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Collier Bankruptcy Case Update

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

0807-036 **Bankruptcy court properly found that credit counseling received more than 180 days prior to filing substantially complied with requirement.** (*E.D. Cal.)*

PROCEDURAL POSTURE: Appellant, the United States Trustee sought review of the bankruptcy court's denial of its motion to dismiss appellee debtor's chapter 7 bankruptcy petition pursuant to 11 U.S.C. § 109(h) for failure to obtain prepetition credit counseling and to properly file a certificate regarding the same as required by section 109(h).

OVERVIEW: Although the trustee viewed the section 109(h) requirements as jurisdictional, the court held that the bankruptcy court properly construed section 109(h) as an element of a federal claim. The bankruptcy court declared the trustee's motion to be untimely in part because it was filed subsequent to the meeting of the creditors and in part due to the debtor's substantial compliance with section 109(h). Given the allowance under 11 U.S.C. § 707 for dismissals after a creditors' meeting, the court held that the bankruptcy court's finding of untimeliness for a motion filed a week after the meeting of the creditors was unwarranted. The court, however, concluded that the finding of substantial compliance was not clearly erroneous. Although the debtor received credit counseling more than 180 days prior to filing her petition, the facts weighed in favor of a substantial compliance finding because she filed her petition less than four months after the new credit counseling provisions under 11 U.S.C. § 109(h) went into effect, she initiated credit counseling roughly five months prior to the enactment of section 109(h), and the counseling resulted in the type of debt repayment contemplated by Congress in section 109(h).

***Kistler v. Meza (Inre Meza)**, 2007 U.S. Dist. LEXIS 48430 (E.D. Cal. June 22, 2007) (England, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.09**

§ 362(a)(3) Automatic Stay; Scope; Acts to Obtain Property.

0807-037 **Dismissal of state court action that was property of the estate violated stay.** (*Bankr. N.D. Ill.)*

PROCEDURAL POSTURE: Chapter 7 trustee filed a motion to have a state court dismissal of a lawsuit filed by the debtors declared void ab initio on the grounds that the dismissal order violated the automatic stay under 11 U.S.C. § 362(a)(3), and have the defendants in the state court lawsuit assessed compensatory and punitive damages, and attorney fees and costs, based upon their willful violation of the automatic stay.

OVERVIEW: The debtors obtained a discharge, their case was closed, and the trustee was discharged. Subsequently, debtors' counsel filed a motion to reopen the debtors' bankruptcy case in order to include two lawsuits that were omitted from the debtors' schedules and that had been filed in state court and pending at the time of the debtors' bankruptcy filing. The motion was granted and the trustee was re-appointed. The defendants in one of the state court actions had the lawsuit dismissed on the grounds that the debtors failed to properly list the lawsuit claim in the bankruptcy case. The court held that the dismissal was void ab initio because it was entered in violation of the automatic stay under 11 U.S.C. § 362(a)(3). The court held that the lawsuit claim was never abandoned by the trustee, and remained property of the estate and subject to the stay. The court declined to award damages for the violation of the stay because neither the debtors, the debtors' bankruptcy counsel, nor the trustee provided either the defendants or their counsel with notice that the bankruptcy case had been re-opened for the purpose of listing and administering the state court lawsuit.

***In re Enyedi**, 2007 Bankr. LEXIS 2275 (Bankr. N.D. Ill. July 12, 2007) (Cox, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.03[5]**

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

0807-038 **Relief from stay to allow foreclosure granted in single asset case.** (*Bankr. D. Conn.)*

PROCEDURAL POSTURE: Secured creditor filed a motion for relief from the automatic stay to permit the creditor to continue with a pending state-court foreclosure action. The motion asserted that the debtor's case was a single asset real estate case under 11 U.S.C. § 362(d)(3), that the debtor lacked equity in the property; and that the property was not necessary for a reorganization.

OVERVIEW: The creditor's argument that 11 U.S.C. § 362(d)(3) mandated the granting of its motion, unanswered by the debtor, was persuasive. There was no dispute that: (1) the debtor fit the description of a single asset real estate case; and (2) that the debtor failed to make interest payments or to file a chapter 11 plan within 90 days after it had filed its petition. The unequivocal language of the statute mandated relief from stay in such cases. Congress was persuaded to give a secured creditor quick relief in a single asset case when the debtor failed to promptly file a plan or make early interest payments to the creditor secured by the real estate. The court was not persuaded that the debtor is entitled to lesser relief than terminating the stay. The evidence produced at trial pointed to the debtor's efforts in the four years prior to its petition and the eight months subsequent to its petition designed to develop housing on the property. The court concluded that such action, including the decision to allow its special permit to excavate gravel to lapse, made the testimony of the creditor's appraiser the most credible of all such testimony received.

Four J Funding LLC v. Land Pres., LLC (In re Land Pres., LLC)*, 2007 Bankr. LEXIS 2288 (Bankr. D. Conn. July 2, 2007) (Krechevsky, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.07[5]**

§ 502(e)(1)(B) Allowance of Claims or Interests; Claims for Reimbursement or Contribution; Disallowance; Contingent Claims.

0807-039 **Claim by former officer of debtor for attorneys' fees received in SEC investigation was not subject to disallowance.** (*Bankr. D. Del.)*

PROCEDURAL POSTURE: A former officer of the corporate debtor filed a claim for indemnification and advancement of his defense costs incurred in a civil Securities Exchange Commission ("SEC") action in the Northern District of California, pursuant to debtor's corporate charter and Del. Code Ann. tit. 8, § 145. The plan administrator filed an objection seeking to disallow the claim pursuant to 11 U.S.C. § 502(e)(1)(B), as a contingent claim for reimbursement of debt.

OVERVIEW: The SEC instituted a civil action against the officer and other former employees of the debtor related to their work at the debtor, seeking civil penalties against the officer. Prior to filing its petition, the debtor agreed to advance attorney's fees and costs to the officer in connection with the SEC action, with a cap on such fees of $4.5 million. The plan administrator asserted that the claim was contingent because the full amount was unknown and the former officer might not ultimately be entitled to indemnification, if he had not acted in good faith. The court ruled that the debtor was nonetheless obligated to advance the fees under the Delaware statute, regardless of the ultimate disposition. The claim was unliquidated, but not contingent. The court found, as a matter of law, that a claim for attorney's fees incurred in connection with the investigation and defense of government civil and criminal prosecution was not subject to disallowance under 11 U.S.C. § 502(e)(1)(B). The plan administrator also failed to establish that the debtor and the claimant were co-liable on the claim for which reimbursement was sought.

In re RNI Wind Down Corp.*, 2007 Bankr. LEXIS 2263 (Bankr. D. Del. July 9, 2007) (Sontchi, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:502.06[2][d]**

§ 506(a) Determination of Secured Status; Bifurcation of Claim.

