July 2007

Collier Bankruptcy Case Update

CURRENT BANKRUPTCY CASES ANALYZED

July 9, 2007 Issue 2

Cases of Particular Interest in This Issue

Appointment of health care ombudsman not necessary where experienced physician in good standing had adequate procedures in place to protect privacy of patients.
In re Saber (Bankr. D. Colo. April 26, 2007) **0707-037**

Below-median debtor not required to file additional Form B22A upon conversion to chapter 7 where Form B22C had been filed in original chapter 13 case.
Edwards v. Turner (In re Edwards) (Bankr. S.D. Ga. April 5, 2007) **0707-041**

Presumption of abuse arose after adjustment of disposable income calculation to eliminate improper deduction.
In re Brandenburg (Bankr. E.D. Wis. May 15, 2007) **0707-046**

Debtor spouse had inherent right to voluntarily dismiss non-converted chapter 13 case.
In re Davis (Bankr. M.D. Fla. May 16, 2007) **0707-051**

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POST-2005 ACT CASES IN THIS ISSUE

2d Circuit

§ 522 Debtor's homestead exemption limited on reconsideration due to intersts of unsecured creditors.
In re Nersinger (*Bankr. W.D.N.Y. February 9, 2007*)..... 0707-042

3d Circuit

§ 363(e) Adequate protection payments for security interests in FCC lease conversion payments not required as rejection of underlying option contract rendered interests worthless.
Gateway Access Solutions, Inc. v. Nester (In re Gateway Access Solutions, Inc.)
(*Bankr. M.D. Pa. May 17, 2007*)..... 0707-040

4th Circuit

§ 1325(b)(3) Debtor could deduct ownership expense on Form B22C for vehicle owned free and clear.
In re Lynch (*Bankr. E.D. Va. May 8, 2007*)..... 0707-056

5th Circuit

§ 101(51B) Debtor who conducted timber harvesting on multiple properties was not a single asset debtor.
In re Scotia Dev., LLC (*Bankr. S.D. Tex. April 5, 2007*)..... 0707-036

§ 523(a)(6) Debtor's failure to remit health insurance proceeds rendered debt nondischargeable.
North Miss. Med. Ctr. v. Finnie (In re Finnie) (*Bankr. N.D. Miss. May 2, 2007*)..... 0707-043

§ 727(a) Discharge denied due to debtor's numerous omissions and false statements.
Cadle Co. v. Moore (In re Moore) (*Bankr. N.D. Tex. May 18, 2007*)..... 0707-049

6th Circuit

§ 707(b)(3) Case dismissed due to debtors' ability to pay substantial portion of debt.
In re dePellegrini (*Bankr. S.D. Ohio April 26, 2007*)..... 0707-048

§ 1322(b)(2) Mortgage creditor waived right to claim postpetition escrow deficiency due to failure to provide debtor with notice of changes in payments.
Craig-Likely v. Wells Fargo Home Mortg. (In re Craig-Likely) (*E.D. Mich. March 2, 2007*)..... 0707-053

7th Circuit

§ 707(b)(2) Presumption of abuse arose after adjustment of disposable income calculation to eliminate improper deduction.
In re Brandenburg (*Bankr. E.D. Wis. May 15, 2007*)..... 0707-046

§ 707(b)(2)(A) Mortgage and car loan payments were appropriate Form B22A deductions regardless of intent to surrender.
In re Kogler (*Bankr. W.D. Wis. March 30, 2007*)..... 0707-047

§ 1325(a) Debtor could surrender vehicle in full satisfaction of secured debt under hanging paragraph.
In re Roth (*Bankr. N.D. Ind. May 4, 2007*)..... 0707-055

8th Circuit

§ 362(d)(3) Extension of stay to allow debtor additional time to make mortgage payments denied.
In re Heather Apts. Ltd. P'ship (*Bankr. D. Minn. March 28, 2007*)..... 0707-038

9th Circuit

§ 362(d)(4) Prepetition transfer of property subject to delinquent loan from debtor's principal to debtor was not part of a scheme to hinder and delay creditor.
In re Duncan & Forbes Dev., Inc. (*Bankr. C.D. Cal. April 6, 2007*) 0707-039

§ 1307 Dismissal reversed as not in best interests of creditors.
Brown v. Sobczak (In re Sobczak) (*B.A.P. 9th Cir. May 11, 2007*) 0707-050

§ 1325(b)(4)(B) Confirmation denied where above-median debtors' plan was for less than five years and did not provide for payment of all allowed unsecured claims in full.
In re Mullen (*Bankr. D. Or. May 14, 2007*) 0707-057

10th Circuit

§ 333 Appointment of health care ombudsman not necessary where experienced physician in good standing had adequate procedures in place to protect privacy of patients.
In re Saber (*Bankr. D. Colo. April 26, 2007*) 0707-037

§ 541 Real property owned by debtor's general partnership was not property of the estate and could not be exempted.
In re Shephard (*Bankr. D.N.M. May 7, 2007*) 0707-044

§ 1322(b) Amended plan calling for sale of house and distribution of proceeds rather than monthly payments approved subject to four month limitation on sale.
In re Valdez (*Bankr. D.N.M. May 17, 2007*) 0707-052

11th Circuit

§ 521 Below-median debtor not required to file additional Form B22A upon conversion to chapter 7 where Form B22C had been filed in original chapter 13 case.
Edwards v. Turner (In re Edwards) (*Bankr. S.D. Ga. April 5, 2007*) 0707-041

§ 545 IRS tax lien was not avoidable as preference or otherwise.
Burr v. United States (In re Burr) (*Bankr. N.D. Ga. April 10, 2007*) 0707-045

§ 1307(b) Debtor spouse had inherent right to voluntarily dismiss non-converted chapter 13 case.
In re Davis (*Bankr. M.D. Fla. May 16, 2007*) 0707-051

§ 1325(a) Hanging paragraph did not allow debtors to surrender vehicle in full satisfaction of secured claim.
In re White (*Bankr. N.D. Ga. April 9, 2007*) 0707-054

PRE-2005 ACT CASES IN THIS ISSUE

1st Circuit

§ 727(a)(2) Discharge denied due to debtor's undisclosed transfer of business assets to LLC he controlled 30 days prior to petition date.
Vickers v. Hurley (In re Hurley) (*Bankr. D. Mass. May 15, 2007*) 0707-068

2d Circuit

§ 523(a)(6) Judgment for copyright infringement involved willful and malicious conduct by debtor and was nondischargeable.
Yash Raj Films (USA), Inc. v. Akhtar (In re Akhtar) (*Bankr. E.D.N.Y. May 17, 2007*) 0707-063

4th Circuit

§ 363(h) Court approved settlement by which trustee abandoned debtor's interest in real estate held as tenant in common with former spouse in exchange for payment from spouse.
In re Lee (*Bankr. E.D. Va. May 16, 2007*) 0707-059

§ 503(b) Debtor's attorney allowed reduced administrative expense for fees incurred in chapter 13 case prior to conversion to chapter 7.
In re Fotso (*Bankr. D. Md. May 9, 2007*) 0707-060

§ 523(a)(6) Judgment for fatal alcohol related auto accident was based on debtor's willful and malicious conduct and was nondischargeable.
Millsaps v. Yates (In re Yates) (*Bankr. W.D.N.C. February 6, 2007*) 0707-062

§ 727(a) Debtor's reliance on attorney's advice prevented denial of discharge on grounds of fraud.
United States Trustee v. Arnold (In re Arnold) (*Bankr. W.D. Va. March 29, 2007*) 0707-067

5th Circuit

Rule 3001(e) Failure to provide copy of assignment or transfer of credit card debt was not grounds for disallowance as transfer preceeded filing of proof of claim.
In re Griffin (*Bankr. W.D. Tex. May 17, 2007*) 0707-070

