January 2007

Collier Bankruptcy Case Update

CURRENT BANKRUPTCY CASES ANALYZED

January 16, 2007 Issue 3

Cases of Particular Interest in This Issue

Dental practice did not qualify as a "health care business" and appointment of health care ombudsman was not required.
In re Banes (Bankr. M.D.N.C. November 16, 2006) **0107-071**

Secured creditor was entitled to claim a deficiency upon debtor's surrender of vehicle.
In re Partika (Bankr. E.D. Mich. November 17, 2006) **0107-078**

Secured creditor could not avail itself of claim bifurcation process where debtor surrendered collateral in full satisfaction of debt.
In re Feddersen (Bankr. S.D. Ill. November 15, 2006) **0107-080**

Debtor could use portion of Social Security benefits to demonstrate ability to fund plan.
In re Siegel (Bankr. D.S.C. November 20, 2006) **0107-082**

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

2d Circuit

§ 109(h)(1) Case dismissed due to debtor's failure to obtain credit counseling or file a timely, legitimate request for exemption.
In re Swiatkowski (*Bankr. E.D.N.Y. November 16, 2006*)..... 0107-072

§ 1325(a)(4) Confirmation denied due to improper valuation of debtor's insurance agency.
In re Williams (*Bankr. N.D.N.Y. November 15, 2006*) 0107-081

4th Circuit

§ 101(27A) Dental practice did not qualify as a "health care business and appointment of health care ombudsman was not required.
In re Banes (*Bankr. M.D.N.C. November 16, 2006*)..... 0107-071

§ 1325(a)(6) Debtor could use portion of Social Security benefits to demonstrate ability to fund plan.
In re Siegel (*Bankr. D.S.C. November 20, 2006*)..... 0107-082

§ 1325(b)(1)(B) Private school tuition was reasonable and necessary expense.
In re Cleary (*Bankr. D.S.C. November 16, 2006*)..... 0107-084

5th Circuit

§ 362(c)(4)(D) Court refused to reconsider decision not to impose stay in debtor's third case in one year where evidence of good faith was unpersuasive.
In re Oritz (*Bankr. S.D. Tex. November 20, 2006*) 0107-073

6th Circuit

§ 502(a) Trustee's objection to unsecured claim sustained where plan provided for surrender of debtor's car in full satisfaction of debt.
In re Kitts (*Bankr. E.D. Tenn. November 16, 2006*)..... 0107-074

§ 1325(a) Secured creditor was entitled to claim a deficiency upon debtor's surrender of vehicle.
In re Particka (*Bankr. E.D. Mich. November 17, 2006*)..... 0107-078

7th Circuit

§ 707(b)(2)(A) Car payments are not a prerequisite for the ownership deduction.
In re Grunert (*Bankr. E.D. Wis. November 20, 2006*)..... 0107-076

§ 1325(a) Surrender of vehicles satisfied secured claims in full, including deficiency balance.
In re Turkowitch (*Bankr. E.D. Wis. November 16, 2006*) 0107-079

§ 1325(a) Secured creditor could not avail itself of claim bifurcation process where debtor surrendered collateral in full satisfaction of debt.
In re Feddersen (*Bankr. S.D. Ill. November 15, 2006*)..... 0107-080

9th Circuit

§ 554 Debtor could not compel abandonment of property despite trustee's earlier representation of intent to do so.
In re Lane (*Bankr. D. Or. November 15, 2006*)..... 0107-075

§ 1112(b) Misdemeanor conviction for converting cattle collateral was cause for conversion to chapter 7.
In re Jayo (*Bankr. D. Idaho July 28, 2006*)..... 0107-077

§ 1325(b)(1)(B) Confirmation denied due to monthly charitable contribution not necessary for debtor's employment.
In re Tranmer (*Bankr. D. Mont. November 16, 2006*) 0107-083

11th Circuit

§ 1326(a) Plan providing for pre-confirmation adequate protection payments to chapter 13 trustee approved.
Drive Fin. Servs. v. Brown (*Bankr. N.D. Ga. July 24, 2006*) 0107-085

PRE-2005 ACT CASES IN THIS ISSUE

1st Circuit

§ 346(d) Capital gains taxes owed on sale of property were sole responsibility of debtor and not the estate.
In re Brown (*Bankr. D. Mass. November 20, 2006*) 0107-086

§ 362 Collection notices sent by creditor with actual notice were presumptively deliberate violations of stay.
Baker v. Somerville Mun. Fed. Credit Union (In re Baker) (*Bankr. D. Mass. November 20, 2006*) 0107-088

2d Circuit

§ 522(f) Pre-acquisition judgement lien was not avoidable as impairing exemption so that prior avoidance ruling was reversed on reconsideration.
In re Bromstead (*Bankr. W.D.N.Y. November 17, 2006*) 0107-090

3d Circuit

§ 1307(c) Court lacked jurisdiction over post-dismissal fee dispute between debtor and counsel.
In re Ragland (*Bankr. E.D. Pa. May 25, 2006*) 0107-103

§ 1322(b)(5) Creditor violated discharge injunction by executing on prepetition judgment to remedy a post-cue default.
In re Venuto (*Bankr. E.D. Pa. June 6, 2006*) 0107-104

4th Circuit

§ 523(a)(4) Motion objecting to discharge rather than adversary proceeding gave notice to debtor and was sufficient to meet filing deadline.
Highgrove, LC v. Holcombe (In re Holcombe) (*Bankr. E.D. Va. May 18, 2006*) 0107-094

§ 1325(b) Trustee's motion to modify plan to include exempt workers' compensation settlement in disposable income denied.
In re Krapf (*Bankr. D.S.C. November 20, 2006*) 0107-105

7th Circuit

§ 348 Postpetition earnings remaining in debtors' possession or control on conversion date were estate property subject to lowest intermediate balance rule.
In re Parsons (*Bankr. S.D. Ind. November 17, 2006*) 0107-087

§ 727(a)(8) Extension of waiting period from six to eight years was not impermissibly retroactive and barred debtor's second case in seven years.
United States Trustee's Office v. McKittrick (In re McKittrick) (*Bankr. W.D. Wis. August 24, 2006*) 0107-101

8th Circuit

§ 547(c)(1) Subsequent new value defense to avoidance not available where preferential payment was made to cure a bounced check.

Velde v. Kirsch (In re Miller) (*Bankr. D. Minn. August 29, 2006*) 0107-097

9th Circuit

§ 547 Insider status sufficient to give rise to avoidance could not be based solely on creditor's superior bargaining position.

MCA Fin. Group, Ltd. v. Hewlett-Packard (In re Fourthstage Techs., Inc.)
(*Bankr. D. Ariz. November 15, 2006*)..... 0107-096

§ 727(a) Discharge denied on objection from debtor's creditor brother due to debtor's conversion of assets to cash which constituted concealment and failure to account for funds.

Scott v. Scott (In re Scott) (*Bankr. N.D. Cal. November 16, 2006*)..... 0107-099

§ 1129(a)(11) Plan lacked feasibility due to reliance on debtor's implausible development of a flying car within three years.

In re Trans Max Techs., Inc. (*Bankr. D. Nev. August 15, 2006*)..... 0107-102

10th Circuit

§ 523(a)(2)(C) "Cash advances" were not subject to presumption of fraud where debtor's overall liabilities did not increase and creditor could not establish pecuniary loss.

U.S. Nat'l Bank Ass'n v. Pugh (In re Pugh) (*Bankr. D. Colo. November 15, 2006*)..... 0107-093

§ 524 Post-confirmation personal injury claim by plaintiff with no pre-petition relationship with debtor was not discharged by confirmation order.

White v. Chance Indus. (In re Chance Indus.) (*Bankr. D. Kan. July 7, 2006*) 0107-095

11th Circuit

§ 510(c) Claims of involuntary debtor's former spouse and spouse's mortgagee brother allowed but equitably subordinated.

Salkin v. Chira (In re Chira) (*Bankr. S.D. Fla. November 16, 2006*)..... 0107-089

§ 523(a)(1)(C) Tax debt was not discharged in either of well-to-do debtors' two bankruptcies given evidence of efforts to evade or defeat taxes.

