June 2007

Collier Bankruptcy Case Update

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June 18, 2007 Issue 3

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§ 324(a) Removal of Trustee or Examiner; For Cause.

0607-071 **Chapter 7 trustee could not serve as attorney for debtor.** (*Bankr. N.D. Iowa)*

PROCEDURAL POSTURE: The chapter 7 trustee filed an application to employ himself as attorney for the trustee.

OVERVIEW: The chapter 7 trustee filed a motion to employ himself as attorney for the trustee. The court denied the motion. The court concluded that the trustee was not disinterested within the meaning of 11 U.S.C. § 101(14)(C), as was required by 11 U.S.C. § 701(a)(1), because he represented a secured creditor and filed a motion for adequate protection on its behalf during the debtors' chapter 12 case. The court held that the trustee's lack of disinterestedness was cause for removal under 11 U.S.C. § 324(a). The court held that, while no party objected to the chapter 7 trustee's appointment and the chapter 7 and U.S. Trustee could not point to an actual conflict, those circumstances were not an explicit safe harbor for the appointment of trustee, as they were for the employing of an attorney for the trustee, pursuant to 11 U.S.C. § 327(c). The court ordered that the trustee would not be removed as trustee from other cases in which he was serving because there was no ill motive in the U.S. Trustee's decision to appoint the chapter 7 trustee or in the decision to accept the appointment.

In re Timmerman*, 2007 Bankr. LEXIS 1518 (Bankr. N.D. Iowa April 25, 2007) (Edmonds, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:324.01**

§ 327(a) Employment of Professional Persons; Who May Be Employed.

0607-072 **Employment of postpetition counsel approved over objection by creditors' committee to quality of representation of debtor during case.** (*Bankr. N.D. Tex.)*

PROCEDURAL POSTURE: A debtor filed an application, pursuant to 11 U.S.C. §§ 327 and 329 and Fed. R. Bankr. P. 2014 and 2016, to authorize the employment and retention of a law firm as its postpetition counsel *nunc pro tunc* to the date of the bankruptcy petition. A creditors' committee objected that the firm was not disinterested and represented an adverse interest to the bankruptcy estate.

OVERVIEW: The debtor applied for approval of the firm as its postpetition counsel. The committee objected that the firm failed to conduct a Uniform Commercial Code ("UCC") search, failed to commence the bankruptcy case within 90 days of an alleged perfection of a security interest in personalty by the debtor's secured creditor, committed legal malpractice, and was disqualified under 11 U.S.C. § 327(a). The court granted the application. The court found that the debtor appeared satisfied with the services the firm rendered and continued to provide during the case. The court found it unclear whether the committee had standing to assert that the firm committed prepetition legal malpractice because the debtor client was the only entity under Texas law who could make such claim and did not do so. The court found that there was a real disagreement as to whether the firm was required to conduct a UCC search, given the information it had from the client, and also, whether the firm, given business realities, was required to instruct the client to file within 90 days of the date the lender perfected its interest against the personalty.

In re Specialty Rest. Group, LLC*, 2007 Bankr. LEXIS 1506 (Bankr. N.D. Tex. April 24, 2007) (Hale, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:327.02**

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

0607-073 **Extension of stay denied in debtor's fourth chapter 13 case where debtor failed to rebut presumption of bad faith.** (*Bankr. E.D. Va.)*

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

OVERVIEW: Debtor had filed three prior chapter 13 cases. The immediately prior case, which was dismissed for debtor's failure to make the payments required by the plan, was pending within the year preceding the petition date of the instant case. A woman argued that the instant case was filed to frustrate

collection of a domestic support obligation that debtor owed to her. The court held that debtor had failed to rebut the statutory presumption of section 362(c)(3)(C) that his new case was filed not in good faith. The court noted that debtor admitted to many inaccuracies contained in his schedules, in his plan, and in his affidavit, and was unable to reconcile his expenses with those itemized on his schedule J. The court also noted that the vast discrepancy between the additional income that was needed to fund even a zero percent plan and debtor's available disposable income suggested that debtor was in no better position to make the plan work than he was in the prior chapter 13 cases. The court did hold, however, that the stay terminated only with respect to debtor, not with respect to property of the estate.

In re Taylor, *2007 Bankr. LEXIS 1505 (Bankr. E.D. Va. April 26, 2007) (Huennekens, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.06[3]**

§ 362(d)(2) Automatic Stay; Relief from Stay; Acts Against Property.

0607-074 **Relief from stay granted to allow foreclosure of judgment lien on property necessary to fund reorganization where debtor had made no genuine efforts to fund plan.** (*Bankr. E.D. Tex.)*

PROCEDURAL POSTURE: Movants filed a motion for relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2) to foreclose their judgment lien upon chapter 11 debtor's property interests.

OVERVIEW: Movants granted to debtor the right to mine sand from certain tracts of real property for a designated royalty payment. The state court issued a money judgment in favor of movants and against debtor, arising from a finding that debtor had mined sand beyond the geographic bounds of the property described in the agreement. The action imposed a judgment lien upon debtor's real property interests to secure the payment of the judgment. After debtor filed a chapter 11 petition, movants sought relief from the stay. The court held that, because it was uncontested that there was no equity in the property, the only question for the court under a section 362(d)(2) analysis was whether the property was necessary to an effective reorganization. The court held that, while debtor's continued utilization of its property rights granted under the agreement was obviously necessary for its sand extraction operations to continue in order to produce the income required to fund a future plan of reorganization, debtor had not engaged in a genuine effort to facilitate a reorganization which addressed the contested judgment debt because debtor's proposal to give movants 90 percent of its cash flow was illusory.

In re W.B.S.S., LP, *2007 Bankr. LEXIS 1413 (Bankr. E.D. Tex. March 13, 2007) (Parker, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.07[4]**

§ 521(i)(1) Debtor's Duties; Individual Voluntary Debtor's Failure to File in Chapter 7 or Chapter 13 Case; Automatic Dismissal.

0607-075 **Case automatically dismissed on 46th day after petition date due to failure to provide information omitted from schedules.** (*Bankr. W.D. Tex.)*

PROCEDURAL POSTURE: Chapter 7 debtor filed a motion requesting that the court enter an order reflecting that the bankruptcy case had been automatically dismissed on the 46th day after the petition date under 11 U.S.C. § 521(i)(1) due to debtor's failure to comply with the provisions of section 521(a).