6th Circuit

§ 542(a) Debtor shareholder could not be compelled to turnover corporate assets.
In re Tillman (*Bankr. N.D. Ohio May 4, 2007*) 0707-064

8th Circuit

§ 1325(a)(3) Debt owed to Department of Veterans Affairs was nondischargeable due to debtor's misrepresentation of spouse's income in application for pension benefits.
In re Squires (*Bankr. D.S.D. May 7, 2007*) 0707-069

9th Circuit

§ 101(5) Creditor held a valid claim for postpetition attorneys' fees incurred in defending adversary proceeding.
Qmect, Inc. v. Burlingame Capital Partners II, LP (In re Qmect, Inc.)
(*Bankr. N.D. Cal. May 17, 2007*) 0707-058

§ 727(a) Debtor attorney denied discharge for postpetition recording of deed of trust in favor of mother with intent to hinder, delay or defraud creditors.
Hansen v. Moore (In re Hansen) (*B.A.P. 9th Cir. April 23, 2007*) 0707-066

11th Circuit

§ 522(f) Creditor who failed to file amended claim after denial of secured status ordered to return payment from chapter 13 trustee.
Jaecksch v. GMAC (In re Jaecksch) (*Bankr. N.D. Ga. April 4, 2007*) 0707-061

§ 727 Discharge revoked due to debtor's failure to turn over tax refunds.
Kelley v. Swain (In re Swain) (*Bankr. M.D. Ga. May 14, 2007*) 0707-065

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

§ 101(51B) Definitions; "Single Asset Real Estate".

0707-036 **Debtor who conducted timber harvesting on multiple properties was not a single asset debtor.** (*Bankr. S.D. Tex.)*

PROCEDURAL POSTURE: A bankruptcy debtor owned private timberland and the exclusive right to harvest timber from additional private timberland owned by subsidiaries of the debtor. A committee of noteholders moved for a determination that the debtor was a single asset real estate debtor under 11 U.S.C. § 101(51B) and was thus subject to the provision for relief from the automatic bankruptcy stay under 11 U.S.C. § 362(d)(3).

OVERVIEW: The debtor conducted timber harvesting operations on the timberlands, but the committee argued that the timberland was single asset real estate because the debtor derived its sole income from the timberland and conducted no substantial business on the timberland. The bankruptcy court held that the debtor's substantial activities in harvesting timber precluded a finding that the timberland was single asset real estate. The timberland did not constitute a single property or project since the debtor's harvesting operations involved multiple sites under separate harvesting plans, and the right to harvest on the subsidiaries' timberland was not real property. Further, the debtor's revenue was not derived from the property itself by passively collecting rent or holding the property for resale, but rather the debtor's revenue was derived from the active entrepreneurial efforts of its skilled employees in harvesting timber, protecting the timberland from forest fires and other damage, engaging in reforestation activities, and monitoring and implementing environmental and regulatory compliance.

In re Scotia Dev., LLC*, 2007 Bankr. LEXIS 1740 (Bankr. S.D. Tex. April 5, 2007) (Schmidt, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:101.51B**

§ 333 Appointment of Patient Care Ombudsman.

0707-037 **Appointment of health care ombudsman not necessary where experienced physician in good standing had adequate procedures in place to protect privacy of patients.** (*Bankr. D. Colo.)*

PROCEDURAL POSTURE: The debtor, a medical professional corporation ("PC"), filed a voluntary petition for relief under chapter 11. The debtor filed a motion for relief from the requirements of 11 U.S.C. § 333, which required appointment of a patient care ombudsman. The court issued findings of fact and conclusions of law.

OVERVIEW: The debtor provided plastic and reconstructive surgery to its patients. The physician, who was the sole owner of the debtor, was the only physician in the PC. The debtor employed three other workers. The physician had practiced medicine for over 20 years. The physician indicated that the debtor's bankruptcy was precipitated by a state court judgment against the debtor that was obtained by a former employee. The physician remained in good standing with the Colorado state medical board. The court found that the debtor, which provided a surgical treatment facility, met all four requirements under 11 U.S.C. § 101(27A)(B) to qualify as a health care business. However, the court, in its discretion, determined that a patient care ombudsman was not necessary under the circumstances of the case. The evidence showed that the physician had practiced more than 20 years, remained in good standing, and intended to continue his practice. The physician had sufficient procedures in place to protect the privacy of his patients. Further, the court was concerned that the costs of appointment of an ombudsman could preclude the physician from reorganizing as desired.

In re Saber*, 2007 Bankr. LEXIS 1697 (Bankr. D. Colo. April 26, 2007) (Romero, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:333.01**

§ 362(d)(3) Automatic Stay; Relief from Stay; Acts Against Single Asset Real Estate by Secured Creditor.

0707-038 **Extension of stay to allow debtor additional time to make mortgage payments denied.** (*Bankr. D. Minn.)*

PROCEDURAL POSTURE: Debtor, a Minnesota limited partnership, filed a voluntary petition under chapter 11. Less than 90 days after it filed its petition, the debtor filed a motion under 11 U.S.C. § 362(d)(3), seeking additional time to begin paying a mortgagee.

OVERVIEW: The debtor borrowed money to build a 436-unit apartment complex located near Oklahoma City (Oklahoma) and filed a voluntary petition under chapter 11 after a mortgagee initiated a foreclosure action in state court. The bankruptcy court imposed an automatic stay on payments the debtor owed to a mortgagee, and before that stay expired, the debtor filed a motion seeking additional time to begin making payments. The court denied the motion. Although the debtor claimed that "an entity" had expressed an interest in purchasing the property, and that it needed more time to complete the sale so it could pay the mortgagee, the debtor did not have a firm commitment for purchase and the condition of the property raised serious concerns about the debtor's claim that the property could be sold at a price which would allow payment of all money the mortgagee was owed. Extension of the stay was not warranted because the debtor's rationale did not respond to Congress's very specific concerns in enacting 11 U.S.C. § 362(d)(3).

In re Heather Apts. Ltd. P'ship, *2007 Bankr. LEXIS 1759 (Bankr. D. Minn. March 28, 2007) (Kishel, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.07[5]**

§ 362(d)(4) Automatic Stay; Relief from Stay; Scheme to Delay, Hinder and Defraud Creditors With Claims Secured by Real Property.

0707-039 **Prepetition transfer of property subject to delinquent loan from debtor's principal to debtor was not part of a scheme to hinder and delay creditor.** (*Bankr. C.D. Cal.)*

PROCEDURAL POSTURE: A creditor moved for relief from the automatic bankruptcy stay pursuant to 11 U.S.C. § 362(d)(4), alleging that a transfer of real property from a principal of a corporate bankruptcy debtor to the debtor constituted a scheme to hinder, delay, and defraud the creditor which was secured by the property.

OVERVIEW: After the creditor's loan to the principal was in default, the principal transferred the property to the debtor which filed its bankruptcy petition a few days thereafter. The creditor contended that such conducted demonstrated a scheme to hinder, delay, and defraud the creditor and thus warranted relief from the bankruptcy stay. The bankruptcy court held, however, that the course of events did not demonstrate a scheme or an intent to hinder, delay, and defraud the creditor. The transfer of the property from the principal to the related debtor was a common practice of corporate planning, and the transfer while in default and the subsequent bankruptcy filing were insufficient to constitute a scheme. Further, the lawful transfer and the lawful bankruptcy did not unlawfully hinder and delay the creditor, and there was no showing that the principal did not intend to pay the debt to the creditor, especially since the creditor retained its security interest in the property regardless of the transfer.

In re Duncan & Forbes Dev., Inc., *2007 Bankr. LEXIS 1630 (Bankr. C.D. Cal. April 6, 2007) (Bufford, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.07[6]**

§ 363(e) Use, Sale, or Lease of Property; Adequate Protection.