Hamm v. United States (In re Hamm) (*Bankr. S.D. Fla. November 17, 2006*)..... 0107-091

§ 523(a)(2) Merely accepting credit and incurring charges did not create an implied misrepresentation that would prevent discharge of credit card debt.

MBNA America v. Horrocks (In re Horrocks) (*Bankr. N.D. Ga. May 4, 2006*) 0107-092

§ 727(a) Involuntary debtor held liable for wrongful death of spouse denied discharge due to concealment of assets and failure to file schedules and statements.

Pettigrew v. Sullivan (In re Sullivan) (*Bankr. N.D. Ga. June 19, 2006*)..... 0107-098

§ 727(a)(2)(A) Transfer of corporate property by debtor, its sole shareholder, was not a transfer of property of debtor.

Lort v. Ferguson Enters. (In re Lori) (*M.D. Fla. July 27, 2006*) 0107-100

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

§ 101(27A) Definitions; "Health Care Business".

0107-071 **Dental practice did not qualify as a "health care business and appointment of health care ombudsman was not required.** (*Bankr. M.D.N.C.)*

PROCEDURAL POSTURE: The chapter 7 debtor was a defunct dental practice. It had no active patients. The bankruptcy administrator moved for the appointment of a patient care ombudsman. The administrator's motion sought a determination of whether the dental practice was a "health care business," as defined by 11 U.S.C. § 101(27A).

OVERVIEW: If the debtor was a health care business, a patient care ombudsman would need to be appointed to monitor the quality of patient care and represent the interest of the debtor's patients, unless the bankruptcy court found that such an appointment was not necessary under the specific facts of the case. Section 101(27A) was a new provision under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. After an examination of the statute, the bankruptcy court held (1) a dental practice was not intended to be included within definition, and (2) even if it was included under the definition of health care business, a patient care ombudsman was not required under the facts of this case. The bankruptcy court observed that it did not appear that Congress intended for section 101(27A) to apply to health care businesses that were not continuing to treat patients during the pendency of their bankruptcy cases. The debtor had ceased patient care and was defunct; therefore, it should not be classified as a health care business under section 101 (27A), even if it were to meet the statutory definition of section 101 (27A)(B).

***In re Banes**, 2006 Bankr. LEXIS 3194 (Bankr. M.D.N.C. November 16, 2006) (Carruthers, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:101.27A**

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

0107-072 **Case dismissed due to debtor's failure to obtain credit counseling or file a timely, legitimate request for exemption.** (*Bankr. E.D.N.Y.)*

PROCEDURAL POSTURE: The chapter 13 trustee filed a motion to dismiss the debtor's case on the ground that the debtor was not eligible to be a debtor pursuant to 11 U.S.C. § 109(h)(1) because of his failure to comply with the credit counseling requirement. Although other matters were pending, the court's disposition of the motion to dismiss obviated the need to consider these other matters.

OVERVIEW: The debtor did not file a request to obtain a temporary exemption from the credit counseling requirement until well over two months after having filed the petition. Absent from the request was any statement of exigent circumstances. Nor was there any statement that the debtor had even requested credit counseling prior to filing the petition. At best, the debtor was somehow arguing that his request on Official Bankr. Form 23 to be exempted from the personal financial management requirement on the basis of a disability or capacity was also a request to be exempted from the credit counseling requirement as well. The court was not prepared to deem the Form 23 request to be a request for exemption from the credit counseling requirement. Moreover, the debtor's argument that he was so disabled or incapacitated that he could not attend credit counseling was disingenuous in light of the fact that he ultimately did obtain that counseling. Finally, the court noted that the appropriate resolution was a dismissal; the court declined to follow that line of cases which held that petitions should be "stricken" rather than dismissed for 11 U.S.C. § 109(h) deficiencies.

***In re Swiatkowski**, 2006 Bankr. LEXIS 3105 (Bankr. E.D.N.Y. November 16, 2006) (Cygnowski, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.09[1]**

§ 362(c)(4)(D) Automatic Stay; Duration; Cases Filed Within One Year of Dismissal of Two or More Prior Cases; Presumption of Bad Faith.

0107-073 **Court refused to reconsider decision not to impose stay in debtor's third case in one year where evidence of good faith was unpersuasive.** (*Bankr. S.D. Tex.)*

PROCEDURAL POSTURE: After a court denied the imposition of a stay under 11 U.S.C. § 362(c)(4), the debtor filed a motion to reconsider that order to prevent a creditor from repossessing the debtor's car. The debtor asserted that the court applied the wrong legal standard to the evidence presented at the hearing.

OVERVIEW: The debtor had been a petitioner in two unsuccessful bankruptcy cases within a year prior to filing the case at issue. The court denied the imposition of the automatic stay after concluding that the third case had not been filed in good faith. The court concluded that the debtor was required to prove good faith by clear and convincing evidence because the statutory presumption existed that the case was not filed in good faith under 11 U.S.C. § 362(c)(4)(D). Two previous bankruptcy cases were pending, and the debtor failed to perform the terms of the plan confirmed in the first case. The court found her testimony about changed financial and health circumstances to be unpersuasive. Even if the proper standard was preponderance of the evidence, the debtor did not prove that she filed the case in good faith. Her testimony about her illness and new job was superficial, vague, and ambiguous at best. Although the test of good faith applied only to the current case, her conduct in the prior cases was relevant. The court saw the current case as a continuation of that conduct, and her testimony in the current case was made not credible by her conduct and testimony in the prior cases.

In re Oritz*, 2006 Bankr. LEXIS 3227 (Bankr. S.D. Tex. November 20, 2006) (Steen, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:362.06[4]**

§ 502(a) Allowance of Claims or Interests; Objections.

0107-074 **Trustee's objection to unsecured claim sustained where plan provided for surrender of debtor's car in full satisfaction of debt.** (*Bankr. E.D. Tenn.)*

PROCEDURAL POSTURE: Debtors' filed for chapter 13 bankruptcy relief. The bankruptcy trustee filed an objection to a proof of claim filed by a creditor.

OVERVIEW: The trustee asserted that the debtors' confirmed chapter 13 plan provided for the surrender of the debtors' car in full satisfaction of the creditor's debt. The creditor argued that its claim was secured by collateral in addition to the car and that it was, therefore, entitled to an unsecured claim for any amounts over the value of the car. The bankruptcy court found that it was undisputed that the creditor did not object to confirmation of the debtors' proposed chapter 13 plan and the plan was confirmed. There was no ambiguity or lack of clarity in the confirmed plan regarding the treatment of the creditor's debt. The plan provided that the car would be surrendered in full satisfaction of the creditor's debt. The confirmed plan was binding on all parties, irrespective of whether they were provided for in the plan and/or objected to, rejected, or accepted the plan. The phrase "surrender in full satisfaction of debt" contained in the plan meant that the entire outstanding balance of $3,698.00 owed by the debtors to the creditor had been fully satisfied by the surrender of the car. The creditor did not hold an unsecured claim in the debtors' case.

In re Kitts*, 2006 Bankr. LEXIS 3161 (Bankr. E.D. Tenn. November 16, 2006) (Stair, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:502.02**

§ 554 Abandonment of Property of the Estate.

0107-075 **Debtor could not compel abandonment of property despite trustee's earlier representation of intent to do so.** (*Bankr. D. Or.)*

PROCEDURAL POSTURE: Debtor filed a motion to compel abandonment of debtor's residence pursuant to 11 U.S.C. § 554, based on the trustee's initial agreement that he would abandon the residence.

OVERVIEW: After debtor filed her bankruptcy petition, she advised the trustee that she wanted to sell her house, as she could no longer afford the payments. Debtor asked the trustee whether he wanted to negotiate the sale of debtor's home or whether he would abandon the property to debtor so she could sell

it. The trustee's agreed to abandon the home. In reliance on the trustee's representation that he would abandon the property, debtor entered into a sale agreement, which was conditioned on the trustee's abandonment. Shortly thereafter, having consulted with counsel and having determined that the property might produce value for the estate, the trustee through his counsel told debtor's counsel that he would not abandon the property. In denying debtor's motion to compel abandonment, the court held that there was no enforceable contract that resulted from the trustee's statement that he would abandon the property because there was no consideration. The court also held that the trustee's fiduciary duties trumped an agreement to abandon when the trustee learned that the agreement was ill-advised.

