March 2007

Collier Bankruptcy Case Update

CURRENT BANKRUPTCY CASES ANALYZED

March 26, 2007 Issue 4

Cases of Particular Interest in This Issue

Denial of debtor's motion to convert to chapter 13 was an appropriate response to debtor's fraudulent conduct.
Marrama v. Citizens Bank (U.S. February 21, 2007) **0307-139**

Bankruptcy court had authority to excuse compliance with credit counseling requirement in appropriate cases.
In re Nichols (Bankr. S.D.N.Y. February 9, 2007) **0307-107**

Trustee permanently enjoined from enforcing section 526(a)(4) which court held to be unconstitutional.
Zelotes v. Adams (D. Conn. February 27, 2007) **0307-114**

Secured creditor could not claim deficiency where debtor surrendered vehicle in full satisfaction of claim.
Capital One Auto Fin. v. Bivins (In re Bivins) (Bankr. M.D. Ga. February 23, 2007) **0307-120**

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

1st Circuit

§ 707(b)(2) Means test for above median debtors is to be applied to circumstances on petition date and not to possible postpetition developments.
In re Harwick (*Bankr. D.N.H. February 12, 2007*) 0307-116

2d Circuit

§ 109(h)(1) Bankruptcy court had authority to excuse compliance with credit counseling requirement in appropriate cases.
In re Nichols (*Bankr. S.D.N.Y. February 9, 2007*).....0307-107

§ 362(c)(3)(B) Stay in debtor's second chapter 13 case terminated as to debtor and debtor's property but not as to property of the estate.
In re McFeeley (*Bankr. D. Vt. February 23, 2007*).....0307-112

§ 526(a)(4) Trustee permanently enjoined from enforcing section 526(a)(4) which court held to be unconstitutional.
Zelotes v. Adams (*D. Conn. February 27, 2007*).....0307-114

3d Circuit

§ 303(i)(1) Standing to seek to recover attorneys' fees is limited to debtors
In re VII Holdings Co. (*Bankr. D. Del. February 22, 2007*) 0307-108

§ 707(b) Above median debtor without disposable income as shown on Form B22C was not required to make plan payments to unsecured creditors despite surplus shown on Schedules I and J.
In re Brady (*Bankr. D.N.J. February 13, 2007*).....0307-115

4th Circuit

§ 362(c)(3)(B) Extension of stay denied in debtor's sixth case due to failure to rebut presumption of bad faith.
In re Chaney (*Bankr. E.D. Va. February 27, 2007*).....0307-110

§ 1325(a)(5)(B) Confirmation denied due to debtor's failure to adequately address creditor's lien or equal monthly payments.
In re Hill (*Bankr. M.D.N.C. February 12, 2007*) 0307-119

§ 1325(b) 60 month minimum plan period required for above median debtors where trustee objected to confirmation despite lack of disposable income.
In re Strickland (*Bankr. M.D.N.C. February 13, 2007*) 0307-121

5th Circuit

§ 1325(a) Confirmation denied due to failure to recognize creditor's rights under hanging paragraph.
In re Allen (*Bankr. E.D. Tex. October 13, 2006*).....0307-117

7th Circuit

§ 109(h)(1) Bankruptcy court properly struck chapter 13 petition which failed to allege that debtors had reecived timely credit counseling.
Gargula v. Thompson (In re Thompson) (*S.D. Ind. December 4, 2006*) 0307-106

§ 362(c)(3)(B) Stay terminated after 30 days in debtor's second bankrupty not only as to person or property of debtor but also as to property of the estate.
In re Curry (*Bankr. N.D. Ill. February 22, 2007*) 0307-111

8th Circuit

§ 1325(a) Secured creditor was not entitled to deficiency claim where debtor surrendered vehicle in full satisfaction of claim.
Capital One Auto Fin v. Osborn (In re Osborn) (*B.A.P. 8th Cir. February 23, 2007*) 0307-118

9th Circuit

§ 363(b) Debtor granted authority to conduct private sales of wine delivered from winery pursuant to bottling agreement.
In re Kirkland Knightsbridge, LLC (*Bankr. N.D. Cal. February 9, 2007*) 0307-113

10th Circuit

§ 330(a) BAPCPA justified increase in presumptive attorneys' fees.
In re Beck (*Bankr. D. Kan. February 21, 2007*).....0307-109

11th Circuit

§ 1325(a)(5)(C) Secured creditor could not claim deficiency where debtor surrendered vehicle in full satisfaction of claim.
Capital One Auto Fin. v. Bivins (In re Bivins) (*Bankr. M.D. Ga. February 23, 2007*).....0307-120

PRE-2005 ACT CASES IN THIS ISSUE

Supreme Court

§ 706(a) Denial of debtor's motion to convert to chapter 13 was an appropriate response to debtor's fraudulent conduct.
Marrama v. Citizens Bank (*U.S. February 21, 2007*).....0307-139

1st Circuit

§ 105 Bankruptcy court lacked authority to enforce alleged injunction that was not expressly set forth in plan or settlement with creditor.
In re Ground Round, Inc. (*Bankr. D. Mass. February 13, 2007*).....0307-123

§ 503(b)(1)(A) Creditor granted administrative expense for counsel fees due to actions to preserve estate.
In re Brown (*Bankr. D. Mass. February 13, 2007*).....0307-133

§ 541(a) Claims for breach of fiduciary duty against directors of debtor were property of the estate and could be settled by trustee.
Morley v. Ontos, Inc. (In re Ontos, Inc.) (*1st Cir. March 1, 2007*) 0307-136

2d Circuit

§ 362 Relief from stay granted to allow arbitration of asbestos-related insurance claims.
Continental Casualty Co. v. Pfizer, Inc. (In re Quigley Co.) (*Bankr. S.D.N.Y. February 22, 2007*).....0307-127

§ 362(b)(3) Creditor's claim was unsecured due to failure to act to protect lien that expired thirty days after chapter 11 plan confirmation.
In re WorldCom, Inc. (*Bankr. S.D.N.Y. February 23, 2007*).....0307-129

§ 365(b)(1) Simple default, rather than default as defined in agreement, is sufficient to require cure by debtor as prerequisite to assumption.
Abovenet, Inc. v. SBC Telecom, Inc. (*S.D.N.Y. February 27, 2007*).....0307-131

4th Circuit

§ 109(e) Unemployed debtor who nonetheless had sufficiently stable and regular income was eligible under chapter 13.
Singer Asset Fin. Co., LLC v. Mullins (In re Mullins) (*Bankr. W.D. Va. February 12, 2007*).....0307-124

§ 362(a) Stay did not apply to bar ejectment action against debtor's non-debtor subsidiary.
Kreisler v. Goldberg (*4th Cir. February 26, 2007*).....0307-128

§ 523(a)(2)(A) Fraud claim against insurance investor that did not involve pecuniary loss was dischargeable.
Nunnery v. Rountree (In re Rountree) (*4th Cir. February 27, 2007*).....0307-135

5th Circuit

§ 105 Bankruptcy court had authority to enjoin creditor from filing adversarial proceedings following several frivolous complaints.
Friendly Fin. Service-Eastgate, Inc. v. Dorsey (*W.D. La. February 22, 2007*) 0307-122

7th Circuit

§ 328(a) Bankruptcy court erred in reducing fee claimed by trustee's attorney pursuant to approved contingency fee agreement.
In re Gilbertson (*E.D. Wis. February 4, 2007*).....0307-126

8th Circuit

§ 550 Trustee could avoid return of vehicle to auction house where it had been purcahsed by debtor.
Huisinga v. Greater Quad City Auto Auction (In re Hocken) (*Bankr. N.D. Iowa February 22, 2007*).....0307-138

9th Circuit

§ 110 Petition software provider was a bankruptcy petition preparer and was properly sanctioned for unauthorized practice of law.
In re Reynoso (*9th Cir. February 27, 2007*) 0307-125

§ 502(b)(1) State procedural requirements are not incorporated into bankruptcy claims process and could not render debt unenforceable.
In re Lasky (*Bankr. C.D. Cal. February 22, 2007*).....0307-132