0807-040 **Deficiency established prepetition could be asserted as unsecured claim.** (*Bankr. W.D.N.Y.)*

PROCEDURAL POSTURE: After a debtor voluntarily surrendered certain collateral prior to the filing of his chapter 13 petition for bankruptcy relief, he objected to an unsecured claim for a deficiency on an automobile loan.

OVERVIEW: Under the terms of a retail installment contract, the debtor gave a security interest in his newly purchased vehicle to a bank, which perfected its lien. Shortly after, the debtor surrendered the vehicle to the bank, which sold it at auction and realized a deficiency. The debtor filed a chapter 13 petition, and the bank filed a proof of claim in the amount of the deficiency. The court overruled the debtor's objection to the proof of claim, holding that the claim was not subject to the treatment that 11 U.S.C. §§ 1322(b)(2) and 1325(a)(5) would have applid to secured claims. Pursuant to N.Y. U.C.C. Law § 9-615(d) (2002), the debtor became liable for the deficiency after the application of the sale proceeds. Because the creditor had established the deficiency before the commencement of the bankruptcy, the unsecured character of its claim was already determined. When the debtor filed his bankruptcy petition, the bank no longer enjoyed the status of a secured creditor under 11 U.S.C. § 506(a), and the bank was entitled to assert its deficiency as an unsecured claim.

***In re Krotje**, 2007 Bankr. LEXIS 1890 (Bankr. W.D.N.Y. May 24, 2007) (Bucki, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:506.03**

§ 507(a)(1) Priorities; Order of Priorities; Domestic Support Obligations.

0807-041 **Obligation to pay credit card debt pursuant to divorce decree was not a domestic support obligation and was dischargeable.** (*Bankr. E.D. Tenn.)*

PROCEDURAL POSTURE: Bankruptcy debtors proposed a chapter 13 plan which provided for payment of debt arising from one debtor's prior divorce proceedings as general unsecured debt. The debtor's former spouse objected to confirmation of the debtors' plan on the ground that the debt was entitled to priority treatment under 11 U.S.C. § 507(a)(1) as a domestic support obligation.

OVERVIEW: The divorce proceedings required the debtor to pay credit card debt, and the spouse contended that the debt was a domestic support obligation which was entitled to priority, and thus full payment, in the debtors' plan. The bankruptcy court held, however, that the divorce award was not in the nature of alimony, maintenance, or support, and thus the debt was not entitled to priority. The divorce decree itself did not designate the obligation as support and instead indicated that the allocation of debt was intended as part of an equitable division of marital assets and liabilities. Further, the spouse admitted that alimony was never discussed in the divorce negotiations, and it was thus clear that neither the state court nor the parties intended to create an obligation to provide support.

***In re Knox**, 2007 Bankr. LEXIS 1875 (Bankr. E.D. Tenn. May 23, 2007) (Cook, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:507.02A**

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

0807-042 **Case dismissed for failure to file payment advice despite debtor's efforts at substantial compliance.** (*Bankr. D. Utah)*

PROCEDURAL POSTURE: The court inquired into whether a chapter 13 debtor complied with the filing requirements of 11 U.S.C. § 521(a)(1). The debtor claimed to have complied and, alternatively, challenged the constitutionality of the automatic dismissal provision of section 521(i)(1).

OVERVIEW: The debtor filed three of the four pay advices received from his employer within the 60-day period prior to the date of the filing of his petition. Rather than filing a payment advice for the missing pay date, the debtor included a detailed chart that included gross income, withholding, and net income information for all four pay dates that had apparently been extrapolated from the three available payment advices. The court held that the debtor's case was automatically dismissed effective on the 46th day after the date of the filing of the petition because the debtor did not provide all of the pay advices received from his employer during the 60-day period, as required under section 521(a)(1)(B)(iv). The

court held that there was no room in section 521(a)(1)(B)(iv) for substantial compliance or similar equitable theories; either the required documents were filed or they were not. The court also held that the automatic dismissal provision of section 521(i)(1) did not violate the debtor's constitutional right to due process because there was no constitutional right to obtain a discharge of one's debts in bankruptcy and dismissal was not delegated to a clerk or other administrative officer.

***In re Miller**, 2007 Bankr. LEXIS 2287 (Bankr. D. Utah July 12, 2007) (Boulden, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:521.24**

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

0807-043 **Debtor living below property level and suffering from severe mental condition granted undue hardship discharge of student loan debt.** (*Bankr. E.D. Ark.)*

PROCEDURAL POSTURE: Plaintiff debtor filed an adversary proceeding against defendant creditor to determine the dischargeability of his student loans with regard to 11 U.S.C. § 523(a)(8).

OVERVIEW: A student loan was excepted from discharge unless it would impose an undue hardship on the debtor, 11 U.S.C. § 523(a)(8). Debtor had the burden of proving that the debt would have imposed an undue hardship. His educational expenses were paid for at a university with the use of student loans that were the subject of these proceedings. He failed to receive a degree from the university. As of March 22, 2006, the total balance due was $136,010. The court stated that debtor had tried to find employment and minimize his expenses by living with his mother, that his listed expenses were minuscule expenses, that his income was well below the poverty level, and that his future job prospects were bleak because of a mental condition diagnosed in 1982, dysthymic disorder, for which there was no apparent cure. He had failed at every job-related endeavor, except that he did graduate from a college in 1975. Even the Air Force recommended against his re-enlistment. His vocational failures were clearly due to his mental condition, which was beyond his control. His reasonable future financial resources were inadequate to cover payment of the debt while allowing for a minimal standard of living.

***Robins v. Educational Credit Mgmt. Corp. (In re Robbins)**, 2007 Bankr. LEXIS 2265 (Bankr. E.D. Ark. July 9, 2007) (Mixon, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.14**

§ 541(b)(7) Property of the Estate; Exclusions; ERISA, Deferred Compensation and Annuity Plans.

0807-044 **Contributions to retirement account which were less than 15% of income were excluded from the estate.** (*Bankr. D. Vt.)*

PROCEDURAL POSTURE: Debtors, a husband and wife, filed a petition under chapter 7. The chapter 7 trustee filed an objection to the debtors' claim of exemptions, asserting that contributions the wife made to a retirement account within one year of the date the debtors filed their petition were assets of the estate under Vt. Stat. Ann. tit. 12, § 2470(16). The trustee sought an order requiring the wife to turn over that money.

OVERVIEW: The wife worked as a nurse at a not-for-profit hospital in Vermont, and she had 15 percent of her income paid to a retirement plan the hospital established under I.R.C. § 403(b). At the time the wife and her husband declared bankruptcy, the wife had between $117,000 and 128,000 in her account, and they claimed that the account was not property of the bankruptcy estate. The court found that 11 U.S.C. § 541(b)(7), which was added to the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, excluded all contributions the wife made to her retirement account that were allowed by I.R.C. § 403(b), and because the wife had never contributed more than 15 percent of her income to the account, everything in her account was excluded from the bankruptcy estate. Moreover, because the wife's contributions were excluded from the bankruptcy estate, the court did not have to decide if those contributions were exempt from attachment and execution under Vt. Stat. Ann. tit. 12, § 2470(16).