In re Lane, *2006 Bankr. LEXIS 3158 (Bankr. D. Or. November 15, 2006) (Perris, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:554.01**

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

0107-076 **Car payments are not a prerequisite for the ownership deduction.** (*Bankr. E.D. Wis.)*

PROCEDURAL POSTURE: Chapter 13 debtors were above-median debtors who owned two vehicles that had no liens or lease obligations on them. On Form B22C, debtors deducted $471 and $332, respectively, for the Local Standards: transportation ownership/lease expense for their vehicles. A creditor filed an objection to confirmation of debtors' plan, arguing debtors were not allowed to take an ownership/lease expense deduction on any vehicle that was owned free and clear.

OVERVIEW: The question was whether above-median debtors who owned their vehicles "free and clear" were nevertheless entitled to deduct an ownership expense for purposes of calculating their disposable income necessary to fund their chapter 13 plan. Resolving this question required construction of the phrase, "applicable . . . amounts specified under the Local Standards," in 11 U.S.C. § 707(b)(2)(A)(ii)(I). One argument was that "applicable" meant applicable to a particular debtor who owned a vehicle subject to a lien. The other construction was that "applicable" meant the region where the debtor lived or the number of vehicles owned by the debtor. Bankruptcy courts were split on the issue of whether the debtor had to have a car payment in order to claim the ownership deduction. Here, the bankruptcy court held that debtors were not required to have a car payment in order to claim the ownership deduction. Section 707(b)(2)(A)(ii) allowed debtors to take ownership/lease expenses on vehicles they owned, not just on vehicles on which they made payments. The Local Standard deductions for vehicle ownership were to be treated as fixed allowances rather than caps on actual expenses.

In re Grunert, *2006 Bankr. LEXIS 3176 (Bankr. E.D. Wis. November 20, 2006) (Kelley, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[2]**

§ 1112(b) Conversion or Dismissal; Involuntary Conversion or Dismissal.

0107-077 **Misdemeanor conviction for converting cattle collateral was cause for conversion to chapter 7.** (*Bankr. D. Idaho)*

PROCEDURAL POSTURE: The United States Trustee and creditors filed a motion to convert chapter 11 debtor's case back to a chapter 7 liquidation pursuant to 11 U.S.C. § 1112(b).

OVERVIEW: Debtor lived on approximately 660 acres of real property. She owned 60 head of cattle, which were secured to the benefit of one of the creditors, the U.S. Farm Services Administration ("FSA"). Debtor pled guilty to a single misdemeanor count of converting the cattle collateral of the FSA. The court held that the criminal conviction constituted cause to convert the case to chapter 7. The court also held that debtor had made materially incomplete and, under the weight of the evidence, knowingly false sworn statements on her schedules and statements of financial affairs. Debtor argued that conversion was prohibited by section 1112(c) because she was a farmer, based on evidence that a substantial portion of her prior year's income came from the salvage of timber on her property. The court held that debtor's salvage logging was not a farming operation under 11 U.S.C. § 101(21), and the proceeds therefrom were not farm income within section 101(20), because the trees were never planted or raised as a crop or on a sustained yield basis, nor were they part of the farming and ranching operations conducted over several decades.

In re Jayo, *2006 Bankr. LEXIS 1996 (Bankr. D. Idaho July 28, 2006) (Myers, B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 7:1112.04**

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

0107-078 **Secured creditor was entitled to claim a deficiency upon debtor's surrender of vehicle.** (*Bankr. E.D. Mich.)*

PROCEDURAL POSTURE: Creditor, a finance company, objected to the provision of a Chapter 13 plan proposed by debtors under which the debtors offered to surrender a vehicle in which the creditor had a secured interest in full satisfaction of the claim thereon, as they claimed was permitted by the so-called "hanging paragraph" added to 11 U.S.C. § 1325(a)(9) by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").

OVERVIEW: Even though the debt exceeded the car's value, debtors wanted to return the car to the creditor in "full satisfaction" of the secured debt. The creditor objected, arguing that surrender would not satisfy the debt and that it was still entitled to payment of any deficiency remaining after sale. The court upheld the objection. After reviewing BAPCPA and finding that the claim of the creditor, a "910 creditor," was subject to the so-called "hanging paragraph" in 11 U.S.C. § 1325(a)(9), the court ruled that BAPCPA did not support the debtors' position. As 11 U.S.C. § 506 did not apply to a vehicle surrendered per 11 U.S.C. § 1325(a)(5)(C), as debtors wished to do, the specific statement in the "hanging paragraph" that 11 U.S.C. § 506 no longer applied to 11 U.S.C. § 1325(a)(5) did not change the outcome where, as here, a debtor surrendered a vehicle under 11 U.S.C. § 1325(a)(5)(C) to a "910 creditor" so that the estate no longer retained an interest therein. As the creditor was entitled to enforce a claim for the full amount of the debt despite the car's surrender, that right was still properly asserted and allowed as an unsecured deficiency claim per 11 U.S.C. § 502.

***In re Particka**, 2006 Bankr. LEXIS 3160 (Bankr. E.D. Mich. November 17, 2006) (Shefferly, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

0107-079 **Surrender of vehicles satisfied secured claims in full, including deficiency balance.** (*Bankr. E.D. Wis.)*

PROCEDURAL POSTURE: Chapter 13 bankruptcy debtors proposed plans which provided for the surrender of vehicles to creditors secured by the vehicles in full satisfaction of their debts to the creditors under 11 U.S.C. § 1325(a). The creditors objected to confirmation of the debtors' plans on the ground that the hanging paragraph at the end of section 1325(a) did not preclude allowance of unsecured claims for deficiency balances.

OVERVIEW: The debtors asserted that, because their vehicles were purchased within the statutory period before their bankruptcies were filed, the hanging paragraph under section 1325(a) precluded the application of 11 U.S.C. § 506 to bifurcate the creditors' claims into secured and unsecured claims. The debtors thus contended that surrender of their vehicles satisfied their debts to the creditors, but the creditors argued that the preclusion of bifurcation required that the creditors' secured claims be paid in full, including deficiency balances after the vehicles were sold. The bankruptcy court held that the hanging paragraph was not ambiguous and barred the creditors from pursuing deficiency claims upon surrender and sale of the vehicles. The hanging paragraph promoted fair treatment by not permitting the reductions of the creditors' liens to the value of the vehicles if the debtors elected to retain the vehicles, and the creditors obtained the vehicles immediately upon surrender and avoided depreciation.

***In re Turkowitch**, 2006 Bankr. LEXIS 3152 (Bankr. E.D. Wis. November 16, 2006) (Kelley, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

0107-080 **Secured creditor could not avail itself of claim bifurcation process where debtor surrendered collateral in full satisfaction of debt.** (*Bankr. S.D. Ill.)*

PROCEDURAL POSTURE: Creditor, which held a purchase money security interest in debtor's motor vehicle purchased within 910 days of the petition date, filed an objection to the confirmation of debtors' chapter 13 plan, asserting it was entitled to an unsecured claim for the deficiency owed on the vehicle that debtors proposed to surrender in full satisfaction of creditor's claim, under the revised form of 11 U.S.C. § 1325(a)(5).

OVERVIEW: Debtors filed a petition under chapter 13 after the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Pursuant to their plan, debtors proposed to surrender the vehicle in full satisfaction of the creditor's claim. Under pre-BAPCPA law, the creditor would have been entitled to a bifurcation of its claim under 11 U.S.C. § 506(a)(1), and would have retained an unsecured claim for the deficiency on the vehicle upon its surrender. The court found that courts had almost universally concluded that a creditor could not assert a deficiency claim upon the surrender of collateral subject to the "anti-cramdown" paragraph of 11 U.S.C. § 1325(a)(5). A secured creditor could not avail itself the claim bifurcation process to assert a deficiency claim in the circumstances present in the case.