OVERVIEW: Debtor filed a chapter 13 petition, but the case was dismissed due to debtor's failure to submit tax returns. He filed a second chapter 13 case, but marked virtually every page of the schedules and statement of financial affairs either "TBA" or "To Be Amended." The case was converted to chapter 7. The debtor either failed to appear at the Section 341 meetings or exercised his Fifth Amendment privilege against self-incrimination in response to virtually every question asked. The court discovered that the debtor, while the case was pending as a chapter 13 case, had transferred assets to an entity that he controlled. The chapter 7 trustee asked the court not to dismiss the case and instead enjoin debtor from taking any actions relating to estate property. Debtor then filed the instant motion. The court held that it was unable to find anything in section 521 that gave it the discretion to not enter an order reflecting that the case was automatically dismissed on the 46th day after the petition date. The court however, conditioned the automatic dismissal by prohibiting debtor from filing any petition under Title 11 for a period of two years from the date of the entry of the dismissal order.

In re Hall, *2007 Bankr. LEXIS 1497 (Bankr. W.D. Tex. April 23, 2007) (Monroe, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:521.24**

§ 523(a)(5) Exceptions to Discharge; Types of Debt Excepted; Domestic Support Obligations.

0607-076 **Debt owed to former spouse incurred in connection with divorce decree was excepted from discharge.** (*Bankr. N.D. Ga.)*

PROCEDURAL POSTURE: Plaintiff debtor filed a motion for default judgment on her adversary complaint, which sought a determination that a debt owed to defendant former spouse under a divorce decree was dischargeable in her bankruptcy case.

OVERVIEW: The debtor's adversary complaint contended that, pursuant to a final decree of divorce, she was obligated to pay joint debts owed to third parties by the debtor and her former spouse and that such debt was not in the nature of alimony or support and was dischargeable. The court denied the debtor's motion for default judgment on her complaint. The court held that the complaint failed to state a claim for relief. The court held that, while the debtor's debt to the spouse may not have been a domestic support obligation as contemplated by section 523(a)(5), it was a debt to a former spouse incurred by the debtor in connection with the divorce decree and, thus, fell within the category of debts described in section 523(a)(15), as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which were excepted from discharge.

Procter v. Tulloss (In re Procter)*, 2007 Bankr. LEXIS 1571 (Bankr. N.D. Ga. March 21, 2007) (Bonapfel, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.11**

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

0607-077 **Civil judgment for damages from criminal battery was nondischargeable.** (*Bankr. N.D. Iowa)*

PROCEDURAL POSTURE: Plaintiff judgment creditor filed an action against defendant debtor, alleging that a default judgment awarded to her by an Illinois state court was not dischargeable pursuant to 11 U.S.C. § 523(a)(6) because the predicate injury was willful and malicious. The debtor had pled guilty to criminal battery for causing the creditor's injury. The court made findings of fact and conclusions of law.

OVERVIEW: The judgment creditor claimed that while the creditor and the debtor were patrons at a restaurant, the debtor, without provocation, grabbed the creditor by the hair, jerked her from her seat to the floor, and dragged her across the floor by her hair. The debtor pled guilty to a charge of battery. The creditor sued the debtor for money damages, and after several months of proceedings, the state court entered a default judgment against the debtor for $218,663. The award included $25,000 for punitive damages because the state court found the debtor's conduct to be willful and malicious. The court found that the criminal judgment, in which the debtor pled guilty to a violation of 720 Ill. Comp. Stat. 5/12-3, precluded the court from revisiting the factual question concerning whether or not the debtor acted willfully and maliciously under 11 U.S.C. § 523(a)(6). Because of the state court findings that showed that the debtor acted willfully and maliciously, the obligation to the judgment creditor was excepted from discharge pursuant to section 523(a)(6).

Benson v. Dunbar (In re Dunbar)*, 2007 Bankr. LEXIS 1166 (Bankr. N.D. Iowa April 5, 2007) (Kilburg, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.12**

§ 524(a)(1) Effect of Discharge; Avoidance and Injunctive Relief; Judgments Regarding Debtor's Personal Liability Voided.

0607-078 **Reaffirmation agreement approved as meeting requirements despite being filed more than one year post-discharge.** (*Bankr. W.D. Tex.)*

PROCEDURAL POSTURE: A creditor filed a chapter 7 debtor's reaffirmation agreement as to a motor vehicle financed with the creditor.

OVERVIEW: The debtor filed for bankruptcy prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. In November, 2005, the debtor signed a reaffirmation agreement form and received a discharge in January, 2006. The creditor executed and filed the reaffirmation agreement in April, 2007. The court held that the agreement was not rendered invalid by its extraordinarily tardy filing after the discharge. The court held that the agreement between the debtor and creditor was made prior to the discharge even though only the debtor's signature appeared on the reaffirmation agreement form. The fact that the form contained detailed financial information regarding

the loan and the debtor's handwritten explanation for why the agreement did not represent an undue hardship supported the conclusion that the creditor prepared the reaffirmation and sent it to the debtor for completion, following up on the debtor's stated intention in her schedules to reaffirm the debt, and that the parties mutually assented in November, 2005, to the waiver of discharge when the debtor signed the form; therefore, the court held that the agreement satisfied 11 U.S.C. § 524(c)(1).

***In re Merritt**, 2007 Bankr. LEXIS 1201 (Bankr. W.D. Tex. April 9, 2007) (Clark, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:524.02[1]**

§ 1325(b) Confirmation of Plan; Objections.

0607-079 **Confirmation denied where above median debtor proposed plan for less than five year term which paid nothing to unsecured creditors.** (*Bankr. D. Kan.)*

PROCEDURAL POSTURE: The debtor filed for relief under chapter 13 and submitted a proposed plan. The chapter 13 trustee objected to the plan because it ran for less than five years and paid nothing to unsecured creditors.

OVERVIEW: The debtor's form indicated that the debtor's income was above the median, but that the debtor's disposable income under the means test was a negative $1,498. Under the proposed plan, the debtor would pay $120.00 per month for 38 months and non-priority, unsecured creditors would not receive anything under the plan. The court held that the debtor's plan could not be confirmed because it did not provide for the five-year applicable commitment period required by 11 U.S.C. § 1325(b)(1) and (4). Because the debtor's income was above-median the debtor was required to propose a plan that ran five years. The fact that the debtor reported a negative disposable income number on Form B22C did not conclusively establish that the debtor did not have any disposable income to be received during the applicable commitment period. A feasible plan payment proposal rebutted the presumption that the Form B22C alone determined disposable income. A feasible plan would, by statute, commit the debtor to a plan of five years.