***In re Leahy**, 2007 Bankr. LEXIS 2200 (Bankr. D. Vt. July 3, 2007) (Brown, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:541.22C**

§ 543(b) Turnover of Property by a Custodian; Duties of Custodian.

0807-045 **State director of insurance could be compelled to turn over property of the estate.** (*Bankr. N.D. Ill.)*

PROCEDURAL POSTURE: The trustee for a chapter 11 debtor filed a motion pursuant to 11 U.S.C. § 543(b) to compel the Illinois Director of Insurance in his capacity as conservator of the debtor's assets, to turn over any property of the estate in his possession and for an accounting of all such property.

OVERVIEW: The debtor sold vehicle service contracts to owners of vehicles. It was registered with the Director as an authorized service contract provider under state law. The Director obtained an ex parte order in state court giving him possession and control of the debtor's assets. The debtor filed a chapter 11 petition and also filed the instant motion, which was adopted by the trustee. The court held that sovereign immunity did not prevent the court from ordering the Director to turn over all property of the estate that was in his control because states ceded their sovereign immunity by agreeing to the Bankruptcy Clause in Article One of the U.S. Constitution. The court also held that the automatic stay was not relevant to the turnover issue presented in the instant motion because the Director was bound by the provisions of section 543(b) whether or not the automatic stay applied. The court further held that the fact that the assets were transferred to the Director prepetition was not determinative because such assets were nonetheless part of the debtor's bankruptcy estate and had to be turned over to the trustee. The court also held that section 543(b) superseded the common law *Barton* doctrine.

In re Auto Professional, Inc., *2007 Bankr. LEXIS 2177 (Bankr. N.D. Ill. July 3, 2007) (Doyle, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:543.03**

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

0807-046 **Debtors allowed to rebut presumption of abuse with evidence of higher than usual income during statutory period.** (*Bankr. C.D. Ill.)*

PROCEDURAL POSTURE: A U.S. Trustee asserted that bankruptcy debtors' statutory calculation of their income and expenses was erroneous, and that a proper calculation of disposable income raised a presumption of bankruptcy abuse under 11 U.S.C. §707(b). The trustee moved to dismiss the debtors' case based on the presumption, but the debtors contended that special circumstances existed to rebut the presumption.

OVERVIEW: The debtors asserted that the requirement that the debtors use historical income in calculating their disposable income failed to account for higher than usual income during the statutory period. The debtors also argued that special circumstances existed based the postpetition birth of a child, the necessity to pay student loan and postpetition loan debt, and excess transportation costs. The bankruptcy court held that the debtors showed sufficient special circumstances to rebut the presumption of bankruptcy abuse. The evidence indicated that the debtors worked more hours than normal during the historical period, and the requirement that the historical period be used in calculating disposable income did not preclude consideration of the debtors' lower actual income as a special circumstance. Further, the debtors had no reasonable alternative to incurring new expenses related to the postpetition birth of their child, and thus their standard expense based on family size was inaccurate. Also, the debtors had no reasonable alternative to the student loan debt, but the debtors failed to provide sufficient information to support special circumstances based on travel costs and loan debt.

In re Martin, *2007 Bankr. LEXIS 2285 (Bankr. C.D. Ill. July 16, 2007) (Gorman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05**

0807-047 **Debtor's loss of employment was a special circumstance rebutting the presumption of abuse.** (*Bankr. E.D. Mich.)*

PROCEDURAL POSTURE: The United States trustee brought a motion to dismiss for abuse debtor's converted chapter 7 case, pursuant to 11 U.S.C. § 707(b)(2) and (b)(3). The issue was whether debtor's loss of her job constituted special circumstances that rebutted the statutorily defined presumption of abuse, and whether the totality of the circumstances demonstrated abuse.

OVERVIEW: Debtor's scheduled combined monthly net income after layoff was $2,124.77 a month, and her nonpriority unsecured debt was scheduled as $36,256.39. The presumption of abuse thus arose because her prepetition monthly income less the approved expenses in the means test was $719.88. That figure multiplied by 60 equaled $43,192.80 which is well above $9,063.10, or 25 percent of the nonpriority unsecured debt. The debtor filed a proposed a plan that paid 100 percent of her debt in less than five years, but auto industry layoffs forced her into early retirement and cut her pay in half. She converted to chapter 7. While her retirement income was stable, the small amount of surplus income was attributable to another source, and the reliability of these payments is unknown. The court refused to find abuse by the debtor. There were no allegations that she was dishonest in her schedules, that she splurged prior to bankruptcy, nor that she had excessive expenses. She certainly was not at fault for her reduction in income.

***In re Heath**, 2007 Bankr. LEXIS 2290 (Bankr. E.D. Mich. July 6, 2007) (Shapero, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05**

0807-048 **Trustee barred from seeking presumption of abuse dismissal for failure to file required statement within ten days of creditors' meeting.** (*Bankr. D. Minn.)*

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

OVERVIEW: The trustee alleged that a presumption of abuse existed in the debtors' case because, after recalculating the debtors' Form B22A, the debtors' monthly disposable income multiplied by 60 exceeded the threshold amount. The debtors argued that the trustee's motion to dismiss was barred because the trustee had never filed a statement as to whether the debtors' case would be presumed to be an abuse under section 707(b), as required under 11 U.S.C. § 704(b)(1)(A). The trustee filed such a statement following the hearing on the motion to dismiss. Previously, the trustee had only filed a statement in which he had stated that he could not determine whether a presumption of abuse existed. In denying the trustee's motion, the court held that the trustee was barred from seeking a dismissal of the debtor's case because he failed to file the statement required under section 704(b)(1)(A) within 10 days after the first meeting of creditors.

***In re Robertson**, 2007 Bankr. LEXIS 2250 (Bankr. D. Minn. July 3, 2007) (Kishel, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05**

§ 707(b)(1) Dismissal of a Case or Conversion to a Case Under Chapter 11 or 13; Substantial Abuse; Test.

0807-049 **Debtor who owned vehicles free and clear could not take standard deductions.** (*Bankr. W.D. Wash.)*

PROCEDURAL POSTURE: A United States trustee filed a motion under 11 U.S.C. § 707(b)(1), seeking an order dismissing a petition which a debtor filed under chapter 7. The trustee claimed that the debtor was not eligible for relief under chapter 7. The debtor opposed the motion.