§ 547(b) Payment of sale of debtor's residence to debtor's mother was an avoidable payment to an insider.
Locke v. Scoggins (In re Perpinan) (*Bankr. N.D. Cal. February 14, 2007*) 0307-137

10th Circuit

§ 362(c)(1) Property which was undisclosed in schedules and remained in estate was subject to stay.
PHH Mortgage Corp. v. Dick (In re Dick) (*Bankr. D. Kan. February 9, 2007*).....0307-130

§ 727(d)(3) Revocation of discharge denied where debtor's failure to turnover income tax refund was due to debtor spouse's use of funds to purchase illegal drugs.
Morris v. Wheeler (*Bankr. D. Kan. February 14, 2007*) 0307-140

11th Circuit

§ 506(c) Trustee was entitled to surcharge against creditor's interest in debtor's insurance proceeds as creditor had not requested timely relief from bankruptcy court.
In re Milligan (*Bankr. S.D. Ala. February 9, 2007*) 0307-134

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

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

0307-106 **Bankruptcy court properly struck chapter 13 petition which failed to allege that debtors had reecived timely credit counseling.** (*S.D. Ind.)*

PROCEDURAL POSTURE: The bankruptcy judge struck appellees', debtors, chapter 13 bankrputcy petition because debtors failed to allege in the petition that they had received credit counseling within 180 days of the filing as required by the Bankruptcy Act, 11 U.S.C. § 109(h)(1). Appellant United States Trustee moved the bankrputcy court to reconsider, but the bankruptcy court denied the motion to reconsider, and the trustee appealed.

OVERVIEW: 11 U.S.C. § 109(h)(1) merely informed petitioners that if they wished to avail themselves of the protections of the Bankruptcy Act, they had to first submit to a counseling class. The question before the court was whether the filing of a chapter 13 petition was synonymous with the commencement of a case? When the language in 11 U.S.C. § 301(a) was appended to the legislative mandate of 11 U.S.C. § 109(h)(1), it was not unreasonable for the bankruptcy court to conclude that a case was not commenced unless the petitioning individual could be considered a "debtor" under the Bankruptcy Act. The instant court examined the language of 11 U.S.C. § 109(h)(1) and concluded that the decision to strike the petition of an individual who could be considered a debtor comported with the language of the statute and thus comported with the will of the Congress. Furthermore, only a person aggrieved by a bankruptcy court's order could appeal. It was difficult for the court to see how the Trustee had been aggrieved by the striking of a petition filed by those who could not commence a case. The court declined the invitation to address the issue.

Gargula v. Thompson (In re Thompson)*, 2006 U.S. Dist. LEXIS 95486 (S.D. Ind. December 4, 2006) (McKinney, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.09[1]**

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

0307-107 **Bankruptcy court had authority to excuse compliance with credit counseling requirement in appropriate cases.** (*Bankr. S.D.N.Y.)*

PROCEDURAL POSTURE: Citing 11 U.S.C. § 109(h), 11 U.S.C. § 521(b), and 11 U.S.C. § 707(a), the U.S. trustee asked the court to dismiss two chapter 7 petitions filed by unrelated debtors based on a claim that debtors in each case failed to comply with the credit counseling requirement in 11 U.S.C. § 109(h)(1). At issue was whether the court had express or implied power to excuse such noncompliance.

OVERVIEW: In each case, counsel failed to assure that the requirements of section 109(h) were satisfied. One used outdated forms and failed to properly note that debtors had complied with section 109 on the day on which their amended petition was filed. The other sought an extension of time to comply, but filed an unsigned copy of the motion, which was denied for that reason. The court held that debtors' noncompliance with section 109 was properly excused and denied the motions to dismiss. In so ruling, it held that it had authority to exercise discretion when deciding whether to dismiss a case due to a failure to comply with section 109(h) where, as here, a refusal to exercise discretion would result in manifest injustice, both because judicial discretion was permitted and because Congress has not specifically circumscribed judicial discretion in connection with the particular requirements. The court thereupon adopted a six-part "totality of the circumstances" test for use in determining whether a petition should be dismissed under 11 U.S.C. § 707(a) for failure to comply with 11 U.S.C. § 109(h)(3). Applying that test at bar, the court held that in both cases, dismissal was unwarranted, and it so ruled.

In re Nichols*, 2007 Bankr. LEXIS 427 (Bankr. S.D.N.Y. February 9, 2007) (Morris, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.09[1]**

§ 303(i)(1) Involuntary Cases; Judgment upon Dismissal; Award of Costs and Fees.

0307-108 **Standing to seek to recover attorneys' fees is limited to debtors** (*Bankr. D. Del.)*

PROCEDURAL POSTURE: Petitioner filed an involuntary petition against debtor. Debtor owned an interest in certain real property which had been in foreclosure proceedings. The involuntary case triggered the automatic stay, frustrating the foreclosure process. Creditors, a mortgage holder and the buyer of the foreclosed property, argued the involuntary petition was filed in bad faith. The court agreed and dismissed the petition. Creditors sought attorneys' fees.

OVERVIEW: Creditors sought an award against petitioner of approximately $27,000 in attorneys' fees and costs under 11 U.S.C. 303(i) and 11 U.S.C. § 105(a). In opposition to this request, petitioner argued that neither the plain language of 11 U.S.C. § 303(i) nor the corresponding legislative history, public policy, and case law granted standing to a non-debtor seeking attorneys' fees and costs. The court denied creditors' request for attorneys' fees and costs. In so ruling, the court held that (1) the plain language of 11 U.S.C. § 303(i)(1) limited the recovery of attorneys' fees and costs to a debtor; (2) although 11 U.S.C. § 303(i)(2) did not, by its terms, limit the recovery of damages only to a debtor, the structure and scheme of 11 U.S.C. § 303(i) yielded the court's conclusion that only a debtor could seek damages under 11 U.S.C. § 303(i)(2); and (3) in light of this prohibition under 11 U.S.C. § 303(i), the court elected not to utilize its broad equitable powers under 11 U.S.C. § 105(a) to achieve a result it deemed inconsistent with the Code's statutory scheme.

In re VII Holdings Co.*, 2007 Bankr. LEXIS 532 (Bankr. D. Del. February 22, 2007) (Shannon, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:303.15**

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

0307-109 **BAPCPA justified increase in presumptive attorneys' fees.** (*Bankr. D. Kan.)*

PROCEDURAL POSTURE: In ten selected chapter 13 test cases, the bankruptcy trustee filed objections to confirmation in each case, generically claiming that the amount of attorney's fees requested by debtors' counsel exceeded the previously approved fees for similar work. Debtors' counsel asserted that an increase in fees was warranted following the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").

OVERVIEW: Prior to the enactment of the Bankruptcy Reform and Consumer Protection Act of 2005, an unofficial presumptive attorney fee for the filing of chapter 13 cases in the instant court had been set by custom between $1,500 to $2,000, After enactment of BAPCPA, however, debtors' attorneys believed that the presumptive fee should be increased. The trustee requested the court set the presumptively reasonable fee at $2,500 for below-median income debtors, and $3,000 for above-median debtors, The court settled on a presumptive below median fee of $2,800, and an above-median fee of $3,300, which included $450 for post-confirmation time not directly related to court activity. The court found that debtors who incurred greater fee amounts should not be subsidized by compliant debtors, and that fees should still be calculated individually. Debtors' counsel should still submit pleadings containing itemized billing records, or should pray for a specific amount of fees with respect to each beyond standard proceeding. Either basis would be acceptable to request additional fees.

In re Beck*, 2007 Bankr. LEXIS 517 (Bankr. D. Kan. February 21, 2007) (Karlin, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:330.01**

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

0307-110 **Extension of stay denied in debtor's sixth case due to failure to rebut presumption of bad faith.** (*Bankr. E.D. Va.)*

PROCEDURAL POSTURE: A debtor filed a motion to extend the automatic stay, pursuant to 11 U.S.C. § 362(c)(3)(B), in his chapter 13 bankruptcy case.

