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Collier Bankruptcy Case Update

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

0907-071 **Bankruptcy petition preparer's presentation of worksheet containing legal advice to debtor violated Bankruptcy Code.** (*Bankr. N.D. Cal.)*

PROCEDURAL POSTURE: A debtor filed a petition under chapter 7, and she asked the court to waive her filing fee. The court noticed errors in the schedules the debtor submitted, and it ordered a person who prepared those schedules to appear so it could determine if she engaged in the unauthorized practice of law.

OVERVIEW: After the court learned that the debtor used a petition preparer to prepare her schedules, it ordered the preparer to appear before the court. The preparer disputed the debtor's claim that the preparer was responsible for errors that appeared in schedules the debtor filed with the court, but the court did not have to address that dispute to find that the preparer violated 11 U.S.C. § 110 when she gave the debtor a worksheet that contained legal advice. Even assuming the worksheet was drafted by a lawyer, the lawyer who drafted the worksheet did not represent the debtor, and the preparer was not supervised by the lawyer who drafted the worksheet. Anything the preparer did beyond typing a set of official forms the debtor had filled out was unlawful, as was the giving of legal advice by proxy.

In re Newman*, 2007 Bankr. LEXIS 2659 (Bankr. N.D. Cal. August 6, 2007) (Jaroslavsky, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:110.01**

§ 110(i) Penalty for Persons Who Negligently or Fraudulently Prepare Bankruptcy Petitions; Violations, Fraud and Unfair or Deceptive Acts.

0907-072 **Bankruptcy court had jurisdiction in debtor's case over violations by bankruptcy petition preparers in all other cases filed in the same year.** (*Bankr. D. Or.)*

PROCEDURAL POSTURE: Defendant bankruptcy petition preparer ("BPP") moved to dismiss claims filed by plaintiff, the United States Trustee, for monetary penalties for providing legal advice to debtors other than the debtor in whose the complaint was filed, for damages and penalties under 11 U.S.C. § 110(i), for injunctive relief, and for other relief in all other cases filed in the last year in which the BPP allegedly failed to comply with section 110.

OVERVIEW: Debtor's bankruptcy petition was prepared by the BPP. The trustee filed an adversary proceeding against the BPP seeking relief against on account of his conduct in the instant case as well as in all other cases filed during the prior year in which the BPP was shown to have violated section 110. Claiming that the court lacked subject matter jurisdiction over his conduct in any case other than that before the court, the BPP sought dismissal. The court denied the motion. It noted that section 110(b) and (1) related to fines for a preparer's failure to sign and provide a name and address for each document filed and that neither provision was tied to one specific debtor but rather provided for forfeiture or fines in each instance in which such a preparer failed to comply. The court thereupon concluded that it had subject matter jurisdiction despite the BPP's claims to the contrary and that the precedents established that a single adversary proceeding afforded sufficient due process to the BPP. The court went forward to consider and approve a notice concerning the proceeding that the Trustee proposed to provide to other debtors and interested parties and to address related procedural issues.

United States Trustee v. Taub (In re Nicholas)*, 2007 Bankr. LEXIS 2605 (Bankr. D. Or. August 1, 2007) (Alley, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:110.10**

§ 303(i) Involuntary Cases; Judgment upon Dismissal.

0907-073 **Attorneys' fees awarded to debtor in involuntary case where petitioner was not holder of an undisputed unsecured claim.** (*Bankr. N.D. Tex.)*

PROCEDURAL POSTURE: The debtor, by and through its remaining director, moved for judgment, pursuant to 11 U.S.C. § 303(i), against the petitioner who filed the involuntary petition, for attorney's fees, costs, and actual and punitive damages. The petitioner and the director were both shareholders of the debtor, and were embroiled in litigation and an arbitration proceeding prior to the filing of the involuntary petition.

OVERVIEW: Less than a year after the debtor was formed, two of the three shareholders, including the petitioner, each tendered their resignations, and the business failed to thrive. After substantial and expensive litigation began and an arbitration was about to commence, the petitioner filed an involuntary petition. The court ultimately ruled that the involuntary petition should be dismissed, on the ground that the petitioner did not have standing, as he was not the holder of an unsecured claim that was not the subject of a bona fide dispute. Debtor, through the remaining director, moved for section 303(i) damages against the petitioner. The court held that the petitioner had improperly used the filing as a forum shopping litigation tactic. The court did not find, under the totality of the circumstances, that there was bad faith under either an objective or subjective standard that warranted an award of damages or future attorneys' fees. The court found that the petitioner should, under 11 U.S.C. § 303(i)(1), have to pay the reasonable attorney's fees spent by the debtor to stop the bankruptcy, a total of $10,520.

In re Synergistic Techs., Inc.*, 2007 Bankr. LEXIS 2660 (Bankr. N.D. Tex. August 6, 2007) (Jernigan, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:303.15**

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

0907-074 **Enhanced fee for debtor's attorneys denied where disclosure statement appeared to call for flat fee.** (*Bankr. E.D. Pa.)*

PROCEDURAL POSTURE: After a bankruptcy debtor's chapter 13 plan was confirmed, counsel for the debtor applied for allowance of compensation and reimbursement of expenses for the filing fee, parking, and copying.

OVERVIEW: Counsel sought compensation for his efforts in preparing documents, representing the debtor at the meeting of creditors, resolving motions, preparing the debtor's plans, and obtaining plan confirmation. The bankruptcy court held that counsel failed to show entitlement to a fee in excess of the amount set out in counsel's disclosure statement regarding his fee agreement with the debtor. The disclosure statement appeared to indicate, perhaps unintentionally, that counsel agreed to a flat fee for his services, and counsel offered no insight into the particular circumstances in the case that would warrant the enhanced fee requested by counsel. Counsel failed to provide adequate information concerning a substantial portion of the claimed hours and, although counsel was successful in obtaining plan confirmation providing for cure of the debtor's mortgage arrearage, the plan contained ambiguities which would require further resolution. Also, counsel failed to identify the activities which required the parking expenses and failed to identify the documents which were copied or the necessity for doing so.

In re Murray*, 2007 Bankr. LEXIS 2737 (Bankr. E.D. Pa. August 6, 2007) (Frank, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:330.04**

§ 362 Automatic Stay.

0907-075 **Automatic stay reinstated due to creditor's inaccurate affidavit of default.** (*Bankr. D.S.C.)*

PROCEDURAL POSTURE: The debtor filed for relief under chapter 13 and an amended plan was confirmed. Counsel for the creditor alleged that the debtor was in default of arrearage payments and a subsequent court order to make the arrearage payments, and the court granted the creditor a relief from the stay. The debtor asked for reconsideration of the order granting relief from the stay.

OVERVIEW: In October 30, 2006 the creditor and the debtor entered into a post-confirmation settlement order whereby the debtor agreed to catch up postpetition arrearages plus the creditor's attorney fees and costs over a six-month period beginning December, 2006. The October 30 order provided for ex parte

relief in the event of future defaults. After filing an initial motion for ex parte relief, which was ultimately found by the court to be erroneous, a law firm representing the creditor filed a second affidavit of default and the debtor again sought reconsideration after the default was granted. The court noted that the second affidavit of default was filed four days before the 20-day grace period for payment of the default had expired. The creditor acknowledged at the hearing that the debtor was in fact in default of several months' payments, not just the most recent payment, however the court noted that the affidavit filed with the court was nevertheless inaccurate. The court noted that affidavits of default should not be filed without sufficient attention and care to the facts alleged.

