May 2007

Collier Bankruptcy Case Update

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May 7, 2007 Issue 1

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§ 109(h) Who May Be a Debtor; Mandatory Credit Counseling.

0507-001 **Credit counseling obtained on the petition date prior to filing satisfied requirements.** (*Bankr. D.D.C.)*

PROCEDURAL POSTURE: Chapter 7 trustee filed a motion to dismiss debtor's case on the grounds that debtor, who obtained a credit counseling agency briefing on the day of, but prior to the time of, the filing of the petition that commenced the bankruptcy case, did not comply with 11 U.S.C. § 109(h).

OVERVIEW: Debtor obtained a credit counseling agency briefing on the day of, but prior to the time of, the filing of the chapter 7 petition. Under section 109(h), an individual debtor had to obtain a credit counseling agency briefing during the 180-day period preceding the date of filing of the petition by such individual in order to be eligible to be a debtor. The court had held in a previous case that section 109(h) required a debtor to obtain the required briefing no later than the day before the filing of the debtor's bankruptcy petition. In denying trustee's motion to dismiss and directing that the previous case no longer be followed in the district, the court held that Congress used the term "date" in section 109(h) to refer to the moment of the filing of the petition. As a consequence, a debtor could comply with section 109(h) by obtaining the required briefing on the day of the filing, so long as the briefing was obtained before the filing of the petition.

In re Barbaran*, 2007 Bankr. LEXIS 1013 (Bankr. D.D.C. March 29, 2007) (Teel, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.09**

§ 109(h)(3)(A) Who May Be a Debtor; Mandatory Credit Counseling; Exemption; Exigent Circumstances.

0507-002 **Debtors who were unable to obtain credit counseling prior to scheduled foreclosure sale were granted five day extention to fulfill requirement.** (*Bankr. W.D.N.Y.)*

PROCEDURAL POSTURE: The chapter 13 debtors filed a motion for a 30-day extension of time to complete the credit counseling requirement of 11 U.S.C. § 109(h)(1).

OVERVIEW: On the evening before the foreclosure sale of their property, the debtors filed a bankruptcy petition and a statement that they requested but were unable to obtain counseling during the five days from the time of their request. The debtors filed a motion to extend the time to complete counseling and completed counseling five days after the petition date. The court held that the debtors satisfied the standard of section 109(h)(3)(A) to receive a waiver of the time requirement for completion of counseling because they retained counsel on the day before the imminent foreclosure sale, which was an exigent circumstance. Because the debtors had already obtained their credit counseling prior to the hearing of the motion, they fulfilled the requirements of section 109(h)(3)(B) and remained eligible for bankruptcy relief. The court rejected an interpretation of section 109(h)(3)(A)(ii) that compelled the debtors to delay a bankruptcy filing for up to five days in those instances where counseling could be obtained during that period. The court held that the debtors demonstrated that they were unable to obtain counseling before the sale and during the 5-day period beginning from the moment of their request.

In re Giambrone*, 2007 Bankr. LEXIS 1058 (Bankr. W.D.N.Y. March 29, 2007) (Bucki, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.09[3]**

§ 109(h)(3)(B) Who May Be a Debtor; Mandatory Credit Counseling; Exemption; Expiration.

0507-003 **Exigent circumstance of imminent foreclosure on family homestead and debtor's dilligent attempts to obtain credit counseling justified extension of time to fulfill requirement.** (*Bankr. N.D. Tex.)*

PROCEDURAL POSTURE: Chapter 7 debtors filed a motion for an extension of time to complete the pre-bankruptcy credit counseling required by 11 U.S.C. § 109(h).

OVERVIEW: Debtor husband met with his attorney on a Saturday in the face of a scheduled foreclosure sale on his home on Tuesday. The husband tried all weekend and all day Monday to get the required credit counseling over the Internet and could not get a connection with the one and only website address he had been given by his attorney. The husband had no phone number to call to try to obtain credit

counseling by phone. The attorney filed the bankruptcy petition on Monday, believing that debtors had taken the credit counseling as planned. In granting an extension of time to complete the pre-bankruptcy credit counseling, the court held that debtors qualified under section 109(h)(3)(A) and (B) for a temporary waiver of the credit counseling requirement and were allowed the short postpetition window that section 109(h)(3)(B) contemplated for debtors to complete their credit counseling. The court held that there were exigent circumstances due to an imminent foreclosure on a family homestead, and evidence of diligent attempts by debtors to get credit counseling for several days prepetition during a time when the credit counseling website may have been experiencing technical difficulties.

In re Henderson*, 2007 Bankr. LEXIS 1042 (Bankr. N.D. Tex. March 28, 2007) (Jernigan, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.09[3]**

§ 305(b) Abstention; Dismissal or Suspension Sought by Foreign Representative.

0507-004 **Involuntary case filed against state's attorney by inmate he convicted of murder dismissed for bad faith.** (*Bankr. S.D. Fla.)*

PROCEDURAL POSTURE: Debtor, an assistant state attorney, filed an emergency motion to dismiss an involuntary bankruptcy proceeding filed pursuant to 11 U.S.C. § 305(b) that had been filed against him by a purported creditor whose criminal conviction had resulted from a prosecution handled by the alleged debtor. At issue was whether the petition was properly dismissed as a bad faith filing.

OVERVIEW: The purported creditor was a state prison inmate serving a life sentence for murder. He claimed that debtor owed him nearly 10 billion dollars. This was the purported creditor's third involuntary petition directed at persons or entities who were involved in his conviction. Debtor filed an emergency motion to dismiss and for other relief, which the court granted. After taking judicial notice of the other petitions filed by the purported creditor as well as records relating to his state criminal conviction, the court held that the involuntary petition was nonsensical and absurd, that there was no basis for any finding that debtor owed anything to the purported creditor because a civil monetary judgment against a prosecuting attorney could not result from a criminal prosecution, and that the petition had been filed in bad faith. In so ruling, the court relied on three principles: that 11 U.S.C. § 303(i) permitted an award of punitive damages for a bad faith filing; that there was no reason to distinguish bad faith filings in voluntary bankruptcies from those concerning involuntary bankruptcies, and that the court was empowered by 11 U.S.C. § 105(a) to prevent abuses of process.

In re Loe*, 2007 Bankr. LEXIS 1146 (Bankr. S.D. Fla. March 29, 2007) (Ray, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:305.04**

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

0507-005 **Trustee's compensation was subject to reasonableness test.** (*Bankr. W.D. Pa.)*

PROCEDURAL POSTURE: Before the court in a chapter 7 matter was the Trustee's Final Report and Account, an Application for Compensation as Trustee, and an Application for Compensation as Attorney *Pro Se*. The trustee requested compensation as trustee in the amount of $9,188 plus $584 in expenses and compensation as attorney *pro se* in the amount of $2,199.

