all creditors denied as untimely and due to failure to rebut presumption of bad faith.** (*Bankr. C.D. Ill.)*

PROCEDURAL POSTURE: The debtors filed a motion for an order imposing the stay as to all creditors pursuant to 11 U.S.C. § 362(c)(3)(B). Creditor, which held a first and second mortgage on the debtors' residence, filed an objection (objecting creditor).

OVERVIEW: The court first noted that the debtors motion was not timely because the instant hearing had been schedule after the expiration of the 30-day period in 11 U.S.C. § 362(c)(3)(B). The court rejected the debtors' contention that the court could not use its equitable powers under 11 U.S.C. § 105 to impose the stay and circumvent the clear language of 11 U.S.C. § 362(c)(3)(B). Even had the court not found that the automatic stay terminated by operation of law, it would have been unable to find that the debtors had met their burden to establish that the instant chapter 13 bankruptcy case was filed in good faith. In an attempt to rebut the presumption of bad faith, the debtors argued that their chapter 13 plan in the instant case was confirmed without objection and that, as such, the objecting creditor was bound by the plan. However, the confirmed plan was not dispositive of the automatic stay issue. There was nothing in the confirmation order which addressed the continuation or termination of the automatic stay as to the objecting creditor. The fact that the debtors were better able to fund their instant chapter 13 plan also did not rebut the presumption of bad faith.

In re Garrett*, 2006 Bankr. LEXIS 3312 (Bankr. C.D. Ill. December 7, 2006) (Fines, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.06[3]**

§ 362(d) Automatic Stay; Relief from Stay.

0107-002 **Stay in debtor's third chapter 13 case annulled to allow validation of foreclosure sale held during pendency of debtor's second case.** (*Bankr. W.D. Mo.)*

PROCEDURAL POSTURE: Creditor filed a motion to annul the automatic stay and validate a foreclosure sale held during the pendency of a previous chapter 13 proceeding by the debtor.

OVERVIEW: The court first rejected the debtor's argument that because the trustee had already exercised its power of sale under the deed of trust at the first foreclosure sale, that, although the first sale was void, the trustee had exhausted its power of sale and could not conduct a second foreclosure sale. The court then found that there was cause to annul the stay and ratify the second foreclosure sale. The creditor had neither notice nor knowledge of the filing of the second bankruptcy case at the time the sale was conducted. The debtor's conduct, both in the instant case and the prior two chapter 13 filings, evidenced a lack of good faith. Each of the debtor's prior cases was filed on the eve of a foreclosure sale and for the specific purpose of preventing those sales. Each case was dismissed as a result of the debtor's failure to comply with the appropriate Bankruptcy Rules. There apparently was no equity in the property. Although the court had no information to consider the necessity of the property to an effective reorganization because of the debtor's failure to provide such information, the court noted that there was serious doubt as to whether he could effectively reorganize.

In re Campbell*, 2006 Bankr. LEXIS 3353 (Bankr. W.D. Mo. December 11, 2006) (Dow, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.07**

§ 526 Restrictions on Debtor Relief Agencies.

0107-003 **BAPCPA provision requiring "debt relief agencies" to give advice favoring creditors over debtor clients violated duty of loyalty as applied to attorneys.** (*D. Minn.)*

PROCEDURAL POSTURE: Plaintiffs, practicing bankruptcy attorneys, sought an order declaring portions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") that restricted and compelled speech on the part of debt relief agencies unconstitutional as violative of the First Amendment, at least as applied to attorneys. Defendant United States moved to dismiss the claim for failure to state a claim upon which relief can be granted.

OVERVIEW: The attorneys' attack on the statute alleged that the BAPCPA's debt relief agency provisions were unconstitutional as applied to them, because the BAPCPA impermissibly regulated the attorneys' advice to prospective debtor clients. The United States took the position that the BAPCPA restrictions applied to attorneys. First Amendment jurisprudence dictated that the claim that a law had a potential chilling effect on speech established standing. A lawyer's highest duty was to a client, and advice that a counselor was required to give that benefitted creditors over the debtor, under 11 U.S.C. § 526(a)(4) could cause the attorney to violate the duty of loyalty. The court also found that 11 U.S.C. § 528 violated the attorneys' First Amendment rights. That section required "debt relief agencies," to include particular language in their advertisements. Congress thus struck down truthful, as well as false or deceptive, advertising, and would create consumer confusion. The term "debt relief agency" was a legislative contrivance, and did not expressly exclude lawyers. As applied to attorneys, the BAPCPA failed constitutional scrutiny.

Milavetz, Gallop & Milavetz PA v. United States*, 2006 U.S. Dist. LEXIS 88785 (D. Minn. December 7, 2006) (Rosenbaum, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:526.01**

§ 526(c) Restrictions on Debtor Relief Agencies; Failure to Comply.

0107-004 **Debtor's former attorney ordered to disgorge fees due to failure to comply with BAPCPA provisions for Bankruptcy Truthfulness Notice or fee agreements.** (*Bankr. N.D. Cal.)*

PROCEDURAL POSTURE: Chapter 7 debtor filed a motion, seeking an order compelling his former bankruptcy attorney to disgorge pursuant to 11 U.S.C. § 526(c) all monies received in connection with his representation of debtor.

OVERVIEW: Debtor's attorney was paid $700 for his legal services by a legal services group through a plan provided by the employer of debtor's wife. Debtor contended that the attorney did not give him a Bankruptcy Truthfulness Notice before he signed the bankruptcy petition and that the attorney did not execute a written contract with him at all, let alone one that complied with 11 U.S.C. § 528(a)(1). The court held that the attorney clearly violated 11 U.S.C. § 527(a)(2) by failing to provide debtor with the Notice. The court also held that the attorney did not comply with the requirements of 11 U.S.C. § 528 (a)(1) or (2) because the attorney did not execute any agreement with debtor describing the services he would provide and the fees or charges for such services. The court held that the attorney acted negligently because he appeared to have made little or no attempt to determine what new obligations were imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 or to comply with them. The court ordered disgorgement of the $700 and payment of debtor's reasonable attorney's fees incurred in connection with the motion to disgorge.

In re Gutierrez*, 2006 Bankr. LEXIS 3355 (Bankr. N.D. Cal. December 1, 2006) (Tchaikovsky, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:526.04**

§ 528 Requirements For Debt Relief Agencies.

0107-005 **BAPCPA provision violates First Amendment rights by barring truthful as well as false and deceptive advertising.** (*D. Minn.)*

PROCEDURAL POSTURE: Plaintiffs, practicing bankruptcy attorneys, sought an order declaring portions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") that restricted and compelled speech on the part of debt relief agencies unconstitutional as violative of the First Amendment, at least as applied to attorneys. Defendant United States moved to dismiss the claim for failure to state a claim upon which relief can be granted.