0707-040 **Adequate protection payments for security interests in FCC lease conversion payments not required as rejection of underlying option contract rendered interests worthless.** (*Bankr. M.D. Pa.)*

PROCEDURAL POSTURE: Movant bankruptcy debtor was permitted to reject a contract granting an option to purchase FCC leases from the debtor, and respondent creditors who held security interests in lease conversion payments under the contract asserted that their liens extended to proceeds from postpetition lease sales and that the creditors were entitled to adequate protection under 11 U.S.C. § 363(e) as a condition of the contract rejection.

OVERVIEW: Since the creditors' collateral was narrowly described as an interest in amounts received under the option contract, the rejection of the contract essentially depreciated the value of the creditors' collateral to zero. The bankruptcy court first held that, even though the creditors' security agreements did not expressly extend to proceeds of the option contract, under state law the creditors' collateral included any payments under the option contract even if the payments were made after the debtor initiated its bankruptcy. However, adequate protection was not required or warranted since the rejection of the contract did not constitute a lease, sale, or use of the creditors' interests in contract proceeds, and there was no basis for attaching the creditors' liens to any future sales of the leases. Further, while the creditors' security interests remained intact, the rejection of the option contract rendered such interests worthless and thus obviated the need to provide adequate protection for the creditors' claims which had a value of nothing.

Gateway Access Solutions, Inc. v. Nester (In re Gateway Access Solutions, Inc.)*, 2007 Bankr. LEXIS 1847 (Bankr. M.D. Pa. May 17, 2007) (Opel, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:363.05**

§ 521 Debtor's Duties.

0707-041 **Below-median debtor not required to file additional Form B22A upon conversion to chapter 7 where Form B22C had been filed in original chapter 13 case.** (*Bankr. S.D. Ga.)*

PROCEDURAL POSTURE: Movant debtor filed a motion for an order determining that she was in compliance with the means test filing requirement of 11 U.S.C. § 521 and directing the entry of a discharge.

OVERVIEW: The debtor's Official Bankr. Form B22C that accompanied her chapter 13 petition reflected an income below the applicable median family income for her household. The debtor converted her case to chapter 7. The clerk issued a notice of deficiency indicating that the debtor would not receive a chapter 7 debtor because the debtor did not file Form B22C when she converted her case. The debtor filed a motion for an order determining that she was in compliance with the means test filing requirement and directing the entry of a discharge. The United States Trustee conceded that the debtor's income was below the applicable median income. The court granted the motion because the debtor was not required to file an additional Form B22A upon conversion in order to obtain a chapter 7 discharge. The court held that the debtor complied with the filing requirement of 11 U.S.C. § 521 where the debtor converted the case from chapter 13 to chapter 7 and the Official Bankr. Form B22C filed in the debtor's chapter 13 case indicated that the annualized current monthly income of debtor's household was below the applicable median income.

Edwards v. Turner (In re Edwards)*, 2007 Bankr. LEXIS 1738 (Bankr. S.D. Ga. April 5, 2007) (Dalis, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:521.01**

§ 522 Exemptions.

0707-042 **Debtor's homestead exemption limited on reconsideration due to intersts of unsecured creditors.** (*Bankr. W.D.N.Y.)*

PROCEDURAL POSTURE: The court allowed the debtor a homestead exemption in the amount of $30,961.09, finding that 11 U.S.C. § 522(l), Fed. R. Bankr. P. 4003(b), and the U.S. Supreme Court's *Taylor* decision prevailed over 11 U.S.C. § 522(g) when the trustee had failed to timely object to the debtor's Schedule C claim of a homestead exemption. The trustee moved to amend judgment under Fed. R. Bankr. P. 9023(a), arguing, *inter alia*, a manifest error of law was made.

OVERVIEW: The court believed that its judgment was incorrect in not taking into account the rights of the debtor's unsecured creditors, who were protected by the provisions of 11 U.S.C. §§ 551, 541(a)(3), 541(a)(4) and 552(g). These provisions applied in circumstances where the trustee avoided unrecorded mortgage liens that were automatically preserved for the benefit of the estate where the unsecured creditors had no notice or knowledge of the avoidability of the liens within the time required to object to any Schedule C claim of a homestead exemption by the debtor. Notwithstanding the failure of the trustee to timely object to the debtor's Schedule C claim of a $30,961.09 homestead exemption, the debtor's homestead exemption could not exceed the equity she possessed in the property at the time of the filing of her petition (being the value of the property less the balance due on the two mortgage liens on the date

of the filing of the petition). On reconsideration of the issues, the court believed that the debtor's homestead exemption should have been limited to $5,002.53, the amount previously paid to the debtor by the trustee.

***In re Nersinger**, 2007 Bankr. LEXIS 1807 (Bankr. W.D.N.Y. February 9, 2007) (Ninfo, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:522.01**

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

0707-043 **Debtor's failure to remit health insurance proceeds rendered debt nondischargeable.** (*Bankr. N.D. Miss.)*

PROCEDURAL POSTURE: Plaintiff creditor filed an adversary proceeding against defendant debtor seeking a determination that its debt was nondischargeable pursuant to 11 U.S.C. § 523(a)(6). The issue before the court was whether the debtor's failure to remit to the creditor the insurance proceeds paid to her by her health insurance constituted a non-dischargeable debt pursuant to 11 U.S.C. § 523(a)(6). The creditor filed a motion for summary judgment.

OVERVIEW: The debtor's failure to serve a timely answer or objection to the creditor's requests for admissions required those matters to be deemed admitted. Specifically, the debtor admitted That she executed a consent agreement assigning to the creditor all rights, benefits, and interest under her health insurance policy, as well as authorizing payment directly to the creditor of any claims payable under the insurance policy for services rendered by the creditor. She further admitted that she remained financially responsible to the creditor for all charges not covered or paid by insurance. The final fact deemed admitted was that, although the health insurer had sent the debtor the sum of $11,252 representing the payment of the costs of medical services and facilities provided by the creditor, she did not remit these insurance proceeds to the creditor. As a result of these admissions, there were no longer any genuine material factual issues in dispute. The amount of the insurance proceeds which the debtor failed to remit constituted a non-dischargeable debt pursuant to 11 U.S.C. § 523(a)(6).

***North Miss. Med. Ctr. v. Finnie (In re Finnie)**, 2007 Bankr. LEXIS 1628 (Bankr. N.D. Miss. May 2, 2007) (Houston, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.12**

§ 541 Property of the Estate.

0707-044 **Real property owned by debtor's general partnership was not property of the estate and could not be exempted.** (*Bankr. D.N.M.)*

PROCEDURAL POSTURE: Debtor filed for chapter 7 relief. Debtor and another individual (who also sought bankruptcy relief) were general partners in a general partnership formed under California law. The general partnership owned real property in California. Debtor claimed a homestead exemption under 11 U.S.C. § 522(b)(1). The bankruptcy trustee objected.

OVERVIEW: Under California law, a partnership was an entity separate and distinct from its partners. A partner was not a co-owner of partnership property and had no interest in partnership property that could be transferred, either voluntarily or involuntarily. The only transferable interest of a partner in the partnership was the partner's share of profits and losses and the partner's right to receive distributions. Here, debtor's partnership interest became estate property under 11 U.S.C. § 541. However, the partnership assets remained in the partnership and did not become an asset of debtor's bankruptcy estate. Therefore, the real property at issue was never property of the bankruptcy estate, and debtor could not exempt it. There was no question that debtor could exempt his partnership interest, but that was not real estate. Finally, the court found that debtor was not entitled to claim a California homestead exemption.

***In re Shephard**, 2007 Bankr. LEXIS 1667 (Bankr. D.N.M. May 7, 2007) (Starzynski, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:541.01**

§ 545 Statutory Liens.

0707-045 **IRS tax lien was not avoidable as preference or otherwise.** (*Bankr. N.D. Ga.)*

PROCEDURAL POSTURE: Defendant IRS filed a Fed. R. Civ. P. 56 motion for summary judgment on plaintiff debtor's adversary proceeding, which sought to avoid the tax lien of the IRS on the debtor's property as a preference pursuant to 11 U.S.C. § 547.