***In re Beckerle**, 2007 Bankr. LEXIS 1178 (Bankr. D. Kan. April 13, 2007) (Berger, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08**

0607-080 **Three year plan could be confirmed where debtor remained below median despite increase in income.** (*Bankr. D. Kan.)*

PROCEDURAL POSTURE: The debtor filed for relief under chapter 13. The chapter 13 trustee objected to the plan, contending that it was not proposed in good faith under 11 U.S.C. § 1325(a)(3). The trustee contended that the debtor's proposed three-year plan was too short.

OVERVIEW: The trustee contended that the debtor's proposed three-year plan was too short because the debtor's current monthly income was above the median income. The debtor's second set of amended schedules showed that the debtor's household had grown from two to six members and that the debtor's income had increased due to a bonus. Under the amended form B22C, the debtor's income continued to remain below the median income. The court found that the debtor's household size needed to be measured as of the date upon which the debtor's proposed plan was confirmed. The court found that the debtor's applicable commitment period was set under 11 U.S.C. § 1325 at three years. The trustee had not made any allegations that the debtor had attempted to manipulate the bankruptcy process or had otherwise tried to mislead the trustee or the court as to the debtor's true circumstances. It was undisputed that the debtor's household had in fact increased from two to six people within two months after the petition date but prior to confirmation. The trustee had failed to support an objection based upon the debtor's bad faith.

***In re Anderson**, 2007 Bankr. LEXIS 1177 (Bankr. D. Kan. April 13, 2007) (Berger, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08**

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

§ 303(b)(1) Involuntary Cases; Commencement; By Three or More Entities.

0607-081 **Bankruptcy court did not err in setting joinder deadline in involuntary case resulting in dismissal for insufficient number of creditors.** (*6th Cir.)*

PROCEDURAL POSTURE: Appellants challenged the decision of the District Court for the Eastern District of Michigan that affirmed the decision of the bankruptcy court that dismissed an amended involuntary petition for bankruptcy due to the lack of a sufficient number of qualified creditors under 11 U.S.C. § 303(b)(1).

OVERVIEW: Relying on 11 U.S.C. § 303(c) which allowed joinder at any time before the case was dismissed, appellants argued that the bankruptcy court erred by establishing and enforcing a joinder deadline which resulted in the exclusion of an additional petitioning creditor. Appellants also argued that the bankruptcy court erred in determining that they did not qualify as petitioning creditors under section 303(b)(1). The bankruptcy court rejected appellants' arguments on two grounds. First, the bankruptcy court had concluded that appellants waived the argument because they failed to object to the joinder deadline at any time before the court entered its order dismissing the petition. Second, the bankruptcy court had concluded that it had the authority to manage its caseload in an orderly and efficient manner. The appellate court found that the bankruptcy court did not err in establishing and enforcing the joinder deadline. Section 303 did not prohibit the court from setting an earlier deadline in order to ensure efficient proceedings. The bankruptcy court also did not commit error in holding that appellants were not qualified petitioning creditors under section 303(b)(1).

Riverview Trenton R.R. v. DSC, Ltd. (In re DSC, Ltd.)*, 2007 U.S. App. LEXIS 12025 (6th Cir. May 23, 2007) (Forester, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:303.04**

§ 329 Debtor's Transactions with Attorneys.

0607-082 **Debtor's attorneys' fees reduced for failure to file quarterly applications or other disclosures.** (*Bankr. N.D. Ala.)*

PROCEDURAL POSTURE: The law firm for a deceased chapter 13 debtor filed an application for approval of a $31,047 fee for services rendered as bankruptcy counsel. The Bankruptcy Administrator's Office filed an objection.

OVERVIEW: The law firm, comprised of a husband and wife, was approved as bankruptcy counsel for debtor. The court approved the attorneys' hourly fee and the firm's retention of the $8,315 retainer paid by the debtor. The court's order required the firm to file applications for compensation every 90 days. The case went on for over five years, during which the debtor committed suicide. The firm failed to file any quarterly fee applications. Instead, it drew $17,343 from estate sales proceeds after the debtor's death and after the initial retainer amount had been depleted. The attorneys also increased their hourly rate without approval by the court. The court held that the attorneys were required to amend their Fed R. Bankr. P. 2016(b) disclosure when they began receiving payments from a source other than the retainer fee. The court held that the total fee request at the originally approved rates was $21,709. The court approved the first $8,315 in requested fees to be paid at 100 percent. The balance of $13,394 was reduced by 25 percent to $10,046 as a sanction for the failure to comply with the disclosure requirements of 11 U.S.C. § 329 and Fed. R. Bankr. P. 2016.

In re Davis*, 2007 Bankr. LEXIS 1514 (Bankr. N.D. Ala. April 25, 2007) (Stilson, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:329.01**

§ 362(d)(1) Automatic Stay; Relief from Stay; For Cause.

0607-083 **Court denied relief from stay that would have allowed state to join debtor in 120 asbestos claims actions.** (*Bankr. D. Del.)*

PROCEDURAL POSTURE: The State of Montana filed a motion for relief from the automatic stay so that the debtors could be joined as third-party defendants in 120 actions currently pending against the State of Montana in Montana state courts (state court actions). These actions alleged violations of the State's independent duty to its citizens.

OVERVIEW: The various state court actions related to claims arising from the mining and processing of vermiculite containing asbestos within the State of Montana. The state court actions alleged a failure to warn the plaintiffs about alleged asbestos hazards. The court found that relief from stay was not appropriate. It was undisputed that the debtors filed bankruptcy in order to address in a single forum and under uniform rules the thousands of asbestos claims it faced. To have allowed the State of Montana to join the debtors as defendants would have circumvented this purpose and interfered with the orderly rehabilitation of the debtors. Further, there was no certainty that a judgment would be entered against the State. Thus, the debtors would have been required to participate in trials before any alleged contribution or indemnity claim against them was even ripe. Moreover, even if the claims were ripe, granting the motion created the risk that the outcomes reached in the state court actions could have significantly differed from the treatment of similar claims within the chapter 11 proceeding. This result would have prejudiced similarly situated creditors.

In re W.R. Grace & Co.*, 2007 Bankr. LEXIS 1214 (Bankr. D. Del. April 13, 2007) (Fitzgerald, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.07[3]**

§ 365(a) Executory Contracts and Unexpired Leases; Trustee's Right to Assume or Reject.

0607-084 **Rejection of unexpired commercial lease properly made retroactive to date of hearing.** (*2d Cir.)*

PROCEDURAL POSTURE: Appellant landlord sought review of a judgment of the District Court for the Southern District of New York affirming the bankruptcy court's approval of appellee debtor's motion to reject an unexpired commercial lease pursuant to 11 U.S.C. § 365(a). The landlord argued that the bankruptcy court abused its discretion by making its approval of the debtor's rejection of the lease retroactive to the date of the hearing on the motion.