OVERVIEW: The attorneys' attack on the statute alleged that the BAPCPA's debt relief agency provisions were unconstitutional as applied to them, because the BAPCPA impermissibly regulated the attorneys' advice to prospective debtor clients. The United States took the position that the BAPCPA restrictions applied to attorneys. First Amendment jurisprudence dictated that the claim that a law had a potential chilling effect on speech established standing. A lawyer's highest duty was to a client, and advice that a counselor was required to give that benefitted creditors over the debtor, under 11 U.S.C. § 526(a)(4) could cause the attorney to violate the duty of loyalty. The court also found that 11 U.S.C. § 528 violated the attorneys' First Amendment rights. That section required "debt relief agencies," to include particular language in their advertisements. Congress thus struck down truthful, as well as false or deceptive, advertising, and would create consumer confusion. The term "debt relief agency" was a legislative contrivance, and did not expressly exclude lawyers. As applied to attorneys, the BAPCPA failed constitutional scrutiny.

Milavetz, Gallop & Milavetz PA v. United States*, 2006 U.S. Dist. LEXIS 88785 (D. Minn. December 7, 2006) (Rosenbaum, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:528.01**

§ 707(b)(3)(A) Dismissal of a Case or Conversion to a Case Under Chapter 11 or 13; Substantial Abuse; Considerations When Presumption Does Not Apply; Bad Faith.

0107-006 **Case dismissed with prejudiceand 180-day filing bar due to debtor's willful and intentional abusive and fraudulent credit usage prior to filing.** (*Bankr. C.D. Cal.)*

PROCEDURAL POSTURE: The United States Trustee filed a motion to dismiss debtor's chapter 7 case with prejudice pursuant to 11 U.S.C. § 707(b)(3)(A) and contingent motion to extend bar date for filing complaint under 11 U.S.C. § 727 objecting to debtor's discharge (the Motion).

OVERVIEW: In the Motion, the trustee argued that the chapter 7 case filed by debtor should be dismissed because debtor filed her bankruptcy petition in bad faith, having willfully and intentionally engaged in abusive and fraudulent credit usage leading up to her bankruptcy filing. Debtor opposed the Motion and raised several evidentiary objections, challenging the admissibility of various statements made in the declarations of the Bankruptcy Analyst. Each of these objections was without merit. Having determined that it was supported by competent evidence, the court turned to the merits of the Motion. It found that there was sufficient evidence of bad faith to warrant dismissal of debtor's case under 11 U.S.C. § 707(b)(3)(A). Granting her relief would have been an abuse of the provisions of chapter 7. Debtor was seeking more than a fresh start. She was seeking in impermissible head start at the expense of her creditors. Furthermore, the court concluded that filing one chapter 7 petition in bad faith was sufficient cause under 11 U.S.C. § 349 to impose a 180-day bar against refiling another chapter 7 petition.

In re Mitchell*, 2006 Bankr. LEXIS 3343 (Bankr. C.D. Cal. December 5, 2006) (Robles, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[3]**

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

0107-007 **Vehicles purchased for personal use were treated as fully secured despite partial use to transport foster children.** (*Bankr. D. Kan.)*

PROCEDURAL POSTURE: Bankruptcy debtors proposed a chapter 13 plan which provided for payment of the value of vehicles which secured debts, rather than the full amounts of the debts, but the creditors which financed the vehicles asserted that they were entitled to the full amounts of the debts under the hanging paragraph in 11 U.S.C. § 1325(a), because the debtors purchased the vehicles for personal use. The creditors objected to plan confirmation.

OVERVIEW: The debtors contended that they purchased the vehicles with large seating capacities to transport children in the course of the debtors' business of child fostering, and thus they were required to pay the creditors' secured claims only to the extent of the current value of the vehicles. The creditors argued that the debtors obtained the vehicles for personal use which rendered the full amount of the debts secured under section 1325(a). The bankruptcy court held that, while the vehicles were purchased at least in part to assist the debtors as foster parents, the debtors' use of the vehicles for personal reasons was significant and material, and thus the debtors were required to account for the full amounts of the debts as secured in their plan. Although the debtors used the large capacity vehicles for functions such as transporting the foster children to school and appointments, the debtors also used the vehicles for personal shopping and the debtors' own appointments, and the financing contracts expressly indicated that the vehicles were purchased for personal rather than business use.

In re Wilson*, 2006 Bankr. LEXIS 3325 (Bankr. D. Kan. December 5, 2006) (Karlin, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.**

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

§ 304 Cases Ancillary to Foreign Proceedings.

0107-008 **Creditor's objections to enforcement of Argentine court's order barred by *res judicata*.** (*S.D.N.Y.)*

PROCEDURAL POSTURE: Appellee debtor filed an action pursuant to 11 U.S.C. § 304, seeking approval and enforcement of an *acuerdo preventivo extrajudicial* ("APE") that had been approved by an Argentine court. Appellant creditor appealed from an order of the Bankruptcy Court for the Southern District of New York, which confirmed the debtor's petition.

OVERVIEW: After notice to creditors, an Argentine court approved an APE, which had been approved by a requisite number of creditors and bound non-consenting parties to a restructuring agreement. Faced with only one remaining objector, the creditor in the instant case, the debtor sought confirmation of the APE. The creditor argued that *res judicata* should not have barred consideration of its objections and that the policies underlying comity should have precluded recognition of the Argentine court's order. On appeal, the court held that *res judicata* barred the creditor from raising objections based on liquidation value for the first time in the bankruptcy court because the creditor had notice of the Argentine confirmation proceedings, the creditor could have raised such objections in the Argentine proceedings, and the creditor chose not to raise objections in the Argentine confirmation proceedings. The bankruptcy court did not abuse its discretion in granting comity to the Argentine order because 11 U.S.C. § 304 did not conflict with the Trust Indenture Act, 15 U.S.C. § 77ppp(b), and the lack of a best interests of creditors test did not preclude affording comity to the APE order.

Argo Fund Ltd. v. Board of Directors of Telecom Arg. (In re Board of Directors of Telecom Arg.)*, 2006 U.S. Dist. LEXIS 85274 (S.D.N.Y. November 20, 2006) (Buchwald, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:304.01**

§ 330 Compensation of Officers.

0107-009 **Contemporaneous time records were not required for lodestar analysis of supplemental attorneys' fee applications.** (*E.D. Va.)*

PROCEDURAL POSTURE: Appellant law firm appealed the bankruptcy court's order denying the firm's request for supplemental fees and costs.

OVERVIEW: The bankruptcy court concluded that the minimums utilized by the firm were little more than estimates in disguise and held that actual contemporaneous time records were required when submitting supplemental fee applications. On that basis, the bankruptcy court denied all eleven of the firm's supplemental fee applications. The firm assigned error to the bankruptcy court's: (i) denial of its motion to quash/overrule omnibus objection; (ii) disallowance of proffered expert testimony; (iii) holding that traditional contemporaneous time records must be present before the lodestar analysis could begin; and, (iv) denial of its supplemental fee applications. Considering that the ultimate responsibility to review fee applications was with the court, the bankruptcy court did not err in denying the firm's motion to quash. The bankruptcy court did not abuse its discretion when it determined that the expert's testimony would not be helpful since he lacked chapter 13 area expertise. Unavailability of traditional time records did not preclude further analysis – especially when, as in this case, it was undisputed that the work for which compensation was sought was performed.