OVERVIEW: The debtor's adversary complaint stated that the federal tax lien in the county real estate records, which was based on income taxes, interest, and penalties owed by the debtor, was a preferential transfer in violation of 11 U.S.C. § 547. The court held that summary judgment in favor of the IRS was appropriate. The court, even when construing the admitted facts in the light most favorable to debtor, concluded that the lien was not avoidable, pursuant to 11 U.S.C. § 545, and, thus, could not be avoided as a preference pursuant to 11 U.S.C. § 547(c)(6). The court held that the lien did not fall within any of the circumstances in which a statutory lien could be avoided under 11 U.S.C. § 545 and could not be avoided under section 545(1)(D) on the basis that the lien was filed during the debtor's insolvency.

Burr v. United States (In re Burr)*, 2007 Bankr. LEXIS 1859 (Bankr. N.D. Ga. April 10, 2007) (Diehl, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:545.01**

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

0707-046 **Presumption of abuse arose after adjustment of disposable income calculation to eliminate improper deduction.** (*Bankr. E.D. Wis.)*

PROCEDURAL POSTURE: The debtor filed for relief under chapter 7. The U.S. Trustee filed a motion to dismiss the debtor's case for abuse, based on the presumption of abuse arising under 11 U.S.C. § 707(b)(2) or alternatively under the totality of the circumstances under 11 U.S.C. § 707(b)(3).

OVERVIEW: After a hearing the court denied the trustee's motion under 11 U.S.C. § 707(b)(3). However, the trustee also challenged the propriety of one of the debtor's deductions listed on the Form B22A. The deduction involved the payment for a condominium. Two days before the petition date, the condominium was sold at a foreclosure sale conducted under the provisions of Minnesota law. The trustee contended that after foreclosure the mortgage payments were no longer contractually due. The court noted that pursuant to Minn. Stat. § 580.03, and the other foreclosure provisions, the mortgage, both as a contract and as security, is exhausted by the foreclosure. The foreclosure sale thus operated to extinguish all terms under the mortgage note, including the debtor's scheduled monthly payments of principal and interest. The court rejected the debtor's assertion that the debtor's obligations remained in place until the redemption period had expired. Because the debtor did not have a secured payment contractually due, as scheduled on Form B22A, the debtor had disposable income, and the presumption of abuse arose under 11 U.S.C. § 707(b)(2)(B).

In re Brandenburg*, 2007 Bankr. LEXIS 1781 (Bankr. E.D. Wis. May 15, 2007) (Kelley, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[2]**

§ 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.

0707-047 **Mortgage and car loan payments were appropriate Form B22A deductions regardless of intent to surrender.** (*Bankr. W.D. Wis.)*

PROCEDURAL POSTURE: Before the court was the U.S. Trustee's motion to dismiss debtors' chapter 7 case.

OVERVIEW: Debtors' statement of intention indicated that they planned to surrender their home, on which their monthly mortgage payments totaled $1,657, and a vehicle, for which the payment was $387. They used these figures as deductions from their current monthly income in the calculation of their Form B22A, the so-called "means test." According to the trustee, 11 U.S.C. § 707(b)(2) did not permit them to claim the monthly payments associated with surrendered items as secured debt. The court stated that, in calculating the means test eligibility, the crucial language was found in section 707(b)(2)(A)(iii). The court's task was to determine the appropriate application of section 707(b)(2)(A)(iii)'s reference to

payments "scheduled as contractually due to secured creditors." It concluded that the best interpretation of section 707(b)(2) was to regard it as requiring a "snapshot" of the debtors' finances at the time of filing. At the time of filing, debtors were clearly contractually obligated to pay their mortgage debt and their vehicle loan. Those debts were scheduled and contractually due. As such, these monthly payments were appropriately deducted from debtors' current monthly income on their Form B22A.

***In re Kogler**, 2007 Bankr. LEXIS 1648 (Bankr. W.D. Wis. March 30, 2007) (Utschig, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[2]**

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

0707-048 **Case dismissed due to debtors' ability to pay substantial portion of debt.** (*Bankr. S.D. Ohio)*

PROCEDURAL POSTURE: The United States Trustee filed a motion to dismiss the chapter 7 debtor's case pursuant to 11 U.S.C. § 707(b)(3).

OVERVIEW: The debtor claimed that the trustee's motion was not timely filed because all motions to dismiss filed under section 707(b), including motions to dismiss under 707(b)(3), had to be filed within 30 days after the filing. The court held that a motion to dismiss under section 707(b)(3) had to be filed within 60 days after the date first set for the section 341 meeting of creditors. The court held that the trustee's motion was timely filed because it was filed within the requisite 60-day period. In granting the Trustee's motion to dismiss, the court held that the debtor had the ability to pay a meaningful percentage of his debts, at the very least 40 percent of his unsecured debt and as much as 80 percent of his unsecured debt. The court noted that his job and income were stable because he worked for his father. The court also held that the debtor's explanation that he ran up a large credit card debt to give his adult sons the same lifestyle after his divorce as they had before the divorce did not weigh against dismissal.

***In re dePellegrini**, 2007 Bankr. LEXIS 1622 (Bankr. S.D. Ohio April 26, 2007) (Aug, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[3]**

§ 727(a) Discharge; Grounds for Denial.

0707-049 **Discharge denied due to debtor's numerous omissions and false statements.** (*Bankr. N.D. Tex.)*

PROCEDURAL POSTURE: Pending decision following trial was plaintiff judgment creditor's objection to the granting of defendant debtor's global discharge: (1) pursuant to 11 U.S.C. § 727(a)(3), on the grounds that debtor, without adequate justification, concealed or otherwise failed to keep, record, or preserve records from which his financial condition or business transactions might be ascertained; (2) pursuant to section 727(a)(4); and (3) pursuant to section 727(a)(5).

OVERVIEW: The court determined that there were no grounds to deny debtor's discharge pursuant to 11 U.S.C. § 727(a)(3). Generally, debtor had produced a significant amount of recorded information, as it had been requested by the creditor. With regard to section 727(a)(4), the evidence was rather clear that debtor's original and Amended Schedules and Statements of Financial Affairs ("SOFAs") did not contain a substantial amount of information that debtor should have disclosed, including, *inter alia*, significant income and property he controlled. The numerous omissions rose to the level of requiring denial of discharge under section 727(a)(4), as the court believed the omissions were the equivalent of false statements made under oath, debtor most assuredly knew the statements were false, he had a fraudulent intent to deceive (or at least reckless disregard for the truth), and the statements were material. Regarding section 727(a)(5), vague and indefinite explanations uncorroborated by documentation were precisely what the court had with regard to certain transfers. Accordingly, there was an additional basis to deny discharge.

***Cadle Co. v. Moore (In re Moore)**, 2007 Bankr. LEXIS 1785 (Bankr. N.D. Tex. May 18, 2007) (Jernigan, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.01**

§ 1307 Conversion or Dismissal.

0707-050 **Dismissal reversed as not in best interests of creditors.** (*B.A.P. 9th Cir.)*

PROCEDURAL POSTURE: Appellant, the chapter 13 trustee, challenged a ruling of the Bankruptcy Court for the District of Arizona granting appellee debtor's motion to dismiss his chapter 13 case. At issue was whether the bankruptcy court's analysis of appellee's motion to dismiss, filed under 11 U.S.C. § 1307, was proper.