In re Lucas, *2007 Bankr. LEXIS 2704 (Bankr. D.S.C. August 13, 2007) (Duncan, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.01**

§ 362(a) Automatic Stay; Scope.

0907-076 **Sanctions, fees and punitive damages awarded to debtor due to creditors' knowing, intentional violation of stay and of court order for return of collateral.** (*Bankr. E.D. Va.)*

PROCEDURAL POSTURE: The matter was before the court on debtor's motion for contempt. Debtor filed the motion against respondents, two individuals and businesses, alleging violation of the automatic stay of 11 U.S.C. § 362(a). The court earlier granted the motion for contempt. It also earlier awarded debtor $2,244 for attorneys' fees and $3,300 for damages that had been caused to debtor's vehicle. The matter of punitive damages was taken under advisement.

OVERVIEW: Punitive damages required more than a mere willful violation of the automatic stay imposed by 11 U.S.C. § 362(a). In the instant matter, the actions of one of the individual respondents and his towing company in violation of the automatic stay were intentional and were done with full knowledge of the stay. The actions were also in blatant contravention of the court's order requiring that the vehicle be returned to debtor. These actions demonstrated an obvious disregard for the law. These two respondents repeatedly refused to relinquish possession of the vehicle despite having knowledge of debtor's bankruptcy proceedings and being presented with the motion and the order on multiple occasions by debtor, debtor's counsel, and by a police officer. These numerous and continued refusals to return the vehicle over the course of approximately four months rose to the level of egregious conduct for which punitive damages were appropriate. Next, neither the second individual nor a repair service had possession of the vehicle since at least late January, 2007; therefore, their actions did not rise to the level of conduct required for the imposition of punitive damages.

Brown v. Pit Road Auto Serv. (In re Brown), *2007 Bankr. LEXIS 2609 (Bankr. E.D. Va. August 3, 2007) (Huennekens, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.03**

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

0907-077 **Debtor's failure to pay real estate taxes for period of tenancy was a default.** (*Bankr. N.D. Ill.)*

PROCEDURAL POSTURE: Movant, the vendee of certain of debtor's operating assets, sought an order requiring debtor to pay certain real estate taxes in connection with a lease that vendee was assuming. The taxes at issue related to a period of time during which debtor was in possession of the leasehold, raising the question of whether debtor's failure to pay those taxes constituted a default under 11 U.S.C. § 365(b)(1).

OVERVIEW: The assets bought by the vendee included a lease. While debtor was liable to cure defaults therein, including overdue 2005 real estate taxes and certain 2006 rent, the parties disagreed as to whether debtor was liable for 2006 real estate taxes arising for the time period during which debtor was in possession of the property. Though the vendee claimed that debtor was responsible therefore, debtor argued that because no bill had been issued for the taxes at issue as of the date on which the vendee was to assume the lease, there was no current obligation for which debtor was properly held liable. The court granted the vendee's motion. While noting that there was no authority precisely on point, the court found that the Seventh Circuit had decided, in the context of 11 U.S.C. § 365(d)(3), that it was neither inevitable nor sensible to find that simply because a billing date had not arrived, a tenant was not contractually obligated to pay taxes incurred during its period of tenancy. Rejecting claims that there was no "default,"

the court concluded that even though the billing date had not arrived, the obligation to pay taxes had in fact arisen.

In re Bachrach Clothing, Inc., *2007 Bankr. LEXIS 2623 (Bankr. N.D. Ill. August 2) (Hollis, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:365.05[c]**

§ 365(d)(3) Executory Contracts and Unexpired Leases; Time for Assumption or Rejection; Trustee to Perform Debtor's Obligations Until Assumption or Rejection.

0907-078 **Rent due under lease prorated for period from petition date to date of rejection.** (*Bankr. E.D.N.Y.)*

PROCEDURAL POSTURE: Debtor moved to reject a nonresidential lease debtor had entered into prepetition for premises it had vacated on the same date that debtor filed a petition for relief under chapter 11. The court granted debtor's request to reject the lease, and reserved for a written decision the issue of whether and to what extent debtor was responsible for immediate payment of postpetition rent under 11 U.S.C. § 365(d)(3).

OVERVIEW: The reserved issues were: (1) whether and the extent to which the landlord was entitled to immediate payment of rent under 11 U.S.C. § 365(d)(3); (2) notwithstanding section 365(d)(3), whether the lease was surrendered prior to entry of the lease rejection order, thereby excusing debtor from complying with lease obligations from the petition date to the date of the lease rejection order; and (3) whether the cash collateral agreement and order debtor entered into with its secured creditor, precluded debtor from paying the landlord under section 365(d)(3). The court followed the "proration cases" which required that the rent due under the lease be prorated for the time period from the petition date to the date the lease was rejected. Next, under the facts, the court could not conclude that the lease was terminated on the petition date by virtue of debtor's alleged surrender of the premises. The fact that debtor was not using the premises postpetition did not excuse compliance with section 365(d)(3). Finally, whether debtor had budgeted for this expense in connection with its cash collateral order with its secured creditor had no bearing on whether it was obligated to make payment under section 365(d)(3).

In re Rothman, *2007 Bankr. LEXIS 2651 (Bankr. E.D.N.Y. August 2, 2007) (Eisenberg, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:365.04[3]**

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

0907-079 **Claim received one day after bar date disallowed on debtor's objection.** (*Bankr. M.D. Ala.)*

PROCEDURAL POSTURE: The debtors filed for relief under chapter 13 and the creditor filed a proof of claim in the case. The debtors objected to the claim, pursuant to 11 U.S.C. § 502(b) and Fed. R. Bankr. P. 3002, and a hearing was held on the matter.

OVERVIEW: The debtor husband had filed a lawsuit in a Tennessee state court against the creditor. The state-court jury returned a verdict in favor of the creditor and the costs were taxed against the debtor in the amount of $8,615. The creditor initiated garnishment proceedings against the debtor in a court in Alabama to recover the costs award. In their schedules, the debtors listed an unsecured debt to the creditor. The debtors' plan proposed to pay unsecured creditors 100% and the plan was approved by the court. The creditor filed a proof of claim by mailing it on May 4, 2007, and the proof of claim was received one day after the bar date. The creditor acknowledged that the claim was received outside of the bar date, but contended that the creditor could be deemed to have filed an informal proof of claim before the bar date. The court found that the creditor had not established that the court was made aware of the claim through some affirmative act of the creditor. The fact that the claim was in the debtors' files was not enough.

In re Laprade, *2007 Bankr. LEXIS 2739 (Bankr. M.D. Ala. August 9, 2007) (Sawyer, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:502.03**

§ 521(a)(6) Debtor's Duties; Required Acts; Individual Debtor's Retention of Property Securing Claims.

0907-080 **Disapproval of reaffirmation agreement did not trigger automatic termination of stay.** (*Bankr. D. D.C.)*

PROCEDURAL POSTURE: The debtor filed for relief under chapter 7. The creditor filed a motion for approval of a reaffirmation agreement or in the alternative an entry of an order confirming termination of the automatic stay.