Boleman Law Firm, PC v. United States*, 2006 U.S. Dist. LEXIS 86534 (E.D. Va. November 28, 2006) (Spencer, C.D.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 3:330.01**

§ 362(b) Automatic Stay; Exceptions.

0107-010 **Denial of parking permit and vehicle registration due to unpaid prepetition parking citations was within police powers exception to stay.** (*N.D. Cal.)*

PROCEDURAL POSTURE: Appellant, a chapter 13 debtor, sought review of an order from the bankruptcy court denying his motion for damages against appellees, a City's department of parking and traffic, the California Department of Motor Vehicles ("DMV"), and the California Franchise Tax Board ("FTB"), for alleged violations of the automatic stay under 11 U.S.C. § 362.

OVERVIEW: The debtor argued that appellees violated the automatic stay provisions of section 362(a) by denying him a residential parking permit and annual vehicle registration on account of unpaid, dischargeable, prepetition parking citations and by sending him postpetition collection notices. The court held that the bankruptcy court properly found that appellees' actions fell within the exceptions under section 362(b)(3) and (4). The actions fell within the police powers exception because appellees were not acting to further a narrow pecuniary interest but rather were acting in furtherance of legitimate police powers by enforcing parking and traffic laws that affected public health and safety. The lien exception applied because the DMV's postpetition refusal to register the debtor's vehicle, the City's issuance of tickets for failure to have a valid registration, and the FTB's demand for payment were efforts to maintain and continue the lien on the debtor's vehicle which arose under Cal. Veh. Code § 9800(a)(5). As to the debtor's 11 U.S.C. § 525(a) discrimination claim, the court found that it would benefit from the bankruptcy court's determination in the first instance as to whether section 525(a) applied.

In re Thomas*, 2006 U.S. Dist. LEXIS 86295 (N.D. Cal. November 13, 2006) (Armstrong, D.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 3:362.05**

§ 363(b)(1) Use, Sale, or Lease of Property; Notice and Hearing; Not in the Ordinary Course of Business.

0107-011 **Debtor's remainder interest in real property which merged with life interest postpetition was a fee simple interest fully subject to sale by trustee.** (*Bankr. W.D. Ky.)*

PROCEDURAL POSTURE: A chapter 7 trustee filed a petition to sell certain real property of a debtor's estate under 11 U.S.C. § 363(b)(1) and to employ a professional to conduct the auction of the property.

OVERVIEW: At the time the debtor filed her bankruptcy petition, she possessed a remainder interest in certain real property given to her by her parents. She contended that because her interest in the property

was only a remainder interest at the time of the filing, there would be no benefit to the estate in selling it because the value of the remainder interest was below her exemption amount pursuant to 11 U.S.C. § 522(d)(1). The court authorized the trustee to employ an auctioneer and to sell the property, holding that the trustee stood in the shoes of the debtor until the property ceased being property of the estate. With the passing of the debtor's father after the bankruptcy filing, her remainder interest merged with the life estate, granting the debtor a fee simple interest that was fully subject to sale. The debtor's property underwent a change in character, thereby increasing in value, and this increase was available to the trustee to be used to satisfy the bankruptcy estate, notwithstanding the debtor's original valuation of the property or any claim of exemption.

In re Oglesby, *2006 Bankr. LEXIS 3345 (Bankr. W.D. Ky. December 6, 2006) (Stosberg, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:363.02**

§ 506(c) Determination of Secured Status; Trustee's Costs and Expenses.

0107-012 **Former chapter 11 trustee's counsel was not entitled to surcharge for services provided to perserve collateral prior to conversion to chapter 7.** (*Bankr. N.D. Ill.)*

PROCEDURAL POSTURE: After conversion of a debtor's bankruptcy case from chapter 11 to chapter 7, plaintiff counsel to the former chapter 11 trustee, brought an adversary proceeding against defendant chapter 7 trustee in the converted case, claiming entitlement to payment for counsel's services from funds obtained in a prior settlement. The trustee moved for approval of a settlement which would provide a cash payment to counsel.

OVERVIEW: Counsel asserted that it provided services to preserve collateral of secured creditors, which created a surcharge against the collateral under 11 U.S.C. § 506(c), and that payment was due from funds obtained by the chapter 7 trustee in a settlement of claims against the secured creditors. The bankruptcy court held, however, that the settlement was not in the best interest of the bankruptcy estate since the likely outcome of litigating counsel's claims was that the estate rather than counsel would receive a net recovery. Interim payments to counsel were made without court authorization and, in any event, chapter 7 administrative expenses would exhaust the estate's cash; thus, for either reason the prior payments to counsel were subject to disgorgement. Further, a surcharge against collateral under section 506(c) was only allowable at the instance of the trustee, and any recovery of the surcharge by the trustee was solely for the benefit of the estate. Also, the trustee's recovery from the secured creditors was not subject to a constructive trust in the absence of any wrongdoing by the trustee, and quantum meruit did not apply in view of counsel's express contract with the trustee.

Ungaretti & Harris, LLP v. Steinberg (In re Resource Tech. Corp.), *2006 Bankr. LEXIS 3250 (Bankr. N.D. Ill. December 4, 2006) (Wedoff, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:506.05**

§ 510(c) Subordination; Equitable Subordination.

0107-013 **Corporation's aiding and abetting fraud by lender did not justify equitable subordination of its claims in lender's bankruptcy.** (*9th Cir.)*

PROCEDURAL POSTURE: In two consolidated actions, the District Court for the Central District of California found defendant corporation liable under California tort law to a class of borrowers for aiding and abetting fraud, and in a bankruptcy trustee's action, the district judge concluded that the corporation's conduct pursuant to its relationship with the bankrupt company did not warrant relief under the equitable principles of bankruptcy laws.

OVERVIEW: The debtor was driven into bankruptcy and subsequent liquidation by justified allegations of fraudulent lending practices. The demise of the debtor led to the two actions against the corporation that grew out of the corporation's activity as a lender to the debtor and as the underwriter of the debtor's securitized debt. One action was a class action on behalf of the debtor's borrowers that sought to impose liability for aiding and abetting the fraudulent scheme. The other brought by the trustee sought to set aside payments the corporation received in the course of its financing relationship with the debtor and to subordinate the corporation's secured claims. The appellate court affirmed the holdings of the district court imposing liability on the corporation for aiding and abetting a class-wide fraud perpetrated by the debtor, and rejected the borrowers' claims for relief in the form of equitable and punitive remedies, as

well as the trustee's claims for equitable relief under the Bankruptcy Code. The appellate court vacated the damages verdict and remanded for further proceedings on the proper calculation of out-of-pocket damages caused by the debtor's fraudulent lending scheme.