In re Feddersen, *2006 Bankr. LEXIS 3135 (Bankr. S.D. Ill. November 15, 2006) (Caochys, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

§ 1325(a)(4) Confirmation of Plan; Conditions for Confirmation; Value of Property Distributed No Less Than if Estate Were Liquidated.

0107-081 **Confirmation denied due to improper valuation of debtor's insurance agency.** (*Bankr. N.D.N.Y.)*

PROCEDURAL POSTURE: A creditor and trustee objected to confirmation of the debtor's amended chapter 13 bankruptcy plan based on the value of the debtor's insurance agency business.

OVERVIEW: The debtor, an independent insurance agent, had contracts with different insurance companies. The debtor listed the value of his agency as "0" on his schedules The court denied confirmation because the debtor failed to establish that his chapter 13 plan complied with the liquidation test in 11 U.S.C. § 1325(a)(4). The court, using a multiplier of 1, found that the agency had a value of at least $122,478 based on its gross income for the 12 months prepetition, the testimony of an agent that the agency was worth two times the annual gross earnings, and the testimony that the debtor bought the creditor's business for $191,000. The contracts with the companies allowed for the transfer/assignment of the policies to another agent and did not prevent a chapter 7 trustee from employing a licensed agent to manage the accounts postpetition with the companies' consent while the trustee marketed the asset, pursuant to 11 U.S.C. §§ 704 and 721. The court noted that the trustee testified that an inability to compel the debtor to enter a covenant not to compete would not negatively impact the value of the "book of business," including renewals or expirations, to a great degree.

In re Williams, *2006 Bankr. LEXIS 3107 (Bankr. N.D.N.Y. November 15, 2006) (Gerling, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.05**

§ 1325(a)(6) Confirmation of Plan; Conditions for Confirmation; Debtor's Ability to Comply with Plan.

0107-082 **Debtor could use portion of Social Security benefits to demonstrate ability to fund plan.** (*Bankr. D.S.C.)*

PROCEDURAL POSTURE: A trustee objected to confirmation of the debtors' amended chapter 13 plan, pursuant to 11 U.S.C. § 1325(a)(6), on the ground that the plan was not feasible because the net income less expenses and plan payment yielded a deficit.

OVERVIEW: The trustee objected to confirmation on the ground that the debtors were not permitted to use a portion of their Social Security benefit to fund the plan unless all of the benefit was dedicated to the plan. The court denied the objection. The court held that the debtors could use a portion of their Social Security benefits, otherwise not includable in "current monthly income," to satisfy the requirement of 11 U.S.C. § 1325(a)(6) that they demonstrate the ability to make all payments proposed under the plan without committing all of the benefits to the plan. In light of the exclusion of Social Security benefits from the current monthly income calculation, the court could not compel the debtors to fund a plan using the Social Security income and could consider the voluntarily devoted Social Security benefit as income in the disposable income and feasibility analyses. The court was not prepared to confirm the plan because the debtors intended to retain investment property with a potentially negative impact on the income available to creditors.

In re Siegel, *2006 Bankr. LEXIS 3236 (Bankr. D.S.C. November 20, 2006) (Duncan, B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.07**

§ 1325(b)(1)(B) Confirmation of Plan; Objections; Considerations on Objection By Trustee or Allowed Unsecured Claimholder; Application of Disposable Income.

0107-083 **Confirmation denied due to monthly charitable contribution not necessary for debtor's employment.** (*Bankr. D. Mont.)*

PROCEDURAL POSTURE: Pending in the chapter 13 bankruptcy was confirmation of debtors' chapter 13 plan and the trustee's objections thereto based upon the "disposable income" test of 11 U.S.C. § 1325(b)(1)(B) and, by reference, 11 U.S.C. § 707(b)(2)(A)(ii).

OVERVIEW: The trustee objected that debtors' transportation expenses exceeded the standards issued by the IRS, and that debtors' monthly $15 in charitable contributions were not allowed under 11 U.S.C. § 1325(b). As a result of debtors' Plan failing to provide for payments in accordance with Form B22C, and failing to satisfy the test under 11 U.S.C. § 707(b)(2)(B) to show special circumstances to justify additional expenses, confirmation was denied for failure to satisfy the "disposable income" test under 11 U.S.C. § 1325(b)(1)(B), as determined by reference to 11 U.S.C. §§ 1325(b)(2) and (b)(3) and 707(b)(2)(A)(ii). Regarding the charitable contributions, as section 707(b)(2)(A)(ii)(I) applied, the court looked to the categories specified as Other Necessary Expenses located in the IRS Financial Analysis Handbook, and found an allowed expense for charitable contributions if they were a condition of employment or meets the necessary expense tests. The evidence admitted showed that debtors' $15 monthly charitable contribution to school groups was not necessary for debtor husband's employment, but rather was based on the students' expectations.

***In re Tranmer**, 2006 Bankr. LEXIS 3150 (Bankr. D. Mont. November 16, 2006) (Kirscher, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08[4]**

§ 1325(b)(1)(B) Confirmation of Plan; Objections; Considerations on Objection By Trustee or Allowed Unsecured Claimholder; Application of Disposable Income.

0107-084 **Private school tuition was reasonable and necessary expense.** (*Bankr. D.S.C.)*

PROCEDURAL POSTURE: The matter was before the court for hearing on confirmation of the debtor's plan dated July 31, 2006. The chapter 13 trustee objected to confirmation.

OVERVIEW: The trustee objected on the basis that expenditures for private school tuition were not reasonable and necessary expenses and thus that the plan did not provide that all of the debtor's projected disposable income to be received in the applicable commitment period would be applied to make payments to unsecured creditors under the plan. 11 U.S.C. § 1325(b)(1)(B). The court found that private school tuition was a reasonable and necessary expense of the debtor. The court reasoned that the debtor and his family had shown long term enrollment at parochial schools. All of the children attended private school, save one - who planned to return to private school next year. The debtor's wife attended private school. The debtor and his wife had strongly held religious convictions. Additionally, the debtor's wife would not work outside the home except to provide additional income to pay for private school tuition. Finally, the court found that the debtor and his family sacrificed significantly in the purchase of food and clothing and in the areas of recreation and transportation expense. The expense of $1,513.00 for private school tuition was a reasonable and necessary expense.

***In re Cleary**, 2006 Bankr. LEXIS 3235 (Bankr. D.S.C. November 16, 2006) (Duncan, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08[4]**

§ 1326(a) Payments; Plan Payments.

0107-085 **Plan providing for pre-confirmation adequate protection payments to chapter 13 trustee approved.** (*Bankr. N.D. Ga.)*

PROCEDURAL POSTURE: Creditor objected to chapter 13 debtor's plan confirmation.

OVERVIEW: Creditor's claim was secured by debtor's automobile and was more than the value of the automobile. The contract between debtor and creditor was entered into within 910 days of the filing of the chapter 13 case. Debtor's plan called for debtor to make adequate protection payments on creditor's claim by making monthly payments to the trustee until confirmation of the plan. Creditor objected on the

basis that debtor had to make the adequate protection payments directly to it, and that the pre-confirmation payments could not be applied only to reduce the principal amount of creditor's claim, but had to be applied to both interest and principal. The court held that, pursuant to 11 U.S.C. § 1326(a), it could confirm a plan where debtor made pre-confirmation adequate protection payments to the Chapter 13 Standing Trustee for disbursement to the secured creditor pending confirmation or dismissal of the case. The court also held that pre-confirmation adequate protection payments under section 1326(a)(1)(C) were to compensate for any depreciation in the collateral and had to be applied to principal only.

Drive Fin. Servs. v. Brown*, 2006 Bankr. LEXIS 2031 (Bankr. N.D. Ga. July 24, 2006) (Bihary, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1326.02**

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

§ 346(d) Special Tax Provisions; Taxing Income in Chapter 13 Cases.