OVERVIEW: The debtor had five prior bankruptcy cases. The immediately prior chapter 13 case was dismissed for failure to make plan payments. The court in the present case denied the debtor's motion to continue the stay beyond the 30th day following the filing of the case because the debtor failed to rebut

the statutory presumption that his new case was filed not in good faith. The totality of the circumstances revealed that the case represented an abuse of the spirit and purpose of chapter 13 because, in spite of the increase in the debtor's income and the decrease in his expenses after the dismissal of the immediately prior case, the debtor's plan payments in the current case were reduced significantly. The court found that the case appeared to be an attempt to pay the debtor's creditors as little as possible. The court found that, despite the elimination of the expense of having a daughter who was in law school and studying for the bar exam, which was the reason for the default in the prior case, the debtor proposed a far less generous plan without explanation.

In re Chaney, *2007 Bankr. LEXIS 534 (Bankr. E.D. Va. February 27, 2007) (Huennekens, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.06[3]**

0307-111 **Stay terminated after 30 days in debtor's second bankrupty not only as to person or property of debtor but also as to property of the estate.** (*Bankr. N.D. Ill.)*

PROCEDURAL POSTURE: Movant creditor sought an order confirming that an automatic stay issued in reference to the debtor's chapter 13 bankruptcy filing had in fact terminated with respect to the property securing the mortgage issued by the creditor such that the creditor could move forward with foreclosure on the debtor's residence.

OVERVIEW: The debtor initially filed for relief under chapter 13, but that bankruptcy was dismissed for failure to make timely payments to the trustee. A few months later, the debtor again filed for chapter 13 relief but failed to file a motion to extend the automatic stay pursuant to 11 U.S.C. § 362(c)(3)(B). Therefore, the 30-day period after filing of this case expired on November 11, 2006. The creditor who held a mortgage on the debtor's residence sought an order confirming that the automatic stay completely terminated on November 11, 2006, pursuant to 11 U.S.C. § 362(c)(3)(A). The debtor argued that the language of section 362(c)(3)(A) dictated that termination of the automatic stay only applied to person or property of debtor, and not to property of the bankruptcy estate. Therefore, because the subject property was property of the estate, debtor contended that the automatic stay did not terminate with respect to it. The court disagreed with debtor and with the majority opinion on this issue. The court held that section 362(c)(3)(A) terminated the automatic stay in all respects with respect to the property, noting that any other view would produce an obvious conflict with the statutory scheme.

In re Curry, *2007 Bankr. LEXIS 474 (Bankr. N.D. Ill. February 22, 2007) (Schmetterer, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.06[3]**

0307-112 **Stay in debtor's second chapter 13 case terminated as to debtor and debtor's property but not as to property of the estate.** (*Bankr. D. Vt.)*

PROCEDURAL POSTURE: Chapter 13 debtor filed a motion to extend the automatic stay under 11 U.S.C. § 362(c)(3)(B).

OVERVIEW: Debtor filed a chapter 13 petition. That case was dismissed based upon debtor's failure to file schedules, statements, payment advices, a means test form, and a chapter 13 plan. Immediately after the case was dismissed, debtor filed the instant case. Debtor filed a motion under section 362(c) to extend the stay with regard to one of his creditors so that his car, which he needed to work and produce income upon which his plan relied, would not be repossessed. The court held that it could not extend the time for completing a hearing to determine whether the stay was limited to 30 days pursuant to section 362(c)(3)(B) because debtor did not file a motion to extend the stay in time to have a hearing held and concluded within 30 days of the date the instant case was filed. The court, however, did hold that the stay against debtor's car was not terminated because the stay referred to in section 362(c)(3)(A) terminated the stay with respect to actions taken against the debtor and against property of the debtor, but did not terminate the stay with respect to property of the bankruptcy estate.

In re McFeeley, *2007 Bankr. LEXIS 461 (Bankr. D. Vt. February 23, 2007) (Brown, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.06[3]**

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

0307-113 **Debtor granted authority to conduct private sales of wine delivered from winery pursuant to bottling agreement.** (*Bankr. N.D. Cal.)*

PROCEDURAL POSTURE: Defendant chapter 11 debtor filed a motion for authority to conduct "Article 9" private sales of wine, the collateral asset. Plaintiff winery objected.

OVERVIEW: The winery's wine was delivered to the debtor pursuant to a bottling agreement. The winery's complaint against the debtor for turnover of the wine was dismissed and an injunction, which prohibited the debtor from exercising lien rights against the wine, was lifted. The debtor filed a motion for authority to sell the wine. The court held that 11 U.S.C. § 363(b) did not apply because the wine was the property of the winery, not the estate. The sale was governed by the Uniform Commercial Code and did not require court approval. The court held that the debtor's estate had a compelling need to liquidate its lien rights because the agreement by which the winery bankrolled the debtor's operations had been terminated. The court granted the motion, which was treated as one for leave to dispose of the wine to the extent the debtor had the right to do so. The court held that another company lacked standing because it was not a creditor and had no interest in maximizing the estate. The court held that an adversary proceeding, pursuant to Fed. R. Bankr. P. 7001(2), rather than a motion to sell was the proper forum for the winery to assert its ordinary commercial law claims.

In re Kirkland Knightsbridge, LLC*, 2007 Bankr. LEXIS 491 (Bankr. N.D. Cal. February 9, 2007) (Jaroslovsky, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:363.02**

§ 526(a)(4) Restrictions on Debtor Relief Agencies; Restricted Actions; Advice to Incur More Debt or Pay Fees.

0307-114 **Trustee permanently enjoined from enforcing section 526(a)(4) which court held to be unconstitutional.** (*D. Conn.)*

PROCEDURAL POSTURE: Plaintiff bankruptcy attorney sued defendant bankruptcy trustee challenging 11 U.S.C. § 526(a)(4) as violative of the First Amendment. The court denied the trustee's motion to dismiss for failure to state a claim and found that section 526(a)(4) was facially unconstitutional. The attorney moved for a judgment declaring that section 526(a)(4) was unconstitutional and enjoining its enforcement. The trustee moved for reconsideration and for summary judgment.

OVERVIEW: The court had previously ruled that section 526(a)(4) was facially unconstitutional in that it was overbroad and restricted attorney speech beyond what was necessary to further the governmental interest in curbing abusive practices. In its motion for reconsideration, the trustee did not raise any new arguments, but merely reiterated and elaborated its previously rejected argument that the court's ruling was predicated on an erroneous interpretation of the scope of section 526(a)(4). Although the court granted the trustee's motion for reconsideration, the court again rejected the trustee's argument and found that section 526(a)(4) encompassed and prohibited attorneys from advising clients to take various lawful, financially prudent actions prior to filing for bankruptcy. The court further found that section 526(a)(4) was not sufficiently narrow to meet the underlying legitimate government interests, but that it was overbroad and unnecessarily restricted attorney speech. Accordingly, the court entered judgment in favor of the attorney. However, the court agreed with the trustee that the attorney was only entitled to a narrowly-tailored injunction against the trustee and not against a class of trustees.

Zelotes v. Adams*, 2007 U.S. Dist. LEXIS 13236 (D. Conn. February 27, 2007) (Dorsey, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:526.02**

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

0307-115 **Above median debtor without disposable income as shown on Form B22C was not required to make plan payments to unsecured creditors despite surplus shown on Schedules I and J.** (*Bankr. D.N.J.)*

PROCEDURAL POSTURE: Trustee and an unsecured creditor objected to the confirmation of chapter 13 debtors' plan.

OVERVIEW: Debtors had an above median income. They calculated their disposable income for purposes of Form B22C as a negative number, while their surplus income, as calculated on their Schedules I and J, was positive. Trustee and the creditor argued that the "disposable income" calculation on Form B22C had to be adjusted to factor in the actual surplus income that resulted from comparing debtors' Schedules I and J. The court held that there was no discretion to substitute debtors' Schedule J expenses for the 11 U.S.C. § 707(b) standardized formula for the calculation of applicable and actual expenses. The court held that there was no requirement that a payment to unsecured creditors be made through debtors' plan because there was no disposable income to project to be received during debtors' applicable commitment period in the plan. The court also held that debtors were not required to extend their applicable commitment period under 11 U.S.C. § 1325(b)(4) from 36 to 60 months because, since they had no projected disposable income to apply to unsecured creditors' claims, the length of the applicable commitment period was irrelevant.