Henry v. Lehman Comm'l Paper, Inc. (In re First Alliance Mortgage Co.), *2006 U.S. App. LEXIS 30108 (9th Cir. December 8, 2006) (Clifton, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:510.05**

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

0107-014 **Voluntary sale of exempt homestead did not remove proceeds from protection of original exemption.** (*D. Mass.)*

PROCEDURAL POSTURE: Appellant individual was owed a prepetition non-dischargeable debt by appellee debtor and sought to satisfy it against the proceeds from the sale of the debtor's home. The Bankruptcy Court confirmed that proceeds from the sale of debtor's home were exempt from the individual's prepetition debt. The individual appealed.

OVERVIEW: The debtor claimed a homestead exemption under Massachusetts law in his home. He then filed for bankruptcy. After the allowance of the homestead exemption by the bankruptcy court, he moved to a Florida vacation property that was held in the name of his wife, sold the Massachusetts property, and kept the proceeds. The issue presented on appeal was whether proceeds realized by the debtor from the postpetition, voluntary sale of his home, in which he had an "estate of homestead" under state law, and for which he claimed and received an exemption in the bankruptcy proceedings, were liable for a prepetition, non-dischargeable debt. The individual contended that Massachusetts law governed whether the proceeds were exempt, and that the Massachusetts Homestead Act should have been construed so that the exemption ended upon the voluntary sale of the homesteaded property. The court found that postpetition conduct, including the voluntary sale of homesteaded property and the consequent conversion into proceeds that may not have been exempt under state law, could not remove previously exempted property from the protections of 11 U.S.C. § 522(c).

Pasquina v. Cunningham (In re Cunningham), *2006 U.S. Dist. LEXIS 85874 (D. Mass. November 28, 2006) (Saylor, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:522.11**

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

0107-015 **Default judgment for fraud and embezzlement by debtor in construction of creditor's house was dischargeable.** (*Bankr. C.D. Ill.)*

PROCEDURAL POSTURE: Plaintiff creditors commenced an adversary proceeding to determine the dischargeability of their default judgment against defendant debtor under 11 U.S.C. § 523(a)(2)(A) and (a)(4) because of alleged fraud and embezzlement arising out of the construction of the creditors' house.

OVERVIEW: The creditors took out a construction loan to build the house, and the funds from the loan were disbursed to the debtor's business account from which he paid the bills. After four draw requests, the creditors took over the project because it was over budget and they were unhappy with the debtor's workmanship. The creditors obtained a default judgment against the debtor in state court based on breach of contract. The bankruptcy court concluded the debt was dischargeable. The creditors failed to prove anything fraudulent about the draw requests under 11 U.S.C. § 523(a)(2)(A). The suggestion that the debtor had been paid sufficient funds to complete the house was contradictory to all the evidence. They did not show evidence that any subcontractor listed on the draw requests was not paid or that they had to pay any such subcontractor directly from their own funds. The court did not find embezzlement under 11 U.S.C. § 523(a)(4). The debtor had the right to payments under the contract once certain stages of the project had been reached. When the debtor used the funds in the escrow account to pay himself for work on the project, even if the amount was disputed, he was not embezzling.

Cripe v. Mathis (In re Mathis), *2006 Bankr. LEXIS 3346 (Bankr. C.D. Ill. December 6, 2006) (Gorman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.01**

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

0107-016 **Portion of debt owed by highway construction company to insurer under completion bond was nondischargeable on grounds of defalcation.** (*Bankr. E.D. Ark.)*

PROCEDURAL POSTURE: Plaintiff insurer filed an action to determine the dischargeability of a debt pursuant to 11 U.S.C. § 523(a)(4) arising from the insurer's payment on a construction surety bond.

OVERVIEW: When a construction company owned by defendant debtor did not complete the work on a highway, the county finished it and filed a claim against the insurer for reimbursement under a surety bond. The insurer claimed that the construction company had not spent the entire trust fund paid to it by the county on expenses for which the insurer as surety would have been liable. The court concluded that a portion of the debt was nondischargeable under 11 U.S.C. § 523(a)(4) due to defalcation. Based on the indemnity agreement, the bonds, and Arkansas law, the trust res was for the benefit of materialmen, laborers, suppliers, subcontractors, and owners who could have made a claim against the surety on the bonds. Any use of the trust res to cover the debtor's own expenses, such as the cost of using his own equipment, the cost of maintaining full-time employees expressed as "burden," or overhead expenses, was a breach of fiduciary duty. The court further found that the burden item could not be allocated to the jobs as a direct cost for which the insurer was liable because it was not conclusively proven what expenses were represented by the burden figure.

International Fidelity Ins. Co. v. Fox (In re Fox)*, 2006 Bankr. LEXIS 3347 (Bankr. E.D. Ark. December 8, 2006) (Evans, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.10**

§ 523(a)(5) Exceptions to Discharge; Types of Debt Excepted; Alimony, Maintenance, or Support.

0107-017 **Award of former spouse's attorneys' fees in post-dissolution custody proceeding was in the nature of support and nondischargeable.** (*Bankr. D. Kan.)*

PROCEDURAL POSTURE: Creditor objected pursuant to 11 U.S.C. § 523(a)(5) to the discharge of a judgment for attorney's fees against chapter 7 debtor entered in a post-divorce custody proceeding.

OVERVIEW: In connection with their divorce, debtor and his ex-wife were awarded joint custody of their minor child and debtor was ordered to pay child support. Subsequently, debtor sought to modify custody and terminate child support on the grounds that the ex-wife had physically abused the child and engaged in other wrongful conduct. The family court found no credible evidence to support the allegation of physical abuse and ordered debtor to pay a portion of the ex-wife's attorney's fees, entering judgment for the ex-wife's attorney against debtor. Debtor argued that the judgment was not excepted from discharge because it was payable to the attorney, not his ex-wife. The court held that the judgment was nondischargeable under section 523(a)(5) as being in the nature of child support, and that it was the nature of the obligation, not the identity of the payee, that determined nondischargeability.

Blond v. Marsh (In re Marsh)*, 2006 Bankr. LEXIS 3324 (Bankr. D. Kan. December 4, 2006) (Somers, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.11**

§ 541(a)(1) Property of the Estate; Creation and Composition of the Estate; All Legal or Equitable Interests.

0107-018 **Debtor's alienation of affection claim against former spouse was property of the estate and could not be set off against nondischargeable divorce decree obligations.** (*Bankr. D.S.D.)*

PROCEDURAL POSTURE: Ex-spouse filed a complaint to determine that debtor's obligations under their divorce decree were nondischargeable, pursuant to 11 U.S.C. § 523(a)(15). The debtor sought to set off, against the ex-spouse's nondischargeable claim, an alleged claim against his ex-spouse.