OVERVIEW: Appellee first filed a chapter 7 in which he listed one piece of land as to which he claimed a $150,000 homestead exemption. The chapter 7 trustee objected, arguing that appellee had not lived in Arizona for the required 730 days and that the less liberal exemption scheme in his last home, in Ohio, applied. Appellee filed a motion to convert to chapter 13 and a response to the objection alleging that there was a factual issue as to residency. After another round of objections on the same grounds, appellee moved to dismiss. Appellant objected to dismissal, claiming that appellee did not have a right to dismiss and, later, challenging appellee's standing. The bankruptcy court dismissed, and appellant sought review. The court reversed. Though rejecting appellant's claim that appellee lacked standing because appellee's pecuniary and practical interest in his own bankruptcy case was undeniable, the court ruled that the bankruptcy court had erred. Specifically, because section 1307's language was unambiguous and referred only to the interests of creditors and the estate, the bankruptcy court's reliance on the impact of the case on appellee was incorrect, requiring the reversal of its ruling.

Brown v. Sobczak (In re Sobczak)*, 2007 Bankr. LEXIS 1840 (B.A.P. 9th Cir. May 11, 2007) (Brown, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1307.01**

§ 1307(b) Conversion or Dismissal; Dismissal on Request of Debtor.

0707-051 **Debtor spouse had inherent right to voluntarily dismiss non-converted chapter 13 case.** (*Bankr. M.D. Fla.)*

PROCEDURAL POSTURE: Debtors, husband and wife, filed for chapter 13 relief. Creditor IRS objected to confirmation because the wife had not filed federal employment tax returns in relation to a child care business she owned. The court confirmed the chapter 13 plan. A notice of voluntary dismissal was filed as to the wife. The court dismissed the case as to the wife. The IRS moved to set aside the order dismissing the case as to the wife.

OVERVIEW: The IRS had appealed the order confirming debtors' chapter 13 plan. The district court held a hearing on the appeal and noted that the dismissal as to the wife could potentially make the issue on appeal moot. In its motion to set aside, the IRS alleged that the attempt to dismiss the wife was not made in good faith, and that the issue on appeal was "great importance." The court held that, because the chapter 13 case was never converted, the wife had an absolute right to voluntarily dismiss the case as to herself, in accordance with 11 U.S.C. § 1307(b). The court opined that the contention that the issue on appeal was of "great importance" had no substantive bearing as to the wife's inherent right to dismiss her case under the law, and the court would not engage in such judicial activism.

In re Davis*, 2007 Bankr. LEXIS 1751 (Bankr. M.D. Fla. May 16, 2007) (Proctor, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1307.03**

§ 1322(b) Contents of Plan; Discretionary Provisions.

0707-052 **Amended plan calling for sale of house and distribution of proceeds rather than monthly payments approved subject to four month limitation on sale.** (*Bankr. D.N.M.)*

PROCEDURAL POSTURE: Debtors filed a voluntary petition under chapter 13 and a plan for paying their creditors. Several months later, they filed an amended plan and asked the court to approve their amended plan. A creditor opposed the amended plan.

OVERVIEW: The debtors executed a note and mortgage in favor of a financial institution (creditor) in the principal amount of $113,584 and used the money to purchase a house. In December, 2006, the debtors filed a petition under chapter 13, and they filed a plan which required them to make monthly payments to the creditor and the chapter 13 trustee. When the debtors were unable to make monthly payments to the creditor, they filed an amended plan which required them to sell the house and use the proceeds to

pay the creditor. The creditor opposed the amended plan, arguing that 11 U.S.C. § 1322(b)(5) required the debtors to make monthly payments. The court disagreed. 11 U.S.C. § 1322(b)(8) allowed the debtors to sell their property to provide for the payment of all or part of a claim against them, and the fact that the debtors had sufficient equity in their house to protect the creditor's interest, had requested a limited time period within which to effectuate the sale, and had already taken steps to employ a broker and market the property justified a decision approving the amended plan.

In re Valdez, *2007 Bankr. LEXIS 1789 (Bankr. D.N.M. May 17, 2007) (McFeeley, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1322.05**

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

0707-053 **Mortgage creditor waived right to claim postpetition escrow deficiency due to failure to provide debtor with notice of changes in payments.** (*E.D. Mich.)*

PROCEDURAL POSTURE: Appellant chapter 13 debtor sought review of an order issued by the bankruptcy court, which denied the debtor's motion to foreclose appellee mortgagee from asserting a postpetition arrearage claim that resulted from a deficiency in the escrow account for insurance premiums and tax payments.

OVERVIEW: The debtor argued that the mortgagee should not be allowed to collect the arrearage because it violated Bankr. D. Mich. R. 3001-2 when it failed to serve the trustee, the debtor, and the debtor's counsel with a statement of the change in her mortgage payments. The mortgagee contended that the tax and insurance advances it made on the debtor's behalf were postpetition debts that were not modifiable and not subject to discharge under 11 U.S.C. § 1322(b)(2) and (5). Although the bankruptcy court found that the mortgagee violated Bankr. D. Mich. R. 3001-2, it concluded that discharge would be an overly harsh remedy. The court, however, held that the mortgagee waived the right to assert a claim to the postpetition debt because it violated Rule 3001-2 and 12 U.S.C. § 2609(b) of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.*, when it failed to provide notice for more than three years of the changes in the monthly mortgage payment due to the escrow account deficiency. The court found that the equity did not weigh in favor of the mortgagee because the mortgagee's failure to meet its notice obligations resulted in the debtor facing a $13,000 arrearage.

Craig-Likely v. Wells Fargo Home Mortg. (In re Craig-Likely), *2007 U.S. Dist. LEXIS 29042 (E.D. Mich. March 2, 2007) (Battani, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1322.06**

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

0707-054 **Hanging paragraph did not allow debtors to surrender vehicle in full satisfaction of secured claim.** (*Bankr. N.D. Ga.)*

PROCEDURAL POSTURE: Objector, a secured creditor, asserted an objection to a plan proposed by chapter 13 debtors pursuant to which they sought to surrender the vehicle that secured the claim to the creditor in full satisfaction thereof without regard to any possible deficiency. At issue was whether debtors were entitled, pursuant to the "hanging paragraph" in 11 U.S.C. § 1325(a), to surrender the vehicle without making provision for payment of any deficiency.

OVERVIEW: Debtors purchased the vehicle at issue in January, 2006. In December, 2006, they filed a voluntary petition under chapter 13. When they sought confirmation of a plan which proposed to allow them to surrender the vehicle to the creditor in full satisfaction of the creditor's claim without provision for recovery of any deficiency, the creditor objected. The parties agreed only that the "hanging paragraph" applied to the claim, with debtors arguing that it limited the creditor's ability to seek payment of an unsecured claim for any deficiency remaining after the surrender of the vehicle and the creditor arguing that its right to payment thereof was unaffected by the "hanging paragraph." The court ruled for the creditor, finding that the "hanging paragraph" did not permit debtors to surrender the vehicle in full satisfaction of the creditor's claim. It thereupon denied confirmation of the proposed plan without prejudice.

In re White, *2007 Bankr. LEXIS 1831 (Bankr. N.D. Ga. April 9, 2007) (Drake, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

0707-055 **Debtor could surrender vehicle in full satisfaction of secured debt under hanging paragraph.** (*Bankr. N.D. Ind.)*

PROCEDURAL POSTURE: The matter was before the court to consider confirmation of debtors' proposed chapter 13 plan together with the objection thereto filed on behalf of a creditor.

OVERVIEW: The issue was purely a legal one and involved whether a debtor could surrender a motor vehicle in full satisfaction of a claim held by a creditor with a purchase money security interest in a motor vehicle acquired, during the 910 days prior to the date of the petition, for the personal use of the debtor. The debate centered upon the meaning of the unnumbered paragraph following 11 U.S.C. § 1325(a)(9), which for want of any better designation had commonly come to be called "the hanging paragraph." Whether a chapter 13 plan could force a 910 car creditor to accept its collateral in full satisfaction of its claim was a matter upon which the courts were divided. As of last count, the court stated, by a margin of about 3-to-1, the vast majority of reported cases favored the position taken in this case by both debtors and the chapter 13 trustee: that a 910 car creditor could, through the confirmation of a proposed plan, be compelled to accept the surrender of its collateral in full satisfaction of its claim. The court agreed with the majority that the hanging paragraph did permit a debtor to surrender the collateral of a 910 car creditor in full satisfaction of that creditor's claim.