In re Brady*, 2007 Bankr. LEXIS 501 (Bankr. D.N.J. February 13, 2007) (Wizmur, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05**

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

0307-116 **Means test for above median debtors is to be applied to circumstances on petition date and not to possible postpetition developments.** (*Bankr. D.N.H.)*

PROCEDURAL POSTURE: The United States Trustee filed a motion to dismiss chapter 7 debtors' case pursuant to 11 U.S.C. § 707(b)(2).

OVERVIEW: Debtors, as above median filers, had to complete the expense portion of Form B22A and pass the means test prescribed in section 707(b)(2). Debtors completed the expense portion of Form B22A, which resulted in a negative monthly disposable income because debtors deducted an amount as payments due on claims secured by two home mortgages. Debtors testified at the first meeting of creditors that they could not afford the keep their home and that they were close to acquiring another home on which the mortgage payment would be substantially less. The trustee argued that debtors monthly disposable income was actually a positive number, based upon debtors' projected mortgage expense and not upon the actual amounts due under debtors' mortgages on the petition date. The trustee argued that the presumption of abuse arose because the 60-month disposable income was more than $10,000 under the trustee's means test calculation. In denying debtor's motion, the court held that postpetition developments in the application of the means test of section 707(b)(2) was not appropriate because the plain meaning of section 707(b)(2) required its application to the circumstances that existed on the petition date.

In re Harwick*, 2007 Bankr. LEXIS 476 (Bankr. D.N.H. February 12, 2007) (Deasy, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[2]**

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

0307-117 **Confirmation denied due to failure to recognize creditor's rights under hanging paragraph.** (*Bankr. E.D. Tex.)*

PROCEDURAL POSTURE: Debtors proposed a chapter 13 plan and sought confirmation. The court sua sponte questioned the propriety of confirming a plan, even in the absence of an objection from an affected secured creditor, that proposed a bifurcation of a claim into secured and unsecured components when such claim was entitled to protection from bifurcation under 11 U.S.C. § 506 by the "dangling paragraph" following 11 U.S.C. § 1325(a)(9).

OVERVIEW: Debtors conceded the applicability of the "dangling paragraph" (referred to by the court as section 1325(a)(*)) to the treatment of allowed secured claims in this case. However, debtors argued that section 1325(a)(*) had no application to the acceptance of a plan by a creditor under section 1325(a)(5)(A) and that, in light of the failure of either secured creditor to present a timely objection to a proposed plan treatment based upon a bifurcation of its secured claim, each creditor had "accepted" the bifurcation treatment and the substantial reduction of its secured claim. Because of those purported acceptances, debtors argued their proposed plan was entitled to confirmation under section 1325(a). The court rejected debtors' arguments, noting the Code invoked the protection section 1325(a)(*) on the secured creditors' behalf. The court held that when an allowed secured claim was entitled to the protection offered by section 1325(a)(*), but that protected status was not acknowledged by the terms of a proposed chapter 13 plan, that proposed plan was unconfirmable under section 1325(a), notwithstanding the lack of a timely objection, in the absence of an affirmative waiver of that protection by the affected creditor.

***In re Allen**, 2006 Bankr. LEXIS 3934 (Bankr. E.D. Tex. October 13, 2006) (Parker, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

0307-118 **Secured creditor was not entitled to deficiency claim where debtor surrendered vehicle in full satisfaction of claim.** (*B.A.P. 8th Cir.)*

PROCEDURAL POSTURE: Plaintiff creditor appealed a decision of the Bankruptcy Court for the Western District of Missouri, which confirmed defendant debtors' chapter 13 plan and allowed the creditor's claim as fully secured.

OVERVIEW: The creditor held a claim secured by a purchase money security interest in the debtors' truck, which was purchased within 910 days prior to the bankruptcy filing. The debtors' plan proposed to surrender the truck as full payment of the entire debt, leaving the creditor without an unsecured claim. The bankruptcy court confirmed the plan and allowed the creditor's secured claim. The panel affirmed. The panel agreed with the majority view that the hanging paragraph following 11 U.S.C. § 1325(a)(9) applied when the debtors chose to surrender the collateral under section 1325(a)(5)(C), instead of retaining it under section 1325(a)(5)(B), and to thereby treat the claim as fully secured for confirmation purposes under section 1325(a)(5)(B) or (C). The court held that the bankruptcy court correctly concluded that the plain language of section 1325(a)(5) and the hanging paragraph mandated that a secured creditor had a secured claim for the full amount due as of the date of filing of the petition, regardless of whether the debtor intended to retain the collateral or to surrender it; therefore, the creditor was not entitled to a deficiency claim even though the collateral sold for less than the debt.

***Capital One Auto Fin v. Osborn (In re Osborn)**, 2007 Bankr. LEXIS 497 (B.A.P. 8th Cir. February 23, 2007) (Mahoney, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

§ 1325(a)(5)(B) Confirmation of Plan; Conditions for Confirmation; Allowed Secured Claimholders; Retention of Lien and Distribution of Property.

0307-119 **Confirmation denied due to debtor's failure to adequately address creditor's lien or equal monthly payments.** (*Bankr. M.D.N.C.)*

PROCEDURAL POSTURE: A trustee and an oversecured creditor objected to confirmation of a debtor's chapter 13 plan of reorganization.

OVERVIEW: The plan proposed to pay adequate protection payments to the creditor until the debtor's attorneys' fees were paid. When the fees were paid, the debtor proposed to pay the creditor in equal monthly installments as determined by the trustee. The court overruled the creditor's objection to confirmation because 11 U.S.C. § 1325(a)(5)(B)(iii)(II) did not require that the equal monthly payments begin immediately after confirmation and continue through the end of the plan. The court also held that, consistent with 11 U.S.C. § 1326(b)(1), the debtor could pay the 11 U.S.C. § 507(a)(2) claims for the debtor's attorneys' fees and costs each month after the payment of the adequate protection payment required by 11 U.S.C. § 1325(a)(5)(B)(iii)(II) and before the equal monthly payments began. However, the court found that the plan did not satisfy section 1325(a)(5) and denied confirmation because the plan did not address creditor's lien, as required by section 1325(a)(5)(B)(i), and did not adequately address equal monthly payments, as required by the unambiguous language of section 1325(a)(5)(B)(iii).

In re Hill, *2007 Bankr. LEXIS 502 (Bankr. M.D.N.C. February 12, 2007) (Waldrep, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.06[3]**

§ 1325(a)(5)(C) Confirmation of Plan; Conditions for Confirmation; Allowed Secured Claimholders; Debtor's Surrender of Property.

0307-120 **Secured creditor could not claim deficiency where debtor surrendered vehicle in full satisfaction of claim.** (*Bankr. M.D. Ga.)*

PROCEDURAL POSTURE: Respondent debtor petitioned for relief under chapter 13 and filed a plan for confirmation. Movant creditor, who had provided financing for the debtor's car, objected to the confirmation when the debtor proposed returning the car for satisfaction of the debtor's claim.

OVERVIEW: In June, 2006, the debtor purchased a vehicle that was financed by the creditor. The creditor had a purchase money security interest in the vehicle. The debtor had purchased the vehicle within 910 days of the petition for bankruptcy relief. In her proposed confirmation plan, the debtor sought to surrender the vehicle in full satisfaction of her obligation to the creditor. The value of the vehicle was less than the creditor's secured claim for $17,606. The debtor also proposed in her plan to pay a 100% dividend on non-priority unsecured claims. The court agreed with the majority that the amendments made to 11 U.S.C. § 1325(a)(5)(C) by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), precluded the creditor from bifurcating its undersecured claim when the debtor had elected to return the vehicle in satisfaction of the claim. Under the amendments made by the BAPCPA, the creditor did not have the authority to file an unsecured claim for the deficiency once the debtor had elected to return the vehicle.