OVERVIEW: The debtor claimed that she had a current monthly income ("CMI") of $4,469.30, and monthly expenses in the amount of $4,540.26. The trustee alleged that monthly expenses the debtor claimed were too high because she claimed $471 for vehicle ownership costs and $329 for vehicle operating expenses, even though she made no payments on a car loan or lease, and did not prove that $166 she claimed as a mandatory payroll expense was legitimate. The bankruptcy court disallowed the debtor's claim for $166 because she did not submit evidence showing that the expense was mandatory. The court also disallowed the debtor's deduction for vehicle ownership costs and allowed her to claim $200 as a monthly vehicle operating expense. Although bankruptcy courts were split on the issue of whether a debtor was allowed to claim vehicle ownership costs on a vehicle the debtor owned free and clear, the court decided to follow those courts which held that a debtor with no auto loan or lease payment should not be permitted to take the standard vehicle ownership deduction in the Means Test Form. After the debtor's claims were disallowed, her CMI exceeded her expenses by more than $166.67.

***In re Cole**, 2007 Bankr. LEXIS 2258 (Bankr. W.D. Wash. July 3, 2007) (Overstreet, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[1]**

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

0807-050 **Child support payments were not an allowable expense on Form B22A but did serve to rebut the presumption of abuse.** (*Bankr. D. Idaho)*

PROCEDURAL POSTURE: The U.S. Trustee filed a motion under 11 U.S.C. § 707(b)(1) contending the granting of chapter 7 relief to debtor would be an abuse and that, unless the case was converted voluntarily to chapter 13, it should be dismissed.

OVERVIEW: The court needed to evaluate whether child support payments due under a postpetition state court order could be deducted under section 707(b)(2)(A)(iv) in calculating the presumption of abuse, and whether "special circumstances" were shown under section 707(b)(2)(B) to rebut the presumption of abuse if it arose. The trustee argued that debtor could not deduct the $785 monthly child support payment incurred under the state court order as an allowable expense on his Official Form 22A. The court concluded that debtor could not deduct the $785 monthly payment on his Form 22A. It was not a debt owed at the time of filing. As a result, he failed the means test under section 707(b)(2)(A) and the presumption of abuse arose. Next, the court adopted a fact-specific, case-by-case approach to assessing special circumstances under the several requirements of section 707(b)(2)(B). Debtor met his obligation to show that the expense was "necessary and reasonable." Similarly, there was no "no reasonable alternative" to paying the monthly support obligation. Finally, he showed how the added expense brought his disposable income below the threshold amounts in section 707(b)(2)(B)(iv). He rebutted the presumption of abuse.

In re Littman*, 2007 Bankr. LEXIS 2269 (Bankr. D. Idaho July 6, 2007) (Myers, C.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.

0807-051 **Debtor could claim deductions for secured debt payments on house and motor home despite intent to surrender.** (*Bankr. D. Idaho)*

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

OVERVIEW: The trustee claimed that the debtors improperly included secured debt payments under section 707(b)(2)(A)(iii) for their house and a motor home, both of which the debtors proposed in their statement of intention to surrender. The Trustee also objected to the debtors' attempt to deduct their postpetition tax liabilities as a "priority" debt payment under section 707(b)(2)(A)(iv). The Trustee claimed that, if the disputed items were disallowed, a presumption of abuse would have arisen under section 707(b)(2). The court held that the debtor could deduct amounts based on secured debts, notwithstanding their expressed intention to surrender the collateral securing those debts, because the amounts were contractual and remained outstanding at the time of the bankruptcy filing. The court also held that the debtors could not deduct for means test purposes payment of their postpetition taxes because the obligations were for a taxable year ending after the date of the petition. The court concluded that the presumption of abuse did not arise because including the deductions for the secured debt payments on the house and motor home in the debtors' means test resulted in a negative monthly disposable income.

In re Kelvie*, 2007 Bankr. LEXIS 2294 (Bankr. D. Idaho July 10, 2007) (Myers, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[2]**

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

0807-052 **Dismissal by bankruptcy court pursuant to notice of potential for dismissal in conference order vacated.** (*E.D.N.Y.)*

PROCEDURAL POSTURE: Appellant debtor sought review of a bankruptcy court's order dismissing the debtor's chapter 11 case *sua sponte* at a status conference.

OVERVIEW: A conference order setting the date for a status conference stated that the order constituted notice under 11 U.S.C. § 1112(b) that the bankruptcy court might consider any motion to dismiss made by the bankruptcy court. At the conference, the bankruptcy court dismissed the case *sua sponte* based on the debtor's failure to file a plan of reorganization by a deadline, the debtor's failure to provide information reasonably requested by the U.S. trustee, and the bankruptcy court's finding that the plan that was submitted was not proposed in good faith. On appeal, the court held that the boilerplate notice contained in the conference order did not satisfy the requirements of 11 U.S.C. § 1112(b), 11 U.S.C. § 102(1)(A), and Fed. R. Bankr. P. 2002 because the notice informing the debtor that the bankruptcy court was considering dismissing the bankruptcy petition for cause was not provided at a meaningful time and did not provide the debtor with a meaningful opportunity to respond. Although the conference order referred to 11 U.S.C. § 1112(b), § 1112(b) listed 16 circumstances that could constitute cause for dismissal, none of which had occurred at the time the notice issued.

In re Munteanu*, 2007 U.S. Dist. LEXIS 48233 (E.D.N.Y. June 28, 2007) (Spatt, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 7:1112.04**

§ 1325 Confirmation of Plan.

0807-053 **Bankruptcy court properly held that surrender of vehicle subject to hanging paragraph barred claim for deficiency.** (*B.A.P. 10th Cir.)*

PROCEDURAL POSTURE: Chapter 13 debtors proposed a plan whereby they would each surrender a vehicle purchased with purchase-money financing by a secured creditor within 910 days preceding the date of the filing of the petition. The bankruptcy court ruled that the surrender operated as full satisfaction of the secured creditor's claim, thereby precluding the filing of an unsecured claim for a deficiency, pursuant to the "hanging paragraph" of 11 U.S.C. § 1325.

OVERVIEW: In two separate cases, debtors each purchased a vehicle for personal use within 910 days of the filing of their chapter 13 bankruptcies. Each vehicle was secured by a purchase money security interest and was worth less than the outstanding balance. Debtors in both cases filed plans proposing to surrender each vehicle in full satisfaction of the secured debt on it. The secured creditor objected to confirmation of both plans, asserting that it was entitled to liquidate the vehicles and then file unsecured claims for any resulting deficiencies pursuant to 11 U.S.C. § 506. Like the bankruptcy court, the appellate panel adopted the majority view that bifurcation and assertion of an unsecured claim for a deficiency balance under section 506 was no longer available to the creditor under the post-Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 version of 11 U.S.C. § 1325. Debtors could surrender the vehicles in full satisfaction of the debts. The creditor raised an argument that the amended section 1325 constituted an impermissible taking of a state law property right to collect a deficiency, and the issue was certified to the Attorney General pursuant to 28 U.S.C. § 2403(a).

DaimlerChrysler Fin. Servs. Americas LLC v. Quick (In re Quick)*, 2007 Bankr. LEXIS 2175 (B.A.P. 10th Cir. July 5, 2007) (Clark, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

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

0807-054 **Neither payments nor interest rates for secured debts on "910" vehicles are dependent on original contract but rather determined by plan and *Till* rate of interest.** (*Bankr. N.D. Ill.)*

PROCEDURAL POSTURE: The debtor moved for confirmation of her chapter 13 plan. Creditor filed an objection.