OVERVIEW: The trustee posited that 11 U.S.C. § 330(a)(7) instructed courts that his compensation was to be treated as a commission without considering the reasonableness test of 11 U.S.C. § 330(a)(3). He further posited that 11 U.S.C. § 326 entitled him to include payments made to secured creditors as part of the base amount on which the trustee's fees were calculated. Regarding payments to secured creditors, the court determined that he was entitled to include funds turned over to secured creditors in the base upon which his compensation was calculated. It cited legislative history which noted that the base on which the maximum fee was computed included moneys turned over to secured creditors, to cover the situation where a trustee liquidated property subject to a lien and distributed the proceeds. On the topic of reasonableness of compensation, 11 U.S.C. § 326(a) established a maximum compensation amount, not an entitlement. Under both 11 U.S.C. § 330(a)(1) and 11 U.S.C. § 326, a court had to consider the reasonableness of fees requested in ruling on a fee application of a chapter 7 trustee. It appeared that the trustee's proportionate efforts did not warrant a fee of $9,188.

Roeder v. No Respondent (In re Ward)*, 2007 Bankr. LEXIS 1155 (Bankr. W.D. Pa. April 13, 2007) (Bentz, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:330.04**

§ 363(f)(4) Use, Sale, or Lease of Property; When Property May Be Sold Free and Clear of Any Interest; Interest in a Bona Fide Dispute.

0507-006 **Order permitting trustee's sale of debtor's land was proper despite bona fide dispute over creditor's lien in property.** (*Bankr. N.D. Ohio)*

PROCEDURAL POSTURE: A creditor, a mortgagee, objected to a motion filed by movant, a chapter 7 trustee, seeking court approval of its proposed sale of land belonging to debtors. At issue was whether, pursuant to 11 U.S.C. § 363(f)(4), the trustee was properly authorized to sell the land despite the creditor's objection and whether a "bona fide" dispute as to the scope of the creditor's interests existed.

OVERVIEW: Debtors owned two parcels of land (lot 1 and 2). Though they had the same street address, each had a separate legal description. When the trustee sought authorization to sell lot 1, the creditor objected, claiming that its mortgage attached to both lots and that the sum for which the land was proposed to be sold was inadequate. The trustee countered that the mortgage attached only to lot 2 and that it thus was entitled to sell lot 1. On the creditor's objection to the trustee's motion, the court concluded that there was a bona fide dispute within the meaning of section 363(f)(4) as to the creditor's interest in lot 1 and that while the trustee was properly authorized to sell lot 1, the creditor was entitled to receive a replacement lien on the proceeds of sale as permitted by section 363(e). In so ruling, the court noted that section 363 did not require that an adversary proceeding on the issue of the conflicting interests be pending in order to determine that there was a bona fide dispute. Rather, because the purpose of section 363(f)(4) was to allow the sale of estate property without the delays that would result from litigation of the disputes relating thereto, an order permitting the sale was proper.

In re Downour*, 2007 Bankr. LEXIS 1102 (Bankr. N.D. Ohio March 28, 2007) (Whipple, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:363.06[5]**

§ 523(a)(7) Exceptions to Discharge; Types of Debt Excepted; Fines, Penalties, or Forfeitures Owed to Governmental Unit.

0507-007 **Bail bond obligation was contractual in nature and dischargeable.** (*Bankr. S.D.N.Y.)*

PROCEDURAL POSTURE: Plaintiff, a private bail bondsman, filed an adversary proceeding against debtor for a determination that its contractual indemnity claim against debtor was non-dischargeable under 11 U.S.C. § 523(a)(7) on the theory that plaintiff, which had paid a forfeited bail bond to the State of New York, was properly subrogated to the forfeiture right of the State of New York.

OVERVIEW: Plaintiff issued a $100,000 bail bond to obtain release, on bail, of a criminal defendant. Debtor executed an indemnity agreement under which he agreed to indemnify plaintiff if plaintiff was required to pay on the bond. When the defendant failed to appear, bail was forfeited, and plaintiff paid $100,000 to the state. After the obligation was reduced by a co-obligor's payment and debtor filed bankruptcy, plaintiff sought an order that the debt was non-dischargeable under section 523(a)(7), but the court denied relief. After reviewing the rules governing statutory interpretation and noting its obligation to construe exceptions to discharge against a creditor such as plaintiff, the court found that the debt did not satisfy the three requirements in section 523(a)(7). Moreover, because the debt was purely contractual, the equitable doctrine of subrogation, urged by plaintiff as an alternative basis for relief, did not apply. Citing 11 U.S.C. § 509(a), the court held that because debtor was not a surety on the bond itself and was not obligated to the state but only to plaintiff, its contractual nature meant that it was subject to discharge as was the case with purely contractual obligations.

Corrales v. Sanchez (In re Sanchez)*, 2007 Bankr. LEXIS 1127 (Bankr. S.D.N.Y. March 28, 2007) (Hardin, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.13**

§ 524 Effect of Discharge.

0507-008 **Reporting of debt to credit agency and refusal to remove debt from report did not violate discharge injunction.** (*Bankr. S.D. Ohio)*

PROCEDURAL POSTURE: Defendants, a creditor and a collection agency retained by the creditor, moved to dismiss an adversary complaint filed by plaintiff, a chapter 7 debtor who had obtained a discharge, for relief from alleged violations of the discharge injunction in 11 U.S.C. § 524. At issue, *inter alia*, was whether the reporting of the debt and a subsequent refusal to remove the debt from debtor's credit report violated the injunction.

OVERVIEW: Though debtor won a discharge in a chapter 7 proceeding, a debt owed to defendant creditor that presumably had been discharged thereby continued to be reflected on debtor's credit report. Debtor claimed that he was entitled to relief from defendants' conduct in reporting the debt and refusing to remove it from his credit report, arguing that it had affected his efforts to buy a house. Defendants moved for dismissal, arguing that the complaint failed to state a claim. The court agreed, and it dismissed the complaint. It rejected debtor's claim that the discharge had extinguished the debt, instead ruling that section 524 did not extinguish the debt but merely eliminated debtor's personal responsibility to pay it and enjoined any further efforts by the creditor to collect it. Second, while a discharge in bankruptcy was intended to provide a debtor with a fresh start, it did not require a discharged debt to be removed from a debtor's credit report where, as here, the debt had been included in the debtor's credit history prior to the bankruptcy filing. Thus, because the mere act of reporting the debt to a credit agency was not an act to effect collection thereof, it did not violate section 524.

Torrance v. Qualified Emergency Specialist, Inc. (In re Smith)*, 2007 Bankr. LEXIS 1038 (Bankr. S.D. Ohio April 3, 2007) (Speer, B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 4:524.01**

§ 707(a)(2) Dismissal of a Case or Conversion to a Case Under Chapter 11 or 13; For Cause; Nonpayment of Fees.

0507-009 **Dismissal due to debtors' failure to pay filing fee upheld.** (*N.D. Ala.)*

PROCEDURAL POSTURE: Plaintiff debtors appealed a decision of the bankruptcy court, which dismissed the debtors' chapter 7 bankruptcy petition for failure to timely pay their filing fee under 11 U.S.C. § 707(a)(2) and denied their motion to reinstate the case.