In re Roth*, 2007 Bankr. LEXIS 1647 (Bankr. N.D. Ind. May 4, 2007) (Grant, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

§ 1325(b)(3) Confirmation of Plan; Objections; Calculation of Disposable Income.

0707-056 **Debtor could deduct ownership expense on Form B22C for vehicle owned free and clear.** (*Bankr. E.D. Va.)*

PROCEDURAL POSTURE: Chapter 13 trustee objected to confirmation of the above-median income debtor's plan on the grounds that the plan did not comply with the requirement of 11 U.S.C. § 1325(b)(1)(B) that all of a debtor's disposable income be committed to the funding of a chapter 13 plan.

OVERVIEW: The debtor's schedules included Official Form B22C, which provided a summary of the debtor's income and expenses in accordance with 11 U.S.C. § 1325(b)(3). The trustee objected to the plan on the grounds that the debtor improperly deducted an ownership expense on Official Form B22C for a vehicle owned free and clear. In overruling the trustee's objection, the court held that the debtor was permitted to include a vehicle ownership expense, even though she did not have a debt or lease payment on her vehicle, because the statutory construction and legislative history supported such a holding. The court also noted that the language of Official Form B22C supported allowance of the ownership expense by directing debtors to consult either the clerk of the bankruptcy court or the office of the U.S. Trustee's website for the appropriate IRS figures, rather than any other IRS source or manual.

In re Lynch*, 2007 Bankr. LEXIS 1649 (Bankr. E.D. Va. May 8, 2007) (Tice, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08[5]**

§ 1325(b)(4)(B) Confirmation of Plan; Objections; "Applicable Commitment Period"; Shorter Period.

0707-057 **Confirmation denied where above-median debtors' plan was for less than five years and did not provide for payment of all allowed unsecured claims in full.** (*Bankr. D. Or.)*

PROCEDURAL POSTURE: The court conducted a hearing on the objections of the chapter 13 trustee to confirmation of the above-median income debtors' plan.

OVERVIEW: The debtors' schedules reflected that they had $396 net monthly income to contribute to their plan, and in fact the debtors committed to pay $396 into the plan each month for the plan duration. The debtors, however, took the position that, because their "monthly disposable income" reflected on line 58 of Form B22C was $103.13, payment of $6,187.80 ($103.13 x 60) satisfied the payment requirements under 11 U.S.C. § 1325(b). As a result, the debtors' plan projected that it would make the last payment in approximately month 25 according to the trustee. The trustee argued that the "applicable commitment period" under section 1325(b)(4) mandated that payments be made for a full five years. The court held that section 1325(b)(4)(B) authorized confirmation of a plan with a shorter payment period than five years only if the plan provided for payment in full of all allowed unsecured claims over the shorter period, and

the debtors' plan did not provide for payment in full of all allowed unsecured claims. The court also held that the debtors had to commit, as part of their projected disposable income, payment of their tax refunds to the plan for the applicable commitment period.

***In re Mullen**, 2007 Bankr. LEXIS 1813 (Bankr. D. Or. May 14, 2007) (Dunn, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08[5]**

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

§ 101(5) Definitions; ``Claim''.

0707-058 **Creditor held a valid claim for postpetition attorneys' fees incurred in defending adversary proceeding.** (*Bankr. N.D. Cal.)*

PROCEDURAL POSTURE: Defendant moved for an award of postpetition attorneys' fees as part of its judgment in adversary proceedings filed by plaintiff debtors. At the time, Ninth Circuit precedent (the *Fobian* case) held that attorneys' fees were not recoverable for litigating issues peculiar to bankruptcy law. In its *Travelers* decision, the Supreme Court overruled the *Fobian* case. Following briefing, the bankruptcy court issued its ruling on defendant's motion.

OVERVIEW: Defendant sought an award of postpetition attorneys' fees pursuant to its various contracts with debtors as part of its undersecured claim against debtor corporation and its general, unsecured claim against debtor individuals. The bankruptcy court held that defendant was entitled to include its reasonable postpetition attorneys' fees in its unsecured claim against debtors. The bankruptcy court determined that defendant's postpetition attorneys' fees qualified as a "claim" under 11 U.S.C. § 101(5). The cases establishing the bankruptcy estate's right to attorneys' fees as the prevailing party in postpetition litigation provided an equitable rationale supporting the bankruptcy court's conclusion. The bankruptcy court opined that it would seem highly inequitable to permit the bankruptcy estate to recover fees incurred in postpetition with a creditor while at the same time denying the creditor the right even to include its postpetition fees in its unsecured claim. The bankruptcy court reasoned that, absent a clear provision of the Bankruptcy Code modifying a creditor's nonbankruptcy legal rights, those rights should be deemed to be left intact.

***Qmect, Inc. v. Burlingame Capital Partners II, LP (In re Qmect, Inc.)**, 2007 Bankr. LEXIS 1845 (Bankr. N.D. Cal. May 17, 2007) (Tchaikovsky, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:101.05**

§ 363(h) Use, Sale, or Lease of Property; Sale of Estate and Co-Owner Interests.

0707-059 **Court approved settlement by which trustee abandoned debtor's interest in real estate held as tenant in common with former spouse in exchange for payment from spouse.** (*Bankr. E.D. Va.)*

PROCEDURAL POSTURE: Movant, the chapter 7 trustee, asked the court to approve a settlement that the trustee proposed to enter into with an individual who co-owned real estate with a chapter 7 debtor. The co-owner was also debtor's ex-husband. At issue was whether the proposed settlement was proper under 11 U.S.C. § 363(h).

OVERVIEW: Debtor was a tenant in common with her ex-husband in the subject real estate. Though debtor had lived on the land only for a short time, the ex-husband had resided there for 22 years, paying all costs including the mortgage. The trustee valued the land at $225,000 and originally proposed to sell its interest to the ex-husband for $14,500. At the hearing, however, the trustee proposed to simply abandon its interest in exchange for $14,500. The court approved the modified proposal. After noting the limitations placed on the trustee's powers by 11 U.S.C. § 363(h)(3), the court pointed out that the benefit, to the debtor's estate, of a proposed sale had to outweigh the detriment of such sale to the co-owners. It thereupon held that the trustee's original proposal was unfair to debtor because debtor's half-interest in the equity, estimated to be between $50,000 and $75,000, was substantial,. If, however, the estate abandoned its interest, the property would continue to be titled as it was prior to the chapter 7, leaving it to debtor and her ex-husband to resolve their respective interests. As that was an acceptable result, the court approved the modified settlement.

***In re Lee**, 2007 Bankr. LEXIS 1746 (Bankr. E.D. Va. May 16, 2007) (Mayer, B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 3:363.08**

§ 503(b) Allowance of Administrative Expenses; Types of Expenses Allowed.

0707-060 **Debtor's attorney allowed reduced administrative expense for fees incurred in chapter 13 case prior to conversion to chapter 7.** (*Bankr. D. Md.)*

PROCEDURAL POSTURE: The debtors' former counsel filed an application for an order authorizing compensation of attorney's fees and reimbursement of expenses.