0107-086 **Capital gains taxes owed on sale of property were sole responsibility of debtor and not the estate.** (*Bankr. D. Mass.)*

PROCEDURAL POSTURE: Bankruptcy debtor filed a voluntary chapter 13 petition. The debtor filed a motion for order directing trustee to reserve fund pursuant to 11 U.S.C. § 105(a), in which the debtor sought to have the chapter 13 estate pay capital gains taxes triggered by the postpetition sale of the debtor's interest in rental property. The chapter 13 trustee and a creditor objected to some or all of the motion.

OVERVIEW: Among the debtor's assets was a 50 percent interest in rental property owned as a tenant in common with his former wife. In January, 2006, the court confirmed the debtor's first amended chapter 13 plan. In May, 2006, the debtor sought and obtained approval for a settlement dividing some marital assets whereby his former wife would buyout the debtor's interest in the property pursuant to a formula. After the sale, $70,894.78 was tendered to the chapter 13 trustee. The debtor estimated that the capital gains taxes which would be due totalled $17,936. The chapter 13 trustee was not holding sufficient funds to pay the capital gains taxes and all creditors in full. The court held that whatever taxes owed to the Commonwealth and the federal government as a result of the income generated from the sale of the property were the sole responsibility of the debtor and could not be shifted to the estate; 11 U.S.C. § 346(d).

In re Brown*, 2006 Bankr. LEXIS 3156 (Bankr. D. Mass. November 20, 2006) (Rosenthal, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:346.01**

§ 348 Effect of Conversion.

0107-087 **Post-petition earnings remaining in debtors' possession or control on conversion date were estate property subject to lowest intermediate balance rule.** (*Bankr. S.D. Ind.)*

PROCEDURAL POSTURE: The debtors filed for relief under chapter 13, and the matter was converted to a proceeding under chapter 7. The chapter 7 trustee filed a motion for turnover to the estate the value of the funds that the debtors had in a bank account at the time that the chapter 13 proceeding was filed.

OVERVIEW: When the debtors filed a petition under chapter 13, they had a bank account containing approximately $2200. All income earned by the debtors after the petition date was deposited into the same account. The debtors' chapter 13 case was converted to a case under chapter 7 on November 11, 2005. At the conversion date, the debtors contended that they had approximately $2000 on deposit. The debtors alleged that between the petition date and the conversion date, there were times when the account was overdrawn. The court rejected the trustee's assertion that the turnover amount needed to be calculated at the time of the original chapter 13 petition date. The court acknowledged that the account was properly considered as property of the chapter 7 estate, pursuant to 11 U.S.C. § 541, however, pursuant to 11 U.S.C. § 348, only those petition date funds that remained in the debtor's possession or control as of the conversion date were recoverable by the chapter 7 trustee. The court determined that the best way to calculate the amount that needed to be turned over to the estate was under the lowest intermediate balance rule.

In re Parsons*, 2006 Bankr. LEXIS 3184 (Bankr. S.D. Ind. November 17, 2006) (Metz, B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 3:348.01**

§ 362 Automatic Stay.

0107-088 **Collection notices sent by creditor with actual notice were presumptively deliberate violations of stay.** (*Bankr. D. Mass.)*

PROCEDURAL POSTURE: Plaintiff debtor brought a complaint against defendant lender alleging violation of the automatic stay, 11 U.S.C. § 362, and the discharge injunction pursuant to 11 U.S.C. §§ 524 and 105. The matter came before the court for hearing on cross motions for summary judgment.

OVERVIEW: The lender admitted that it sent two collection notices after debtor filed her bankruptcy petition, and two more after debtor received her discharge. The lender admitted that it had knowledge of the automatic stay and the discharge order when it issued the notices. It argued, however, that it did not intend to mail the notices; it intended that the notices be pulled. This was insufficient, the court stated. In cases where a creditor received actual notice of the automatic stay, courts were required to presume that the violation was deliberate. A debtor had the burden of providing the creditor with actual notice. Once the creditor received actual notice, the burden shifted to the creditor to prevent violations of the automatic stay. The lender's system clearly did not work to prevent the mailing of notices to debtor. It was incumbent upon the lender to ensure that whatever system it had in place was effective to prevent violations of the kind that occurred in the case. Overall, it was clear the lender knew of the automatic stay and the discharge injunction but mailed the four collection letters to debtor.

Baker v. Somerville Mun. Fed. Credit Union (In re Baker)*, 2006 Bankr. LEXIS 3183 (Bankr. D. Mass. November 20, 2006) (Rosenthal, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.01**

§ 510(c) Subordination; Equitable Subordination.

0107-089 **Claims of involuntary debtor's former spouse and spouse's mortgagee brother allowed but equitably subordinated.** (*Bankr. S.D. Fla.)*

PROCEDURAL POSTURE: Plaintiff, trustee for ex-husband debtor, brought an adversary proceeding against eight defendants, *i.e.*, those who claimed an interest in certain real property, to determine the validity, priority, and amount of deeds made and obligations incurred by debtor. After a series of partial summary judgments, three defendants remained in litigation. The matter was pending decision following trial on issues between the trustee and remaining defendants.

OVERVIEW: The remaining defendants were one of debtor's ex-wives, a first mortgage holder, and a hotel corporation. The issues were: (1) What were the ex-wife's interests in the property and her claims against debtor, and should any of those claims be subordinated because of inequitable conduct? (2) What were the first mortgage holder's secured claims, and should any of those claims be subordinated? (3) Should the lease held by the corporation be disregarded as a sham? On the first issue, the court established which insider relationships existed. It found that the ex-wife was entitled to a priority claim and general unsecured claim, but that her claims had to be equitably subordinated pursuant to 11 U.S.C. § 510(c) to all other claims either allowed or to be allowed in the chapter 7 case, because damages she caused to debtor exceeded the aggregate of her allowed claims. On the second issue, the court noted that the mortgage holder was the ex-wife's brother, and breached fiduciary duties. His claim, though secured, was also subordinated, to an extent, to the claims of all other creditors. On the third issue, the court found that the lease, never intended to be performed, was a sham.

Salkin v. Chira (In re Chira)*, 2006 Bankr. LEXIS 3330 (Bankr. S.D. Fla. November 16, 2006) (Olson, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:510.05**

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

0107-090 **Pre-acquisition judgement lien was not avoidable as impairing exemption so that prior avoidance ruling was reversed on reconsideration.** (*Bankr. W.D.N.Y.)*

PROCEDURAL POSTURE: Bankruptcy debtors filed a petition for relief under chapter 13 of the Bankruptcy Code. They claimed a homestead exemption with respect to their residence and were granted relief under 11 U.S.C. § 522(f) to avoid the liens of three outstanding judgments. Movant judgment creditor sought reconsideration of the order which avoided the lien of her judgment as against the homestead of the debtors.

OVERVIEW: The creditor had obtained a judgment against one of the bankruptcy debtors which became a lien against any real property that he then owned or would thereafter acquire. Consequently, when the debtor and his wife purchased a home later, the husband's interest in that real property was immediately encumbered by the lien of the creditor's judgment. Thus, the court held that such a pre-acquisition judgments was not the type of liens whose affixation could be avoided for purposes of section 522(f) and that the court had held the mistaken understanding that the judgment was docketed after the debtors' acquisition of title. The court also held that the creditor had satisfied the limitation of one year from entry of the order for Fed. R. Civ. P. 60(b) motions and had brought her request for reconsideration within a reasonable time. She had filed a proof of claim only a few days after the court's order granting the homestead exemption and therefore the debtors had received prompt and reasonable notice of the creditor's continuing claim to secured status.

In re Bromstead*, 2006 Bankr. LEXIS 3155 (Bankr. W.D.N.Y. November 17, 2006) (Bucki, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:522.11**

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

0107-091 **Tax debt was not discharged in either of well-to-do debtors' two bankruptcies given evidence of efforts to evade or defeat taxes.** (*Bankr. S.D. Fla.)*

PROCEDURAL POSTURE: Debtors, a physician and his spouse, brought an adversary proceeding seeking a determination that their liability for federal income taxes to the IRS over a five-year period had been discharged in a prior chapter 7 case. At issue was whether the government had shown that debtors willfully attempted in any manner to evade or defeat the tax so as to trigger nondischargeability per 11 U.S.C. § 523(a)(1)(C).