OVERVIEW: The clerk entered a notice of nonpayment of filing fees, and then the bankruptcy court entered a notice to show cause why the case should not be dismissed. The debtors' counsel then tendered a check for a larger amount, but the check was not entered until after the show cause hearing. The debtors contended that the initial failure to pay was due to mistake and that because the mistake was corrected, the case should be reinstated. On review, the court affirmed the dismissal of the petition. The bankruptcy court was permitted to dismiss the case pursuant to 11 U.S.C. § 707 and 28 U.S.C. § 1930(a)(1)(A) after giving notice. Further, the debtors did not apply to pay the fee in installments under Fed. R. Bankr. P. 1006(a); thus, the fees were due at the commencement of the case. The bankruptcy court entered two notices regarding the failure to pay fees, and the fee remained unpaid. The debtors did not even attempt to pay the fee until the day before the hearing, almost a month after the first notice on nonpayment was entered. The debtors offered no real excuse for the month-long failure to pay the fees, making dismissal appropriate.

Butler v. United States Bankruptcy Court*, 2007 U.S. Dist. LEXIS 26614 (N.D. Ala. March 26, 2007) (Blackburn, C.D.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 6:707.03[1][b]**

§ 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.

0507-010 **Debtors could claim expense allowance for payments on secured debt, even though no payments were to be made, where they intended to surrender the collateral.** (*Bankr. S.D. Ohio)*

PROCEDURAL POSTURE: The United States Trustee ("UST") filed a motion to dismiss the debtors' bankruptcy case, pursuant to 11 U.S.C. § 707(b)(2), as an abuse of the provisions of chapter 7.

OVERVIEW: The UST's motion to dismiss alleged that, pursuant to section 707(b)(2)(A)(iii)(I), nothing was "due" to a secured creditor in each month of the 60 months following the petition date if the debtors surrendered the collateral. The court denied the motion. The court held that the debtors qualified for an expense allowance for payments on secured debt, under 11 U.S.C. § 707(b)(2)(A)(iii)(I), even though no payments would be made because they intended to surrender the property securing the debt. The court held that the discharge under 11 U.S.C. § 524(e) of the contractual debt did not extinguish the debt, which remained contractually due.

***In re Hoerlein**, 2007 Bankr. LEXIS 1043 (Bankr. S.D. Ohio April 3, 2007) (Hpkins, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[2]**

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

0507-011 **Chapter 7 case dismissed for substantial abuse where debtors' had income above median and were capable of filing chapter 13 plan.** (*Bankr. N.D. Ohio)*

PROCEDURAL POSTURE: Debtors filed for relief under chapter 7. The chapter 7 trustee filed a motion to dismiss the case for abuse under 11 U.S.C. § 707(b)(3)(B). After a hearing, the court issued findings of fact and conclusions of law.

OVERVIEW: Debtors' amended schedules showed $354,679 in assets and $448,917 in debt. In the most recent schedule debtors indicated a combined monthly income of $10,000 and $7,850 in monthly expenses. The court found that debtors' obligations were primarily consumer debts pursuant to 11 U.S.C. § 101(8). The court found under the totality of the circumstances that debtors were not entitled to a discharge under chapter 7. The current evidence indicated that debtors had stable sources of income and would probably continue to have stable sources of income over the next five years. Debtors' income was well above the median family income for an Ohio family of debtors' size. If debtors' circumstances changed, they could seek relief under chapter 7 at a later date. The court concluded that debtors were capable of funding a chapter 13 plan to make payments to the general unsecured creditors of at least $167 per month for 60 months, the threshold for determining abuse under 11 U.S.C. § 707(b)(2), without depriving debtors of adequate necessities.

***In re Zayas**, 2007 Bankr. LEXIS 1104 (Bankr. N.D. Ohio April 2, 2007) (Harris, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[3]**

§ 1126 Acceptance of Plan.

0507-012 **Creditor's assignee could not vote on plan confirmation where creditor had not filed a proof of claim.** (*Bankr. D.S.C.)*

PROCEDURAL POSTURE: Debtor operated a golf course. Debtor filed a petition under chapter 11. Debtor filed its proposed plan of reorganization. The bankruptcy court entered an order setting a deadline to file ballots accepting or rejecting the plan. Creditor did not file a proof of claim prior to the initial confirmation hearing. The matter was before the bankruptcy court for a confirmation hearing. Debtor orally moved to allow the ballot of an assignee of creditor.

OVERVIEW: The court noted that, as a threshold matter, a creditor had to have an allowed claim in order to file a ballot accepting or rejecting the plan. A creditor with a claim allowed by Fed. R. Bankr. P. 3003(b)(1) was eligible to vote for a chapter 11 plan. Here, pursuant to debtor's plan, debtor sought to reject its lease with creditor and rejection was effective upon confirmation. Though debtor may have had a present liability to creditor, the schedules nevertheless indicated that the claim was contingent. Though

all parties acknowledged that the contingency had occurred by the closing of the golf course, the description of the claim as contingent would appear to control until creditor filed a proof of claim. Creditor did not appear to have an allowed claim because it had not filed a proof of claim. Since creditor did not have an allowed claim, it could not vote on the plan per 11 U.S.C. § 1126. As the deadline for creditor to file a proof of claim had not expired, debtor's motion to allow creditor's ballot was denied without prejudice.

In re Eastport Golf Club, Inc., *2007 Bankr. LEXIS 1098 (Bankr. D.S.C. March 28, 2007) (Waites, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 7:1126.01**

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

0507-013 **Debtor's failure to make car payments due to incarceration was not due to bad faith and was not grounds for denial of confirmation.** (*Bankr. N.D. Ala.)*

PROCEDURAL POSTURE: The issue of confirmation of debtor's proposed chapter 13 plan and creditor auto dealer's objection to confirmation on good faith grounds, pursuant to 11 U.S.C. § 1325(a)(3) and (7) was before the court. Debtor also objected to the classification of creditor's $5,136.16 claim.

OVERVIEW: Debtor purchased a used vehicle, representing that he was employed. He made two monthly payments of $214.88, but then was arrested after an attempt to fill a forged prescription at a pharmacy where he had passed a forged prescription a year earlier. The car was impounded and accrued $1,700. 00 in storage charges while debtor was incarcerated. Creditor was unwilling to loan debtor additional money to release the car. Creditor argued that debtor fraudulently obtained the collateral from it, and negligently, fraudulently, and intentionally destroyed the collateral and breached his agreement with the creditor. It asserted that debtor failed to disclose when he purchased the automobile that he intended to use it for criminal purposes, which constituted bad faith under 11 U.S.C. § 1325(a). However, the court found that creditor failed to show that debtor acted in bad faith, that is, by his actions intended any injury to the car dealer, at the time he purchased the vehicle.

In re Roberts, *2007 Bankr. LEXIS 1130 (Bankr. N.D. Ala. March 29, 2007) (Stilson, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

BANKRUPTCY RULES (Post-2005 Act)

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

0507-014 **Debtor could not amend schedules to seek exemption for tax refund previously concealed in bad faith.** (*Bankr. D.S.C.)*

PROCEDURAL POSTURE: Debtor filed for chapter 7 relief. Debtor did not disclose any possible tax refunds due to him in his original Schedule B filed with the petition. Debtor also did not inform the trustee prior to the meeting of creditors that he was entitled to a tax refund or that his Schedule B was incorrect. Debtor filed an amended Schedule C, seeking a $900.00 exemption for an anticipated tax refund. The trustee filed an objection to debtor's claim.