OVERVIEW: At the hearing on the debtor's motion to reject an unexpired lease of nonresidential real property, the bankruptcy court indicated that if the rejection of the lease were approved, the approval would be effective as of the hearing date. More than 33 months after the hearing, the bankruptcy court entered an order authorizing the debtor to reject the lease. The bankruptcy court subsequently ruled that its approval of the rejection was retroactive to the hearing date. Because the landlord conceded before the district court that the bankruptcy court had equitable authority to make its order retroactive, the court on appeal assumed, without deciding, that the bankruptcy court had such equitable authority. The court held that the bankruptcy court did not abuse its discretion in exercising its equitable authority because (1) the landlord was put on clear notice of the possibility that an order approving rejection would be retroactive to the hearing date, and (2) even though the debtor had vacated the premises, the landlord did not attempt to lease the premises to another tenant or request relief from the automatic stay of any act to obtain possession of property of the estate.

Adelphia Bus. Solution, Inc. v. Abnos*, 2007 U.S. App. LEXIS 8612 (2d Cir. April 13, 2007) (Walker, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:365.03**

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

0607-085 **Debtor's accountant allowed administrative expense fee for preparation of six tax returns.** (*Bankr. S.D. Tex.)*

PROCEDURAL POSTURE: A debtor's accountant applied for the allowance of his fees as an administrative expense, pursuant to 11 U.S.C. § 503(b)(1)(A).

OVERVIEW: Counsel for the chapter 13 debtor stated that the debtor lacked sufficient funds to pay the accountant for preparing six tax returns and that, because the case was subject to dismissal, counsel agreed to seek payment of the accountant's fee as an administrative expense. The court allowed the accountant's fees of $1,050, pursuant to 11 U.S.C. § 503(b)(1)(A), as actual necessary costs and expenses of preserving the estate. The court held that the estate received a benefit as a result of the applicant's preparation of tax returns, in that the debtor was enabled to propose a plan which was anticipated to cure arrearages on secured claims; pay administrative expense claims, including the accountant's; and pay all unsecured claims in full. The court held that 11 U.S.C. § 330(a)(1) and (4) was not ambiguous and did not apply to an accountant for a chapter 13 debtor.

In re Fifer*, 2007 Bankr. LEXIS 1499 (Bankr. S.D. Tex. April 25, 2007) (Clark, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:503.06**

§ 522 Exemptions.

0607-086 **Bankruptcy court properly denied debtor's exemption in personal injury settlement funds that were not properly disclosed.** (*10th Cir.)*

PROCEDURAL POSTURE: The bankruptcy court concluded that appellee debtor acted in bad faith when she delaying disclosure of her interest in a personal injury suit, and thus denied an exemption that ordinarily applied to personal injury settlements under Utah law. The debtor appealed to the Tenth Circuit Bankruptcy Appellate Panel, which reversed. The debtor and appellant trustee appealed.

OVERVIEW: The question presented on appeal was whether the debtor was entitled to keep a personal injury settlement arising from a claim she failed to disclose in her bankruptcy proceedings. The two issues before the appellate court were: (1) what was the correct burden of proof in determining debtor bad faith, and (2) was the bankruptcy court's bad faith finding clearly erroneous. The appellate court held that a trustee seeking to establish a debtor's bad faith in an exemption proceeding under 11 U.S.C. § 522 had to do so by a preponderance of the evidence. Under both state and federal rules, the debtor was required to disclose the personal injury settlement as an asset of her estate, and then seek an exemption. The bankruptcy court's determination that the debtor met neither of the safe havens to establish inadvertence, that the debtor intentionally concealed her potential litigation interest, and that the concealment prejudiced the trustee's administration of the estate were not clearly erroneous because the debtor's shifting explanations of why she failed to disclose the asset and her failure to give the trustee timely notice of the accident settlement suggested bad faith.

Gillman v. Ford (In re Ford)*, 2007 U.S. App. LEXIS 11559 (10th Cir. May 17, 2007) (Tymkovich, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:522.01**

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

0607-087 **Auto loan was nondischargeable as debtor provided materially false income information in application.** (*Bankr. N.D. Ga.)*

PROCEDURAL POSTURE: Plaintiff bank claimed it loaned money to defendant debtor to buy a car. Debtor began monthly installments on the loan in March, 2003. The bank alleged it had a claim against debtor in the amount of $19,149.96 and attorney's fees. The bank filed a complaint, alleging its debt was nondischargeable under 11 U.S.C. § 523(a)(2)(A) (count 1) and (a)(2)(B) (count 2). The bank moved for a default judgment for a second time.

OVERVIEW: With regard to count 1, brought pursuant to section 523(a)(2)(A), the bank alleged that in violation of the retail installment contract, debtor failed to keep the property in his possession but rather transferred the vehicle to a third party. Debtor stated that he transferred the vehicle to his business

partner because debtor was unable to make the payments on the vehicle. The bankruptcy court found that there was no evidence that debtor made false statements with requisite fraudulent intent. With regard to count II, brought pursuant to section 523(a)(2)(B), the bank alleged that debtor obtained his loan through the use of a statement in writing that was materially false. While debtor's credit application listed a gross annual salary of $60,000 for 2003, debtor's testimony at the Rule 2004 Examination revealed that debtor earned "no money" that year. The bankruptcy court held that, unlike the bank's original complaint, its amended complaint sufficiently pled facts with the required specificity to establish a legitimate exception to discharge pursuant to section 523 due to use of a materially false statement in writing that was reasonably relied on by the bank under section 523(a)(2)(B).

Huntington Nat'l Bank v. Cho (In re Cho), *2007 Bankr. LEXIS 1599 (Bankr. N.D. Ga. March 21, 2007) (Mullins, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.08[2]**

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

0607-088 **Fees of guardian ad litem for debtor's minor children in custody dispute were in the nature of support and nondischargeable.** (*Bankr. N.D. Ga.)*

PROCEDURAL POSTURE: Plaintiff guardian ad litem ("GAL") filed a motion for summary judgment on his adversary complaint, which sought a determination that his fees awarded in state court against defendant debtor were nondischargeable, pursuant to 11 U.S.C. § 523(a)(5).

OVERVIEW: The GAL provided his services to the debtor's minor children in a custody dispute between the debtor and his former spouse. The court granted the GAL summary judgment on his claim that the GAL fees awarded to him and assessed against the debtor in state court were nondischargeable, pursuant to 11 U.S.C. § 523(a)(5). The court held that the GAL's role, which was to protect the interests of the child and investigate and present evidence on the child's behalf, related directly to the welfare and support of the minor child in the context of a custody dispute; therefore, the GAL's fees were in the nature of support and the fact that the award was made to the GAL and not to a spouse, former spouse, or child of the debtor was immaterial for purposes of a nondischargeability determination.