Capital One Auto Fin. v. Bivins (In re Bivins), *2007 Bankr. LEXIS 519 (Bankr. M.D. Ga. February 23, 2007) (Hershner, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.06[4]**

§ 1325(b) Confirmation of Plan; Objections.

0307-121 **60 month minimum plan period required for above median debtors where trustee objected to confirmation despite lack of disposable income.** (*Bankr. M.D.N.C.)*

PROCEDURAL POSTURE: Pursuant to 11 U.S.C. § 1325(b), the trustee objected to the confirmation of the debtors' proposed chapter 13 plan of reorganization on the ground that one debtor was an above-median-income debtor and the length of the plan period was 55 months rather 60 months.

OVERVIEW: The trustee's objection asserted that the plan could not be confirmed because one debtor was an above-median-income debtor and the length of the plan period was 55 months. The court denied confirmation because, the trustee objected to confirmation, pursuant to section 1325(b), and the proposed confirmation was less than 60 months. The court held that, where the trustee objected to confirmation, a plan duration of 60 months was required in a chapter 13 case involving an above-median-income debtor without regard to whether such debtor's Form B22C reflected positive disposable monthly income unless the plan provided for payment in full of all allowed unsecured claims over a shorter period. The court held that accepting the debtors' interpretation that section 1325(b) imposed no minimum plan period where one above-median-income debtor had no monthly disposable income at the time of confirmation was inconsistent with chapter 13's objectives and policy and undermined the ability of interested parties to monitor the case to ensure that the debtors exercised their best efforts to repay creditors during a specified minimum plan period.

In re Strickland, *2007 Bankr. LEXIS 508 (Bankr. M.D.N.C. February 13, 2007) (Stocks, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08**

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

§ 105 Power of Court.

0307-122 **Bankruptcy court had authority to enjoin creditor from filing adversarial proceedings following several frivolous complaints.** (*W.D. La.)*

PROCEDURAL POSTURE: Appellant creditor challenged a judgment of the bankruptcy court, which denied the creditor's objections to the dischargeability of debts of appellee debtor and enjoined the creditor and its affiliates from filing any complaint under 11 U.S.C. §§ 523 or 727 in the Monroe or Alexandria Divisions unless it obtains leave of the bankruptcy court.

OVERVIEW: The creditor claimed that the debtor fraudulently obtained a loan from the creditor by listing an antique firearm that he did not own as collateral. The bankruptcy court found that the debtor did not violate 11 U.S.C. § 523(a)(2)(B) because he did not submit a materially false statement in writing regarding his collateral. The bankruptcy court also found that the debtor did not knowingly and fraudulently fail to disclose his income tax refund in violation of 11 U.S.C. § 727. On appeal, the court found that the debtor gave an oral statement regarding the collateral and that the creditor failed to offer any evidence contradicting the debtor's testimony or the bankruptcy court's conclusions. The debtor testified that he did not list an anticipated tax refund on the bankruptcy forms because he did not know what amount he was going to receive, and he misunderstood his obligation to amend his disclosures. The bankruptcy court had authority under 11 U.S.C. § 105 to enjoin the creditor from participating in adversarial proceedings after the bankruptcy court repeatedly warned the creditor against its frivolous complaints.

Friendly Fin. Service-Eastgate, Inc. v. Dorsey*, 2007 U.S. Dist. LEXIS 13023 (W.D. La. February 22, 2007) (James, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:105.01**

0307-123 **Bankruptcy court lacked authority to enforce alleged injunction that was not expressly set forth in plan or settlement with creditor.** (*Bankr. D. Mass.)*

PROCEDURAL POSTURE: Movant, a liquidating agent for the debtors, requested the entry of an order, pursuant to the court's authority under 11 U.S.C. § 105, enforcing an asserted injunction set forth in the debtors' joint liquidating plan of reorganization against respondent state taxing authorities, which were attempting to collect taxes from former officers or directors of the debtors. The taxing authorities filed oppositions to the motion.

OVERVIEW: The issue in the case was whether the confirmation order or the plan contained an injunction preventing the authorities from pursuing the directors and officers. The court denied the motion. There was nothing in the confirmation order that extended protection to parties other than the debtors, and it only provided relief to the same extent as that provided in 11 U.S.C. § 362. Even if the settlement agreement could be construed to provide the requested injunctive relief, it was unenforceable because the plan and the motion did not remotely satisfy the standards required for such an injunction. Additionally, cobbling an injunction from the confirmation order, the plan, and the settlement, did not reach the level of notice required under Fed. R. Bankr. P. 2002(c)(3) and 3016. Finally, 11 U.S.C. § 105 was not so broad so as to permit the court to amend the confirmation order and plan to create a third party injunction which did not appear therein. Thus, there was no injunction available to the officers and directors in the plan or confirmation order. To the extent that the agent requested such an injunction, the request had to be by an adversary proceeding and not by motion.

In re Ground Round, Inc.*, 2007 Bankr. LEXIS 503 (Bankr. D. Mass. February 13, 2007) (Hillman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:105.01**

§ 109(e) Who May Be a Debtor; Chapter 13.

0307-124 **Unemployed debtor who nonetheless had sufficiently stable and regular income was eligible under chapter 13.** (*Bankr. W.D. Va.)*

PROCEDURAL POSTURE: Creditor alleged that chapter 13 debtor failed to qualify as a chapter 13 debtor because she failed to satisfy the chapter 13 eligibility requirements set forth in 11 U.S.C. § 109(e).

OVERVIEW: Creditor claimed that debtor did not qualify as a debtor under section 109(e) because she did not have a regular income. The court held that, although she was unemployed, she had income that was sufficiently stable and regular based on the contributions of her non-filing husband. The court held that, while the non-filing husband had not evidenced his willingness to contribute the financing necessary to fund debtor's chapter 13 plan via an affidavit or testimony, he had evidenced such a willingness by enabling debtor to make her plan payments to date. Creditor also argued that debtor exceeded the section 109(e) unsecured debt limit of $307,675. The court held that the total of unsecured and undersecured debts did not exceed the debt limit. The court held that creditor presented no evidence to support its claim that debtor failed to properly account for an additional undersecured claim.

Singer Asset Fin. Co., LLC v. Mullins (In re Mullins)*, 2007 Bankr. LEXIS 437 (Bankr. W.D. Va. February 12, 2007) (Krumm, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.06**

§ 110 Penalty for Persons Who Negligently or Fraudulently Prepare Bankruptcy Petitions.

0307-125 **Petition software provider was a bankruptcy petition preparer and was properly sanctioned for unauthorized practice of law.** (*9th Cir.)*

PROCEDURAL POSTURE: In an adversary proceeding, appellate bankruptcy petition software provider was found to have acted as a "bankruptcy petition preparer" within the meaning of 11 U.S.C. § 110 and to have violated the requirements thereof. The provider had committed fraudulent, unfair, or deceptive conduct, and had engaged in the unauthorized practice of law. The Bankruptcy Appellate Panel ("BAP") of the Ninth Circuit affirmed and the software provider appealed.

OVERVIEW: In a different bankruptcy proceeding, another bankruptcy court had held that the software provider was a bankruptcy petition preparer. Because there remained some possibility that, as the provider contended, the website changed significantly before the current debtor accessed it, the court declined to hold that issue preclusion applied. For a fee, the provider had provided customers with completed bankruptcy petitions. Customers merely provided the data requested by the software and printed the finished forms. This was materially indistinguishable from other cases in which individuals or corporations had been deemed bankruptcy petition preparers. The court held that the bankruptcy court did not err in imposing fines under 11 U.S.C. § 110(b), (c) and (f) because bankruptcy petitions prepared by the provider did not include the preparer's signature, name, address, or social security. The provider's system touted its offering of legal advice and projected an aura of expertise concerning bankruptcy petitions; and, in that context, it offered personalized – albeit automated – counsel. Because this was the conduct of a non-attorney, it constituted the unauthorized practice of law.

In re Reynoso*, 2007 U.S. App. LEXIS 4256 (9th Cir. February 27, 2007) (Fletcher, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:110.01**

§ 328(a) Limitation on Compensation of Professional Persons; Professionals Employed by Trustee or Committee.