OVERVIEW: In its objection, the creditor insisted that it was entitled to be paid the contract rate of interest and to receive monthly payments at the contract rate. The creditor argued that under 11 U.S.C. § 1325(a)(5)(B)(i)(I)(aa), creditors with debts secured by "910 vehicles" and owed by debtors who did not qualify for a discharge, as in the instant case, were entitled to be paid pursuant to the terms of the contract. Section 1325(a)(5)(B)(i)(I)(aa), however, said nothing about payments or interest and did not require particular terms in a plan. When a creditor's claim was secured by a lien on a "910 vehicle," the amount of the claim was treated as fully secured, and under section 1325(a)(5)(B)(i)(I)(aa) the creditor retained its lien until the claim was paid in full. But how the debtor went about paying that amount under her plan - the monthly payment, the number of months, and so on - was not dependent on the contract. And neither is the interest rate, which was governed by *Till*. Nothing in 11 U.S.C. § 1325(a)(5) prevented the debtor from modifying payment terms or interest rates under 11 U.S.C. § 1322(b)(2).

***In re Hopkins**, 2007 Bankr. LEXIS 2216 (Bankr. N.D. Ill. July 10, 2007) (Goldgar, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.06[3]**

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

0807-055 **Objection to confirmation sustained where debtors failed to include annual bonuses not received in the six months prior to filing on Form B22C.** (*Bankr. M.D. Fla.)*

PROCEDURAL POSTURE: Chapter 13 trustee objected to confirmation of the above-median-income debtors' plan on the grounds that it did not commit all of the debtors' projected disposable income to be received in the applicable commitment period to be paid to unsecured creditors over the term of the plan, as required under 11 U.S.C. § 1325(b)(1)(B).

OVERVIEW: The debtors testified that the debtor husband received an annual bonus. Because the debtors did not receive the most recent annual bonus in the six months prior to the month in which their case was filed, they did not include that income on Form B22C. The debtors also did not include the annual bonus in their calculation of income on Schedule I. The trustee asserted that the debtors' income was understated because it did not include the annual bonus. The court held that the debtors' "projected disposable income," within the meaning of section 1325(b)(1)(B), did not have to be determined solely by the calculation of monthly disposable income on Form B22C if there was evidence that simply using the historic six-month snapshot did not form a reasonable basis for projecting income forward. The court held that the debtors' projected disposable income had to include their anticipated annual bonuses. The court also held that, with respect to calculating the expenses that had to be deducted from current monthly income to arrive at the amount available to pay unsecured creditors under the debtors' chapter 13 plan, the calculations had to be done under Form B22C without resort to Schedule J.

***In re Arsenault**, 2007 Bankr. LEXIS 2282 (Bankr. M.D. Fla. July 3, 2007) (Williamson, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08[4]**

§ 1328(f) Discharge; Where Discharge May Not be Granted.

0807-056 **Debtor not entitled to discharge in chapter 13 case filed within four years of chapter 7 discharge.** (*Bankr. E.D. Mich.)*

PROCEDURAL POSTURE: The debtors filed for relief under chapter 13, and submitted a proposed plan. The trustee objected to the plan and requested that the debtors not receive a discharge, pursuant to 11 U.S.C. § 1328(f)(1).

OVERVIEW: The trustee asserted that the debtor was not entitled to a discharge in the chapter 13 proceeding because the debtor had received a chapter 7 discharge within four years of the present case being filed. The trustee claimed that the four-year period in 11 U.S.C. § 1328(f)(1) ran from the date that the prior bankruptcy case was discharged, and the debtor claimed that the four-year period ran from the date that the prior bankruptcy case was filed and had therefore expired. The court determined that 11 U.S.C. § 1328(f) required the four-year period to be calculated from the date that the discharge was received in the earlier case. The debtor received his discharge in the chapter 7 case on February 3, 2003. The debtor filed his petition for chapter 13 relief on January 5, 2007. Because the chapter 13 case was filed within four years of the chapter 7 discharge, the debtor was not entitled to a discharge in the chapter 13

case. Nevertheless, there was no reason to preclude confirmation of the debtor's plan if it was otherwise confirmable.

In re Sanders, *2007 Bankr. LEXIS 1900 (Bankr. E.D. Mich. May 18, 2007) (Rhodes, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1328.06**

0807-057 **Debtor entitled to discharge in second chapter 13 case filed two years after prior discharge as prohibition period ran from filing date in earlier case.** (*Bankr. D. Neb.)*

PROCEDURAL POSTURE: The debtors moved to confirm their chapter 13 plan. The chapter 13 trustee filed an objection. The only issue in dispute was whether the debtors were entitled to a chapter 13 discharge under 11 U.S.C. § 1328(f).

OVERVIEW: The chapter 13 trustee argued that since the chapter 13 case was filed within two years of the entry of the discharge in the debtors' prior chapter 13 case, the debtors were not entitled to a discharge under 11 U.S.C. § 1328(f)(2). Thus, the question presented was whether the discharge prohibition period of 11 U.S.C. § 1328(f) commenced upon the filing of the first case or upon the issuance of the discharge in the first case. The court held that the better interpretation of 11 U.S.C. § 1328(f) was that the discharge prohibition period began running on the date the prior case was filed rather than the date of discharge.

In re Ward, *2007 Bankr. LEXIS 2220 (Bankr. D. Neb. July 3, 2007) (Saladino, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1328.06**

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

§ 157(a) Procedures; Reference of Cases and Proceedings by District Court to Bankruptcy Court.

0807-058 **Dispute over creditor's repossession of vehicle after lifting of stay was not related to bankruptcy.** (*W.D. Mo.)*

PROCEDURAL POSTURE: Plaintiff, a discharged chapter 7 debtor, filed a conversion suit in the Circuit Court of Callaway County (Missouri) against defendant creditor alleging that it unlawfully repossessed his truck. The debtor filed a motion to remand after the creditor removed the suit to the court. The creditor moved to reassign or transfer the case to the bankruptcy court pursuant to 28 U.S.C. § 157(a).

OVERVIEW: The creditor issued a purchase money loan to the debtor. It successfully obtained relief from the automatic bankruptcy stay and repossessed the truck. The debtor filed his state court suit after he received a bankruptcy discharge. He alleged that the creditor acted unlawfully because he was current on his payments at the time the repossession occurred. The creditor removed the suit under 28 U.S.C. § 1452(a). It claimed that the court had jurisdiction under 28 U.S.C. § 1334(b) because the debtor's conversion claim was related to his bankruptcy case. The court disagreed. The debtor's conversion claim was not a "core proceeding" for 28 U.S.C. § 157(b)(2) purposes. The lifting of the automatic stay did not create the creditor's repossession rights, it just removed an impediment to the creditors exercise of those rights. The creditor's repossession rights were created by contract and by U.C.C. art. 9. "Related to" jurisdiction did not exist under 28 U.S.C. § 157 because pursuant to 11 U.S.C. § 521(a)(6), the truck ceased to be part of the debtor's bankruptcy estate after the debtor failed to redeem the truck or sign an approved reaffirmation agreement for it.