Baskin & Baskin, PC v. Carlucci (In re Carlucci), *2007 Bankr. LEXIS 1567 (Bankr. N.D. Ga. March 12, 2007) (Bonapfel, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.11**

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

0607-089 **Incarcerated debtor denied undue hardship discharge of student loan debt.** (*Bankr. E.D. Tenn.)*

PROCEDURAL POSTURE: Defendants, two of plaintiff chapter 7 debtor's student loan creditors, filed motions for summary judgment in the debtor's action, which sought a determination that the debtor's student loans owed to all of the defendants were dischargeable under the undue hardship provisions of 11 U.S.C. § 523(a)(8). The debtor also filed a motion for summary judgment.

OVERVIEW: The debtor was 42 years old and for the past several years had been incarcerated in a penitentiary, where he was serving a life sentence with no possibility of parole. He owed more than $300,000 in student loan obligations to the various defendants. In granting the creditors' motions for summary judgment, the court held that the debtor maintained a minimal standard of living because, although he earned minimal funds, his basic living needs were furnished by the State of Tennessee. The court also held that the debtor's financial circumstances were the direct result of his actions because it was is the debtor's own actions that led to his conviction and incarceration. The court further held that the debtor had not made any real effort, much less a good faith one, to repay his student loans.

Looper v. United States Dep't of Educ. (In re Looper), *2007 Bankr. LEXIS 1482 (Bankr. E.D. Tenn. April 25, 2007) (Stair, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.14**

0607-090 **Recovering alcoholic with two minor childred to support and record of low wages despite law degree granted undue hardship discharge of student loan debt.** (*Bankr. D. Minn.)*

PROCEDURAL POSTURE: Chapter 7 debtor filed a complaint against defendant creditors, seeking a discharge of student loan debt owed to the creditors under 11 U.S.C. § 523(a)(8).

OVERVIEW: The debtor was 43 years old and unmarried. He had two children, aged five years and 19 months from different relationships. He paid child support to the five-year-old and expected to pay support to the other child. He was a recovering alcoholic. It took him several years to complete his undergraduate education. He also obtained a law degree. He had never made any payments on his student loan debt, which totalled over $364,000. Although he earned $4,000 a month at a temporary staffing agency, where he had worked for only a few months, his employment history consisted of several lower paying jobs. The court held that, assuming that he maintained his current income, an assumption that was tenuous given his history, he would have an approximate monthly surplus of $55. The court also held that, even if the debtor could sustain a payment of $514 per month, which was the amount calculated under the Income Contingent Repayment Program, the debt would rise to over $1.7 million after 25 years. The court concluded that excepting the debtor's student loans from discharge would impose an undue hardship.

Jesperson v. United States Dep't of Educ. (In re Jesperson)*, 2007 Bankr. LEXIS 1191 (Bankr. D. Minn. April 16, 2007) (O'Brien, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.14**

§ 524(a)(2) Effect of Discharge; Avoidance And Injunctive Relief; Injunction Against Actions to Recover a Debt as Personal Liability of Debtor.

0607-091 **City's actions to enforce property maintenance laws had been excepted from stay and did not violate discharge injunction.** (*Bankr. N.D. Ind.)*

PROCEDURAL POSTURE: Defendant city filed a motion for summary judgment on plaintiff chapter 7 debtor's complaint, which sought a determination that the city cease any actions against the debtor to enforce property maintenance standards.

OVERVIEW: The city issued citations to the debtor for nuisance violations on her property under the city's property maintenance laws. The debtor recorded a quit-claim deed in an effort to transfer the property to the creditor holding a mortgage lien on the property. The creditor did not acknowledge the transfer. The debtor received a discharge and argued that the city had violated the automatic stay and the discharge injunction. The debtor also argued that she no longer owned the property. In granting the city's motion for summary judgment, the court held that the city's actions were excepted from the automatic stay pursuant to 11 U.S.C. § 362(b)(4) because its actions constituted actions by a governmental unit to enforce its police or regulatory power. The court also held that the city's actions did not violate the post-discharge injunction of 11 U.S.C. § 524(a)(2) because the same actions that were excepted from the automatic stay, and which continued after discharge, did not violate the post-discharge injunction under section 524(a). The court further held that the debtor could not compel the creditor to accept the surrendered, quitclaimed property, in the absence of a foreclosure.

Phillips v. South Bend (In re Phillips)*, 2007 Bankr. LEXIS 1503 (Bankr. N.D. Ind. March 27, 2007) (Dees, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:524.02[2]**

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

0607-092 **Bankruptcy court properly ordered debtor to turn over portion of tax refund which was property of the estate.** (*E.D. Mich.)*

PROCEDURAL POSTURE: Appellant debtor filed a voluntary petition for relief under chapter 7. The bankruptcy court ordered her to turn over a portion of her 2005 state and federal income tax refunds to appellee bankruptcy trustee. The debtor appealed.

OVERVIEW: The debtor contended that her interest in the tax refund was not property of the estate because she had no enforceable right to receive the payment under state law or vested interest in the refund at the time of filing. She asserted that her interest in the tax refund did not vest until well after her petition was filed. The trustee argued that the debtor's tax refunds were the property of the estate. The

court agreed holding that the debtor's interest in the tax refund was property of the estate. The court held that the debtor's right to a tax refund accrued over the course of the year, and not merely at the occurrence of a single event. The court held that it was appropriate for the bankruptcy court to have prorated the tax refund so that only that portion of the refund that related to the debtor's prepetition past became property of the estate. The court agreed with the bankruptcy court that the debtor's tax refund payment was sufficiently rooted in the prebankruptcy past so as to be included as property of the bankruptcy estate under 11 U.S.C. § 541(a).

Araj v. Kohut (In re Araj), *2007 U.S. Dist. LEXIS 38529 (E.D. Mich. May 29, 2007) (Battani, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:541.01**

§ 541(a)(5) Property of the Estate; Creation and Composition of the Estate; Interests in Certain Property Acquired within 180 Days Postpetition.

0607-093 **Debtor's benefits under late mother's 401(k) plan and life insurance policies were property of the estate.** (*Bankr. N.D. Iowa)*

PROCEDURAL POSTURE: The trustee filed a motion for turnover of money that the debtor received from his late mother's 401(k) plan. The debtor objected that the money was not property of the bankruptcy estate, pursuant to 11 U.S.C. § 541(a)(5).