0307-126 **Bankruptcy court erred in reducing fee claimed by trustee's attorney pursuant to approved contingency fee agreement.** (*E.D. Wis.)*

PROCEDURAL POSTURE: Appellant collection attorney sought review of an order of the bankruptcy court, which reduced the fees owed him by the bankruptcy trustee under his one-third contingency fee arrangement with the trustee, which the bankruptcy court had previously approved, for his efforts in recovering $10,000 of the $12,500 that the debtor had fraudulently transferred to a Wisconsin lawyer.

OVERVIEW: The bankruptcy court reduced the attorney's fee after finding that the attorney had settled the claim earlier and more easily than expected. The court held that the bankruptcy court erred in reducing the fee. Given the contingency fee set forth in the attorney's retention application, the bankruptcy court properly assumed that the attorney sought approval under 11 U.S.C. § 328. Further, it approved the attorney's application on the terms and conditions set forth in the application and subject to the provisions of section 328(a). The bankruptcy court gave no indication in its order that it intended to later review the application under 11 U.S.C. § 330. Thus, it was obliged to review the attorney's application under the "improvident" standard of 11 U.S.C. § 328(a), so the contingency fee could be modified only upon a finding that unanticipatable developments had occurred subsequent to approval of the application. The court held that the fact that the attorney settled the claim quickly and easily was not a development "not capable of being anticipated" at the time his application was approved.

***In re Gilbertson**, 2007 U.S. Dist. LEXIS 11734 (E.D. Wis. February 4, 2007) (Griesbach, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:328.02**

§ 362 Automatic Stay.

0307-127 **Relief from stay granted to allow arbitration of asbestos-related insurance claims.** (*Bankr. S.D.N.Y.)*

PROCEDURAL POSTURE: Defendants, chapter 11 debtor and its parent company, moved to dismiss plaintiff insurers' complaint, which sought a declaratory judgment that the policies issued to debtor did not cover asbestos-related claims and challenged the proposed assignment of rights in the policies to a trust. Defendant insurance companies sought relief from the automatic stay, 11 U.S.C. § 362, to allow arbitration of the coverage issues raised in the complaint.

OVERVIEW: Debtor sold a number of products containing asbestos and was a defendant in thousands of personal injury lawsuits. The insurers issued liability policies to the parent which also covered debtor. Although the policies excluded coverage for claims arising out of asbestosis or any similar condition caused by asbestos, the parent and debtor contended that the policies covered asbestos-related claims. Defendant insurance companies also issued liability insurance policies that the parent claimed could provide coverage for asbestos-related claims. Debtor's plan proposed a transfer of the parent's and debtor's rights under the policies to a trust that would administer the defense and payment of any claims. Debtor, the parent, one of the insurers, and many of the insurance companies entered into an agreement to arbitrate any disputes and attached a list of some, but not all, of the policies. The court held that the resolution of the coverage dispute was subject to the arbitration agreement. The court also held that the arbitration agreement covered all of the insurance policies, not just those listed, because the arbitration clause did not expressly exclude unlisted policies from its scope.

***Continental Casualty Co. v. Pfizer, Inc. (In re Quigley Co.)**, 2007 Bankr. LEXIS 480 (Bankr. S.D.N.Y. February 22, 2007) (Bernstein, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.01**

§ 362(a) Automatic Stay; Scope.

0307-128 **Stay did not apply to bar ejectment action against debtor's non-debtor subsidiary.** (*4th Cir.)*

PROCEDURAL POSTURE: In a chapter 11 proceeding initiated by appellants, corporate debtors, the District Court for the District of Maryland affirmed the bankruptcy court's denial of the debtors' motion for sanctions against appellees, creditors, for alleged violation of the automatic stay, to void ejectment and to turn over property and rents collected. The debtors appealed.

OVERVIEW: The debtors claimed that the creditors violated the automatic stay under 11 U.S.C. § 362(a) by pursuing a state ejectment action against the debtors' wholly-owned subsidiary. The appellate court held that the district and bankruptcy courts did not err in finding that the automatic stay under 11 U.S.C. § 362(a) did not apply to the creditors' actions against the debtors' non-bankrupt subsidiary in state court because the creditors' state ejectment action against the debtors' subsidiary was not against a bankruptcy debtor and was not an action to obtain ownership or control of property of the debtors' bankruptcy estate. The appellate court found that 11 U.S.C. § 362(a)(1) did not apply because the debtors' non-bankrupt subsidiary was a distinct legal entity established to hold title to property and a judgment against it imposed no obligations or liability on the debtors. The appellate court further found that 11

U.S.C. § 362(a)(3) did not apply because the subsidiary's loss of its property due to the creditors' state ejectment action affected only the value of the debtors' interests, and not the nature and extent of the debtors' interest in the subsidiary.

Kreisler v. Goldberg, *2007 U.S. App. LEXIS 4152 (4th Cir. February 26, 2007) (Williams, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.03**

§ 362(b)(3) Automatic Stay; Exceptions; Acts to Perfect, Maintain or Continue Perfection of an Interest in Property.

0307-129 **Creditor's claim was unsecured due to failure to act to protect lien that expired thirty days after chapter 11 plan confirmation.** (*Bankr. S.D.N.Y.)*

PROCEDURAL POSTURE: The debtors filed a motion for partial summary judgment to reclassify creditor's claim number as unsecured. The creditor filed its own motion for summary judgment and argued that its claim was secured by virtue of a mechanic's lien under Nebraska law.

OVERVIEW: The debtors argued that, assuming the lien was valid, the lien lapsed because the creditor failed to bring a suit to foreclose the lien as required under Nebraska law. However, Neb. Rev. Stat. § 52-140 was a statute of limitations and not an aspect of the perfection process under the Nebraska law. Accordingly, any action to enforce the lien was subject to the automatic stay of 11 U.S.C. § 362. During the pendency of the automatic stay, 11 U.S.C. § 108(c) tolled the time for the creditor to institute a foreclosure action. However, although section 108(c) tolled the statute of limitations, the lien lapsed 30 days after the chapter 11 plan became effective. The creditor's argument that the plan obligated the debtors to treat its claim as secured also failed. This provision only applied to "allowed" claims. Because the debtors filed an objection, the claim was not "allowed." Finally, there was no merit to the creditor's equitable estoppel argument. The creditor asserted that the debtors stated the lien "was fine." However, the debtors never stated that the creditor was not required to take any action to protect its lien, and the creditor was responsible for protecting its own interests.

In re WorldCom, Inc., *2007 Bankr. LEXIS 494 (Bankr. S.D.N.Y. February 23, 2007) (Gonzalez, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.05[4]**

§ 362(c)(1) Automatic Stay; Duration; Acts Against Property of the Estate.

0307-130 **Property which was undisclosed in schedules and remained in estate was subject to stay.** (*Bankr. D. Kan.)*

PROCEDURAL POSTURE: Plaintiff creditor filed a Fed. R. Civ. P. 12(b)(6) motion to dismiss defendant trustee's counterclaim against the creditor for damages and for violating the automatic stay under 11 U.S.C. § 362(h) by including a mobile home in a foreclosure action and by commencing a quiet title action.

OVERVIEW: The debtors disclosed the land they owned but did not disclose the mobile home on the land. The creditor obtained an order lifting the stay to foreclose its mortgage on the land. The trustee did not object because he did not know about the home. The land and home were sold at judicial sale. The creditor filed a quiet title action. The trustee filed a counterclaim for a violation of the stay. The creditor's motion to dismiss the counterclaim for failure to state a claim alleged that the bankruptcy case was closed before the commencement of the quiet title action. The court denied the motion because the creditor failed to supply a memorandum of any authority, pursuant to Bankr. D. Kan. R. 7012.1(a). The court found that the trustee stated a claim for a violation of the automatic stay against the creditor and for damages under 11 U.S.C. § 362(h) because the home was undisclosed on the schedules and in the stay relief motion and, thus, remained in the estate and was not abandoned, pursuant to 11 U.S.C. § 554(c). The court held that 11 U.S.C. § 362(c)(1), which stated that the stay remained in force as long as the property remained in the estate, rather than section 362(c)(2), applied.