OVERVIEW: In the event that the court disapproved the reaffirmation agreement, the creditor asked the court for an order confirming termination of the automatic stay. The creditor contended that if the court disapproved the reaffirmation agreement, the automatic stay would terminate with regard to the debtor's vehicle pursuant to 11 U.S.C. § 521(a)(6). The court held that confirmation of a termination of the automatic stay was not warranted under 11 U.S.C. § 521(a)(6). The stay did not automatically terminate under 11 U.S.C. § 521(a)(6) if the debtor entered into a reaffirmation agreement within 45 days of the creditors' meeting under 11 U.S.C. § 341(a). This was true even if the court disapproved of the reaffirmation agreement. Further, events that occurred after the expiration of the 45-day period after the initial creditors' meeting had no impact on the automatic stay. Because the court could disapprove a reaffirmation agreement before or after the expiration of the 45-day period, a disapproval of the affirmation agreement could not trigger an automatic termination of the stay.

***In re Bond**, 2007 Bankr. LEXIS 2643 (Bankr. D. D.C. August 6, 2007) (Teel, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:521.10[4]**

§ 522(c)(1) Exemptions; Debts Collectible from Exempt Property; Domestic Support Obligations.

0907-081 **Trustee did not have authority to exercise liquidation rights of non-appearing domestic support obligation creditors.** (*Bankr. M.D. Fla.)*

PROCEDURAL POSTURE: The debtors filed for relief under chapter 7. The debtors both scheduled domestic support obligations ("DSO") creditors with substantial claims. The chapter 7 trustee filed an objection to the debtors' exemptions on behalf of the DSO creditors.

OVERVIEW: The debtors had substantial equity of approximately $133,000 in their home. The debtors claimed the home as exempt under Florida law. The trustee indicated that there were not any non-exempt assets to administer for the general benefit of creditors. Neither of the DSO creditors scheduled in the action filed a proof of claim. The court found that the trustee gave timely notice to the DSO creditors as required by 11 U.S.C. § 704(c)(1)(A). The trustee also filed a separate notice that he intended to liquidate the home in order to pay the DSO creditors. The trustee asserted that he had a right to go through with the liquidation under 11 U.S.C. §§ 522(a)(1)(C), (c), and 507(a)(1). The court held that 11 U.S.C. § 522(c)(1), as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, at most, gave DSO creditors the right to seek liquidation of otherwise exempt property to pay their claims. However, the trustee did not have authority to exercise that right on behalf of the DSO creditors.

***In re Duggan**, 2007 Bankr. LEXIS 2750 (Bankr. M.D. Fla. August 15, 2007) (Jennemann, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:522.02**

§ 522(f)(1)(A) Exemptions; Liens Impairing Exempt Property; Avoidance; Judicial Liens.

0907-082 **Debtors' homestead exemption did not extend to value of fraudulently obtained funds used to purchase residence.** (*Bankr. E.D. Tex.)*

PROCEDURAL POSTURE: Creditors obtained a judgment which created a judicial lien against bankruptcy debtors' home, based on the debtors' use of funds fraudulently obtained from the creditors as partial payment for the home. The debtors moved to avoid the creditors' judicial lien, the creditors objected to the debtors' claimed exemption in the home as a homestead, and the creditors moved for relief from the stay or for adequate protection.

OVERVIEW: The debtors contended that the creditors' lien impaired their homestead exemption and thus was avoidable under 11 U.S.C. §522(f)(1)(A). The creditors argued that the bankruptcy court was precluded under the *Rooker-Feldman* doctrine from setting aside the state judicial lien. The bankruptcy

court first held that the *Rooker-Feldman* doctrine did not apply since a determination of whether the lien was avoidable in bankruptcy did not constitute a review of the merits of the state-court judgment. Further, the debtors' use of the fraudulently obtained funds to pay a portion of the price for their home created an equitable interest in the home in the creditors, and thus the debtors' homestead exemption did not extend to the creditors' interest which was not property of the debtors' estate. However, the exemption applied, and the lien was avoidable, to the extent that the judgment included attorney fees and costs which were not part of the fraudulently obtained funds. Also, the creditors failed to show that the debtors lacked equity in the home to warrant relief from the stay to pursue foreclosure, but the debtors' failure to make any payment to the creditor warranted adequate protection.

In re Huie, *2007 Bankr. LEXIS 2744 (Bankr. E.D. Tex. August 8, 2007) (Rhoades, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:522.11**

§ 523(a)(4) Exceptions to Discharge; Types of Debt Excepted; Fiduciary Fraud, Embezzlement, or Larceny.

0907-083 **Debtor's misuse of Perishable Agrigultural Commodities Act trust funds resulted in nondischargeable debt.** (*Bankr. M.D.N.C.)*

PROCEDURAL POSTURE: Defendant chapter 7 debtor filed motions for summary judgment in plaintiff creditors' actions, which sought a declaration that the debts owed to the creditors under the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. §§ 499a *et seq*., were nondischargeable pursuant to 11 U.S.C. § 523(a)(4).

OVERVIEW: The debtor was the owner and operator of a company that was a supplier of produce to the federal government. The company was a "dealer" as defined in PACA and subject to the provisions of PACA. The company borrowed a significant amount of money from the debtor's husband. The company was later barred from bidding on future contracts with the government after it did not perform well under its existing contracts. The debtor received a substantial amount of funds due on one of its receivables and used the funds to pay the debt owed to the debtor's husband. The creditors shipped produce to the company and were not paid for the shipments. In finding the debts owed to the creditors to be nondischargeable, the court held that the trust imposed by PACA on the company's assets satisfied the fiduciary capacity prong of section 523(a)(4). The court also held that the company's use of PACA trust assets to pay the debtor's husband was a defalcation within the meaning of section 523(a)(4). The court further held that the debts owed to the creditors were nondischargeable in the debtor's personal bankruptcy because the debtor owned, controlled, and managed the day-to-day affairs of the company.

KGB Int'l, Inc. v. Watford (In re Watford), *2007 Bankr. LEXIS 2707 (Bankr. M.D.N.C. August 9, 2007) (Waldrep, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.10**

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

0907-084 **Judgment debt based on employer debtor's failure to apply ERISA deductions to employee's health insurance premiums was nondischargeable.** (*Bankr. M.D.N.C.)*

PROCEDURAL POSTURE: Plaintiff judgment creditor brought an adversary proceeding against defendant bankruptcy debtor, seeking a determination that a default judgment debt for the creditor's medical expenses, based on the debtor's failure to maintain health insurance, was nondischargeable under 11 U.S.C. § 523(a)(4) and (6) for fiduciary defalcation and willful and malicious injury. The debtor moved to dismiss the complaint.

OVERVIEW: The creditor contended that the debtor, as the creditor's former employer, violated fiduciary duties under the Employee Retirement Income Security Act of 1975 ("ERISA"), 29 U.S.C. §§ 1001 *et seq*., by failing to apply amounts deducted from the creditor's pay to health insurance premiums and failing to provide requested health insurance coverage after the creditor was laid off. The bankruptcy court first held that the allegation of the debtor's fiduciary status under ERISA was sufficient to support fiduciary status for purposes of nondischargeability of the judgment debt, and the debtor's alleged misconduct in failing to provide and maintain the creditor's health insurance sufficiently alleged fiduciary defalcation. However, the creditor's allegation that the debtor acted willfully was insufficient to

show a willful and malicious injury in the absence of any allegation that the actual injury to the creditor was deliberate or intentional.