OVERVIEW: The chapter 7 trustee argued that the debtor became entitled to the 401(k) benefit payment by "bequest, devise or inheritance" or from a "death benefit plan." The court granted the trustee's motion for turnover of the debtor's share of the 401(k) benefit. The court held that the interest in the 401(k) plan to which the debtor became entitled was an interest in a death benefit plan because the 401(k) plan contained a death benefit for her named beneficiaries; therefore, the 401(k) benefit was property of his bankruptcy estate under 11 U.S.C. § 541(a)(5)(C). The court found that the debtor's interest in his mother's probate estate and his interest in life insurance benefits on life insurance policies under which the mother was insured were property of the debtor's bankruptcy estate.

In re Solma, *2007 Bankr. LEXIS 1519 (Bankr. N.D. Iowa April 24, 2007) (Edmonds, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:541.16**

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

0607-094 **Debtor could not be compelled to turn over funds transferred by checks written before petition date but honored after filing.** (*8th Cir.)*

PROCEDURAL POSTURE: In this chapter 7 action, the trustee appealed from a judgment of the Bankruptcy Appellate Panel for the Eighth Circuit, which reversed the bankruptcy court's decision compelling the debtor to turn over to the estate the value of several checks which amounted to $1938.76.

OVERVIEW: The debtor filed a voluntary petition for chapter 7 bankruptcy relief. His petition did not list several checks which had been written prior to his filing but not yet honored. The trustee argued that because the funds in question were still in the debtor's bank account on the date he filed bankruptcy, he was obligated to produce them for the estate. The instant court agreed with the trustee that the funds transferred by the checks were property of the estate. The instant court also found that at the time the trustee's motion to compel turnover was filed, the checks had already been honored, and the debtor then lacked "possession, custody, or control" of the funds. Next, the instant court found that although the debtor would have had the duty to turn over all the money in his checking account before his checks were honored, the trustee could not now compel him to turn over property which was no longer within his control. Finally, the instant court found that the trustee had the power to return the funds to the estate.

Brown v. Pyatt (In re Pyatt), *2007 U.S. App. LEXIS 12019 (8th Cir. May 23, 2007) (Murphy, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:542.02**

§ 547(b) Preferences; Avoidable Transfers.

0607-095 **District court properly held payments to creditor were avoidable as continued use of software and licenses did not constitute new value.** (*7th Cir.)*

PROCEDURAL POSTURE: Pursuant to 11 U.S.C. § 547(b), appellee, an official committee of unsecured creditors, filed an adversary proceeding seeking to set aside, as preferential transfers, four payments made by a debtor to appellant creditor. A bankruptcy court found that the payments were not preferential transfers. The creditor appealed after the District Court for the Northern District of Illinois reversed that decision.

OVERVIEW: The debtor made four payments to the creditor less than 90 days before it filed its bankruptcy petition, as partial payment for computer software and equipment that it had purchased. The committee argued that the payments constituted preferential transfers and that they should be returned to the bankruptcy estate. The creditor successfully argued in the bankruptcy court that the "new value" exception, set out in section 547(c)(4), applied and that the debtor had received new value because, as a result of the payments, it was allowed to continue to use the software and the equipment, its software license was not terminated, and it was able to transfer those assets to a third party buyer. The court agreed that the section 547(c)(4) exception did not apply and that the payments were avoidable preferential transfers. The creditor did not have the right to terminate the debtor's software license. That right rested with the software's owner. The creditor's forbearance, in not reporting the debtor's delinquent payments to the owner, did not constitute "new value" as defined in section 547(a)(2). The bankruptcy court had not approved the assignment of the agreement as required by 11 U.S.C. § 365(f)(2)(A).

In re ABC-Naco Inc.*, 2007 U.S. App. LEXIS 8949 (7th Cir. April 9, 2007) (Manion, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:547.03**

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

0607-096 **Payment to insurer within preference period was avoidable as provision of policy was not new value.** (*W.D. Okla.)*

PROCEDURAL POSTURE: Plaintiff bankruptcy estate filed an action under 11 U.S.C. § 547(b), seeking avoidance of a payment a debtor in bankruptcy made to defendant insurer. The bankruptcy court granted the insurer's motion for summary judgment, and the estate appealed.

OVERVIEW: On July 15, 2002, the debtor submitted an application to obtain group health insurance for its employees and independent contractors. The debtor submitted a check in the amount of $67,610 with its application, the insurer presented the check for payment, and the check was honored on July 24, 2002. After the debtor filed a petition for bankruptcy under chapter 11 on August 5, 2002, the bankruptcy estate filed an action against the insurer, seeking avoidance of the debtor's payment. The insurer defended the action, claiming that the payment was not a preference and that, even if the payment was a preference, it was not avoidable because it was a contemporaneous exchange for new value under 11 U.S.C. § 547(c). The district court found that (1) the debtor's transfer of funds occurred on July 24, 2002, when its check was honored by its bank, and it was paid for or on account of an antecedent debt, and (2) the insurer failed to establish its defense under section 547(c)(1). The provision of insurance did not constitute "new value" and the insurer presented no evidence that the value of the insurance substantially approximated the $67,610 it received.

Rocor Int'l Inc. v. Pam American Life Ins. (In re Rocor Int'l Inc.)*, 2007 U.S. Dist. LEXIS 27599 (W.D. Okla. March 30, 2007) (Miles-LaGrange, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:547.04[1]**

§ 727(a) Discharge; Grounds for Denial.

0607-097 **Debtor's failure to list property transferred to spousefor estate planning purposes twelve years prior to filing was not grounds for denial of discharge.** (*Bankr. D. Conn.)*

PROCEDURAL POSTURE: Defendant chapter 7 debtor filed a motion to dismiss plaintiff creditor's complaint, which sought to deny the debtor's discharge pursuant to 11 U.S.C. § 727(a).

OVERVIEW: The debtor gifted to his wife valuable real and personal property. Twelve years later, the debtor filed a chapter 7 petition. The creditor claimed that the debtor hid his assets from his creditors and that the debtor made a false oath by failing to list the property in the petition, the schedules, and/or the statement of financial affairs. The debtor testified that the gift was undertaken on the advice of counsel as the initial step of an estate plan. Counsel corroborated the debtor's testimony. The court held that the testimony was credible and that it was unpersuaded on the record that there was fraudulent intent on the part of the debtor. The court also held that the debtor made no false oath because he subjectively believed that he had no interest in the gifted property. The creditor also claimed that compensation to the debtor by a company owned by the debtor's son from his first marriage was improperly redirected to his wife. The court held that the wife adequately explained that the payments were not compensation but the repayment of a loan that she had made to the company that she wanted treated as compensation to her in order to maintain health insurance.