PHH Mortgage Corp. v. Dick (In re Dick), *2007 Bankr. LEXIS 487 (Bankr. D. Kan. February 9, 2007) (Nugent, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.06[1]**

§ 365(b)(1) Executory Contracts and Unexpired Leases; Effect of Existing Defaults; Requirements for Assumption.

0307-131 **Simple default, rather than default as defined in agreement, is sufficient to require cure by debtor as prerequisite to assumption.** (*S.D.N.Y.)*

PROCEDURAL POSTURE: Appellant debtor challenged an order of the United States Bankruptcy Judge sitting in a United States Bankruptcy Court, which denied its motion to assume a so-called Dark Fiber Agreement with appellee corporation. At issue was whether there was a default pursuant to 11 U.S.C. § 365(b)(1) under an agreement whereby appellant had agreed to build and appellee had agreed to lease a minimum commitment of fiber miles.

OVERVIEW: Appellee argued that appellant materially breached the agreement by failing to deliver fiber and to complete the backbone network, and by receiving prepaid installation charges for connections never constructed. Appellee denied that there had been any default, contending that appellee's failure to provide written notices of default under the agreement precluded the bankruptcy court from finding appellant in default. The bankruptcy judge held that the power to assume an executory contract under section 365(b)(1) was unavailable unless at the time of the assumption the debtor cured the default or provided adequate assurance that it would promptly cure such default. The court rejected appellant's argument that the word "default," for purposes of section 365(b)(1), meant default as defined in the agreement. Instead, the court agreed with the bankruptcy court that the term "default" simply meant a failure to perform a duty imposed by law or contract. To demand adequate assurance of future performance, appellee did not need to show that it gave technical notice of default and an opportunity to cure; it only needed to show that there was a default by appellant in the ordinary sense of the word.

Abovenet, Inc. v. SBC Telecom, Inc.*, 2007 U.S. Dist. LEXIS 13561 (S.D.N.Y. February 27, 2007) (Brieant, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:365.05**

§ 502(b)(1) Allowance of Claims or Interests; Disallowance; Unenforceable Claim.

0307-132 **State procedural requirements are not incorporated into bankruptcy claims process and could not render debt unenforceable.** (*Bankr. C.D. Cal.)*

PROCEDURAL POSTURE: Chapter 7 debtors objected to certain proofs of claims filed by general unsecured creditors. Debtors argued that the claims at issue should be disallowed under the "applicable law" language of 11 U.S.C. § 502(b)(1). The "applicable law" relied upon was Cal. Code Civ. Proc. § 454 and the Fair Debt Collections Practices Act ("FDCPA"), 15 U.S.C. §§ 1692, 1692a-1692p.

OVERVIEW: The proofs of claims at issue were not filed in accordance with Fed. R. Bankr. P. 3001 and thus were not entitled to prima facie validity. However, noncompliance with the technical requirements of Rule 3001 was not in and of itself a ground for disallowance. When a claim was not entitled to prima facie validity, a debtor had to show that the claim should not be allowed based on one of the grounds listed in 11 U.S.C. § 502(b). Here, debtors relied upon 11 U.S.C. § 502(b)(1). Per Cal. Code. Civ. Proc. § 454, a party suing on an account had to deliver to the adverse party, within ten days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The bankruptcy court held that this procedural requirement would not render a claim unenforceable under 11 U.S.C. § 502(b)(1). State law procedural requirements relating to state law enforcement of debts in state court were not incorporated into the proof of claim process in bankruptcy court. The FDCPA, similarly, did not render a claim unenforceable under 11 U.S.C. § 502(b)(1). The bankruptcy court ruled that certain claims were to be partially disallowed.

In re Lasky*, 2007 Bankr. LEXIS 512 (Bankr. C.D. Cal. February 22, 2007) (Tighe, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:502.03[2]**

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

0307-133 **Creditor granted administrative expense for counsel fees due to actions to preserve estate.** (*Bankr. D. Mass.)*

PROCEDURAL POSTURE: The creditor's counsel objected to the chapter 13 trustee's report and filed a motion for the allowance of an administrative expense for professional services rendered, pursuant to 11 U.S.C. § 503(b)(1)(A).

OVERVIEW: The court confirmed a plan providing for a 100% dividend through the liquidation of the debtor's interest in property he owned with his ex-wife and approved a settlement between the debtor and ex-wife whereby the property was sold. The debtor filed an unsuccessful motion for an order directing the trustee to reserve funds in which the debtor sought to have the estate pay capital gains taxes triggered by the postpetition sale of the property. The trustee disbursed the funds. The creditor's counsel filed a motion for allowance of administrative expense, pursuant to section 503(b)(1)(A). The court granted the motion because the creditor preserved and prevented the encumbering of the estate by objecting to the debtor's motion to use the estate assets to pay a capital gains tax that was not rightfully the estate's burden to bear. The court reduced the requested amount to $5,000 because the $7,972 requested for professional services was somewhat excessive for what was expected as necessary under the circumstances.

In re Brown*, 2007 Bankr. LEXIS 490 (Bankr. D. Mass. February 13, 2007) (Rosenthal, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:503.06**

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

0307-134 **Trustee was entitled to surcharge against creditor's interest in debtor's insurance proceeds as creditor had not requested timely relief from bankruptcy court.** (*Bankr. S.D. Ala.)*

PROCEDURAL POSTURE: Bankruptcy debtors' vehicle was involved in an accident and deemed a total loss by the debtors' insurer, and the bankruptcy trustee received the insurance proceeds. A creditor allegedly secured by the vehicle requested the proceeds from the trustee, but the creditor did not request relief from the court, and the trustee moved for a determination of secured status and for a surcharge for administration under 11 U.S.C. § 506(c).

OVERVIEW: After the creditor did not file a motion for relief within the time stated by the creditor, the trustee hired counsel for the instant proceeding to determine whether the creditor was secured by the vehicle and the insurance proceeds. The trustee contended that a surcharge to cover the trustee's costs and attorney fees was warranted because proper documentation from the creditor of its secured status would have obviated the need for the trustee to incur the costs and fees. The court first held that the documentation offered by the creditor established that the creditor was secured by the vehicle and thus the insurance proceeds, but the creditor was required to show that the creditor was a loss payee under the insurance policy. Further, a surcharge against the creditor's security interest was warranted based on the trustee's efforts to preserve the insurance proceeds in the face of the creditor's unwillingness to seek relief from the court, but the amount of the requested surcharge was subject to reduction since a minimal delay by the trustee might have avoided the necessity for the proceeding.

In re Milligan*, 2007 Bankr. LEXIS 493 (Bankr. S.D. Ala. February 9, 2007) (Mahoney, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:506.05**

§ 523(a)(2)(A) Exceptions to Discharge; Types of Debt Excepted; Fraud; False Pretenses, False Representations or Actual Fraud.

0307-135 **Fraud claim against insurance investor that did not involve pecuniary loss was dischargeable.** (*4th Cir.*)

PROCEDURAL POSTURE: Plaintiff creditor appealed a judgment of the District Court for the Eastern District of Virginia reversing a bankruptcy court's summary judgment holding that a debt owed by defendant debtor was excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A), which excepted from discharge any debt for money, property, services, or credit obtained by false pretenses, a false representation, or actual fraud.

OVERVIEW: The debtor was a private investigator who was hired by an insurance company to investigate the validity of injuries that the creditor allegedly suffered as a result of an automobile accident. The debtor befriended the creditor and convinced the creditor to attempt activities in which the creditor was reluctant to participate because of her injuries. In the underlying state court action, the creditor asserted a fraud claim against the debtor and obtained a judgment awarding compensatory damages for emotional distress and punitive damages. In the instant action, the creditor argued that the state court judgment was not a dischargeable debt because it fell within the exception to discharge established by 11 U.S.C. § 523(a)(2)(A). The parties did not dispute that the state court judgment was based on the debtor's fraud, nor did they dispute that the debtor obtained nothing directly or indirectly from the creditor as a result of the debtor's fraud. On appeal, the court held that section 523(a)(2)(A)'s exception to discharge did not apply to the creditor's judgment claim because the debtor did not obtain money, property, services, or credit from the creditor.