Shepard v. O'Quinn (In re O'Quinn), *2007 Bankr. LEXIS 2706 (Bankr. M.D.N.C. August 9, 2007) (Waldrep, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.12**

§ 524(c)(3) Effect of Discharge; Reaffirmation Agreements; Filing and Affidavit of Debtor's Attorney.

0907-085 **Reaffirmation of loan secured by motorcycle denied as not in debtor's best interest.** (*N.D. Iowa)*

PROCEDURAL POSTURE: A debtor filed a reaffirmation agreement with a creditor in order to retain a motorcycle, and the court held a hearing in order to evaluate the reasonableness of the reaffirmation.

OVERVIEW: At the time the debtor filed his chapter 7 bankruptcy petition, he owned an unencumbered vehicle that he claimed as exempt and a pickup truck with a modest loan against it. The court concluded that the motorcycle was a luxury and not a necessity. Although it was economical to operate, the debtor could not use it for reliable transportation for a significant part of the year because of inclement weather. The debtor was seeking to reaffirm a debt that exceeded the value of the collateral, and the debt was encumbered by an interest rate that was higher than normal on vehicle loans. He had options for transportation other than the motorcycle, and he could go to the marketplace and purchase a reliable automobile for substantially less than the amount he was paying for the motorcycle. Thus, the court concluded that it was not in the debtor's best interest to allow reaffirmation of the obligation.

In re Miller, *2007 Bankr. LEXIS 2752 (N.D. Iowa August 20, 2007) (Kilburg, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:524.04**

§ 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.

0907-086 **Above-median debtor could take mortgage-rent expense on Form B22C despite being rent-free.** (*Bankr. S.D. Fla.)*

PROCEDURAL POSTURE: After debtor deducted the "Local Standard" amount established by the IRS on account of mortgage/rent expense and referenced in 11 U.S.C. § 707(b)(2)(A)(ii)(I), the trustee objected to confirmation on the ground that no deduction was properly taken because debtor was living rent-free. At issue was the proper reading of section 707 as enacted in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").

OVERVIEW: Debtor, an above median-income earner, deducted on Official Form B22C the sum listed in the IRS's Local Standards for mortgage/rent expense even though he had no such expense because he was living in his grandmother's home. The trustee objected, arguing that such a deduction was permitted only where a debtor actually incurred the expense at issue. The court overruled the objection. Noting the deep split of authority on the issue of "actual" versus "applicable" reflected in rulings pertaining to a parallel issue concerning automobile expenses, the court agreed with debtor that the plain meaning of the language in section 707(b)(2)(A)(ii)(I) permitted the deduction without regard to whether debtor actually incurred the expense. It rejected the trustee's contrary position, pointing to the fact that section 707 did not incorporate tax law nor call for the use of the Internal Revenue Manual. Moreover, the authorities on which the trustee relied tended to define the word "applicable" as meaning the same as "actual," which the court considered to be incorrect given Congress' use of the two distinct words. It also concluded that its position was consistent with BAPCPA's legislative history.

In re Morgan, *2007 Bankr. LEXIS 2676 (Bankr. S.D. Fla. August 8, 2007) (Cristol, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[2][a]**

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

0907-087 **Debtor could bifurcate claim partially secured by double wide motor home not attached to real property.** (*Bankr. N.D. Ala.)*

PROCEDURAL POSTURE: Defendant, a chapter 7 debtor, filed a motion pursuant to Fed. R. Civ. P. 60(b)(1), (2) and (5), as incorporated by Fed. R. Bankr. P. 9024, to vacate an order entering a default judgment finding a debt owed by him to be nondischargeable per 11 U.S.C. § 523(a)(2) on a claim that the judgment was void by reason of plaintiff creditor's failure to obtain service, on defendant, of the summons, complaint, and pretrial order.

OVERVIEW: When plaintiff moved for a default judgment on his complaint for nondischargeability, he attached a certification of service asserting that service on defendant had been obtained. On the strength thereof, the court apparently granted his motion. Defendant, who was then incarcerated, filed a motion to vacate the ensuing default judgment pursuant to Fed. R. Civ. P. 60(b)(1), (2) and (5), as incorporated into bankruptcy practice by Fed. R. Bankr. P. 9024. In so moving, defendant submitted his own affidavit to establish that he had never received the summons and complaint either by regular or by certified mail. The court set the default judgment aside for improper service under Fed. R. Civ. P. 60(b)(4), ruling that defendant's affidavit constituted evidence sufficient to rebut the presumption that the summons and complaint had been received by him. In addition to setting the default aside, the court ordered defendant to answer the complaint without 30 days. So as to avoid similar issues in the future, the court also ordered that all future pleadings were to be served on defendant at both his normal residential address as well as the facility in which he was then incarcerated.

In re Manning*, 2007 Bankr. LEXIS 2695 (Bankr. N.D. Ala. August 2, 2007) (Stilson, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1322.06**

§ 1322(c)(1) Contents of Plan; Debtor's Principal Residence; Foreclosure Sale.

0907-088 **Prepetition foreclosure terminated debtor's right to cure default through plan.** (*N.D. W. Va.)*

PROCEDURAL POSTURE: Debtor had defaulted on his mortgage loan, and a trustee under a deed of trust conducted a foreclosure sale. Two days later, debtor filed for chapter 13 relief. Debtor sought to undo the foreclosure sale and cure his mortgage arrearage in his proposed plan. The Bankruptcy Court for the Northern District of West Virginia ruled debtor was not entitled to cure his mortgage default or to avoid the prepetition foreclosure sale. Debtor appealed.

OVERVIEW: The bankruptcy court determined that the foreclosure sale prior to the date of the filing of the debtor's petition extinguished the debtor's right to cure his default. On appeal, the court held that the bankruptcy court correctly determined that (1) debtor was not entitled to cure his mortgage default; and (2) debtor had no basis upon which to avoid the foreclosure sale. In West Virginia, a foreclosure sale was "complete" when the trustee or auctioneer accepted the bid and executed a memorandum of sale. Even though legal title to the real estate did not pass to the purchaser until the deed was delivered, equitable title passed to the purchaser upon the completion of the contract for sale in the absence of a right of redemption. West Virginia law provided no right to a mortgagor to redeem the property after a foreclosure sale. 11 U.S.C. § 1322(c)(1) afforded no relief to debtor. Section 1322(c)(1) unambiguously designated the foreclosure sale itself as the event that terminated a Chapter 13 debtor's right to cure a mortgage default by filing a plan that called for repayment outside the redemption period. The foreclosure sale itself terminated debtor's property rights.