OVERVIEW: Debtors filed bankruptcy 1 in 1999 after receiving a final notice that the IRS intended to levy on bank accounts to satisfy unpaid taxes. Though the IRS filed a proof of claim for taxes exceeding $285,000, no distributions were made thereon. After bankruptcy 1 was concluded, debtors transferred cars and other assets to avoid IRS seizure and began to withdraw large sums of cash on a daily basis from bank accounts owned either by debtors or by the physician's S corporation. Debtors then filed bankruptcy 2 and an adversary proceeding to determine that their prior tax liabilities had been discharged in bankruptcy 1 or were properly discharged in bankruptcy 2. The court ruled against debtors on both. After detailing debtors' methods for dissipating assets prior to bankruptcy 1 and their lavish lifestyle in later years, the court held that the government had proven by a preponderance that debtors willfully attempted to evade or defeat payment of those liabilities within the meaning of 11 U.S.C. § 523(a)(1)(C). In so ruling, the court considered 11 indicia in finding that the "totality of the circumstances" showed efforts on debtors' parts to evade or defeat those liabilities.

Hamm v. United States (In re Hamm)*, 2006 Bankr. LEXIS 3331 (Bankr. S.D. Fla. November 17, 2006) (Olson, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.07[4]**

§ 523(a)(2) Exceptions to Discharge; Types of Debt Excepted; Fraud.

0107-092 **Merely accepting credit and incurring charges did not create an implied misrepresentation that would prevent discharge of credit card debt.** (*Bankr. N.D. Ga.)*

PROCEDURAL POSTURE: Plaintiff creditor filed an adversary proceeding against defendant debtor, seeking a determination that a credit card debt owed by debtor was excepted from discharge under 11 U.S.C. § 523(a)(2)(A). Debtor moved for summary judgment.

OVERVIEW: Creditor claimed section 523(a)(2)(A) excepted from discharge a debt for $2,434 debtor incurred approximately one month before filing his chapter 7 bankruptcy petition. Creditor alleged that by obtaining and/or accepting an extension of credit from the creditor and incurring charges on the account, debtor represented an intention to repay the amounts charged but incurred the debts when debtor had no ability or objective intent to repay them. The court had previously rejected such an implied representation theory. Further, creditor failed to allege any facts supporting its claim, and by failing to respond to debtor's requests for admission, per Fed. R. Civ. P. 36(a), made applicable to the proceedings by Fed. R. Bankr. P. 7036(a), creditor admitted the absence of a factual basis for its claims. Thus, debtor established that the debt at issue was not one incurred by false pretenses, false representations, or actual fraud. Further, although creditor appeared to invoke the presumption in section 523(a)(2)(C), by failing to contest debtor's statement of facts, creditor admitted that none of the purchases made by debtor within the presumption period were for the purchase of "luxury goods."

MBNA America v. Horrocks (In re Horrocks)*, 2006 Bankr. LEXIS 2617 (Bankr. N.D. Ga. May 4, 2006) (Bonapfel, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.08**

§ 523(a)(2)(C) Exceptions to Discharge; Types of Debt Excepted; Fraud; Consumer Debts for Luxury Goods or Services.

0107-093 **"Cash advances" were not subject to presumption of fraud where debtor's overall liabilities did not increase and creditor could not establish pecuniary loss.** (*Bankr. D. Colo.)*

PROCEDURAL POSTURE: Plaintiff creditor filed a Fed. R. Civ. P. 55(b)(2) motion for default judgment on an amended complaint for a determination that cash advances made to defendant debtor were nondischargeable for actual fraud under 11 U.S.C. § 523(a)(2)(A). The creditor was ordered to show cause why its motion should not have been denied for failure to verify the factual elements.

OVERVIEW: The creditor's supplemental affidavit reflected that the debtor obtained cash advances from the creditor within the 60-day period prior to the filing of his chapter 7 petition and that the advances were paid to the creditor to pay off loans the debtor had obtained from the creditor. The court denied the creditor default judgment and dismissed the complaint. Applying a presumption of fraud, pursuant to section 523(a)(2)(C) where there was no increase in the overall amount of the debtor's liabilities and the creditor received every penny of the challenged extension of credit would have been a distortion of the legislative purpose behind the creation of the presumption; therefore, the court determined that the funds were not "cash advances" within the meaning of section 523(a)(2)(C) and the creditor could not rely on "presumptive fraud" to establish that the debt was nondischargeable. The court found it apparent from the facts in the supplemental affidavit that the creditor could not establish that it suffered pecuniary loss from the credit extended to the debtor and, thus, could not establish the elements of fraud under section 523(a)(2)(A) because the funds advanced were immediately repaid to it.

U.S. Nat'l Bank Ass'n v. Pugh (In re Pugh)*, 2006 Bankr. LEXIS 3173 (Bankr. D. Colo. November 15, 2006) (Campbell, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.08[5]**

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

0107-094 **Motion objecting to discharge rather than adversary proceeding gave notice to debtor and was sufficient to meet filing deadline.** (*Bankr. E.D. Va.)*

PROCEDURAL POSTURE: Plaintiff creditor filed an objection to the dischargeability of its debt pursuant to 11 U.S.C. § 523(a)(4) as a motion rather than as a complaint commencing an adversary proceeding. Defendant debtor sought to avoid defending the objection on its merits by having the motion dismissed as the wrong procedural method and having the complaint dismissed or stricken as untimely. The creditor filed motions to consolidate.

OVERVIEW: The issue was whether the motion objecting to discharge, which was timely, when combined with the tardily filed adversary proceeding, was sufficient to meet the deadline in Fed. R. Bankr. P. 4007(c). The creditor's motion requested that the court not discharge the debt and cited 11 U.S.C. § 523(a)(4) as authority for its request. It alleged that the creditor obtained a judgment against the debtor as a result of a settlement agreement resolving a complaint filed in state court which alleged fraud

and breach of fiduciary duty. The bill of complaint from the state court litigation was attached to the motion. The motion also summarized the alleged facts that gave rise to the creditor's objection to discharge. The motion clearly put the debtor on notice of the creditor's nondischargeability claim and satisfied the requirements in Fed. R. Civ. P. 8. Finally, the debtor's argument that the complaint should be dismissed because the creditor failed to pay the filing fee along with its complaint was without merit. The procedure in Bankr. E.D. Va. R. 5005-1(E) was followed and the creditor immediately cured the deficiencies.

Highgrove, LC v. Holcombe (In re Holcombe), *2006 Bankr. LEXIS 2540 (Bankr. E.D. Va. May 18, 2006) (Mayer, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.10**

§ 524 Effect of Discharge.

0107-095 **Post-confirmation personal injury claim by plaintiff with no pre-petition relationship with debtor was not discharged by confirmation order.** (*Bankr. D. Kan.)*

PROCEDURAL POSTURE: Chapter 11 debtors and their principal moved to enjoin state court lawsuits brought by plaintiffs, a child hurt by one of debtors' amusement rides, and his parents, and to find plaintiffs in contempt for violation of the confirmation order and the discharge injunction. Plaintiffs and intervenor, the buyer of the amusement ride, filed an adversary complaint against debtors, seeking a determination of the dischargeability of the state court claims.

OVERVIEW: The child allegedly sustained a permanent brain injury from riding an amusement ride manufactured by debtors and owned by intervenor. The accident occurred after debtors' plan of reorganization had been approved. Debtors argued that the broad definition of claim in 11 U.S.C. § 101(5) included post-confirmation contingent claims such as plaintiffs'. The court held that plaintiffs' claim was not discharged by the confirmation order under 11 U.S.C. § 524 because there was no prepetition relationship between the child and debtors. The court held that the child was an unknown and unknowable future tort victim when debtors filed for chapter 11 bankruptcy, and that the child's right to payment only arose when he rode the amusement ride. The court also held that any indemnity claim by intervenor against debtors was also not discharged by the confirmation order because, notwithstanding the fact that intervenor had a prepetition relationship with debtors by virtue of its purchase of the ride, there was no connection or nexus between the prepetition relationship and the alleged prepetition conduct (negligence, failure to warn, defective design of the ride) giving rise to the claim.