Nunnery v. Rountree (In re Rountree), *2007 U.S. App. LEXIS 4258 (4th Cir. February 27, 2007) (Gregory, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.08[1]**

§ 541(a) Property of the Estate; Creation and Composition of the Estate.

0307-136 **Claims for breach of fiduciary duty against directors of debtor were property of the estate and could be settled by trustee.** (*1st Cir.*)

PROCEDURAL POSTURE: Appellants, former employees of debtor corporation and alleged creditors, challenged an order from the District Court for the District of Massachusetts that affirmed a bankruptcy court's approval of a stipulation for waiver and release entered by the trustee for the bankruptcy estate with appellees, debtor's corporate officers, shareholders, and board members.

OVERVIEW: Appellants sued debtor and appellees in state court for lost wages and benefits alleging, inter alia, fraudulent transfer, breach of fiduciary duty, and alter ego liability. After debtor filed for bankruptcy, appellants sought, and were granted, approval to proceed in state court. The trustee filed a motion to approve a stipulation of settlement and release of appellants' claims which was allowed. Appellants did not have a cause of action for fraudulent conveyance that was separate from the trustee's cause of action. Also, there could be no breach of fiduciary duty to creditors that was not derivative of a breach to the corporation. Claims for breach of fiduciary duty against a debtor's directors accrued to the estate, not appellants. Because the claims the trustee sought to settle were derivative, the same claims pursued against an alter ego or successor corporation were derivative. Such derivative claims were estate property under 11 U.S.C. § 541(a)(1) and the trustee was authorized to settle them. The trustee's motion fell squarely within the definition of core proceedings under 28 U.S.C. § 157, and the bankruptcy court had jurisdiction over the stipulation.

Morley v. Ontos, Inc. (In re Ontos, Inc.), *2007 U.S. App. LEXIS 4663 (1st Cir. March 1, 2007) (Torruella, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:541.02**

§ 547(b) Preferences; Avoidable Transfers.

0307-137 **Payment of sale of debtor's residence to debtor's mother was an avoidable payment to an insider.** (*Bankr. N.D. Cal.)*

PROCEDURAL POSTURE: Plaintiff chapter 7 trustee filed an adversary proceeding against defendant, the debtor's mother, to avoid alleged transfers from the debtor made to his mother or on his mother's behalf a little more than 90 days prior to the bankruptcy.

OVERVIEW: The debtor's mother had acted as a guarantor by pledging her credit union shares as collateral for a loan that the debtor had made. When the escrow closed on the sale of his residence, a check was give to the debtor's mother, which she turned over to credit union, thereby exonerating her shares. The court found without merit the mother's argument that the check written to he out of escrow was not a transfer of an interest of the debtor in property, as required by 11 U.S.C. § 547(b). The debtor clearly had an interest in the funds. The debtor was insolvent at the time of the transfer. There was no support for the proposition that the assets of the debtor's former spouse, who was a codebtor, wee to be considered in determining the debtor's solvency. The payment was for the benefit of an insider-guarantor, and the court found that the mother was an insider, because it reduced the mother's exposure on the guarantee. The payment was made less than one year before the filing of the petition.

Locke v. Scoggins (In re Perpinan)*, 2007 Bankr. LEXIS 530 (Bankr. N.D. Cal. February 14, 2007) (Jaroslovsky, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:547.03**

§ 550 Liability of Transferee of Avoided Transfer.

0307-138 **Trustee could avoid return of vehicle to auction house where it had been purcahsed by debtor.** (*Bankr. N.D. Iowa)*

PROCEDURAL POSTURE: Plaintiff, a chapter 7 trustee, filed an action against defendant, an auto auction company (auction), to obtain turnover of proceeds, pursuant to 11 U.S.C. § 550, that the trustee claimed belonged to the estate.

OVERVIEW: The debtor owned a used car dealership and he routinely acquired inventory at auto auctions. Prior to filing the chapter 7 petition, the debtor had purchased three vehicles from the auction and used the auction's "float" program for payment. Postpetition, the debtor sold two of the cars and authorized the auction to cash the checks that the debtor used to pay for them. The debtor was unable to sell the third car, so the debtor returned the car to the auction, and the auction sold the car for more than the amount owed by the debtor, and the auction kept the difference. Applying Illinois law, the court concluded that the vehicles became property of the estate when the debtor purchased them at the auction sale, even though the auction kept possession of the title. The sales tickets clearly listed the debtor as the buyer and the auction was not able to produce any documentation that it purchased any of the vehicles. There was no explicit agreement that the auction would remain owner, as contemplated by 810 Ill. Comp. Stat. 5/2-401(2). Under 625 Ill. Comp. Stat. 5/3-112(e), the court would still conclude that the debtor was the owner of the vehicles when the petition was filed.

Huisinga v. Greater Quad City Auto Auction (In re Hocken)*, 2007 Bankr. LEXIS 526 (Bankr. N.D. Iowa February 22, 2007) (Kilburg, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:550.01**

§ 706(a) Conversion; By the Debtor.

0307-139 **Denial of debtor's motion to convert to chapter 13 was an appropriate response to debtor's fraudulent conduct.** (*U.S.)*

PROCEDURAL POSTURE: Petitioner bankruptcy debtor filed a voluntary petition under chapter 7 and made a number of statements about his principal asset, a house in Maine, that were misleading or inaccurate. The debtor filed a notice of conversion to chapter 13 which was denied. On appeal, the First Circuit rejected the debtor's argument that 11 U.S.C. § 706(a) gave him an absolute right to convert to chapter 13. Certiorari was granted.

OVERVIEW: In verified schedules attached to his bankruptcy petition, the debtor made a number of statements about his principal asset, a house in Maine, that were misleading or inaccurate. He later claimed that the misstatements were made in error, but the bankruptcy court rejected his argument. The court held that the text of 11 U.S.C. § 706(d) provided adequate authority for the denial of the debtor's motion to convert his chapter 7 case to chapter 13. Nothing in the text of either 11 U.S.C. § 706 or 11 U.S.C. § 1307(c) (or the legislative history of either provision) limited the authority of the bankruptcy court to take appropriate action in response to fraudulent conduct by the debtor. The broad authority granted to the bankruptcy judge to take any action that was necessary or appropriate to prevent an abuse of process described in 11 U.S.C. § 105(a), was adequate to authorize an immediate denial of a motion to convert filed under 11 U.S.C. § 706.

Marrama v. Citizens Bank*, 2007 U.S. LEXIS 2651 (U.S. February 21, 2007) (Stevens, J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:706.02**

§ 727(d)(3) Discharge; Grounds for Revocation; Refusal to Obey Court Order.

0307-140 **Revocation of discharge denied where debtor's failure to turnover income tax refund was due to debtor spouse's use of funds to purchase illegal drugs.** (*Bankr. D. Kan.)*

PROCEDURAL POSTURE: Plaintiff trustee filed an adversary complaint for turnover and for revocation of the chapter 7 discharge, pursuant to 11 U.S.C. § 727(d)(3), as to defendant debtor.

OVERVIEW: The trustee filed an adversary action for turnover and revocation of the debtor's discharge for failure to obey a court order to turn over to the trustee his portion of the debtor's income tax refund. The debtor alleged that her husband, her joint debtor, spent the money on illegal drugs. The court denied the complaint to revoke the debtor's discharge or enter judgment for the amount of the refund because the debtor's actions were not willful, intentional disobedience of the lawful turnover order under section 727(a)(6)(A). Rather, an intervening event, her husband's use of the refund to buy illegal drugs, caused the debtor to neither receive the refund or benefit from the refund. The court found that the debtor did not have the ability to comply with the turnover order.

Morris v. Wheeler*, 2007 Bankr. LEXIS 444 (Bankr. D. Kan. February 14, 2007) (Somers, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.15[5]**