OVERVIEW: While under Fed. R. Bankr. P. 1009 it appeared that debtor had the absolute right to amend, a judicially created exception to this rule had evolved — that is, a court may deny amendment of the schedule of exemptions upon a showing that the debtor had acted in bad faith or concealed property, or if the amendment would prejudice creditors or third parties. The trustee asserted that debtor's failure to initially disclose the tax refund, the timing of the amendment — after the trustee had discovered the existence of the tax refund and after she filed a motion for turnover — and debtor's dishonesty regarding the tax refund and his marital status warranted the denial of the exemption. The court concluded debtor should not be entitled to claim an exemption in his tax refund. Debtor's contention that he did not know whether he would receive a refund was not credible. It was reasonable for debtor to assume that he would receive a tax refund for tax year 2006, as he received a significant refund in the previous year and had a new child to claim as a dependent for 2006. Debtor demonstrated a reckless disregard for his obligation to disclose all of his assets and acted in bad faith.

In re Gartman, *2007 Bankr. LEXIS 1099 (Bankr. D.S.C. March 30, 2007) (Waites, B.J.).*

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

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

§ 105(a) Power of Court; Issuance of Necessary or Appropriate Order, Process, or Judgment.

0507-015 **Debtor sanctioned for unauthorized sale of four classic cars without trustee's knowledge or consent.** (*Bankr. N.D. Tex.)*

PROCEDURAL POSTURE: A chapter 7 trustee filed a motion to sanction the debtor for his unauthorized taking and selling of four classic cars without the trustee's knowledge or consent. The trustee requested a constructive trust.

OVERVIEW: The trustee sought sanctions against the debtor for taking and selling the four cars without the trustee's consent or knowledge before the debtor entered into a settlement agreement with the trustee. The court sanctioned the debtor, pursuant to its inherent power under 11 U.S.C. § 105(a), because he violated his duties under 11 U.S.C. § 521(a)(3) and (4) by failing to cooperate with the trustee and account to the trustee regarding estate property. The court found that the debtor wrongfully took the cars from the company, in which he knew he had an interest and which was an estate asset itself, and sold the cars without the trustee's consent; that his offers to purchase the cars from the trustee reflected an intent to conceal the sale from the trustee and profit himself; and that his conduct was intentional, deceitful, and done in bad faith. The court concluded that $80,000 was the minimal sanction required to deter similar conduct on the part of the debtor, a doctor with a substantial annual income whom the court assumed had a significant level of sophistication, which served to underscore the egregious nature of his conduct.

***In re Paige**, 2007 Bankr. LEXIS 1060 (Bankr. N.D. Tex. March 28, 2007) (Jones, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:105.05**

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

0507-016 **Disputed tax debt was non-contingent liquidated debt that caused debtor to exceed chapter 13 eligibility limit.** (*C.D. Cal.)*

PROCEDURAL POSTURE: In a consolidated bankruptcy appeal, appellant, the United States of America, challenged a bankruptcy court's confirmation of the first amended chapter 13 plan filed by appellee debtor.

OVERVIEW: The bankruptcy court overruled the government's objections and confirmed the debtor's bankruptcy plan. On appeal, the government argued that the debtor exceeded the debt eligibility limits of 11 U.S.C. § 109(e). On June 25, 1999, the IRS imposed jeopardy income tax assessments against the debtor for four years. The assessments totaled over $1.4 million, and the IRS filed tax liens. While the tax case was pending, the debtor filed the instant chapter 13 bankruptcy petition. He listed the IRS claim as disputed, contingent, and unliquidated. In reversing, the court held that to qualify for relief under chapter 13, a debtor could not exceed the statutory limits on non-contingent and liquidated debts. Under 11 U.S.C. § 101, the term "debt" meant liability on a claim. In spite of the debtor's characterization of the IRS claims as contingent and unliquidated, the opposite was true as the assessed tax deficiency was considered a non-contingent, liquidated debt, which exceeded the limit set forth in 11 U.S.C. § 109(e). The debtor had a liquidated tax debt of at least $1.4 million on the date he filed his petition.

***United States v. Ahmed (In re Ahmed)**, 2006 U.S. Dist. LEXIS 95847 (C.D. Cal. November 13, 2006) (Fischer, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.06**

§ 362 Automatic Stay.

0507-017 **Bank's refusal to surrender vehicle in which it held security interest upon notice of debtor's bankruptcy violated stay.** (*D. Kan.)*

PROCEDURAL POSTURE: Appellant bank sought review of a judgment issued by the bankruptcy court, which found that the bank willfully violated 11 U.S.C. § 362 when it allowed its agent to retain appellee debtors' vehicle after it received notice that the debtors had filed for bankruptcy, and awarded the debtors $48.40 in damages and $2,257.50 in attorney's fees.

OVERVIEW: The bank had a security interest in the debtors' vehicle, and it hired a company to repossess the vehicle after the debtors failed to make payments on a loan. Eight days after the vehicle was repossessed, the debtors filed a petition under chapter 13 and, four days later, their attorney faxed a copy of the bankruptcy's court's Notice of Bankruptcy Filing to the bank. Three days after the bank received the notice, the debtors sought an order directing the bank to surrender the vehicle. However, the bank did not surrender the vehicle until the court ordered it to do so. In reviewing the bankruptcy court's judgment awarding the debtors damages and attorney's fees, the district court noted that there was a split in authority on the issue of whether the bank violated the automatic stay provision of 11 U.S.C. § 362 when it refused to surrender the vehicle as soon as it knew the debtors filed for bankruptcy, and it found that the U.S. Bankruptcy Appellate Panel for the Tenth Circuit's *In re Yates* decision provided better reasoning. Under *Yates*, the bank violated section 362 when it held onto the vehicle, and that violation supported the bankruptcy court's judgment.

***In re Hundley**, 2007 U.S. Dist. LEXIS 26206 (D. Kan. April 6, 2007) (Brown, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.01**

§ 362(h) Automatic Stay; Remedies for Willful Violation.

0507-018 **Creditor's inclusion of undisclosed preconfirmation attorneys fees and bankruptcy attorneys' fees in payoff letter demanding payment as prerequisite to closing violated stay.** (*Bankr. N.D.N.Y.)*

PROCEDURAL POSTURE: Under consideration by the court was a motion filed by debtor pursuant to 11 U.S.C. § 362(h). Claiming violations of the automatic stay provisions of 11 U.S.C. § 362, debtor requested $10,000 in actual, statutory, and punitive damages against a creditor and its law firm, as well as contingent attorney fees, or, in the alternative, $2,000 in attorneys' fees, and an order vacating and discharging any indebtedness claimed by the creditor.