OVERVIEW: Counsel in the matter at issue filed a successful motion to convert the case to a chapter 13. A creditor bitterly opposed the plan. The debtors, against counsel's advice, filed a motion to reconvert the case to chapter 7. Counsel applied for $12,177 in fees and $346 in expenses and sought allowance of the compensation as an administrative expense under 11 U.S.C. § 503(b). The court allowed a chapter 13 administrative expense of $6,850 to counsel, as well as reimbursement of out of pocket expenses of $346. The court ordered the chapter 13 trustee, if he held funds of the debtors, to pay $2,024 to counsel and refund the balance to the debtors. The court found that the benefit to the debtors of counsel's services could not be ascertained with confidence until the determination of the adversary proceedings, which sought a denial of the discharge. The court considered that one debtor expressed absolute satisfaction with the quality of work rendered by counsel. The court, as handicapped as it was in its determination of reasonable compensation, gave counsel the benefit of the doubt, particularly since he faced the responsibility of a forthcoming trial.

***In re Fotso**, 2007 Bankr. LEXIS 1657 (Bankr. D. Md. May 9, 2007) (Mannes, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:503.04**

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

0707-061 **Creditor who failed to file amended claim after denial of secured status ordered to return payment from chapter 13 trustee.** (*Bankr. N.D. Ga.)*

PROCEDURAL POSTURE: Plaintiff debtors filed an adversary proceeding seeking reconsideration of the allowance of defendant creditor's claim and seeking to recover funds paid the creditor by the chapter 13 trustee. The debtors sought the return of the funds the creditor had received in excess of the amount it would have received as an unsecured creditor. The parties filed cross-motions for summary judgment.

OVERVIEW: When the creditor's attorney was informed that the debtors had filed bankruptcy, the creditor's duty was to discontinue its collection actions. This the creditor did not do which resulted in the perfection of the creditor's judgment lien postpetition. This action was void, as it violated 11 U.S.C. § 362(a)(4). When the creditor's judgment lien was avoided under 11 U.S.C. § 522(f), the creditor's claim was no longer a secured claim. At that point, the creditor should have filed an amended claim. Alternatively, the debtors should have filed an objection to the claim. In the absence of either action, the claim remained "deemed allowed as filed"; the chapter 13 trustee's disbursements to the creditor were proper. The creditor, however, knew or should have known it was not entitled to the disbursements it received. The debtors' attorney should have filed an objection to the creditor's proof of claim. However, neither attorney took action. The creditor's acceptance of payment from the trustee when it knew its lien was unperfected and when it knew an order avoiding its lien had been entered was wrong. The debtors' attorney, however, behaved with less than competent efficiency.

***Jaecksch v. GMAC (In re Jaecksch)**, 2007 Bankr. LEXIS 1829 (Bankr. N.D. Ga. April 4, 2007) (Murphy, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:522.11**

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

0707-062 **Judgment for fatal alcohol related auto accident was based on debtor's willful and malicious conduct and was nondischargeable.** (*Bankr. W.D.N.C.)*

PROCEDURAL POSTURE: Plaintiff, the personal representative of the deceased's estate, filed an adversary proceeding seeking a determination that a debt owed by defendant debtor was not dischargeable under 11 U.S.C. § 523(a)(6) because the conduct of the debtor was willful and malicious. The court issued findings of fact and conclusions of law.

OVERVIEW: The debtor caused an automobile accident that resulted in a fatal injury to the deceased, a passenger in another car. The evidence from the debtor's criminal and wrongful death trial established that the debtor entered an intersection at a high rate of speed and against a red light, thus striking the deceased's vehicle. At the time of the accident the debtor was under 21 years of age and there was evidence that he had consumed alcohol before driving. The representative obtained a civil judgment against the debtor and an unpaid balance of $36,496 remained. The court determined initially that it was not precluded by the state court proceedings from determining whether or not the debtor's conduct was willful and malicious. Applying an objective standard and looking at the totality of the circumstances, the court concluded that the debtor's conduct was both willful and malicious under 11 U.S.C. § 523(a)(6). The debtor knew that he was violating the law by speeding and by being in possession of alcohol. It was not material that debtor did not intend specific harm to the deceased.

***Millsaps v. Yates (In re Yates)**, 2007 Bankr. LEXIS 1614 (Bankr. W.D.N.C. February 6, 2007) (Wooten, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.12**

0707-063 **Judgment for copyright infringement involved willful and malicious conduct by debtor and was nondischargeable.** (*Bankr. E.D.N.Y.)*

PROCEDURAL POSTURE: Plaintiff creditor filed a motion for summary judgment on its complaint against plaintiff chapter 7 debtor, which sought a determination that the debt arising out of a judgment entered in a federal copyright infringement action against the debtor was nondischargeable under 11 U.S.C. § 523(a)(6). The debtor filed a cross motion for summary judgment.

OVERVIEW: The creditor owned the copyrights and exclusive distribution rights to certain Indian films. The debtor was engaged in the retail distribution of VHS cassettes and DVDs. A federal district court order of seizure resulted in the seizure of unauthorized copies of the creditor's films from the debtor's store. The district court issued an injunction against the debtor, enjoining him from reproducing, displaying, copying, compiling, and distributing unauthorized copies of the creditor's films. Subsequently, the police raided the debtor's store and found 11 unauthorized copies of the creditor's films. The district court found the debtor in contempt and awarded the creditor statutory damages in the amount of $330,000. In granting the creditor's motion for summary judgment, the court held that the debtor was collaterally estopped from claiming that debt arising out of a contempt judgment entered in a federal copyright infringement action was dischargeable under 11 U.S.C. § 523(a)(6) because the identical elements of willfulness and maliciousness were raised and actually litigated in the infringement action, and the debtor had a full and fair opportunity to litigate the issues.

***Yash Raj Films (USA), Inc. v. Akhtar (In re Akhtar)**, 2007 Bankr. LEXIS 1810 (Bankr. E.D.N.Y. May 17, 2007) (Stong, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.12**

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

0707-064 **Debtor shareholder could not be compelled to turnover corporate assets.** (*Bankr. N.D. Ohio)*

PROCEDURAL POSTURE: The husband debtor (debtor) held a one-third of the outstanding shares of stock of a corporation. The chapter 7 trustee filed a motion for turnover in accordance with 11 U.S.C. § 542(a) seeking surrender of all funds held on deposit on the date of filing in the corporation's bank account that the debtor had a right to receive as a shareholder.

OVERVIEW: The debtor argued that since he, as a shareholder, had no right to the corporation's assets, the trustee, inuring only to the debtor's rights as a shareholder, also had no right to the corporate funds. Fundamentally, the debtor's position was correct. The trustee had a right only to the shares of stock held by the debtor. The trustee offered no explanation or basis, such as a reason why the corporate veil should be pierced, as to why she had any right to the corporate funds. The trustee, instead, simply relied on her bare assertions that the funds held on account by the corporation were assets of the bankruptcy estate.

***In re Tillman**, 2007 Bankr. LEXIS 1712 (Bankr. N.D. Ohio May 4, 2007) (Speer, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:542.02**

§ 727 Discharge.

0707-065 **Discharge revoked due to debtor's failure to turn over tax refunds.** (*Bankr. M.D. Ga.)*

PROCEDURAL POSTURE: Plaintiff trustee filed a motion for summary judgment on his complaint to revoke defendant debtor's chapter 7 discharge, pursuant to 11 U.S.C. § 727.

OVERVIEW: The trustee filed a complaint for revocation of the discharge. The trustee alleged that the debtor failed to report and turn over to the trustee the substantial federal income tax refunds the debtor received. The trustee filed copies of tax refund checks signed by the debtor and of affidavits, which were signed by the debtor in connection with the settlement of a postpetition lawsuit that occurred after receipt of the refunds. The court granted the trustee summary judgment and revoked the discharge under section 727 because the debtor concealed and transferred funds from refunds that were property of the estate after filing for bankruptcy. The court held that the refunds were property of the debtor's estate, the debtor failed to turn over or reveal his entitlement to the refunds on his schedules, the debtor was aware of the entitlement to tax refunds when he filed his tax returns and when he received the refunds after filing for bankruptcy, and the debtor failed to respond to the summary judgment motion.