In re Bardell*, 2007 U.S. Dist. LEXIS 59138 (N.D. W. Va. August 10, 2007) (Bailey, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1322.15**

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

0907-089 **Deduction of ownership expense for payments on "luxury" motorcycle not indicative of bad faith.** (*Bankr. E.D. Wis.)*

PROCEDURAL POSTURE: Before the court for confirmation was debtors' Second Amended Plan, and the trustee's Objection thereto, challenging the deduction of ownership expense on Line 29 of Form B22C for a vehicle that was not secured by a lien, the expense deduction for taxes on Line 30 of Form B22C, and the deduction of secured debt on Line 47 of Form B22C for a motorcycle that was allegedly a luxury item.

OVERVIEW: In their amended Form B22C, debtors were no longer claiming ownership expenses for the second vehicle on Line 29. Therefore, the trustee's objection to this deduction was moot. Regarding Line 30, debtors reduced the tax deduction to $1,554. Debtors' $1,554 deduction was based on an increase in income and withholding since December 2006. This increase in income and taxes rebutted the presumption under *Stimac* that favored using the 2005 tax year. Debtors demonstrated that the taxes paid in the most recent year would have constituted a materially insufficient or inaccurate deduction, due to a change in circumstances, *e.g.*, increase in earnings, fewer deductions. Using the current tax year provided a better picture of the total average monthly expense that they actually incurred. Debtor's could use the $1,554 deduction on line 30. Regarding the motorcycle, although a debtor's use of this deduction for multiple "toys" or luxury items might have raised a question about good faith, deduction of $259, which debtors testified was the actual monthly payment on a motorcycle used to save gas and for transportation to work, did not rise to the level of bad faith.

In re Gehrke, *2007 Bankr. LEXIS 2717 (Bankr. E.D. Wis. August 9, 2007) (Kelly, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08[5]**

BANKRUPTCY RULES (Post-2005 Act)

Rule 9006(b) Time; Enlargement.

0907-090 **Motion for approval of stipulation to allow late proof of claim denied.** (*Bankr. D. Idaho)*

PROCEDURAL POSTURE: Creditor filed a motion to file a late proof of claim. The motion sought the court's approval of a stipulation between the creditor and the debtors providing that the creditor would have the right to file a tardy claim to be treated as a timely one.

OVERVIEW: The creditor failed to show that any of the enumerated conditions in Interim Fed. R. Bankr. P. 3002(c) applied. Under Interim Fed. R. Bankr. P. 3002(c) and Fed. R. Bankr. P. 9006(b), the court had no discretion to enlarge the time in which the creditor could file a timely proof of claim. Although the creditor did not receive the clerk's notice of the bar date because of a bad address listed in the debtors' schedules and mailing matrix, the creditor had actual knowledge of the bankruptcy. The creditor admitted that it learned of the bankruptcy filing from the debtor's counsel a full 82 days prior to the claims bar date, and followed its usual procedure to retain counsel to represent it in the case. In addition, the creditor's agent had two conversations with the chapter 13 trustee prior to the claims bar date. While the creditor apparently had some difficulty retaining counsel, such was not a proper basis upon which to allow an untimely claim.

In re Moniz, *2007 Bankr. LEXIS 2602 (Bankr. D. Idaho August 2, 2007) (Pappas, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 10:9006.06**

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

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

0907-091 **Debtor's brother's attorney sanctioned for failure to turn over funds to trustee as required by settlement.** (*Bankr. D. Ariz.)*

PROCEDURAL POSTURE: A debtor filed a petition under chapter 13, and the case was subsequently converted to one under chapter 7. A bankruptcy trustee was appointed, and he sought approval of an agreement the debtor entered to settle a state court action he filed against his brother. After the court approved the agreement, the trustee filed a motion to set aside the agreement and for sanctions against the brother's attorney.

OVERVIEW: The debtor's assets included a pending action in state court involving a dispute between the debtor, as plaintiff, and his brother, as defendant and counter-claimant, over real property. A trustee was appointed to manage the bankruptcy estate, and he negotiated an agreement to settle the state court action which required the debtor to sign a quit claim deed in favor of his brother in exchange for $5,000. The bankruptcy court approved the agreement and ordered the brother to pay $5,000 to the trustee. Although the brother paid $5,000 to his attorney, the attorney held that money in his trust account and did not transfer the funds to the trustee. Four months after the court issued its order, the parties appeared before the bankruptcy court and the court learned that the brother's attorney had not paid the trustee. The court found that the brother's attorney willfully disobeyed its order to gain a tactical advantage for his client in the state court action, and that his conduct was contemptuous, unprofessional, and unethical, and it held him in civil contempt and ordered him to pay $2,500 to the clerk of the court.

In re Engram*, 2007 Bankr. LEXIS 2600 (Bankr. D. Ariz. August 1, 2007) (Marlar, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:105.05**

§ 362(b)(1) Automatic Stay; Exceptions; Criminal Proceedings.

0907-092 **Bankruptcy court erred in enjoining criminal case against debtor pursuant to stay.** (*S.D. Ohio)*

PROCEDURAL POSTURE: Defendant bank filed a motion for summary judgment against plaintiff chapter 7 debtor in the debtor's adversary proceeding filed in bankruptcy court for claimed violations of the automatic stay under 11 U.S.C. § 362(b)(1) and for intentional infliction of emotional distress. The third count sought injunctive relief against defendants State of Ohio and the county prosecutor.

OVERVIEW: The bankruptcy court issued a preliminary injunction against the State of Ohio and the prosecutor, enjoining further prosecution of a criminal case pending against debtor in the county court of common pleas, in which debtor was charged with two felony counts, theft by deception under Ohio Rev. Code Ann. § 2913.02 and passing bad checks under Ohio Rev. Code Ann. § 2913.11. A detective and the grand jury prosecutor both filed affidavits averring that they had not sought criminal charges in order to collect a debt or benefit the bank but based on their exercise of independent judgment. Nonetheless, the bankruptcy court found that the criminal case was initiated for the purpose of collecting a debt and therefore was subject to the automatic bankruptcy stay prohibiting action against the debtor upon the filing his bankruptcy petition. On review, the court disagreed. The plain language of 11 U.S.C. § 362(b)(1) stated that the automatic stay did not apply to the commencement of a criminal action against a debtor, regardless of the prosecutor's good or bad faith. Public policies such as federalism and grand jury secrecy militated against grafting a bad faith exception onto section 362(b)(1).

Dovell v. The Guernsey Bank*, 2007 U.S. Dist. LEXIS 58312 (S.D. Ohio August 9, 2007) (Sargus, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.05[1]**

§ 365(f) Executory Contracts and Unexpired Leases; Assignment.

0907-093 **Assumption and assignement of executory contract denied where proposed assignee could not give adequate assurance of performance of material terms.** (*3d Cir.)*

PROCEDURAL POSTURE: Appellants, grocers, appealed from the order of the District Court for the District of Delaware which affirmed the bankruptcy court's denial of a motion for assumption and assignment of an executory contract in favor of nondebtor contracting party. Debtor was a wholesale supplier of grocery products to supermarkets. The case implicated 11 U.S.C. § 365.