OVERVIEW: The court's discussion addressed four main issues. On the first issue, it found that the inclusion of the "bankruptcy attorney fees" in the mortgage payoff letter, especially when viewed in light of the law firm's subsequent refusal to allow debtor's closing to proceed absent payment of those fees, was a willful violation of the automatic stay under section 362. On the second issue, the refusal to allow the closing of a chapter 13 debtor's real property sale to proceed for lack of payment of undisclosed and unapproved pre-confirmation attorney fees was a clear stay violation. On the third issue, the level of aggravation and frustration caused by the delay in debtor's closing while the firm and mortgagee attempted to collect pre-confirmation attorney fees rose above the level of the run-of-the-mill anxiety that accompanied the typical real estate closing and merited an actual damages award of $1,000. The court did not see evidence of maliciousness or bad faith sufficient to merit punitive damages. On the fourth issue, the automatic stay violation was significant enough to award debtor reasonable fees incurred to commence and prosecute this contested matter.

***In re Sullivan**, 2007 Bankr. LEXIS 1137 (Bankr. N.D.N.Y. April 2, 2007) (Gerling, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.10A**

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

0507-019 **Attorneys fees awarded to former spouse in support enforcement proceeding were nondischargeable.** (*Bankr. S.D. Ohio)*

PROCEDURAL POSTURE: Plaintiff, the ex-wife of a chapter 7 debtor, filed an adversary proceeding by which she asked a judgment that debts arising under a state court divorce decree were non-dischargeable by reason of 11 U.S.C. § 523(a)(5) and (a)(6). The debts included an award for attorney's fees which plaintiff characterized as additional support.

OVERVIEW: Plaintiff sought an order denying discharge of obligations imposed on debtor, her ex-husband, by a divorce decree. She argued that his conduct in defaulting on a mortgage on the marital residence and his withdrawal of retirement account funds, both of which acts violated a state court order, was conduct justifying a denial of discharge. The court agreed. First, applying the Sixth Circuit's four-part test, the court held that a state court award of attorneys' fees incurred in litigation resulting from debtor's alleged violations of the state court orders was in the nature of support and thus nondischargeable per section 523(a)(5). Second, noting significant discrepancies between debtor's state court testimony as to his conduct and that in the adversary proceeding, the court held that the monetary

injuries suffered by plaintiff as a result of debtor's conduct in failing to pay the mortgage and in dissipating retirement assets were "willful and malicious" for purposes of section 523(a)(6). That being so, debtor's obligation to pay a significant sum to plaintiff on account of that conduct, as ordered by the state court, was properly found to be nondischargeable under section 523(a)(6). It so ruled.

Ker v. Ker (In re Ker)*, 2007 Bankr. LEXIS 1032 (Bankr. S.D. Ohio March 30, 2007) (Hoffman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.11**

§ 523(a)(8) Exceptions to Discharge; Types of Debt Excepted; Educational Loans.

0507-020 **Blind debtor with other health problems living at or below poverty level granted an undue hardship discharge of student loan debt.** (*Bankr. C.D. Ill.)*

PROCEDURAL POSTURE: Plaintiff bankruptcy debtor brought an adversary proceeding against defendant creditor, seeking a determination that student loan debt to the creditor, which the debtor incurred for her older daughter's education, was dischargeable based on undue hardship under 11 U.S.C. § 523(a)(8). The bankruptcy court conducted a trial.

OVERVIEW: The debtor was permanently blind with income limited to social security disability benefits, and the debtor lived in a rental house with a younger daughter and a grandchild. Also, the debtor suffered from other health problems which limited her mobility, and her average monthly expenses were approximately equal to her monthly income. The bankruptcy court held that the debtor established undue hardship to warrant discharge of the educational loan debt. Since the debtor and her household were living at or below the poverty level, the debtor would be unable to maintain a minimal standard of living if forced to repay the full amount due on the educational loans. Further, the debtor's blindness and health problems prevented the debtor from obtaining employment, and thus there was no likelihood that the debtor would be able to repay the loan debt in the future. Also, although the debtor made no payments toward the loan debt, the debtor received no direct benefit from the loans, and the debtor's inability to make payments on the student loan debt was due to circumstances beyond her control and not due to bad faith or irresponsible expenditures.

Wilkinson-Bell v. Educational Credit Management Corp.*, 2007 Bankr. LEXIS 1052 (Bankr. C.D. Ill. April 2, 2007) (Perkins, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.14**

§ 524(c) Effect of Discharge; Reaffirmation Agreements.

0507-021 **Forebearance agreement was essentially a reaffirmation and did not comply with necessary requirements.** (*Bankr. D. Mass.)*

PROCEDURAL POSTURE: Plaintiff creditor filed an adversary proceeding against defendants, debtors, seeking a determination that its debt was nondischargeable both because it did not arise before entry of the order for relief and, in the alternative, under 11 U.S.C. § 523(a)(3) due to the debtors' failure to schedule the debt. The creditor filed a motion for summary judgment.

OVERVIEW: The creditor first argued that the debt, the debtors' obligation under the forbearance agreement and the new guarantee given thereunder to which the debtors bound themselves, did not fall within the scope of the discharge because it arose after entry of the order for relief. The obligation did in fact arise after entry of the order for relief. However, a large part of the consideration for the forbearance agreement and the attendant guarantee was consideration that was given in conjunction with the original guarantee: the creditor advanced no new monies, and both involved an agreement to repay the principal and interest loaned under the original loan agreement. While new consideration was added to the mix, the consideration for the new agreement was comprised in large part of the consideration for the old. Thus, this was in essence a reaffirmation agreement that was subject to 11 U.S.C. § 524(c) and its procedural requirements which were not met. The court also denied the motion for summary judgment on the 11 U.S.C. § 523(a)(3) count because the creditor submitted no evidence to show that its debt was of a kind specified in section 523(a)(2), (4) or (6).

TD BankNorth v. Ewing (In re Ewing)*, 2007 Bankr. LEXIS 1062 (Bankr. D. Mass. March 29, 2007) (Somma, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:524.04**

§ 542(a) Turnover of Property to the Estate; Delivery of Property to Trustee.

0507-022 **Legal fees paid by debtor from proceeds of unauthorized postpetition sale of residence were recoverable by trustee.** (*Bankr. D. Mass.)*

PROCEDURAL POSTURE: Plaintiff, a chapter 7 trustee, sued defendant, counsel to debtor, pursuant to 11 U.S.C. § 542(a) for $1,000 that he received from debtor on account of legal fees allegedly owed for legal services, which payment was made from the proceeds of debtor's postpetition but unauthorized sale of her residence while a chapter 13 was pending. Cross-motions for summary judgment were filed.

OVERVIEW: The trustee sought to recover the payment on the theory that the funds were estate assets per 11 U.S.C. § 542(a) and that defendant therefore was liable to turn them over. Defendant claimed that the payment was made from exempt assets and that, in any case, the sum was so small that it was of inconsequential value to the estate. Each party sought summary judgment. The court denied defendant's motion and granted the trustee's. In so ruling, the court first held that because defendant did not properly plead that the assets were exempt nor join debtor as a necessary party, his motion was properly denied. As to the trustee's claim, the court applied a three-part test and found that trustee had shown that defendant had possession of the money during the pendency of debtor's bankruptcy proceeding and that it was property that the trustee might use, sell, or lease per 11 U.S.C. § 363. Inasmuch as the trustee showed the existence of all three elements required to be shown in a turnover claim under 11 U.S.C. § 542, and because the motion was properly supported by admissions, in defendant's answer, of all of the elements, the trustee was entitled to summary judgment. It so ruled.