White v. Chance Indus. (In re Chance Indus.), *2006 Bankr. LEXIS 1449 (Bankr. D. Kan. July 7, 2006) (Nugent, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:524.01**

§ 547 Preferences.

0107-096 **Insider status sufficient to give rise to avoidance could not be based solely on creditor's superior bargaining position.** (*Bankr. D. Ariz.)*

PROCEDURAL POSTURE: Trustee for the debtor's liquidating trust, sued creditor to recover payments made by the debtor pursuant to a settlement agreement. The trustee sought to set aside the payments as avoidable preferences under 11 U.S.C. § 547, alleging that the creditor was an insider of the debtor and the transfers were made within one year from the debtor's filing for bankruptcy. The creditor moved for summary judgment.

OVERVIEW: The inquiry into whether the creditor was an insider focused on whether the creditor's relationship with the debtor was close enough to have gained an advantage attributable simply to affinity. The Trustee was correct that the relationship was not simply creditor and borrower — the note entitled the creditor to certain right in the debtor's shares of common stock, and the creditor was also entitled to have a representative attend board of directors' meetings in a non-voting observer capacity (although neither right was ever exercised). However, this was still a business relationship. The relationship between the debtor and the creditor was not close, as evidenced by the debtor's merger with a company that was a reseller for products made by the creditor's competitor. Further, the creditor did not obtain the settlement payment because of its affinity with the debtor. To the contrary, the course of dealing escalated from differences between the companies to negotiations through counsel. Finally, although the creditor was in a superior bargaining position as the lender in the relationship, non-statutory insider status could not be based only a superior bargaining position.

MCA Fin. Group, Ltd. v. Hewlett-Packard (In re Fourthstage Techs., Inc.), *2006 Bankr. LEXIS 3139 (Bankr. D. Ariz. November 15, 2006) (Hollowell, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:547.01**

§ 547(c)(1) Preferences; Exceptions to Avoidance; Contemporaneous Exchange for New Value.

0107-097 **Subsequent new value defense to avoidance not available where preferential payment was made to cure a bounced check.** (*Bankr. D. Minn.)*

PROCEDURAL POSTURE: An involuntary chapter 7 petition was filed against debtor. Debtor converted the case to chapter 11. The case was later converted to chapter 7. The trustee commenced an adversary proceeding seeking to avoid a payment from debtor to a soybean seller of $44,955 as a preferential transfer. Pending was the trustee's motion for partial summary judgment. The complaint also sought to avoid a separate transfer, but it was not included in the motion.

OVERVIEW: The requirements of 11 U.S.C. § 547(b) were satisfied by the facts. The issue was whether the transferee could properly claim a defense under section 547(c)(1), or if the exceptions were barred as a matter of law because the transfer consisted of a payment made to cure a previously issued bad check. The transferee offered a plausible and well supported argument that the payment for the soybeans, when it was honored, cashed, and applied against his debt to the bank, resulted in the release of the bank's security interest in the soybeans, and that the release constituted new value. However, the law was clear that if the preferential transfer at issue was a payment to replace a bounced check, then the scope of the transfer was limited to that context – a substitute payment of an antecedent debt arising out of an extension of credit transaction – and the section 547(c) defenses were therefore not available. Both the debtor and the transferee intended the second check to satisfy the obligations arising out of the dishonored check. Accordingly, section 547(c)(1) was not a cognizable defense to a section 547(b) action involving a preferential transfer consisting of a payment made to cure a bounced check.

Velde v. Kirsch (In re Miller), *2006 Bankr. LEXIS 2287 (Bankr. D. Minn. August 29, 2006) (O'Brien, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:547.04[1]**

§ 727(a) Discharge; Grounds for Denial.

0107-098 **Involuntary debtor held liable for wrongful death of spouse denied discharge due to concealment of assets and failure to file schedules and statements.** (*Bankr. N.D. Ga.)*

PROCEDURAL POSTURE: Plaintiff trustee filed a motion for the entry of default judgment on his claim for denial of defendant debtor's discharge, pursuant to 11 U.S.C. § 727(a)(2) and (5).

OVERVIEW: The debtor did not file an answer to the chapter 7 trustee's complaint for denial of discharge. The court held that the entry of default judgment was appropriate on the trustee's claims, pursuant to 11 U.S.C. § 727(a)(2) and (5). The court found that the trustee alleged facts that set forth a basis for denying discharge under section 727(a)(2) and (5) by contending that the estate administrator obtained a judgment against the debtor based on the wrongful death of the debtor's wife; the administrator was unable to execute on the judgment due to the debtor's continued concealment of his assets, including money from the sale of a distributorship; the administrator filed an involuntary bankruptcy petition against the debtor and an order of relief was entered; and the debtor did not file schedules and a statement of his financial affairs and failed to appear at the creditors' meeting. The court found that the debtor's default as a result of his failure to controvert the assertions constituted an admission of the complaint's material facts under Fed. R. Civ. P. 8(d).

Pettigrew v. Sullivan (In re Sullivan), *2006 Bankr. LEXIS 2615 (Bankr. N.D. Ga. June 19, 2006) (Bonapfel, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.01**

0107-099 **Discharge denied on objection from debtor's creditor brother due to debtor's conversion of assets to cash which constituted concealment and failure to account for funds.** (*Bankr. N.D. Cal.)*

PROCEDURAL POSTURE: Plaintiff brother objected to the discharge of defendant debtor, pursuant to 11 U.S.C. § 727(a)(5) and (2)(A).

OVERVIEW: From late September to late October 2004, at a time when the debtor knew his creditor brother was asserting substantial claims against him, the debtor converted $180,000 into cash. A substantial portion of the dissipation was after October 15, 2004, which was when the debtor filed his

chapter 7 petition. The brother objected to the discharge. The court denied a discharge, pursuant to section 727(a)(5), because the debtor did not substantiate his claims that he spent the money on gambling and high living. The court held that the debtor's conversion of the funds to cash in order to keep his brother from employing legal process to seize it constituted concealment with intent to hinder a creditor, barring a discharge pursuant to section 727(a)(2)(A). To the extent the debtor actually did lose some of the money gambling, he admitted that he was not as careful as he would ordinarily have been about his gambling because he thought his brother might be able to seize anything not lost; therefore, such conduct amounted to wanton destruction of his property with the intent to hinder his brother, also requiring denial of discharge, pursuant to section 727(a)(2)(A).

Scott v. Scott (In re Scott)*, 2006 Bankr. LEXIS 3191 (Bankr. N.D. Cal. November 16, 2006) (Jaroslovsky, 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.

0107-100 **Transfer of corporate property by debtor, its sole shareholder, was not a transfer of property of debtor.** (*M.D. Fla.)*

PROCEDURAL POSTURE: Appellant debtor appealed the order of the bankruptcy court denying his discharge pursuant to 11 U.S.C. § 727(a)(2)(A).

OVERVIEW: The bankruptcy court had found that the debtor — the sole officer, director, and corporate shareholder of a company — transferred $66,100 from the company's bank account to his relatives, former wives and girlfriend. Although the debtor contended the transfers were for legitimate business expenses, he was unable to produce business records, such as receipts or invoices, to substantiate his contentions. The transfers occurred less than one year before the debtor filed a petition for relief under chapter 7. The instant appeal hinged on the requirement that the transfer at issue involve "property of the debtor." The bankruptcy court had concluded that the debtor's status as sole officer, director and corporate shareholder of the company made the money he transferred from the company's account "property of the debtor," making section 727 applicable. The instant court, however, concluded that a corporation's property was not property of its shareholders, even where, as here, the corporation had only one shareholder.