OVERVIEW: The debtor conceded that his obligations to his ex-spouse under their divorce decree were nondischargeable under 11 U.S.C. § 523(a)(15). The court held that the debtor could not set off his claim against the ex-spouse's nondischargeable claim. The court held that, inasmuch as the parties stipulated that the debtor's alleged claim against the ex-spouse, which was related to an alienation of affection

lawsuit in the federal district court, arose prepetition, that claim belonged to the bankruptcy estate, pursuant to 11 U.S.C. § 541(a)(1), not to the debtor.

Jones v. Jones (In re Jones), *2006 Bankr. LEXIS 3336 (Bankr. D.S.D. December 1, 2006) (Hoyt, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:541.01**

0107-019 **Unearned portion of debtor's attorney's retainer became property of the estate upon filing.** (*Bankr. D. Or.)*

PROCEDURAL POSTURE: Trustee filed a motion to compel turnover of funds held by chapter 7 debtor's attorney.

OVERVIEW: Debtor paid his attorney a retainer of $5,000 and signed a written fee agreement. The attorney deposited the sum into his client trust account and later paid himself $2,115 for prepetition bankruptcy services provided to debtor and paid the chapter 7 filing fee of $209 from the funds in his client trust account. Trustee filed the instant motion. The court held that the standard retainer given to the attorney remained the client's until earned by the attorney. The court held that the unearned portion of the retainer became property of the estate within the meaning of 11 U.S.C. § 541(a)(1) upon the filing of the bankruptcy petition. The attorney contended that, if the funds were property of the estate, he held a valid prepetition security interest in the funds. The court held that the funds could not be used to pay debtor's post filing attorney fees regardless of whether the attorney held a security interest in the funds.

In re Hill, *2006 Bankr. LEXIS 3295 (Bankr. D. Or. November 30, 2006) (Brown, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:541.01**

§ 541(c)(2) Property of the Estate; Restrictions Voided; Effect of Composition; Restrictions on Transfer of Interests in Trusts Unaffected.

0107-020 **Annuities with none of the indicia of a trust were properly ruled property of the estate.** (*D.N.J.)*

PROCEDURAL POSTURE: Pursuant to 28 U.S.C. § 158(a)(1), debtor appealed the Bankruptcy Court for the District of New Jersey's orders granting summary judgment in favor of trustee and denying debtor's request that her interest in two annuities be excluded from her bankruptcy estate. The issue presented was whether debtor's interest in the annuities qualified for exclusion from the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2).

OVERVIEW: Debtor filed a voluntary bankruptcy petition and among the assets debtor listed in her original petition were two annuities. After reviewing the terms of the first annuity, the bankruptcy court determined that the annuity was not excluded from debtor's bankruptcy estate because it had none of the indicia of a trust. Specifically, the annuity was not a trust because it did not have a fiduciary relationship, there was no manifest intent to create a trust, and there was no duty on the part of the annuity company to deal with the property for the benefit of any person. Similarly, upon examining the second annuity, the court noted that the annuity did not give rise to a fiduciary relationship, there was no trustee, and the company held the funds as an asset of the company, not as trust property. This court held that, in order to demonstrate that an asset was excluded from a bankruptcy estate pursuant to section 541(c)(2), the debtor had to establish that the asset represented the debtor's beneficial interest in a trust, there was a restriction on transfer, and the restriction was enforceable under an applicable non-bankruptcy law. Debtor failed to show these things.

Hill v. Dobin, *2006 U.S. Dist. LEXIS 87777 (D.N.J. December 4, 2006) (Pisano, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:541.11**

§ 542 Turnover of Property to the Estate.

0107-021 **Debtor's cause of action for turnover of standby letter of credit proceeds was property of the estate.** (*11th Cir.)*

PROCEDURAL POSTURE: Appellants, a lessor, the lessor's two general partners, and the lessor's assignee, appealed from the District Court for the Northern District of Georgia, in a turnover action pursuant to 11 U.S.C. § 542 filed by appellee debtor.

OVERVIEW: The debtor sought to recover certain standby letter of credit proceeds that were drawn down and retained by the assignee. The standby letter of credit was created to secure the debtor's

obligations to the lessor under a lease agreement that was part of a sale-leaseback transaction. The instant court concluded the debtor's claim for the return of the standby letter of credit proceeds was "property of the estate" pursuant to section 542. The doctrine of independence was inapplicable, as the debtor challenged the right of the assignee to retain the letter of credit proceeds pursuant to the underlying contract between the debtor and lessor. Further, under South Carolina contract law, the debtor had a claim to the proceeds retained by the assignee based on the unambiguous language in the leasing agreement and the letter of credit. Finally, the bankruptcy court's calculation of damages in the amount of $1,175.995.44 was correct, insofar as the debtor conceded the amount of lessor damages properly calculated by the bankruptcy court in a 11 U.S.C. § 502(b)(6) analysis, the calculation accorded with South Carolina law, and appellants did not show that they were entitled to anything more.

Two Trees v. Builders Transp., Inc. (In re Builders Transp., Inc.)*, 2006 U.S. App. LEXIS 29747 (11th Cir. December 5, 2006) (Alarcon, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:542.01**

§ 553 Setoff.

0107-022 **Payments withheld by creditor for debtor's telephone services were not avoidable to the extent they consituted a setoff for overcharges.** (*Bankr. E.D. Tenn.)*

PROCEDURAL POSTURE: Plaintiff bankruptcy trustee brought an adversary proceeding against defendant creditor, alleging that a lack of payment by the creditor for the debtor's telecommunications services during the 90 days prior to the debtor's bankruptcy petition constituted a setoff which was avoidable by the trustee pursuant to 11 U.S.C. § 553. The bankruptcy court conducted a trial.

OVERVIEW: The debtor erroneously overcharged the creditor for toll-free long distance services and agreed that the creditor could withhold future payments for various services until the overcharge was eliminated. The creditor contended that the withheld amount and the overcharges arose out of the same transaction and thus the withheld amount constituted a recoupment which was not avoidable by the trustee. The bankruptcy court held that payments withheld by the creditor during the reach-back period constituted a recoupment, but only to the extent that payment was withheld for toll-free long distance services. The parties had an implied contract whereby the debtor provided the long distance services and the creditor paid an agreed amount for such services, and thus the amounts withheld by the creditor for such services and the overcharges of the debtor arose from the same transaction, i.e., the parties' contract. However, to the extent that the creditor withheld payment for other services, such as the provision of cell phones and telephone charge cards, the amount withheld was a setoff which was properly avoidable by the trustee.

Jahn v. U.S. Xpress, Inc. (In re Transcommunications Inc.)*, 2006 Bankr. LEXIS 3344 (Bankr. E.D. Tenn. December 4, 2006) (Cook, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:553.01**

§ 727(a) Discharge; Grounds for Denial.

0107-023 **Discharge denied due to debtor's concealment of proceeds of sale of home from creditors.** (*Bankr. N.D. Cal.)*

PROCEDURAL POSTURE: Plaintiff trustee commenced an adversary proceeding to deny defendant debtor a discharge for concealing the proceeds of the sale of his home and for turnover of the remaining proceeds.