OVERVIEW: The bankruptcy court determined that the proposed assignee, the grocers, could not provide adequate assurance of future performance because an essential term of the contract at issue could not be fulfilled. The instant court had to decide the question of whether a term relating to the use of a specific facility was material and economically significant to a contract and, if it was, whether the grocers's inability to fulfill the term prevented the assumption and assignment of that contract under 11 U.S.C. § 365(f). The court held that "supply from the Tulsa facility" was both a material and an economically significant term of the contract, and the grocers, by their own actions, could not give adequate assurance of performance. The grocers claimed that to require shipment from the Tulsa facility was to burden an assignee with a heavy economic obligation, thus constituting a de facto anti-assignment provision. Section 365(f) required a debtor to assume a contract subject to the benefits and burdens thereunder. Applying this precept to the determination that "supply from the Tulsa facility" was a material term of the contract, the appellate court rejected the grocers's argument.

In re Fleming Cos.*, 2007 U.S. App. LEXIS 19927 (3d Cir. August 22, 2007) (Chagres, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:365.08**

§ 502 Allowance of Claims or Interests.

0907-094 **Estimation of trade secrets damaged claim appropriate where retrial of issues was likely to cause years of delay.** (*Bankr. S.D.N.Y.)*

PROCEDURAL POSTURE: Before the court, *inter alia*, was debtors' motion to estimate proof of claim number 55 (the Trade Secrets Damages Claim), filed by a claimant pursuant to 11 U.S.C. § 502(b) and (c), and Fed. R. Bankr. P. 3007. Also pending was a motion to expunge proof of claim numbers 54 (the Interest Claim) and 56 (the Legal Fees Claim) filed by the claimant under 11 U.S.C. § 502(b) and Fed. R. Bankr. P. 3007.

OVERVIEW: 11 U.S.C. § 502(c) provided that there shall be estimated for purpose of allowance under that section any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case. In order to avoid the purported delay that would have resulted if debtors were required to retry the trade secrets litigation in the Michigan Court and await the final outcome of the litigation, debtors sought to have the court estimate the Trade Secrets Damages Claim. The court stated that the litigation in the Sixth Circuit had already consumed seven years and following the reversal by the Circuit Court, the litigation was now in a position that in the vernacular would be deemed, "a do over." As both sides made clear their intention to appeal any adverse determination, anywhere, adding years of delay to the issue determination, this was clearly a situation contemplated by Congress for the implementation of section 502(c). Among other matters, because the claimant's judgment had been vacated, there was no longer a valid judgment on which interest could accrue, thereby rendering the Interest Claim void.

In re Lionel LLC*, 2007 Bankr. LEXIS 2652 (Bankr. S.D.N.Y. August 3, 2007) (Lifland, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:502.01**

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

0907-095 **Debt based on fraudulent misrepresentation regarding boundaries of real estate was dischargeable due to buyer's failure to make reasonable inquiry.** (*Bankr. C.D. Ill.)*

PROCEDURAL POSTURE: The case was before the court on the motion of defendant debtor husband for summary judgment on a complaint filed by plaintiff land purchasers. The complaint sought to except from discharge, under 11 U.S.C. § 523(a)(2)(A), a debt allegedly owed to them by debtor on the grounds that he fraudulently induced them to purchase a 15-acre tract of real estate, *p*, made fraudulent misrepresentations regarding the boundary lines of the property.

OVERVIEW: The court could not be sure of what the facts were regarding the parties' conversations and could not say that there were no material undisputed facts regarding what representations were made by debtor to plaintiffs. Regarding intent, the court could not infer fraudulent intent, or the lack thereof, from the paper record before it. This was particularly true when it was unsure of what was said that may have constituted the fraudulent misrepresentation. Debtor's case for summary judgment was much stronger on the issue of justifiable reliance. Plaintiffs had no basis for blindly accepting debtor's ambiguous description of the boundary lines without even a cursory examination of the surveyor stakes or survey plat. If the boundaries were as important to them as they now alleged, debtor's repeated statements that he was unsure of what he owned should certainly have triggered some further inquiry. Plaintiffs thought they were purchasing 15 acres and did purchase 15 acres. That they did not buy the exact 15 acres that they thought they were buying could not be blamed on debtor. Their self-professed reliance on debtor's statements about the location of the boundaries was not justifiable.

Johnston v. Campbell (In re Campbell), *2007 Bankr. LEXIS 2591 (Bankr. C.D. Ill. August 8, 2007) (Gorman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.08[1]**

§ 523(a)(3)(A) Exceptions to Discharge; Types of Debt Excepted; Debts Not Duly Listed or Scheduled; Preventing Timely Filing of Proof of Claim.

0907-096 **Entire unscheduled debt, including deficiency, was nondischargeable.** (*Bankr. D. Mont.)*

PROCEDURAL POSTURE: Plaintiff creditor filed an adversary complaint against defendant chapter 7 debtor, seeking to have debt owed it by the debtor excepted from discharge pursuant to 11 U.S.C. § 523(a)(3)(A).

OVERVIEW: The debtor failed to list the debt owed to the creditor on her schedules. The debtor claimed that the creditor had knowledge of her bankruptcy prior to the expiration of the claims bar date. The court held that insufficient credible evidence existed in the record to convince it that the creditor had any notice or knowledge of the debtor's actual bankruptcy filing until after the claims bar date had expired, and until after it was too late for the creditor to share in the distribution of nonexempt assets. The debtor also argued that, if the court determined that the creditor's obligation should be excepted from discharge, such finding should be limited solely to the *pro rata* share that the creditor would have been entitled to receive had it timely filed its proof of claim. The court held that the entire deficiency amounts owed by the debtor to the creditor on the unlisted debts had to be excepted from the debtor's discharge because, if Congress intended to allow for the discharge of only a *pro rata* portion of unlisted or unscheduled obligations, Congress could have easily so provided.

Mountain West Fed. Credit Union v. Stradinger (In re Stradinger), *2007 Bankr. LEXIS 2716 (Bankr. D. Mont. August 9, 2007) (Kirscher, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.09[3]**

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

0907-097 **Student loan guarantor did not operate program funded by nonprofit institution and could not seek to except debtor's loan from discharge.** (*Bankr. D. Mass.)*

PROCEDURAL POSTURE: Plaintiff debtor filed a complaint in her underlying chapter 7 case, seeking a discharge of several student loans on an undue hardship basis, thereby commencing this adversary proceeding against defendant, a guarantor of one of the loans, who paid on debtor's default and eventually became a judgment creditor. Pending were the parties' cross-motions for summary judgment.

OVERVIEW: 11 U.S.C. § 523(a)(8) (amended 2005) excepted certain student loans from discharge absent undue hardship. At issue was whether the loan was one made under a program funded in whole or in part by a nonprofit institution. For summary judgment, the matter reduced to whether the creditor had adduced evidence that a nonprofit institution funded the student loan program under which the loan was made. This, in turn, required consideration of the meaning of "program" and "funded" as employed in section 523(a)(8) and as applied. The court determined that the giving of the guaranty did not constitute the program funding contemplated by section 523(a)(8) on account of the loan. Next, by any reasonably formulated understanding of the term "program," the marketing service company through which the loan was obtained (the loan was made by a bank) adduced evidence not that it operated a student loan program but, rather, that it provided services to those, like the bank, who did. Overall, the creditor failed to establish an essential element of its case, namely, that the loan was made under a program funded in whole or in part by a nonprofit institution. The loan was not excepted from discharge.