Kelley v. Swain (In re Swain)*, 2007 Bankr. LEXIS 1839 (Bankr. M.D. Ga. May 14, 2007) (Laney, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.01**

§ 727(a) Discharge; Grounds for Denial.

0707-066 **Debtor attorney denied discharge for postpetition recording of deed of trust in favor of mother with intent to hinder, delay or defraud creditors.** (*B.A.P. 9th Cir.)*

PROCEDURAL POSTURE: Appellant debtor challenged decisions of the Bankruptcy Court for the Central District of California, which denied the debtor's discharge under 11 U.S.C. § 727(a), denied the debtor's motion for reconsideration, and awarded attorneys' fees to appellee creditors as a discovery sanction under Fed. R. Civ. P. 37, applicable in bankruptcy proceedings by Fed. R. Bankr. P. 7037.

OVERVIEW: The debtor was an attorney who filed a chapter 7 petition with her husband. Subsequently, the debtor recorded a deed of trust in favor of her mother, which purportedly secured a loan the mother made to the debtor and her husband years earlier to help purchase their home. The creditors and the trustee sought to deny the debtor's discharge. The debtor settled with the trustee, paying a sum to the estate. The debtor was denied a discharge in the adversary proceeding brought by the creditors on the basis that the deed of trust was executed with the intent to hinder, delay, or defraud the creditors and that the debtor and her husband materially misrepresented their financial affairs in their bankruptcy filings. The court also denied the debtor's motion for reconsideration and awarded attorneys' fees to the creditors. In affirming the bankruptcy court's decision, the court held that the bankruptcy court did not clearly err in finding that the debtor acted with the requisite intent to justify denial of discharge. The court also held that there was no abuse of discretion in the denial of her motion for reconsideration, and that the debtor had waived a challenge to the attorneys' fee award.

Hansen v. Moore (In re Hansen)*, 2007 Bankr. LEXIS 1670 (B.A.P. 9th Cir. April 23, 2007) (Brandt, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.01**

0707-067 **Debtor's reliance on attorney's advice prevented denial of discharge on grounds of fraud.** (*Bankr. W.D. Va.)*

PROCEDURAL POSTURE: Plaintiff United States Trustee filed a complaint against defendant chapter 7 debtor, seeking to deny the discharge of the debtor pursuant to 11 U.S.C. § 727(a)(2), (a)(4) and (a)(6).

OVERVIEW: More than one year before filing a chapter 7 petition, the debtor transferred her interest in a mobile home and real estate to a revocable living trust. On her bankruptcy schedules, the debtor listed ownership only of an interest in a trust and valued it at one dollar. At the section 341 meeting of creditors, the debtor disclosed that the value of the property held in the trust was approximately $20,000 and that the value she disclosed was based upon the advice of her attorney. The Trustee e-mailed counsel for the debtor the documents necessary to complete the turnover of the trust assets. Counsel never provided the debtor with the documents and the debtor was later found in contempt for failing to comply with the turnover order. The court held that denial of discharge pursuant to section 727(a)(2) and (a)(4) was not warranted because the debtor's reliance on the advice of her attorney in good faith negated the

assertion that the valuation was made with fraudulent intent. The court also held that the debtor credibly explained that her attorney failed to timely provide her with the conveyance documents, thereby making it impossible for her to comply with the terms of the turnover order.

United States Trustee v. Arnold (In re Arnold), *2007 Bankr. LEXIS 1719 (Bankr. W.D. Va. March 29, 2007) (Krumm, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.01**

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

0707-068 **Discharge denied due to debtor's undisclosed transfer of business assets to LLC he controlled 30 days prior to petition date.** (*Bankr. D. Mass.)*

PROCEDURAL POSTURE: Plaintiff creditor filed a complaint against defendant chapter 7 debtor, seeking a determination that the debtor was not entitled to a discharge pursuant to 11 U.S.C. § 727(a)(2), (a)(3), (a)(4) and (a)(5).

OVERVIEW: The debtor operated a sole proprietorship that offered corporate financial planning services. He later transferred for no consideration all of the assets of the business to a limited liability company in which he held a 97 percent interest. Facing imminent foreclosure on two properties, the debtor filed a chapter 13 petition 30 days after the transfer. The debtor did not identify the transfer on his statement of financial affairs and his schedules did not reflect that any valuable assets had been transferred. In denying the debtor's discharge pursuant to 11 U.S.C. § 727(a)(2), the court held that the transfer of assets was made with intent to hinder, delay, and defraud his creditors, as evidenced by the existence of several badges of fraud, including that: (1) the transfers were between insiders; (2) the debtor retained the benefit, use, and possession of the assets transferred; (3) the company paid no consideration for the transfer; (4) the debtor's financial situation deteriorated after the transfer and he faced imminent foreclosures prompting the bankruptcy filing; and (5) the effect of the transfer was to place assets outside the reach of the debtor's creditors.

Vickers v. Hurley (In re Hurley), *2007 Bankr. LEXIS 1817 (Bankr. D. Mass. May 15, 2007) (Feeney, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.02**

§ 1325(a)(3) Confirmation of Plan; Conditions for Confirmation; Plan Proposed in Good Faith.

0707-069 **Debt owed to Department of Veterans Affairs was nondischargeable due to debtor's misrepresentation of spouse's income in application for pension benefits.** (*Bankr. D.S.D.)*

PROCEDURAL POSTURE: A chapter 13 trustee and the United States Department of Veterans Affairs objected to the confirmation of a debtor's chapter 13 plan, pursuant to 11 U.S.C. § 1325(a)(3).

OVERVIEW: Veterans Affairs was granted a default judgment against the debtor for misstating her husband's income in an application for veterans improved pension benefits. The debtor's subsequent pension benefit applications again stated that her husband had no income. The debtor's chapter 7 petition stated that her husband had $2,325 in monthly income. The debtor filed for chapter 13 relief and her plan proposed no payments to Veterans Affairs. The court denied confirmation on the objection of the chapter 13 trustee and Veterans Affairs because the plan was not proposed in good faith; the debtor had no real desire to repay the claim of Veterans Affairs, her lone unsecured creditor; she did not have the present ability to fund a plan; she misstated her husband's income and net worth three times over several years; and she sought to obtain a discharge of the obligation to Veterans Affairs in the pending chapter 7 case and file the chapter 13 before the effective date of the law rendering fraud claims nondischargeable. The court found that the debtor conceded that the debt owed to Veterans Affairs was nondischargeable in chapter 7.

In re Squires, *2007 Bankr. LEXIS 1673 (Bankr. D.S.D. May 7, 2007) (Hoyt, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.04**

BANKRUPTCY RULES (Pre-2005 Act)

Rule 3001(e) Proof of Claim; Transferred Claim.

0707-070 **Failure to provide copy of assignment or transfer of credit card debt was not grounds for disallowance as transfer preceeded filing of proof of claim.** (*Bankr. W.D. Tex.)*

PROCEDURAL POSTURE: A creditor filed a proof of claim for an unsecured credit card indebtedness that it had purchased from a bank. The chapter 13 debtors objected to the proof of claim, alleging a lack of documentation and no evidence of the transfer between the bank and the creditor.

OVERVIEW: Although the creditor's original claim was deficient, it amended the claim to include account summary statements for the bank account in question. However, there was no evidence of a transfer of the claim from the bank to the creditor. The court determined that the attached monthly account statements were sufficient for all parties to assure themselves that the asserted claim appeared valid. The debtors introduced no evidence rebutting the prima facie status of the claim. After concluding that Fed. R. Bankr. P. 3001(e)(1) did not require evidence of the assignment or transfer when the transfer occurred before the proof of claim was filed, the court held that the creditor's failure to provide a copy of the assignment or other document of transfer by which it obtained the bank's claim against the debtors was not grounds to disallow the claim.

In re Griffin*, 2007 Bankr. LEXIS 1748 (Bankr. W.D. Tex. May 17, 2007) (Monroe, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 9:3001.08**