Desmond v. Baker (In re McDonnell)*, 2007 Bankr. LEXIS 1144 (Bankr. D. Mass. March 30, 2007) (Somma, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:542.02**

§ 546(e) Limitations on Avoiding Powers; Margin or Settlement Payments.

0507-023 **Payments to investment company margin accounts belonging to debtor's former principal were not avoidable.** (*Bankr. M.D. Ga.)*

PROCEDURAL POSTURE: Plaintiff trustee filed an action against defendant investment company to avoid and recover, as fraudulent transfers, certain payments made by the debtor that were to be applied to margin accounts opened by and belonging to a former principal of the debtor. The investment company filed a motion for summary judgment.

OVERVIEW: The investment company asserted that 11 U.S.C. § 546(e) provided a complete defense to the trustee's constructive fraud claims. The court concluded that section 546(e) was a defense to the counts of the trustee's avoidance action brought under 11 U.S.C. § 544, which incorporated the Georgia companion statutes, and to the count brought pursuant to 11 U.S.C. § 548(a)(1)(A). The court entered summary judgment in favor of the investment company. Considering the plain language of 11 U.S.C. § 546(e) and the related definitional sections of the Bankruptcy Code, the court concluded that the transfers qualified as margin or settlement payments and that the investment company qualified as a stockbroker. Section 546(e) did not require that the transfers be made to or for the benefit of the debtor. Thus, the trustee was necessarily prohibited by section 546(d) from avoiding the check and inter-account securities transfers made by the debtor to the investment company margin accounts belonging to the debtor's former principal.

Hayes v. Morgan Stanley DW Inc. (In re Stewart Fin. Co.)*, 2007 Bankr. LEXIS 1044 (Bankr. M.D. Ga. March 30, 2007) (Laney, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:546.06**

§ 547(b) Preferences; Avoidable Transfers.

0507-024 **Payments by debtor to professional association of which it was an officer, employee and shareholder were made to an insider and avoidable.** (*Bankr. D. Kan.)*

PROCEDURAL POSTURE: Plaintiff chapter 7 trustee filed an action against defendant, a professional association ("PA"), alleging that the PA was an insider of one of the debtors and that the PA had received preferential transfers from the debtor. The PA sought summary judgment.

OVERVIEW: The debtor was a physician who was an employee, shareholder, and director of the PA. After terminating his relationship with the PA, the debtors filed for relief under chapter 7 in February 2005. The trustee brought an action pursuant to 11 U.S.C. § 547(b) to avoid payments made to the PA from March 2004 through October 2004. Under the terms of his employment agreement and the loans, the debtor owed the PA over $250,000. The trustee sought to set aside payments made by the debtor to reduce the amount owed. The court found that the PA met the statutory definition of an insider under 11 U.S.C. § 101(31) when the debts were made because the debtor was an officer, employee, and shareholder of the PA. There were also facts that could support a conclusion that the insider status continued after the debtor resigned from the PA. The court rejected the PA's assertion that partial summary judgment should have been granted for three payments because of common law offset. There were material facts remaining concerning the debtor's solvency.

Speth v. Associates in Women's Health P.A. (In re Stevens)*, 2007 Bankr. LEXIS 1086 (Bankr. D. Kan. April 5, 2007) (Somers, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:547.03**

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

0507-025 **Issuance of check to replace prior check drawn on insufficient funds resulting in release of lien was a contemporaneous exchange for new value.** (*D. Minn.)*

PROCEDURAL POSTURE: Plaintiff chapter 7 trustee filed an adversary proceeding seeking to avoid an alleged preferential transfer made to defendant creditor. The creditor appealed after the bankruptcy court granted summary judgment to the trustee, finding that a check that the creditor had received from the chapter 7 debtor was an avoidable preferential transfer under 11 U.S.C. § 547(b).

OVERVIEW: The debtor owned a crop storage elevator. More than 90 days before he filed his bankruptcy petition, he issued a check to the creditor and a bank to pay for soybeans that the creditor had previously delivered. The payment was intended to extinguish the bank's security interest in the soybeans. The debtor reissued the check within 90 days of the bankruptcy filing date, after his original check bounced. The trustee asserted that the reissued check was an avoidable, preferential transfer under 11 U.S.C. § 547(b). The bankruptcy court agreed, finding that the section 547(c)(1) contemporaneous exchange for new value exception did not apply to situations involving bounced checks. The court found error. The section 547(c)(1) exception applied to the check, even though it was issued to replace a bounced check, because the transfer was a contemporaneous exchange for new value. The debtor received new value in exchange for the reissued check, namely the release of the bank's security interest in the soybeans. That value was not received when the original check was issued because pursuant to 7 U.S.C. § 1631(e)(3)(B), the release of the security interest did not occur until the bank was actually paid.

Velde v. Kirsch*, 2007 U.S. Dist. LEXIS 27068 (D. Minn. April 12, 2007) (Kyle, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:547.04[1]**

§ 547(c)(3) Preferences; Exceptions to Avoidance; Security Interests Securing Enabling Loans.

0507-026 **Exception to avoidance of motor vehicle lien did not apply where security interest was not perfected within 20 days of debtor taking possession.** (*Bankr. S.D. Ohio)*

PROCEDURAL POSTURE: Plaintiff bankruptcy trustee brought an adversary proceeding against defendant creditor which financed the bankruptcy debtor's purchase of a vehicle shortly before the debtor filed his bankruptcy petition. The trustee asserted that the creditor's lien was avoidable as a preferential transfer, but the creditor argued that the enabling loan exception under 11 U.S.C. § 547(c)(3) was applicable, and the parties cross-moved for summary judgment.

OVERVIEW: The debtor took delivery of the vehicle and, even though the debtor did not obtain financing within the period set out in the purchase agreement, the seller did not require the debtor to return the vehicle as permitted in the agreement. Instead, the debtor executed a second purchase agreement, obtained financing from the creditor, and obtained a certificate of title indicating the creditor's lien. The creditor contended that its lien was not avoidable as a preference because the creditor perfected its purchase-money security interest within 20 days after the debtor acquired transferable rights in the vehicle as set out in section 547(c)(3). The bankruptcy court held, however, that the exemption from avoidance provided by section 547(c)(3) did not apply since the statute required perfection of the security

interest within 20 days after the debtor obtained possession of the vehicle. There was no requirement that the debtor have an ownership interest or transferable rights in the vehicle and, in view of the length of time involved in obtaining financing, the creditor's interest was not timely perfected after the debtor took possession of the vehicle.

Ransier v. American Suzuki Fin. (In re Eccles-Walker)*, 2007 Bankr. LEXIS 1153 (Bankr. S.D. Ohio March 28, 2007) (Preston, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:547.04[3]**

§ 549 Postpetition Transactions.