Baumgartner v. Ford Motor Credit Co., LLC, *2007 U.S. Dist. LEXIS 49469 (W.D. Mo. July 9, 2007) (Laughrey, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 1:3.02[1]**

BANKRUPTCY RULES (Post-2005 Act)

Rule 2002 Notices to Creditors, Equity Security Holders, United States, and United States Trustee.

0807-059 **Dismissal for nonpayment upheld as chapter 13 debtor was provided with proper notice and hearing.** (*B.A.P. 6th Cir.)*

PROCEDURAL POSTURE: Appellee trustee filed a motion to dismiss a case which appellant debtor filed under chapter 13 for failure to comply with the terms of a repayment plan. The Bankruptcy Court for the Western District of Tennessee dismissed the debtor's case and denied in part the debtor's motion to impose the automatic stay pending appeal. The debtor appealed.

OVERVIEW: The debtor declared bankruptcy in February 2006, and filed a proposed plan for repaying her creditors. The court entered an order directing the debtor to pay her creditors $2,223 per month, and when the debtor failed to make payments required by the court's order, the trustee filed a motion to dismiss her case, and notice of a hearing on the motion was served on the debtor and her attorney. The hearing was postponed, and although the record did not show that the debtor received notice of the new hearing date, she appeared at the hearing when it was held. The appellate panel found that the bankruptcy court did not terminate the debtor's case without giving her notice of the hearing and an opportunity to present evidence. Although the record did not show that the debtor was notified that the hearing on the trustee's motion would be postponed, the debtor appeared at the hearing and any error in failing to provide notice by mail was harmless. Although the debtor claimed that she was not allowed to testify at the hearing, the appellate panel was not able to consider that claim because the debtor did not provide the panel with a transcript of the hearing when she filed her brief.

Robilio v. Stevenson (In re Robilio)*, 2007 Bankr. LEXIS 2264 (B.A.P. 6th Cir. July 13, 2007) (Whipple, B.A.P.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 9:2002.01**

Rule 2004(c) Examination; Compelling Attendance and Production of Documents.

0807-060 **Subpoena from debtor's attorney to creditor quashed in absence of required examination.** (*Bankr. D.S.C.)*

PROCEDURAL POSTURE: Debtors, through their attorney, issued a subpoena to a creditor to obtain documents relating to a potential claim that the debtors might have had against the creditor regarding an alleged improper setoff of debtors' social security benefits. The creditor sought to quash the subpoena because it was issued without the debtors first obtaining a court order permitting them to examine the creditor.

OVERVIEW: The court determined that the plain language of Fed. R. Bankr. P. 2004(c) specifically contemplated that a subpoena compelling the production of documents might only be issued in conjunction with an examination of an entity allowed by Fed. R. Bankr. P. 2004(a). In this case, no motion for examination was made or granted prior to the issuance of the subpoena; thus, the court was required to grant the creditor's motion to quash. The subpoena was invalid because there was no underlying examination of the creditor that had been allowed by a court order. To hold otherwise would have permitted the parties to engage in potentially unfettered and unsupervised pre-action discovery, a practice not authorized by the Federal Rules. The quashing of the motion mooted that portion of the creditor's motion seeking to discover matters related to a contemplated class action against the creditor. However, it appeared that the debtors could obtain the creditor's policy manuals and other non-privileged documents indicating that the creditor had violated its own policy or applicable law regarding the setoff.

In re Kelley*, 2007 Bankr. LEXIS 1883 (Bankr. D.S.C. May 1, 2007) (Waites, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 9:2004.03**

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

§ 502(b)(2) Allowance of Claims or Interests; Disallowance; Unmatured Interest.

0807-061 **Debt was not reduced by payments received from guarantor but was capped at amount due under original agreement on petition date.** (*4th Cir.)*

PROCEDURAL POSTURE: In appellant debtors' chapter 11 proceeding, appellee creditor was paid the full amount due under the parties' electricity tolling agreement. The creditor allocated the amount first to interest, then to principal, continuing to assert a claim against the debtors for the full amount. The Bankruptcy Court for the District of Maryland allowed the claim, and the district court affirmed. One debtor appealed.

OVERVIEW: The debtor argued that the creditor's claim should be limited to only the amount of interest the creditor was currently owed. The appellate court initially held that, despite language in the underlying guarantee for the parties' agreement, purporting to make a non-debtor guarantor a co-obligor, the guarantor was a surety for the debtor's obligations to the creditor, and, pursuant to N.Y. Gen. Oblig. Law § 15-103, the value of debtor's debt to the creditor was not reduced by the full amount received by the creditor from the guarantor to satisfy the debtor's obligation under the parties' agreement. The appellate court then held that 11 U.S.C. § 502(b)(2) barred the creditor from collecting the additional $17 million it sought from the debtor, regardless of whether such amount was classified as interest or principal. The appellate court found that the debtor's debt was capped at the amount of the debtor's obligation under the parties' agreement by the filing of its bankruptcy petition, that the debt was only increased by the accrual of disallowed postpetition interest, and that the creditor was free to pursue collection of the additional amount from the non-debtor guarantor.

National Energy & Gas Transmission, Inc. v. Liberty Elec. Power LLC (In re National Energy & Gas Transmission, Inc.)*, 2007 U.S. App. LEXIS 16263 (4th Cir. July 10, 2007) (Shedd, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:502.03[3]**

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

0807-062 **Creditor's administrative expense claim filed three years after plan confirmation disallowed.** (*Bankr. E.D. Mich.)*

PROCEDURAL POSTURE: Debtors filed a petition under chapter 13, and the court confirmed their plan for repaying their creditors. Just over three years later, a creditor filed a motion for allowance of an administrative expense claim under 11 U.S.C. § 503(b)(1)(A). The chapter 13 trustee filed an objection to the creditor's motion.

OVERVIEW: In June, 2003, one of the debtors entered into an agreement to lease a vehicle. The lease required the debtor to make monthly payments of $568.77 and to pay for excess mileage she put on the vehicle. In July, 2003, the debtors filed a petition under chapter 13, and in January, 2004, the court approved an amended plan the debtors filed. Under that plan, the debtors assumed the lease and were required to make monthly payments to the creditor until the lease expired. At the end of the lease term, the debtors returned the vehicle to the creditor, and the creditor prepared a Vehicle Condition Report which indicated that the debtors owed $2,298.15 for excess mileage, $137.88 for sales tax, and $568.77 for a monthly payment they missed, and it asked the court to award it $3,004.80 as an administrative expense. The court denied the creditor's motion because the creditor's claim was not classified as an administrative expense under the debtors' plan, and the creditor was bound by the terms of the plan, pursuant to 11 U.S.C. § 1327(a). In addition, Sixth Circuit case law precluded the court from construing the creditor's motion as a motion to modify the debtors' plan.