Taratuska v. Educational Res. Inst., Inc. (In re Taratuska)*, 2007 Bankr. LEXIS 2720 (Bankr. D. Mass. August 16, 2007) (Somma, B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 4:523.14**

0907-098 **Debtor suffering from severe bipolar disorder granted undue hardship discharge of student loan debt.** (*Bankr. S.D.N.Y.)*

PROCEDURAL POSTURE: *Pro se* bankruptcy debtor brought an adversary proceeding against creditors seeking a determination that student loan debt to the creditors was dischargeable in the debtor's bankruptcy based on undue hardship under 11 U.S.C. § 523(a)(8).

OVERVIEW: The debtor suffered from bipolar disorder among other conditions which resulted in periods of institutionalization, attempted suicides, and intermittent employment. The bankruptcy court held that the debtor established undue hardship if the debtor was required to repay the student loans, and thus discharge of the student loan debt was warranted. The debtor's monthly expenses were reasonable and, regardless of any reduction of discretionary expenses, the debtor's substantial medical and other expenses left no surplus for student loan repayment, even with the financial assistance of the debtor's parents. Further, the debtor credibly testified concerning the debilitating nature of his bipolar disease including his suicide attempts, hospitalizations, and the many medications he took to control his condition, and it was reasonable to project that the debtor's health problems would affect his future employment efforts, despite periods of normalcy. Also, there was no showing that the debtor did not make good faith repayment efforts, since the creditors did not inform the debtor that partial payments would be accepted and the debtor was financially unable to perform a repayment plan.

Jackson v. Education Resources Inst. (In re Jackson)*, 2007 Bankr. LEXIS 2713 (Bankr. S.D.N.Y. August 9, 2007) (Beatty, B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 4:523.14**

§ 544(b)(1) Trustee as Lien Creditor and as Successor to Certain Creditors and Purchasers; Extent of Trustee's Avoidance Powers; Trustee's Avoidance Powers as Unsecured Creditor.

0907-099 **Failure to exercise option to purchase did not qualify as avoidable transfer.** (*Bankr. N.D. Ill.)*

PROCEDURAL POSTURE: Plaintiff debtor sought recovery from defendant property companies in a ten count complaint relating to actions concerning certain real property known as the "adjacent properties" and an option for debtor to purchase those properties from one of the defendants. The matter was pending decision following trial.

OVERVIEW: In count I, debtor sought, relying on 11 U.S.C. §§ 544(b)(1) and 550, to avoid a "transfer" of property it alleged occurred when an option expired without having been exercised. Although the court recognized that the definition of "transfer" in both the Bankruptcy Code and the Illinois Uniform Fraudulent Transfer Act was very broad, it concluded as a matter of law that it was not so broad as to encompass debtor's failure to exercise the option. Next, because a finding of insolvency was a necessary element in each of Counts III (seeking to recover the rent and other payments as fraudulent transfers under state law), XII (seeking to recover the rental payments made under the lease within one year of filing as fraudulent transfers pursuant to state law), and V (seeking to recover the same payments as count XII, but as preferences under 11 U.S.C. § 547), and because insolvency was not proved, those counts failed. Among other matters, defendants prevailed as to counts II, IV (fraudulent transfers – actual fraud) because the transfers were not made with intent to hinder, delay, or defraud any creditor of debtor, and on Count VI (disallowance of claims pursuant to 11 U.S.C. § 502(d)).

Edgewater Med. Ctr. v. Edgewater Prop. Co. (In re Edgewater Med. Ctr.), *2007 Bankr. LEXIS 2696 (Bankr. N.D. Ill. August 15, 2007) (Black, B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 5:544.09**

§ 548(a)(1)(A) Fraudulent Transfers and Obligations; Elements of Fraudulent Transfers; Avoidable Transfers; Actual Intent to Hinder, Delay, or Defraud.

0907-100 **De facto merger occurred where corporation signed letter of intent to acquire debtor so that transfers to corporation were avoidable.** (*Bankr. M.D. Fla.)*

PROCEDURAL POSTURE: Plaintiff chapter 7 trustee moved for partial summary judgment on certain of its claims against defendants, a corporation and its principals, seeking to recover transfers made to the corporation as fraudulent under 11 U.S.C. § 548(a)(1)(A) and (B), seeking to hold the principals personally liable for the improper transfers, and alleging that the debtor incurred damages as a result of a de facto merger or a joint venture with the corporation.

OVERVIEW: The corporation offered to either acquire the debtor or merge the two companies into one. After signing an agreement of intent to acquire the debtor, the corporation assumed control of the debtor's operations. All of the money received by the debtor was wired to the corporation's bank accounts. The corporation abandoned its relationship with the debtor and a final agreement for a acquisition/merger was never signed. The court held that a de facto merger between the debtor and the corporation had occurred, and that, as a result, the corporation was financially responsible for paying all allowed unsecured and priority claims filed in the debtor's bankruptcy case. The court also held that the trustee could avoid the transfers to the corporation as fraudulent transfers under 11 U.S.C. § 548(a)(1)(A) because the transfers occurred within one year prior to the debtor's bankruptcy petition for which the debtor received no consideration and which occurred at a time when the debtor was insolvent. The court also held that the principals were individually liable for the debtor's obligations as a result of breaching fiduciary duties they owed to the debtor by virtue of the de facto merger.

Fransen v. Nicassio Corp. (In re Metro Sewer Servs.), *2007 Bankr. LEXIS 2735 (Bankr. M.D. Fla. August 10, 2007) (Jennemann, B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 5:548.04**

§ 548(a)(1)(B) Fraudulent Transfers and Obligations; Elements of Fraudulent Transfers; Avoidable Transfers; Transfers Presumed Fraudulent.

0907-101 **Collateralization of antecedent debt conferred new reasonably equivalent value upon debtor for transfer of interest in property.** (*Bankr. D. Ariz.)*

PROCEDURAL POSTURE: Defendant, a secured creditor of chapter 7 debtor, filed a motion for summary judgment in an action brought by plaintiff chapter 7 trustee, alleging that the creditor's late filing of UCC-1 Financing Statements constituted a preference or a fraudulent conveyance that should be avoided and recovered for the benefit of the estate pursuant to 11 U.S.C. §§ 544(b) and 548. The trustee filed a cross motion for summary judgment.

OVERVIEW: The creditor's predecessor in interest made four loans to the debtor, a real estate loan, two equipment loans, and a line of credit. The debtor authorized the predecessor to perfect its security interest in the collateral securing the loans. Pursuant to the credit agreements as to the revolving line of credit and

the equipment loans, the debtor granted the predecessor a security interest in substantially all of the debtor's personal property. The predecessor, however, only recorded a deed of trust related to the real estate loan. After the creditor acquired its interest in the loans, it filed UCC-1 Financing Statements for the other three loans. In granting the creditor's motion for summary judgment, the court held that the collateralization of an antecedent debt conferred value on the debtor. The court held that the debtor received reasonably equivalent value, within the meaning of 11 U.S.C. § 548(a)(1)(B)(ii)(I), in exchange for its transfer of an interest in its property to the creditor because the amount of the three loans secured by the debtor's personal property equaled or exceeded the value of the debtor's personal property.