0507-027 **Real estate broker's commission on unauthorized postpetition sale of debtors' residence was avoidable.** (*Bankr. E.D. Cal.)*

PROCEDURAL POSTURE: Plaintiff trustee filed a complaint to recover the commission received by defendant broker from the sale of the debtors' residence on the ground that the commission constituted property of the bankruptcy estate that was subject to turnover under 11 U.S.C. § 542 and that the payment of the commission constituted a voidable transfer of property of the estate under 11 U.S.C. § 549.

OVERVIEW: The listing broker received a real estate commission from the proceeds of the debtors' unauthorized sale of their residence to buyers who had actual knowledge of the filing of the debtors' bankruptcy petition. The court found no disputed factual issues regarding the chapter 7 trustee's claims. The court held that the trustee was entitled to judgment as a matter of law compelling the broker to turnover the commission, which proceeds from the sale of estate property constituted estate property, that she received. The court held that the trustee was entitled to judgment as a matter of law avoiding the transfer of the proceeds from the sale of estate property because the transfer of the commission to the broker occurred after the commencement of the case and was not authorized by the Bankruptcy Code or court order.

Salven v. Lyons (In re Bergtholdt)*, 2007 Bankr. LEXIS 1161 (Bankr. E.D. Cal. March 30, 2007) (Lee, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:549.01**

§ 726(a)(5) Distribution of Property of the Estate; Order of Distribution; Postpetition Interest.

0507-028 **Creditor's claim for postpetition interest on state court judgment at rate allowed by state law disallowed to the extent exceeding federal judgment interest rate.** (*Bankr. W.D. Ky.)*

PROCEDURAL POSTURE: A chapter 7 trustee filed a motion seeking an order disallowing a creditor's claim to the extent that it asserted a right to postpetition interest calculated at the rate that applied under the state law that governed the claim. At issue was the meaning of the phrase "legal rate" as used in 11 U.S.C. § 726(a)(5) and whether it was the same as the rate under 28 U.S.C. § 1961.

OVERVIEW: The creditor filed an unsecured claim based on a state court judgment, which claim included postpetition interest. The trustee objected to the claim to the extent that it included interest and sought to disallow it. The trustee argued that to the extent that there were sufficient funds, postpetition interest payable per 11 U.S.C. § 726(a)(5) was to be based on the federal interest rate in 28 U.S.C. § 1961(a) on the date of filing. The court agreed, and it disallowed the claim to the extent that the rate utilized therein exceeded the federal rate. In so ruling, the court surveyed authority on both sides of the issue and concluded that the phrase "legal rate" as used in 11 U.S.C. § 726(a)(5) referred to the federal judgment rate as established by 28 U.S.C. § 1961. It rejected the argument that the use of the relevant state law interest rate was appropriate inasmuch as it might eliminate the possibility of a windfall for a debtor, concluding instead that the use of the federal judgment rate promoted equality, fairness, and predictability in the distribution of interest on creditors' claims. It also held that its determination was supported by rules of statutory construction.

In re Best*, 2007 Bankr. LEXIS 1016 (Bankr. W.D. Ky. April 3, 2007) (Lloyd, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:726.02[5]**

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

0507-029 **Case dismissed post-confirmation due to debtor's failure to include "stolen" property or appropriate insurance claims in schedules.** (*Bankr. D. Mont.)*

PROCEDURAL POSTURE: Debtors filed for bankruptcy relief under chapter 13, and the court confirmed debtors' amended chapter 13 plan. A chapter 13 trustee filed a post-confirmation motion to dismiss the case pursuant to 11 U.S.C. § 1307(c). A hearing was held and the court issued findings of fact and conclusions of law.

OVERVIEW: The petition at issue was filed on September 13, 2005, and was the sixth petition by debtors under chapter 13. The trustee filed a post-confirmation motion to dismiss, claiming that debtors purposely omitted assets and transactions from their bankruptcy schedules and statement of financial affairs. At the hearing debtor admitted that the order confirming the plan was based upon schedules that were incorrectly prepared. Debtors omitted six items from their schedules, claiming at the time the schedules were prepared the items had been stolen and were thus not in the debtors' "possession." Debtors did not make efforts to recover insurance proceeds for the stolen items. The court found that debtors failed to fully disclose their assets and to provide information about a possible theft and loss that could have generated a recovery for the estate. Debtors had an extensive history of filings and dismissals. Debtors had confirmed four chapter 13 plans, had received a chapter 7 discharge, and had been dismissed in four cases. The court found egregious behavior by debtors both prepetition and postpetition and concluded that bad faith was shown.

In re Luxford*, 2007 Bankr. LEXIS 1091 (Bankr. D. Mont. March 29, 2007) (Kirscher, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1307.04**

§ 1322(b)(2) Contents of Plan; Discretionary Provisions; Modification of Claimholders' Rights.

0507-030 **Debtors could strip of wholly unsecured lien on real property pursuant to chapter 13 plan.** (*Bankr. D. Neb.)*

PROCEDURAL POSTURE: The debtors filed a motion to determine the status of the automatic stay in their chapter 13 bankruptcy case.

OVERVIEW: The creditor had a security interest in the debtors' vehicle pursuant to a motor vehicle retail installment contract. A stay order provided that, if the debtors defaulted on their plan payments, the stay would automatically terminate and the creditor would be entitled to repossess the vehicle. The order confirming the debtors' chapter 13 plan provided that the creditor's lien would be released after payment through the plan of its secured claim. The debtors missed a payment and the creditor sent a notice of default and unsuccessfully attempted to repossess the vehicle. The debtors paid the claim in full. The court held that the creditor's refusal to tender title of the vehicle to the debtors violated the confirmation order, which provided for the release of the lien upon payment, trumped the stay order, and had *res judicata* effect, pursuant to 11 U.S.C. § 1327(a). The court concluded that the stay order that the creditor relied on to repossess the vehicle preceded and was not incorporated into the confirmation order; accordingly, the creditor was not entitled to repossess the vehicle given that the debtors had fully paid its secured claim as provided for in the plan.

Cox v. Beneficial Neb., Inc. (In re Cox)*, 2007 Bankr. LEXIS 1116 (Bankr. D. Neb. April 9, 2007) (Mahoney, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1322.06**

§ 1327(a) Effect of Confirmation; Parties Bound by Confirmed Plan.

0507-031 **Creditor's attempted repossession of vehicle pursuant to pre-confirmation stay order violated confirmation order providing for surrender of title upon payment in full.** (*Bankr. N.D. Tex.)*

PROCEDURAL POSTURE: The debtors filed a motion to determine the status of the automatic stay in their chapter 13 bankruptcy case.

OVERVIEW: The creditor had a security interest in the debtors' vehicle pursuant to a motor vehicle retail installment contract. A stay order provided that, if the debtors defaulted on their plan payments, the stay would automatically terminate and the creditor would be entitled to repossess the vehicle. The order confirming the debtors' chapter 13 plan provided that the creditor's lien would be released after payment

through the plan of its secured claim. The debtors missed a payment and the creditor sent a notice of default and unsuccessfully attempted to repossess the vehicle. The debtors paid the claim in full. The court held that the creditor's refusal to tender title of the vehicle to the debtors violated the confirmation order, which provided for the release of the lien upon payment, trumped the stay order, and had *res judicata* effect, pursuant to 11 U.S.C. § 1327(a). The court concluded that the stay order that the creditor relied on to repossess the vehicle preceded and was not incorporated into the confirmation order; accordingly, the creditor was not entitled to repossess the vehicle given that the debtors had fully paid its secured claim as provided for in the plan.