In re White*, 2007 Bankr. LEXIS 2201 (Bankr. E.D. Mich. July 3, 2007) (Tucker, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:503.06**

§ 510(c) Subordination; Equitable Subordination.

0807-063 **Committee's request for leave to pursue equitable subordination denied as not in best interests of estate and not necessary for fair and efficient resolution.** (*2d Cir.)*

PROCEDURAL POSTURE: Appellant committee of unsecured creditors (committee) sought authorization to assert a claim of equitable subordination under 11 U.S.C. § 510(c) against various lenders. The chapter 11 trustee investigated the claim and concluded it lacked merit. The bankruptcy court denied the committee permission to pursue the claim. The District Court for the Southern District of New York affirmed the bankruptcy court's order. The committee appealed.

OVERVIEW: In its *STN Enterprises* decision, the Court of Appeals for the Second Circuit held that 11 U.S.C. § 1103(c)(5) and 11 U.S.C. § 1109(b) implied a qualified right for creditors' committees to initiate suit with the approval of the bankruptcy court when the trustee or debtor-in-possession had unjustifiably failed to bring suit or abused its discretion in not suing to avoid a preferential transfer. In its Commodore decision, the Second Circuit held that a committee may sue, with the debtor's consent and the bankruptcy court's approval, so long as the court found that the suit was: (1) in the best interest of the bankruptcy estate, and (2) was necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings. Applied to the instant case, STN Enterprises and Commodore made clear that claims such as those the committee sought to pursue depended on a judicial determination that they were likely to benefit the estate. The chapter 11 trustee and the bankruptcy court concluded that they would not. The appellate court found no reason to disturb the conclusion of the bankruptcy court and trustee.

Official Comm. of Unsecured Creditors v. Halifax Fund LP (In re AppliedTheory Corp.)*, 2007 U.S. App. LEXIS 16180 (2d Cir. July 9, 2007) (per curiam).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:510.05**

§ 521(1) Debtor's Duties; List of Creditors, Schedules, and Statement of Financial Affairs.

0807-064 **Personal injury action dismissed as debtor failed to disclose cause of action in bankruptcy case.** (*10th Cir.)*

PROCEDURAL POSTURE: Plaintiff former employee sought review of a decision of the District Court for the District of Wyoming, which, in his personal injury action against defendants, his former employer and others, held that he was judicially estopped from pursuing his claims because he failed to disclose them to a bankruptcy court in the context of his chapter 7 bankruptcy as was required under 11 U.S.C. § 521(1).

OVERVIEW: The employee took inconsistent positions in the bankruptcy and federal district courts. Based on the evidence, the federal court of appeals thought it inconceivable that the employee, at the time that he filed for bankruptcy, did not understand that he had a personal injury action pending for nine months prior, from which he stood to financially benefit. That he knew of the pending lawsuit and did not disclose it to the bankruptcy court was the only reasonable inference to be drawn from the evidence given that he had been seriously injured in a car accident and sued his employer, along with eight other co-defendants, for thousands of dollars. It was impossible to believe that such a sizable claim could have been overlooked. The employee, too, had a motive to sweep his personal injury action under the rug, so he could obtain a discharge free and clear of his creditors. That he received the benefit of a discharge without disclosing his pending action provided him with an unfair advantage over his creditors. Thus, the district court's discretionary application of judicial estoppel was appropriate. That the bankruptcy was reopened and his creditors were made whole was inconsequential.

Eastman v. Union Pac. R.R.*, 2007 U.S. App. LEXIS 16032 (10th Cir. July 6, 2007) (Baldock, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:521.06**

§ 541 Property of the Estate.

0807-065 **Remainder interests in spendthrift trusts that terminated prior to petition date were property of the estate.** (*B.A.P. 10th Cir.)*

PROCEDURAL POSTURE: Plaintiff bankruptcy trustee sought a declaration that defendant debtor's remainder interests in three revocable inter vivos trusts were assets of the debtor's chapter 7 bankruptcy estate and subject to turnover. The Bankruptcy Court for the District of Kansas ordered the debtor and his brother to transfer the debtor's remainder interests in all three trusts to the bankruptcy trustee. The debtor appealed.

OVERVIEW: The debtor's grandmother and parents established separate trusts which gave the debtor a remainder interest in one-fourth of the property that was placed in the trusts. An oil company obtained a state court judgment against the debtor in 2003, and it filed a lien against the trusts several months before the debtor filed for bankruptcy. When the bankruptcy trustee sought a declaration that the debtor's remainder interests in the trusts were assets of the bankruptcy estate, the debtor opposed the action, arguing that the trusts were not property of the estate because they contained a spendthrift provision. The bankruptcy court found that all three trusts terminated before the debtor filed bankruptcy, and it ordered the debtor and his brother to transfer the debtor's remainder interests in all three trusts to the bankruptcy trustee. In addition, it instructed the bankruptcy trustee to hold property it received subject to the oil company's lien. The appellate panel found that the bankruptcy court correctly determined that the trusts terminated before the debtor filed bankruptcy and that the debtor's interests in the trusts were subject to the oil company's lien.

Case v. Hilgers (In re Hilgers)*, 2007 Bankr. LEXIS 2242 (B.A.P. 10th Cir. July 10, 2007) (Brown, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:541.01**

§ 1101(2) Definitions for This Chapter; ``Substantial Consummation''.

0807-066 **Appeal of settlement dismissed due to substantial consummation of plan where creditor had not sought a stay pending appeal.** (*M.D. Fla.)*

PROCEDURAL POSTURE: Appellant creditor sought review of an order of the bankruptcy court approving a compromise between a chapter 7 debtor and appellee trustee and overruling the creditor's objection. The settlement dismissed discharge and avoidance adversaries and provided the debtor with a release in exchange for the payment of a certain sum. The trustee filed a motion to dismiss the appeal as moot.

OVERVIEW: The creditor had brought an adversary proceeding seeking denial of discharge under 11 U.S.C. § 727. The trustee sent a letter to the creditor stating that because the creditor had not sought a stay, the order was effective. The creditor still did not seek a stay, and the trustee effectuated the settlement agreement. On review, the court granted the trustee's motion to dismiss. Although this was a case in which it might be possible to put the parties back in the legal position that they held before the agreement was finalized, the case was not one that warranted such intervention from the court. The court held that the creditor's appeal was moot under U.S. Const. art. III, § 2, cl. 1 because the settlement and liquidation had been substantially consummated under 11 U.S.C. § 1101(2). The creditor was given advance notice by the trustee of his intent to effectuate the terms of the settlement agreement, and the creditor's decision not to seek a stay was based in part on trial strategy. The court refused to undo the terms of an effectuated settlement agreement simply to provide the creditor relief after he made a calculated but ultimately poor tactical choice.