Lort v. Ferguson Enters. (In re Lori)*, 2006 U.S. Dist. LEXIS 51497 (M.D. Fla. July 27, 2006) (Presnell, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.02**

§ 727(a)(8) Discharge; Grounds for Denial; Previous Chapter 11 Discharge within Six Years.

0107-101 **Extension of waiting period from six to eight years was not impermissibly retroactive and barred debtor's second case in seven years.** (*Bankr. W.D. Wis.)*

PROCEDURAL POSTURE: In a chapter 7 bankruptcy case, plaintiff, the United States Trustee, filed an adversary complaint against defendant debtor, seeking a determination that, per 11 U.S.C. § 727(a)(8), as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the 2005 Act), debtor was not eligible to receive a chapter 7 discharge.

OVERVIEW: The debtor previously filed, and received a discharge in, a chapter 7 bankruptcy case. Debtor filed another chapter 7 petition less than eight years after filing her prior petition. In the interim, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which extended from six to eight years the waiting period imposed by 11 U.S.C. § 727(a)(8). Consequently, the trustee objected to debtor's discharge. Contrary to debtor's argument, the trustee had standing to bring the instant adversary proceeding even though no creditor objected to the discharge; section 727(c)(1) authorized a United States Trustee to object to the granting of a discharge under section 727(a). And, section 727(a)(8), as amended in 2005, was not impermissibly retroactive. The 2005 Act did not affect actual substantive rights debtor received as a result of her 1998 bankruptcy, such as her discharge in that case. Debtor had no substantive right to a subsequent bankruptcy filing given Congress's ability to modify, amend, or even repeal the bankruptcy laws.

United States Trustee's Office v. McKittrick (In re McKittrick)*, 2006 Bankr. LEXIS 2229 (Bankr. W.D. Wis. August 24, 2006) (Utschig, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.11**

§ 1129(a)(11) Confirmation of Plan; Requirements; Subsequent Liquidation or Further Reorganization Not Anticipated.

0107-102 **Plan lacked feasibility due to reliance on debtor's implausible development of a flying car within three years.** (*Bankr. D. Nev.)*

PROCEDURAL POSTURE: Debtor filed a voluntary petition for chapter 11 bankruptcy, and thereafter served as debtor in possession. Before the court was debtor's request for plan confirmation. The Office of the United States Trustee ("UST") objected, as did two creditor groups.

OVERVIEW: A group of creditors made up of former employees filed the first objection. Their claims either had been successfully objected to and disallowed before confirmation, or they were not listed on debtor's schedules. The holders of the disallowed claims could not vote. As to the remaining claimants in the group, they failed to file a proof of claim, and could not vote. They lacked standing. Another creditor, joined by the UST, alleged that debtor's counsel engaged in improper solicitation of votes. The court concluded otherwise. Next, it found that the plan was fair and equitable as to the eliminated equity security holders. It also overruled the UST's objection that the plan had the purpose of avoidance of securities laws. However, as to the feasibility requirement of 11 U.S.C. § 1129(a)(11), any sane investor would have had serious questions regarding the viability of debtor's technology, and debtor's inability to provide sufficient answers reaffirmed a lack of feasibility. Debtor's idea of developing a flying car based on that technology in three years could have been considered somewhat implausible. Debtor had not yet secured any joint venturer or investors.

In re Trans Max Techs., Inc.*, 2006 Bankr. LEXIS 2168 (Bankr. D. Nev. August 15, 2006) (Markell, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 7:1129.03[11]**

§ 1307(c) Conversion or Dismissal; Conversion or Dismissal for Cause.

0107-103 **Court lacked jurisdiction over post-dismissal fee dispute between debtor and counsel.** (*Bankr. E.D. Pa.)*

PROCEDURAL POSTURE: In two chapter 13 cases, counsel for debtors filed motions seeking to direct the chapter 13 trustee to pay them, for payment of outstanding legal fees, all funds received by the trustee from the debtors prior to the dismissal of their chapter 13 cases.

OVERVIEW: Debtors filed chapter 13 petitions. Counsel was counsel of record for debtors. Both cases were dismissed. The orders of dismissal, entered pursuant to 11 U.S.C. § 1307(c), did not purport to retain jurisdiction over any matters, nor did they provide that the property of the estate would not revest. After dismissal, counsel filed the instant motions demanding that the trustee pay them certain sums, which sums represented the total of plan payments allegedly paid to the trustee by the debtors prior to the dismissals, pursuant to 11 U.S.C. § 1326(a)(1). In dismissing the motions, the court held that it lacked subject matter jurisdiction over the motions because the principle that a bankruptcy judge had no jurisdiction over a dispute filed after the case had been closed applied with equal force to dismissed cases. The court also held that the exercise of ancillary jurisdiction was inappropriate if not precluded because no fee disgorgement was sought, no fee application was ever filed or approved prior to dismissal, and the dismissal orders did not retain jurisdiction over any estate property or over any pending dispute.

In re Ragland*, 2006 Bankr. LEXIS 1436 (Bankr. E.D. Pa. May 25, 2006) (Fox, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1307.04**

§ 1322(b)(5) Contents of Plan; Discretionary Provisions; Curing of Default and Maintenance of Payments.

0107-104 **Creditor violated discharge injunction by executing on prepetition judgment to remedy a post-cue default.** (*Bankr. E.D. Pa.)*

PROCEDURAL POSTURE: Debtors moved to reopen their closed chapter 13 case to obtain further relief from the court, more specifically, for the court to enter an order staying a sheriff's sale of their residence which was scheduled for June 9, 2006.

OVERVIEW: Debtors alleged that by initiating execution on the prepetition judgment to remedy a post-cure default, the creditor had acted in disregard of the confirmation and discharge orders. The creditor argued that debtors' failure to make all of their postpetition payments gave it the right, after the entry of discharge, to resume foreclosure – notwithstanding debtors' payment of all of the required plan payments to the trustee. The court determined it had jurisdiction to decide the merits of the motion, perceiving a direct nexus between the dispute and debtors' confirmed chapter 13 plan. On the merits, the issue was whether debtors effected a cure of the prepetition default during the pendency of the bankruptcy case. The record did not establish that there was ever a moment when they were current in their postpetition payments to the creditor and the creditor received the distribution from the trustee for the entire prepetition delinquency. The record showed only that at the time the case was closed, debtors were two months in arrears as to their postpetition monthly installments. Thus, debtors had not shown that a cure was effected under 11 U.S.C. § 1322(b)(5).

In re Venuto, *2006 Bankr. LEXIS 1411 (Bankr. E.D. Pa. June 6, 2006) (Frank, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1322.09**

§ 1325(b) Confirmation of Plan; Objections.

0107-105 **Trustee's motion to modify plan to include exempt workers' compensation settlement in disposable income denied.** *(Bankr. D.S.C.)*

PROCEDURAL POSTURE: A chapter 13 trustee filed an amended motion seeking modification of two joint debtors' confirmed chapter 13 plan. The trustee contended that a workers' compensation settlement that one of the debtors received, which was exempt under S.C. Code Ann. § 42-9-360(A), should nevertheless be included in the debtors' disposable income calculation, as set out in 11 U.S.C. § 1325(b).

OVERVIEW: The trustee originally objected to the debtors' claim of an exemption for the settlement proceeds. In responding to the objection, one of the debtors testified that he needed surgery in connection with work-related injuries that he had sustained, that he would experience a loss of income as a result of the surgery, and that the settlement included payments both for his surgery and for his lost income. The trustee filed an amended motion after her objection was overruled. She argued that, even though it was exempt, the settlement should be included for purposes of recalculating the amount of disposable income that was available to the debtors, for payment under their chapter 13 plan. The court noted that the trustee had not previously objected to the chapter 13 plan. It assumed, therefore, that the debtors had committed all of their disposable income to the plan as required by section 1325(b). The medical payment portion of the settlement did not constitute "income" under section 1325(b). The lost income portion of the settlement did not constitute new, previously unaccounted-for income. It simply replaced income that was previously accounted for during the confirmation process.

In re Krapf, *2006 Bankr. LEXIS 3232 (Bankr. D.S.C. November 20, 2006) (Duncan, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08**