Republic Credit Corp. I v. Boyer (In re Boyer), *2007 Bankr. LEXIS 1192 (Bankr. D. Conn. April 9, 2007) (Weil, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.01**

§ 1113 Rejection of Collective Bargaining Agreements.

0607-098 **Court denied relief from order rejecting collective bargaining agreement and granted debtor's motion to expunge proof of claims for rejection damages.** (*Bankr. S.D.N.Y.)*

PROCEDURAL POSTURE: In debtor's chapter 11 bankruptcy, a group of employees moved for relief from an order granting debtor's application pursuant to 11 U.S.C. § 1113 to reject its collective bargaining agreement ("CBA") with the group. In the second motion, debtor sought to expunge two proofs of claim filed by the same group, which claims sought damages against debtor arising by reason of the rejection of the CBA.

OVERVIEW: In connection with debtor's reorganization, the group sought relief from an order granting debtor's application to reject the CBA while debtor asked for an order expunging the group's proofs of claim, each of which sought $1.2 billion. The court denied the motion for relief and granted the motion to expunge, albeit subject to the preservation of the groups' claim in the event that a new CBA was ratified. As for the motion regarding the CBA's rejection, the court, relying on the Second Circuit's ruling that a CBA rejection per section 1113 resulted in an abrogation but not a breach, held that relief under section 1113 was not subject to subsequent modification because it was not a tentative step but had immediate consequences. Nor, given the group's conduct, was it entitled to equitable relief per Fed. R. Civ. P. 60. On the motion to expunge proofs of claim, the court ruled that it was required by the Second Circuit's recent decision that no damages were properly awarded for a lawful rejection of a CBA in this context to grant expungement as requested. Reconsideration of the expungement order and of other grievances also raised by the group might be proper, however, if a new CBA was ratified.

In re Northwest Airlines Corp., *2007 Bankr. LEXIS 1170 (Bankr. S.D.N.Y. April 13, 2007) (Gropper, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 7:1113.01**

§ 1129 Confirmation of Plan.

0607-099 **Plan confirmed over objection to treatment of settled and outstanding claims for sexual abuse.** (*Bankr. D. Ore.)*

PROCEDURAL POSTURE: The debtor, an archdiocese and successors, together with other interested parties, sought confirmation of the third amended and restated joint plan of reorganization. The plan was submitted by the debtor and the tort claimants committee ("TCC"), the future claimants representative ("FCR"), and the parish and parishioners committee ("PCC"). Three claimants, who had a claim related to expulsion from a parish school, objected to the plan.

OVERVIEW: The debtor filed for relief under chapter 11 to address the financial uncertainty arising from claims for alleged child sexual abuse allegedly committed by priests in the archdiocese. The interested parties and claimants engaged in mediation and submitted the third amended plan to the court for confirmation. The court found that the claimants who had not settled their claims were not treated differently under the proposed plan, in violation of 11 U.S.C. § 1123(a)(4), because the plan required that all claims in the class at issue be paid in full, either as agreed in a settlement or as liquidated. The claimants that chose not to settle were not being treated differently. Additionally the amounts set aside in the fund to pay unresolved tort claims was sufficient to fund those claims, based upon estimates made in the district court concerning the claim values. The court determined that the plan could be approved only if the debtor would agree to the court's proposed modification to the exculpation clause. The plan proposed by the debtor was made in good faith as required by 11 U.S.C. § 1129(a)(3).

In re Roman Catholic Archbishop of Portland in Oregon*, 2007 Bankr. LEXIS 1180 (Bankr. D. Ore. April 13, 2007) (Perris, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 7:1129.01**

§ 1146(c) Special Tax Provisions; Securities and Instruments of Transfer Not Taxed.

0607-100 **Stamp-tax exemption for preconfirmation sale of assets affirmed.** (*11th Cir.)*

PROCEDURAL POSTURE: Plaintiff Florida Department of Revenue ("DOR") appealed the affirmance by the District Court for the Southern District of Florida of a bankruptcy court's decision granting defendant debtor a stamp-tax exemption pursuant to 11 U.S.C. § 1146(c) on the sale of the debtor's assets.

OVERVIEW: The issue presented was whether the section 1146(c) stamp-tax exemption could apply to asset transfers made before the existence of a bankruptcy reorganization plan confirmed under 11 U.S.C. § 1129. The dispute turned upon whether pre-confirmation transfers could constitute transfers "under a plan confirmed." The instant court concluded that section 1146(c)'s tax exemption could apply to those pre-confirmation transfers that were necessary to the consummation of a confirmed plan of reorganization, which, at the very least, required that there be some nexus between the pre-confirmation sale and the confirmed plan. The plain language of section 1146(c) was ambiguous. When Congress wanted to place a temporal restriction in the Bankruptcy Code it did so expressly. Although, as a general rule, grants of tax exemptions were narrowly construed, it was equally true that courts were not to abrogate the purpose of the exemption through too narrow an application. Further, a strict temporal construction of section 1146(c) ignored the practical realities of chapter 11 reorganization cases.

Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc. (In re Piccadilly Cafeterias, Inc.)*, 2007 U.S. App. LEXIS 8810 (11th Cir. April 18, 2007) (per curiam).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1146.02**

§ 1322(a)(2) Contents of Plan; Mandatory Provisions; Payment of Priority Claims.

0607-101 **IRS granted relief from stay to setoff tax refunds against tax liabilities.** (*Bankr. M.D. Pa.)*

PROCEDURAL POSTURE: Movant IRS appealed the decision that permitted it to setoff respondent debtors' federal income tax refunds against prepetition taxes, but only against priority obligations. The district court remanded the matter to provide the court an opportunity to delineate the facts considered in limiting the setoff to the IRS's priority claim.

OVERVIEW: The court permitted the IRS to setoff the debtors' tax refunds against prepetition priority tax liabilities. The IRS appealed. The district court remanded the decision for explanation. The court, on remand, granted the IRS relief from the automatic stay to setoff the debtors' 2002, 2003, and 2004 federal income tax refunds against the debtors' prepetition priority tax liabilities. Although the debtors' ability to confirm a chapter 13 plan was uncertain, the likelihood of success would have been seriously impaired if they were not permitted to partially satisfy their priority tax obligations through the setoff of their tax refunds. The court, after balancing the interests of the IRS, other creditors, and the debtors, determined that it was appropriate to permit the IRS to setoff the tax refunds against its priority claims.