Reaves v. Comerica Bank-California (In re GTI Capital Holdings)*, 2007 Bankr. LEXIS 2649 (Bankr. D. Ariz. August 2, 2007) (Curley, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:548.05**

§ 727(a)(8) Discharge; Grounds for Denial; Previous Chapter 11 Discharge within Six Years.

0907-102 **Intervening chapter 13 filing did not equitably toll six-year waiting period for filing second chapter 7 case.** (*4th Cir.)*

PROCEDURAL POSTURE: Appellant creditor sought review of a judgment of the District Court for the District of Maryland affirming a bankruptcy court order granting summary judgment to appellee debtor in an adversary proceeding that the creditor commenced after the debtor filed a chapter 7 petition. The district court held that 11 U.S.C. § 727(a)(8) did not provide grounds for denying discharge because equitable tolling did not apply to section 727(a)(8).

OVERVIEW: The debtor filed the instant chapter 7 petition more than seven years after she filed a prior chapter 7 petition that resulted in discharge. The creditor argued that section 727(a)(8)'s six-year waiting period was equitably tolled during the debtor's intervening chapter 13 proceedings. If the waiting period were tolled, the debtor would not be entitled to obtain a second discharge under section 727(a)(8), which required the debtor to wait six years before initiating a subsequent chapter 7 case. The court held that equitable tolling did not apply because section 727(a)(8) did not impose a limitations period. Section 727(a)(8) was not a statute of limitations because it did not prescribe a period within which a certain right might be enforced by the creditor, the six-year period did not commence when the creditor had a cause of action, and section 727(a)(8) did not serve the purpose of eliminating stale claims. Contrary to the creditor's contention that failing to toll section 727(a)(8)'s period left a loophole that allowed debtors to cloak themselves with the automatic stay during the six-year period, the court noted that the bankruptcy court had power to screen out petitions that were filed in bad faith.

Tidewater Fin. Co. v. Williams*, 2007 U.S. App. LEXIS 19474 (4th Cir. August 16, 2007) (Motz, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.11**

§ 727(d)(2) Discharge; Grounds for Revocation; Failure to Report, Deliver or Surrender Property.

0907-103 **Discharge revoked due to debtor's spending of tax refunds contrary to court orders.** (*Bankr. S.D. Iowa)*

PROCEDURAL POSTURE: Plaintiff U.S. trustee filed a proceeding to revoke the discharge of defendant debtor after the debtor failed to deliver the non-exempt portion of certain tax refunds under 11 U.S.C. § 727(d)(2). Pursuant to 11 U.S.C. § 727(d)(3) and (a)(6)(A), the U.S. Trustee also asserted that the debtor willfully disobeyed court orders to attend debtor's examinations.

OVERVIEW: Prior to the entry of a discharge in the debtor's chapter 7 bankruptcy case, he was issued both an oral and a written warning not to spend any tax refunds because a portion of those funds might belong to the bankruptcy estate. However, the debtor spent the refunds without contacting his attorney or the trustee. The court concluded that the trustee met his burden of proof under Fed. R. Bankr. P. 4005 and proved by a preponderance of the evidence that the debtor acquired property of the bankruptcy estate and did not deliver it to the trustee. In light of the warnings given to the debtor, the court found that the debtor knowingly spent the money with the intent to defraud the trustee and the estate. Thus, it revoked the debtor's discharge under 11 U.S.C. § 727(d)(2). However, the court declined to revoke discharge under 11 U.S.C. § 727(d)(3) and (a)(6)(A) for failure to obey a court order to submit to examinations under Fed. R. Bankr. P. 2004. The trustee failed to prove by a preponderance of the evidence that the debtor had knowledge of the court order requiring the examination.

United States Trustee v. Klages (In re Klages), *2007 Bankr. LEXIS 2753 (Bankr. S.D. Iowa August 2, 2007) (Edmonds, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.15[4]**

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

§ 1334(c)(2) Bankruptcy Cases and Proceedings; Abstention; Mandatory Abstention.

0907-104 **State law fraud action was subject to mandatory abstention.** (*N.D. Ga.)*

PROCEDURAL POSTURE: Defendant corporation initiated bankruptcy proceedings. Plaintiff stockholder purchased 1,000 shares of the corporation's stock. A bankruptcy court confirmed the corporation's joint plan of reorganization, which provided that all existing common stock in the corporation was cancelled. The stockholder brought an action in a state court alleging fraud under state law. The corporation removed the case to the court. The stockholder moved to remand.

OVERVIEW: The stockholder argued that the court had to abstain from exercising jurisdiction over the matter pursuant to 28 U.S.C. § 1334. The corporation insisted that this was a "core" proceeding under 28 U.S.C. § 157(b)(2) because the stockholder's complaint sought to review the bankruptcy court's administration of the estate and the alleged equity security holder relationship between the corporation and the stockholder. The court found that the stockholder's claims derived solely from the common law of Georgia. A state law fraud claim alleging misrepresentations concerning a company's financial condition was not a claim that arose only in the context of a bankruptcy proceeding. Had there been no bankruptcy, the action could have proceeded in a state court, and would have been virtually identical to the action despite the corporation's reorganization. Because the action did not invoke a substantive right under the bankruptcy laws, and did not arise only in the context of bankruptcy proceedings, the court concluded that the proceeding was non-core. Under 28 U.S.C. § 1334(c)(2), the court had to remand the action to state court.

Cook v. Kmart Corp., *2007 U.S. Dist. LEXIS 58900 (N.D. Ga. August 10, 2007) (Story, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 1:3.05[2]**

BANKRUPTCY RULES (Pre-2005 Act)

Rule 9019 Compromise and Arbitration.

0907-105 **Auction company and successful purchaser lacked standing to seek approval of settlement to which debtor was not a party.** (*Bankr. E.D.N.Y.)*

PROCEDURAL POSTURE: Plaintiff buyer filed an adversary proceeding against defendants, a debtor in bankruptcy and an auction company ("LLC"), seeking a judgment declaring that a purchase and sale agreement was invalid. The buyer and the LLC filed an application under Fed. R. Bankr. P. 9019 for an order approving a settlement agreement. The debtor opposed the application and asked the court to abstain from hearing a cross-complaint the LLC filed.

OVERVIEW: The debtor filed a voluntary petition for relief under chapter 7, and the case was converted to a case under chapter 11. The bankruptcy court authorized the debtor to retain an LLC to sell four properties the debtor owned, and the LLC entered into a purchase and sale agreement with a buyer for one of those properties. The buyer paid a nonrefundable downpayment of $325,000 but did not complete the sale, and it filed an adversary proceeding against the debtor and the LLC to recover its downpayment, alleging misrepresentation. The buyer and the LLC agreed to settle the adversary proceeding, and they asked the court to approve a settlement agreement which allowed the LLC to return $175,000 to the buyer, allowed the LLC to keep $125,000, and allowed payment of $25,000 to the debtor. The debtor filed an objection. The court held that the buyer and the LLC did not have standing to seek a settlement of the buyer's adversary proceeding because the debtor was not a party to that agreement and he opposed it. However, there was no basis under 28 U.S.C. § 1334 for the court to abstain from hearing the cross-complaint the LLC filed against the debtor.

Liani v. Baker (In re Baker), *2007 Bankr. LEXIS 2751 (Bankr. E.D.N.Y. August 16, 2007) (Milton, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 10:9019.01**