In re Moffitt*, 2007 Bankr. LEXIS 1145 (Bankr. N.D. Tex. April 12, 2007) (Lynn, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1327.02**

0507-032 **Debtor who completed all plan payments was entitled to discharge despite failure to fully satisfy several secured claims.** (*Bankr. E.D. Wis.)*

PROCEDURAL POSTURE: Chapter 13 trustee filed a motion to dismiss debtors' case, claiming that debtors were not entitled to a discharge because certain secured claims had not been fully satisfied at the end of the confirmed plan's term. Debtors objected to the motion.

OVERVIEW: Debtors owed secured claims to a federal government agency and a bank. The sum total of all payments that were made under the 36-month term of debtors' plan did not pay all of the amounts owed to the secured creditors. No balloon payment at the end of the plan was provided for; however, the plan anticipated and provided for payments to the secured creditors well past the term of the plan. The secured creditors, to the extent they were unpaid during the term of the plan, continued to hold liens on debtors' property until paid. In denying trustee's motion to dismiss, the court held that debtors fully complied with the confirmed plan and were entitled to a discharge because the plan spelled out the amortization periods of the secured claims and the secured creditors were not fooled by the plan's treatment of their claims. The court held that, while the claims showed that amounts were still owed, the secured creditors had received payments as the plan provided, and the amortization period in the plan required that they would continue to retain their liens and receive payments after the term of the plan.

In re Westenberg*, 2007 Bankr. LEXIS 1033 (Bankr. E.D. Wis. March 30, 2007) (McGarity, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1327.02**

BANKRUPTCY RULES (Pre-2005 Act)

Rule 2014 Employment of Professional Persons.

0507-033 **Debtor's counsel disqualified for failure to disclose connection to senior bondholders who controlled creditors' committee.** (*Bankr. N.D. Cal.)*

PROCEDURAL POSTURE: Bankruptcy debtors' counsel issued a prepetition opinion letter assuring payment to certain of the debtors' senior bondholders who effectively controlled the creditors' committee in the debtors' bankruptcy. After disclosure of the opinion letter, the U.S. Trustee moved to disqualify the debtors' counsel and to appoint a chapter 11 trustee, and a claims trader which acquired claims against the estate moved to convert the case to chapter 7.

OVERVIEW: In its initial disclosure of disinterestedness and subsequent supplemental disclosures, counsel did not disclose its connection with the senior bondholders, and formally disclosed the opinion letter only after the bondholders demanded indemnification from counsel and the trustee sought to disqualify counsel. The bankruptcy court held that disqualification of the debtors' counsel and appointment of a chapter 11 trustee were warranted. It was clear that counsel knew it had a continuing duty to update its disclosures and knew that it had a disabling conflict of interest, and counsel's characterization of the failure to disclose as an inadvertent oversight was belied by counsel's history of supplemental disclosures. Further, the appointment of a strong, neutral chapter 11 trustee was necessary to restore creditor confidence in the bankruptcy system and remove any lingering taint from counsel's representation of the debtors. Also, while conversion to chapter 7 would alleviate apparent improprieties of the bondholders and committee counsel by removing the influence of the committee, these significant concerns were outweighed by the need for a disinterested chapter 11 trustee.

In re Sonicblue, Inc.*, 2007 Bankr. LEXIS 1057 (Bankr. N.D. Cal. March 26, 2007) (Morgan, B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 9:2014.01**

Rule 2016(b) Compensation for Services Rendered and Reimbursements of Expenses; Disclosure of Compensation Paid or Promised to Attorney for Debtor.

0507-034 **Debtor's attorneys ordered to turn over property transferred by debtor in contemplation of bankruptcy.** (*Bankr. C.D. Cal.)*

PROCEDURAL POSTURE: The chapter 7 trustee sought an order compelling debtor's two attorneys and their law firm to disgorge undisclosed fees received within one year before the filing of debtor's bankruptcy petition allegedly "in contemplation of or in connection with" his bankruptcy case.

OVERVIEW: 11 U.S.C. § 329(a) required a debtor's attorney to disclose to the court the amount of compensation paid or promised for services rendered "in contemplation of or in connection with the case." That provision was implemented by Fed. R. Bankr. P. 2016. The test for determining if a payment or transfer was made "in contemplation of" bankruptcy hinged upon the debtor's state of mind and, more precisely, whether the thought of bankruptcy was the impelling cause of the transaction. The facts of the case supported a finding that debtor was contemplating the possibility or imminence of bankruptcy when he transferred a certain property in Oregon to the attorneys on January 14, 2005, and that the transfer was subject to review under 11 U.S.C. § 329(a) and Fed. R. Bankr. P. 2017(a). The court determined that the attorneys failed to disclose property transferred to them in payment for legal services rendered, or to be rendered, in contemplation of debtor's case. Given the gravity of the non-disclosure, the court denied all fees to the attorneys for legal services rendered to debtor to the petition date due to failure to comply with 11 U.S.C. § 329(a) and Fed. R. Bankr. P. 2016(b).

***In re Perrine**, 2007 Bankr. LEXIS 1138 (Bankr. C.D. Cal. March 23, 2007) (Carroll, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 9:2016.15**

Rule 9011(b) Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers; Representations to the Court.

0507-035 **Counsel sanctioned for failing to disclose debtor's tort claim until debtor sought to amend exemptions to protect settlement.** (*Bankr. E.D. Mich.)*

PROCEDURAL POSTURE: After it was disclosed that debtor and her original counsel had failed to disclose the existence of a tort claim against a driver who caused a collision in which she was injured and after debtor sought to amend her exemptions to protect some part of the settlement later paid thereon, the trustee objected to debtor's amended exemptions and the court ordered counsel to show cause why he should not be sanctioned under Fed. R. Bankr. P. 9011(b).

OVERVIEW: Debtor and her husband were injured in a July, 2005, accident. At the time the bankruptcy was filed, debtor had hired counsel to pursue her resulting tort claims, and the claim was not listed in the bankruptcy schedules nor in her answers to the section 341 Trustee Questionnaire. When it was disclosed during debtor's testimony therein, counsel promised to amend debtor's schedules but took 7 months to do so. When debtor recovered $100,000, she moved to amend her exemptions, but the court denied the motion and also concluded counsel had violated Rule 9011 in failing to disclose the claim. After reviewing the record and identifying various state laws under which plausible claims existed, the court held that there was no colorable basis for counsel's failure to list the claim in debtor's filing, that counsel's argument that no "claim" existed at the time of the filing was frivolous, and that counsel had breached his duty to conduct a reasonable inquiry in connection therewith, with the result that a penalty was properly imposed under Rule 9011(c)(2). Second, given the totality of circumstances, debtor's bad faith nondisclosure justified the court in denying her motion to amend her exemptions.

***In re Opra**, 2007 Bankr. LEXIS 1050 (Bankr. E.D. Mich. March 28, 2007) (Tucker, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 10:9011.07**