OVERVIEW: At the time the debtor sold his home, a property owner was suing him under a construction contract. Because of the lawsuit, the debtor took the proceeds from the sale in cash and cashier's checks so that the attorney for the property owner would not "steal them." The debtor filed a chapter 7 petition claiming the remaining sale proceeds as exempt. Pursuant to California's homestead law, the proceeds became estate property if not reinvested in a new homestead. The trustee sought to deny a discharge for concealing the sale proceeds and sought a turnover of the remaining proceeds on the ground that the debtor never validly purchased a new home. The court denied a discharge, pursuant to 11 U.S.C. § 727(a), because he kept the proceeds in cash to hinder a creditor. The court concluded that the debtor's ownership and purchase of a new homestead was a sham because the new homestead was a 4.5% interest in property owned by his mother; the purchase price was paid by a cashier's check, which the mother

never cashed; the day after the mother's deed to the debtor was recorded, he executed a quitclaim deed to his mother; and the mother returned the check to him.

Locke v. Perpinan (In re Perpinan), *2006 Bankr. LEXIS 3352 (Bankr. N.D. Cal. December 4, 2006) (Jaroslavsky, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.01**

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

0107-024 **Discharge denied due to attorney debtor's deliberate concealment and misrepresentations.** (*B.A.P. 6th Cir.)*

PROCEDURAL POSTURE: Defendant debtor challenged an order from the Bankruptcy Court for the Southern District of Ohio, which denied his chapter 7 discharge pursuant to 11 U.S.C. §§ 727(a)(2)(A) and 727(a)(4)(A) following an adversary proceeding commenced by plaintiff creditor.

OVERVIEW: In a state court action filed by the creditor against the debtor's client, the court awarded attorney fees and costs as a sanction for the debtor's outrageous conduct as an attorney. The creditor objected to the debtor's discharge, asserting that the debtor's failure to list the physical assets and/or contingent assets of his unincorporated law firm constituted a knowing and fraudulent false oath or account. On appeal, the court agreed with the bankruptcy court's denial, concluding that the factual findings established the required elements of 11 U.S.C. § 727(a)(4)(A). The debtor's schedules were under oath and were false in that they failed to include the debtor's interests in his business. Those omissions materially related to the bankruptcy case because they concerned the existence of assets. The findings also established the debtor's knowledge of the omissions, and his evasive conduct supported the conclusion of fraudulent intent. The court affirmed the denial of discharge under 11 U.S.C. § 727(a)(2)(A). The debtor had concealed income, deliberately misrepresented the legal status of his law practice, and made the discovery of potential assets difficult.

Pinnacle Tech. Res., Inc. v. Spencer (In re Spencer), *2006 Bankr. LEXIS 3297 (B.A.P. 6th Cir. December 8, 2006) (Scott, B.A.P.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.02**

§ 727(a)(4) Discharge; Grounds for Denial; Fraud.

0107-025 **False statements and omissions by elderly debtor due to confusion and poor memory were not grounds for denial of discharge.** (*Bankr. D. Kan.)*

PROCEDURAL POSTURE: Plaintiff U.S. Trustee brought an adversary proceeding against defendant bankruptcy debtor, seeking a denial of the debtor's discharge based on the debtor's false statements and oaths under 11 U.S.C. § 727(a)(4). The Trustee moved for summary judgment.

OVERVIEW: It was admitted that the debtor falsely stated that he made no transfers and closed no accounts within a year of his bankruptcy, that he had no losses, and that he had no income other than socials security payments. The trustee contended that the debtor's fraudulent intent was inferable from the number and significance of the omissions, but the debtor asserted that the omissions resulted from negligence since he was elderly and had a poor memory. The bankruptcy court held that the evidence was insufficient to show that the debtor intended to provide false information or omit material information. The debtor's deposition testimony reflected confusion and a poor memory for details on the part of the debtor, and thus the trustee failed to show that the debtor had the requisite intent in the statements and omissions.

United States Trustee v. Keck (In re Keck), *2006 Bankr. LEXIS 3323 (Bankr. D. Kan. December 4, 2006) (Karlin, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.04**

§ 1109(b) Right to Be Heard; Parties in Interest.

0107-026 **Investors were not parties in interest and lacked standing to object to settlement between investment fund and creditors' committee.** (*S.D.N.Y.*)

PROCEDURAL POSTURE: Appellants, investors in appellee fund, sought review of final orders of the bankruptcy court settling an adversary proceeding between the fund and appellee creditors committee. The bankruptcy court's orders (1) approved a settlement resolving the committee's efforts to recover amounts the fund withdrew from appellee debtors, and (2) quashed subpoenas issued on behalf of the investors.

OVERVIEW: The investors contended that the fund agreed to the settlement to protect its own insiders from legal exposure and that the settlement was part of a collusive scheme to defraud the investors of millions of dollars. The bankruptcy court concluded that the investors lacked standing to raise objections to the settlement and to take discovery because they were not directly affected by the settlement, but were affected only through their interests in the non-debtor settling parties. On appeal, the court held that the investors lacked standing to appeal because they did not hold a direct interest in the debtors and, thus, they were not directly and adversely affected pecuniarily by the challenged ruling of the bankruptcy court. The court determined that the bankruptcy court's refusal to consider the investors' objections was proper because the investors, who were not debtors or creditors of the debtors, were not parties in interest within the meaning of 11 U.S.C. § 1109(b). The court held that there was substantial evidence supporting the bankruptcy court's determination that the settlement was fair and equitable and benefitted the debtors and their creditors.

Masonic Hall & Asylum Fund v. Official Comm. of Unsecured Creditors (In re Refco, Inc.), *2006 U.S. Dist. LEXIS 85691 (S.D.N.Y. November 26, 2006) (Berman, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 7:1109.02**

§ 1126(e) Acceptance of Plan; Lack of Good Faith.

0107-027 **Court refused to designate creditors' votes for confirmation on grounds of bad faith absent highly egregious conduct.** (*Bankr. S.D.N.Y.*)

PROCEDURAL POSTURE: The bondholders filed a motion to designate, for bad faith, the votes in the class of senior notes of the three targeted creditors that voted to support the chapter 11 plan for confirmation. The targeted creditors and creditors committee opposed the motion on the ground that there was no basis for disqualifying the votes.

OVERVIEW: The targeted creditors voted all of their claims in favor of the reorganization plan. The bondholders opposed the plan and underlying settlement. The court held that, even if all of the bondholders' factual allegations were true, it did not disqualify, by designation under 11 U.S.C. § 1126(e), the targeted creditors' votes because the voting right was not to be denied except for highly egregious conduct. The court held that the targeted creditors' overly aggressive behavior and overreaching in maximizing their recoveries through releases, exculpation, and fee reimbursement under the prospective plan and using enticements to others to support the plan did not have the badges of bad faith because they did not seek to assume control of or destroy the debtor out of pure malice and their behavior could be addressed in the confirmation process. The court held owning bonds in multiple debtors in a single multi-debtor chapter 11 case did not represent an ulterior motive or bad faith warranting vote designation.