Buckeye Ret. Co., LLC v. Crews*, 2007 U.S. Dist. LEXIS 48222 (M.D. Fla. July 3, 2007) (Moore, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 7:1101.02**

§ 1328(a)(3) Discharge; Full-Compliance Discharge; Restitution or Criminal Fines Excepted.

0807-067 **Restitution ordered pursuant to juvenile proceeding was dischargeable.** (*10th Cir.)*

PROCEDURAL POSTURE: Appellant Colorado Judicial Department ("CJD") appealed from the Bankruptcy Appellate Panel of the Tenth Circuit ("BAP"), which reversed the bankruptcy court and concluded that restitution ordered pursuant to juvenile delinquency proceedings was dischargeable under 11 U.S.C. § 1328(a)(3). Appellee debtor was adjudicated a juvenile delinquent eleven years before filing for chapter 13 bankruptcy and was ordered to pay restitution.

OVERVIEW: CJD argued that an adjudication of guilt resulting from juvenile delinquency laws was equivalent to a conviction of crime, and, therefore, that restitution – whether ordered against a juvenile or an adult – was nondischargeable because it was included in a sentence on the debtor's conviction of a crime under 11 U.S.C. § 1328(a)(3). The BAP, applying federal law, determined that juvenile delinquency was an adjudication of status, not guilt, and therefore could not be considered a "conviction of a crime" under 11 U.S.C. § 1328(a)(3). The court agreed, finding that an adjudication of juvenile delinquency was not equivalent to a conviction precisely because 18 U.S.C. § 5031 punished violations of the law that would have been a crime if committed by an adult, with a classification of "status" as opposed to "criminal conviction." The court rejected the CJD's public policy arguments, noting that the public policy effects were not the court's to resolve in the face of unambiguous statutory language.

Colorado Judicial Dep't v. Sweeney (In re Sweeney), *2007 U.S. App. LEXIS 16405 (10th Cir. July 11, 2007) (McKay, C.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 8:1328.02[3]**

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

§ 1334 Bankruptcy Cases and Proceedings.

0807-068 **Bankruptcy court lacked jurisdiction over cure payments under agreement from which debtor was released upon sale of the agreement and other assets.** (*Bankr. N.D. W. Va.)*

PROCEDURAL POSTURE: Plaintiff filed an adversary complaint against defendants, the entities that purchased substantially all the assets of a chapter 11 debtor and the successor to the entities, alleging that defendants failed to pay the remaining cure amount of an agreement that was allegedly assumed and assigned to one of the entities as part of its purchase of the debtor's assets. The successor filed a motion for judgment on the pleadings.

OVERVIEW: Plaintiff had an agreement with the debtor. At the time that the debtor agreed to sell substantially all of its assets, the debtor owed the plaintiff money under the agreement. The debtor's assumption and assignment of the agreement to the purchaser was approved by the court after plaintiff agreed to forego an immediate cash cure payment. Plaintiff opted to allow the purchaser to pay the amount of the debtor's cure obligation over time. Plaintiff later filed the instant action, alleging that the purchaser and/or the successor breached its duty to pay the debtor's cure obligation. The court held that the debtor no longer had any obligation to pay the cure amount to plaintiff because plaintiff specifically waived its right to collect the cure amount from the debtor. The court held that it lacked subject matter jurisdiction under 28 U.S.C. § 1334 because the debtor no longer had any obligation to pay the cure amount, and the dispute was a contractual dispute between non-debtor parties. The court held that the dispute was not one that arose in, arose under, or one that was related to a case under the Bankruptcy Code as defined by the case law interpreting section 1334.

Kinder Morgen/Pinney Dock & Transp., LLC v. Mittal Steel USA, Inc. (In re Weirton Steel Corp.), *2007 Bankr. LEXIS 2205 (Bankr. N.D. W. Va. July 6, 2007) (Pearson, B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 1:3.01**

0807-069 **Bank's claim for breach of postpetition claim settlement agreement was contractual and was not related to debtor's bankruptcy.** (*Bankr. D.D.C.)*

PROCEDURAL POSTURE: A bank filed a motion for permission to examine a debtor under Fed. R. Bankr. P. 2004.

OVERVIEW: The bank filed an adversary proceeding against the debtor, pursuant to 11 U.S.C. § 727, seeking an order denying or revoking the debtor's discharge. The bank and the debtor entered into a settlement agreement which required the debtor's employer and the debtor's spouse to release all sums they were holding for the bank and required the debtor to pay $13,000 as a partial payment of the bank's legal fees. The court approved the settlement agreement and dismissed the bank's adversary proceeding, but it did not issue a judgment that imposed obligations on the debtor. When the debtor allegedly failed to meet his obligations under the settlement agreement, the bank filed a motion for permission to examine the debtor under Fed. R. Bankr. P. 2004. The court found that the bank's claim against the debtor was one alleging breach of contract, and because it did not arise under the Bankruptcy Code and was not related to the debtor's bankruptcy action, it had to be brought in state court. That said, the court denied the debtor's motion for attorney's fees because the bank could have reasonably viewed Rule 2004 as a basis for inquiry into enforcement of the settlement agreement.

In re Barnes*, 2007 Bankr. LEXIS 2206 (Bankr. D.D.C. July 1, 2007) (Teel, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 1:3.01**

BANKRUPTCY RULES (Pre-2005 Act)

Rule 4003(b) Exemptions; Objections to Claim of Exemptions.

0807-070 **Claim objection deadline does not recommence upon conversion from chapter 13 to chapter 7.** (*Bankr. N.D. Tex.)*

PROCEDURAL POSTURE: A bankruptcy trustee filed an amended objection to some of the debtor's claimed exemptions. The objection sought to disallow, under 11 U.S.C. § 522(o) and (p), the homestead exemption claimed by the debtor for property owned by the debtor in Rockwell, Texas. The debtor claimed that the objection was untimely.

OVERVIEW: The debtor claimed a homestead exemption to the property at issue, pursuant to 11 U.S.C. § 522(b), and Texas law. After the meeting of the creditors, the debtor voluntarily converted the chapter 13 case to a proceeding under chapter 7, and the debtor filed an amended set of schedules on January 20, 2006. On February 27, 2006, a second meeting of the creditors was held and concluded. The trustee objected to the claimed exemptions on March 24, 2006. The court held that the trustee's objection was not timely pursuant to Fed. R. Bankr. P. 4003(b). The court followed the analysis that determined that the claim objection deadline in Fed. R. Bankr. P. 4003(b) did not recommence upon conversion of the case from a chapter 13 proceeding to a chapter 7 proceeding. The consequence of the subsequent creditor's meeting after the conversion did not extend the deadline for objecting to a claimed exemption under Fed. R. Bankr. P. 4003(b).

In re Shults*, 2007 Bankr. LEXIS 2274 (Bankr. N.D. Tex. July 11, 2007) (Houser, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 9:4003.03**