United States v. Martinez*, 2007 Bankr. LEXIS 1168 (Bankr. M.D. Pa. March 7, 2007) (France, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1322.03**

§ 1325(a)(3) Contents of Plan; Mandatory Provisions; Equal Treatment of All Claims within a Class.

0607-102 **Plan proposing retention of houseboat in which there was no equity while paying unsecured creditors less than eight percent of total claims was not proposed in good faith.** (*Bankr. N.D.W. Va.)*

PROCEDURAL POSTURE: Creditor sought relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2). Creditor and trustee objected to confirmation of chapter 13 debtors' proposed plan.

OVERVIEW: Creditor held a properly perfected security interest in debtors' houseboat. Debtors' plan proposed that they retain the houseboat while paying unsecured creditors 7.54 percent of the amount of currently filed, allowed unsecured claims. No equity existed in the houseboat. Debtors claimed that the houseboat provided them with a therapeutic benefit that allowed them to continue in their current employment because it was associated with numerous family memories of time spent on the houseboat with their daughter, before she died at 23 years old. In granting creditor relief from stay, the court held that debtors failed to show that the houseboat was necessary for debtors's reorganization, or that, without the houseboat, debtors would be unable to work. The court also held that confirmation of debtors' plan had to be denied pursuant to the good faith test of 11 U.S.C. § 1325(a)(3) because proposing a plan that called for payments to retain an item like the houseboat, which was not debtors' residence, and which was not necessary for their effective reorganization, while repaying unsecured creditors 7.54 percent of their claims, was not a plan filed in good faith.

In re McNeeley*, 2007 Bankr. LEXIS 1175 (Bankr. N.D.W. Va. April 9, 2007) (Flatley, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.04**

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

§ 152(3) Concealment of Assets; False Oaths and Claims; Bribery; False Declaration.

0607-103 **False sworn statements by debtor's attorney that were never filed with the court were not grounds for perjury charge.** (*D.D.C.)*

PROCEDURAL POSTURE: Defendant, an attorney licensed to practice law in California and the District of Columbia, moved to dismiss Count 7 of an indictment, which charged him with making false declarations or statements under penalty of perjury with respect to documents he filed in a chapter 7 petition in bankruptcy court in violation of 18 U.S.C. § 152(3).

OVERVIEW: Defendant was required to complete a statement of financial affairs ("SOFA"), listing all payments aggregating more than $600 made to any creditor within 90 days immediately preceding the filing of his bankruptcy petition. The last page of the SOFA was a declaration, signed under penalty of perjury, that the statements made in the SOFA were true. The indictment charged him with lying about making such payments. The purported SOFA signature page in the bankruptcy court's files, a copy of which was presented to the grand jury, was in fact the signature page for the bankruptcy schedules. After discovering this discrepancy shortly before trial, defendant moved to dismiss Count 7 because the evidence was insufficient to support the offense. After unsealing grand jury transcripts and holding a hearing, the court agreed. To be convicted of violating 18 U.S.C. § 152(3), defendant was required to have made a false statement or declaration under penalty of perjury in or in relation to a bankruptcy proceeding. Because the declaration was never filed with the bankruptcy court but inadvertently languished in the bankruptcy attorney's files, the "in relation to" statutory element was not met.

United States v. Naegele*, 2007 U.S. Dist. LEXIS 28272 (D.D.C. April 18, 2007) (Friedman, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 1:7.02[3]**

0607-104 **Restitution and prison sentence upheld for debtor's fraudulent failure to schedule $8,000 in assets and $36,000 inheritance.** (*8th Cir.)*

PROCEDURAL POSTURE: Defendant sought review of a sentence imposed by the District Court for the Northern District of Iowa after defendant pled guilty to knowingly and fraudulently making a false declaration or statement in connection with his bankruptcy petition, in violation of 18 U.S.C. § 152(3). The sentence included prison time and a mandatory restitution of $8,093, pursuant to the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A.

OVERVIEW: Defendant filed a chapter 7 bankruptcy petition and failed to report various assets and liabilities. Defendant admitted he intended to defraud creditors when he failed to list about $8,000 worth of assets, but denied such intent when concealing a $36,000, inheritance. The district court sentenced defendant to 5 months of imprisonment followed by 5 months of home detention during 3 years of supervised release. The district court also ordered defendant to pay restitution to the bankruptcy trustee. On review, the court concluded that the district court did not clearly err in including defendant's inheritance in the loss calculation, which alone triggered a six-level increase under the Sentencing Guidelines, because defendant offered no persuasive evidence he intended to defraud his creditors of a lesser amount than the total value of the inheritance income he concealed. The court also concluded that the district court correctly determined defendant's violation directly and proximately harmed the bankruptcy trustee because the trustee worked more than 50 uncompensated hours as a result of defendant's fraud. Thus, the restitution ordered under the MVRA was appropriate.

United Sates v. Holthaus*, 2007 U.S. App. LEXIS 12209 (8th Cir. May 25, 2007) (Riley, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 1:7.02[3]**

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

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

0607-105 **Postconfirmation adversary proceeding brought by debtor against bank for breach of contract was not related to bankruptcy.** (*4th Cir.)*

PROCEDURAL POSTURE: Appellant debtor sought review of a decision of the District Court for the Eastern District of Virginia, which determined that a bankruptcy court lacked jurisdiction, pursuant to 28 U.S.C. § 1334(b), over the debtor's postconfirmation adversary proceeding against appellee bank for breach of contract and for tortious interference.

OVERVIEW: After the confirmation of its plan, the debtor filed an adversary complaint that the bank breached a loan agreement and tortiously interfered with the debtor's contractual relationship with a tenant. The court affirmed the district court's decision that the bankruptcy court did not have postconfirmation "arising under" jurisdiction to adjudicate the claims, which bore only a coincidental relationship to the bankruptcy case and would have existed whether or not the debtor had filed for bankruptcy. The claims were not related to a Title 11 case because the plan provided for the satisfaction of obligations from postpetition rents, not from the adversary proceeding; the debtor paid all creditors, including the bank, before instituting the proceeding; and the plan was substantially consummated. The court held that, because the plan and confirmation order did not provide that the claims would remain estate property, the claims vested in the reorganized debtor and were no longer estate property under section 1334(e). The court held that the bankruptcy and district courts could not make additional findings that the complaint failed to state a claim and the claims were not core proceedings.

Valley Historic Ltd. P'ship v. Bank of New York*, 2007 U.S. App. LEXIS 11556 (4th Cir. May 17, 2007) (Wilson, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 1:3.01[4]**