In re Adelphia Communs. Corp., *2006 Bankr. LEXIS 3341 (Bankr. S.D.N.Y. December 11, 2006) (Gerber, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 7:1126.06**

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

§ 157(d) Procedures; Withdrawal of Reference by District Court.

0107-028 **Motion for withdrawal of preference proceeding in which creditor was entitled to jury trial denied without prejudice to renewal at time of trial.** (*D. Conn.)*

PROCEDURAL POSTURE: Pursuant to U.S. Const. amend. VII, 28 U.S.C. § 157(d), and Bankr. D. Conn. R. 5011-1, defendant creditor moved for the court to withdraw its reference of the case to the Bankruptcy Court and to transfer it for a jury trial before the court. Plaintiff bankruptcy trustee did not file a response to the motion.

OVERVIEW: The trustee initiated an adversary proceeding against the creditor, seeking to avoid an allegedly preferential transfer. The creditor filed an answer to the complaint, which incorporated a demand for a jury trial. The trustee filed a motion to strike, stating that he did not consent to the jury trial. The creditor had not filed a proof of claim in the underlying bankruptcy proceeding or otherwise submitted any claim against the bankruptcy estate. The court found that since the creditor had not filed a claim against the debtor's estate in the bankruptcy proceeding, the creditor was entitled to a jury trial on the issue of whether the payments it received constituted avoidable preferences. Nonetheless, the court denied the motion to withdraw. The court found that withdrawal was not necessary at this stage of the proceedings and that judicial economy and efficiency would be best served by permitting the case to remain in the bankruptcy court until it became ready for trial.

Napolitano v. Hourigan (In re R.J. Patton Co.)*, 2006 U.S. Dist. LEXIS 87521 (D. Conn. November 30, 2006) (Dorsey, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 1:3.04**

0107-029 **Reference withdrawn as to adversary proceeding claiming predatory lending practices that could be consolidated with similar civil suit stayed by bankruptcy filing.** (*E.D. Pa.)*

PROCEDURAL POSTURE: Chapter 13 debtors filed an adversary proceeding in the bankruptcy court against defendants, their original mortgage lender, the lender's assignee, and a mortgage broker, seeking recission and other remedies under state law and the Truth in Lending Act, 15 U.S.C. §§ 1601, et seq. Defendant two moved to withdraw the reference to the bankruptcy court pursuant to 28 U.S.C. § 157(d).

OVERVIEW: The debtors contended that they were the victims of a predatory loan transaction. Ten months before filing the adversary proceeding, they filed a nearly identical civil suit in the court. Discovery in that suit had closed, and summary judgment motions were pending, when that suit was automatically stayed due to the filing of the debtors' bankruptcy petition. Defendant two moved to withdraw the reference of the adversary proceeding from the bankruptcy court and to consolidate the proceeding with the stayed civil suit. The court agreed that permissive withdrawal of the reference was appropriate under 28 U.S.C. § 157(d). The debtors' adversary proceeding did not constitute a "core" proceeding as defined in section 157(b)(2). They did not invoke substantive rights under Title 11, and their claims were not ones that could arise only in the bankruptcy context. Pursuant to section 157(c)(1), the bankruptcy court could not render a judgment in the adversary proceeding, but would have to submit its proposed factual findings and legal conclusions to the court for final decision. Confusion, delay, and expense would result if the reference was not withdrawn.

Davis v. Deutsche Bank Nat'l Trust Co. (In re Davis)*, 2006 U.S. Dist. LEXIS 85151 (E.D. Pa. November 20, 2006) (Joyner, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 1:3.04**

§ 1334(b) Bankruptcy Cases and Proceedings; Proceedings Arising Under or Arising In or Related to Cases Under Title 11.

0107-030 **Cause of action for postpetition breach of contract did not arise under Title 11.** (*E.D. La.)*

PROCEDURAL POSTURE: Plaintiff lessor sought to recover from defendants, a lessee and a sublessee, rental payments for a crane, as well as damages due to the crane allegedly having been returned in bad condition. The lessee moved to dismiss the complaint for lack of subject matter jurisdiction and for improper venue or, in the alternative, to transfer venue.

OVERVIEW: The lessor alleged that the claim against the lessee arose under Title 11 and thus there was subject matter jurisdiction over the claim pursuant to 28 U.S.C. § 1334(b). More specifically, the lessor argued that its adversary claims against the lessee were the property of the bankruptcy estate. The lessee argued that the case did not arise under Title 11 because it was a post-bankruptcy petition breach of contract claim. The court agreed. The lessor instituted the adversary proceeding for damages and unpaid rentals that occurred after the lessor had filed for bankruptcy. Further, the motion to dismiss was being heard after the bankruptcy court approved lessor's reorganization plan. Thus, there was no longer a bankruptcy estate and there was no evidence that this matter related to the implementation or execution of the reorganization plan. As a result, there was no subject matter jurisdiction under section 1334(b) for these state law causes of action. Finally, there was no diversity jurisdiction under 28 U.S.C. § 1332 because the lessor sought $62,05.09 in damages, which was less than the $75,000 jurisdictional amount necessary for diversity jurisdiction.

Conmaco/Reactor LP v. Shaw & Sons Equip. Rental, Inc.*, 2006 U.S. Dist. LEXIS 86056 (E.D. La. November 27, 2006) (Berrigan, D.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 1:3.01[4]**

0107-031 **Trespass action by park authority against debtor for unauthorized use of fiber optic utility line was not related to bankruptcy.** (*E.D. Va.)*

PROCEDURAL POSTURE: Plaintiff park authority sued defendants, an electric company and its transferee, in state court, alleging trespass, unjust enrichment, and constructive trust based on its claim that the electric company unlawfully permitted the transferee to use a fiber optic line on its property. Defendants removed the lawsuit to federal court based on the transferee's bankruptcy proceeding. The authority moved to remand and the transferee moved to transfer.

OVERVIEW: The authority acquired property from the electric company and converted it into a public trail. After the electric company conveyed its retained rights to use its telecommunications lines to the transferee, the authority obtained a judgment in its favor, but defendants continued to violate the authority's rights. The transferee later filed for bankruptcy, and the authority filed a claim with the bankruptcy court. The court remanded the case. The civil action was not sufficiently related to the bankruptcy proceeding for the court to exercise jurisdiction under 28 U.S.C. § 1334(b). The bankruptcy plan was confirmed and the authority's claims were accounted for. The present suit would not alter the liabilities of the bankruptcy estate or effect its administration. The court did not have federal question jurisdiction based on defendants' invoking a federal law in their defenses to the complaint. The court also did not have supplemental jurisdiction. Even if it had subject matter jurisdiction, remand was appropriate for equitable reasons. In particular, as a state court had previously ruled on the parties' rights in the trail, comity and issues of state law warranted remand.

Northern Va. Reg'l Park Auth. v. Virginia Elec. & Power Co. (In re Elantic Telecom)*, 2006 U.S. Dist. LEXIS 86536 (E.D. Va. November 22, 2006) (Brinkema, D.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 1:3.01[4]**

0107-032 **Bankruptcy court lacked subject matter jurisdiction over proceeding for breach of arbitration agreement that would have no conceivable effect on bankruptcy.** (*Bankr. S.D.N.Y.)*

PROCEDURAL POSTURE: Plaintiff, a non-filing foreign subsidiary of an entity that had filed a chapter 11 proceeding, filed an adversary action in the court against defendant, a third party, claiming that defendant, which was, like plaintiff, a party to a joint venture, had breached certain arbitration agreements. Defendant sought to dismiss on a claim that the court lacked subject matter jurisdiction under 28 U.S.C. § 1334(b).

OVERVIEW: Though many other subsidiaries and affiliates of the same common corporate parent had filed chapter 11 proceedings, plaintiff did not do so. Nonetheless, it came into the court and filed an adversary proceeding against defendant in the hope of derailing Mexican litigation that defendant had already commenced, claiming that defendant was obligated to arbitrate certain disputes in France, not litigate them in Mexico. Defendant sought dismissal for lack of subject matter jurisdiction and raised other defenses. Finding that it lacked subject matter jurisdiction, the court granted dismissal. In so ruling, the court considered the scope of its "related to" jurisdiction under section 1334(b). Noting that the majority of the circuit courts, including the Second Circuit, had adopted the "conceivable effect" test that

had been articulated by the Third Circuit in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (1984), the court held that that test applied in the case at bar. It thereupon held that it lacked jurisdiction over the proposed adversary proceeding because its subject matter did not have such an effect on the bankruptcy estate.

Tower Automotive Mexico v. Grupo Proeza (In re Tower Auto, Inc.), *2006 Bankr. LEXIS 3326 (Bankr. S.D.N.Y. December 7, 2006) (Gropper, B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 1:3.01[4]**

§ 1412 Change of Venue.

0107-033 **Bankruptcy cases brought in improper venue must be either dismissed or transferred to a venue where the case could have been properly brought.** (*W.D. Tenn.)*

PROCEDURAL POSTURE: Appeals were filed from three decisions of the bankruptcy court. Two of the bankruptcy court's judges held that improperly venued bankruptcy cases were to be transferred or dismissed, and the third judge held that an improperly venued bankruptcy case could be retained if the interests of justice and the convenience of the parties so required.

OVERVIEW: Three judges of the bankruptcy court could not agree as to whether 28 U.S.C. §§ 1406, 1408 and 1412 and Fed. R. Bankr. P. 1014(a)(2) required improperly venued bankruptcy courts to be dismissed or transferred. The court, therefore, resolved the disagreement by reviewing the legislative history and applying rules of statutory construction. It concluded that 28 U.S.C. § 1408 set forth mandatory requirements for establishing proper venue, 28 U.S.C. § 1412 governed the transfer of bankruptcy cases filed in the proper venue, and 28 U.S.C. § 1406 governed the transfer of cases, including bankruptcy cases, filed in an improper venue. The court further interpreted Fed. R. Bankr. P. 1014(a)(2) to authorize the transfer of cases only to a district in which the case could have been properly brought under 28 U.S.C. § 1408, in conformity with 28 U.S.C. § 1406, the enabling provision of Fed. R. Bankr. P. 1014. Thus, it had been proper for the first two judges to dismiss or transfer their improperly venued cases, and the third judge had erred in holding that his improperly venued case could be retained if the interests of justice and the parties' convenience so required.

MacDonald v. Greenwood (In re MacDonald), *2006 U.S. Dist. LEXIS 86184 (W.D. Tenn. October 31, 2006) (Donald, D.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 1:4.04**

BANKRUPTCY RULES (Pre-2005 Act)

Rule 1009(a) Amendments of Voluntary Petitions, Lists, Schedules and Statements; General Right to Amend.

0107-034 **Debtor could not amend schedules to claim exemptions for property that had been intentionally concealed.** (*Bankr. D.N.H.)*

PROCEDURAL POSTURE: A debtor who filed for bankruptcy relief under chapter 7 sought to amend his claim of exemptions under Fed. R. Bankr. P. 1009(a) to list certain assets as exempt. However, a creditor and the trustee objected to both the valuation of those assets and to their exemption.

OVERVIEW: After the debtor filed his petition, he sought to amend a schedule to list as exempt certain inventory and tools that formerly belonged to his corporation. The day before filing the petition, the debtor had foreclosed on the business assets, making him the owner. Several days after the petition, he formed a new corporation and transferred the assets to the new business without either notifying or getting permission from the trustee. The trustee ordered the debtor to stop using and liquidating the assets, and the debtor admitted that the new corporation was generating a sizable amount of income from the assets. The court disallowed the debtor's amendment, holding that the debtor had undervalued the assets. In addition, he concealed the use of these assets by foreclosing on them prior to filing and by transferring them, without a paper trail, to the new corporation. When the trustee attempted to liquidate the assets for the benefit of creditors, the debtor asserted that the assets were exempt property of the estate. The court concluded that although the debtor scheduled the assets and might not have physically concealed them, he intentionally concealed their use.

In re Harris, *2006 Bankr. LEXIS 3342 (Bankr. D.N.H. December 1, 2006) (Vaughn, C.B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 9:1009.02**

Rule 9006(b)(1) Time; Enlargement; In General.

0107-035 **Change in management of creditor's legal department did not establish excusable negect to allow filing of claim two years after bar date.** (*Bankr. W.D. Ky.)*

PROCEDURAL POSTURE: A plan administrator filed a motion to disallow a creditor's claim against a chapter 11 debtor on the ground that it was filed after the bar date established by court order.

OVERVIEW: The creditor requested that the court allow its untimely claim under the doctrine of excusable neglect, as set forth in Fed. R. Bankr. P. 9006(b)(1). The court sustained the administrator's motion to disallow the creditor's claim. Taken as a whole and considering the equities of the situation, the court concluded that the creditor's actions did not constitute excusable neglect. The court found that allowing the creditor to file a late claim would have prejudiced the debtor's estate; established a precedent for all claimants who failed to timely file their claims for relief; and thwarted the specific purpose of setting the bar date. The court found that the claim was filed almost two years after the bar date and that the creditor's only explanation for its failure to timely file its claim was that changes in the management of its legal department affected the performance of the employee charged with filing claims. While such an explanation established neglect, it did not establish excusable neglect. The court had no indication that the creditor's failure to act was motivated by bad faith.

In re Jillian's Entertainment Holdings, Inc.*, 2006 Bankr. LEXIS 3208 (Bankr. W.D. Ky. November 30, 2006) (Stosberg, B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 10:9006.06**