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Collier Bankruptcy Case Update

CURRENT BANKRUPTCY CASES ANALYZED

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§ 362(k) Automatic Stay; Remedies for Violation.

1007-106 (**Consumer**) **University violated stay by refusing to provide transcript due to outstanding student loans and was liable for damages due to absence of good faith defense.** (*Bankr. E.D. Pa.)*

PROCEDURAL POSTURE: The debtor filed a motion to hold the creditor, a university, in contempt for violation of the automatic stay, pursuant to 11 U.S.C. § 362(a)(6). The debtor asserted that the university refused to provide her with a certified transcript because of her unpaid student loan debt that was nondischargeable under 11 U.S.C. § 523(a)(8), and sought an award of damages pursuant to 11 U.S.C. § 362(k).

OVERVIEW: The debtor became delinquent in the repayment of her student loans, and her transcript was placed on "official hold." The university had an official, written policy that student transcripts would not be released if there was a defaulted student loan, without payment or payment arrangement. The university filed a proof of claim in the amount of $59,302.99, to which the debtor had not objected. The claim had thus been allowed, and the chapter 13 plan was confirmed. The debtor conceded that her debt to the university was nondischargeable under 11 U.S.C. § 523(a)(8). However, the court concluded that the automatic stay remained in effect, irrespective of the determination of dischargeability. Following the 2005 amendments to the Bankruptcy Code, the university's defense was no longer legally viable. When the university refused to provide a transcript upon request of a debtor during the pendency of the bankruptcy case, it did not state a "good faith" defense to monetary liability. The court found that the university violated the automatic stay, and entered an order directing it to provide the debtor with a certified copy of her college transcript upon payment of any customary fees.

In re Mu'min*, 2007 Bankr. LEXIS 3214 (Bankr. E.D. Pa. September 25, 2007) (Frank, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.11[3]**

§ 363 Use, Sale, or Lease of Property.

1007-107 (**Commercial**) **Liquidation procedure with shortened notce provision approved given support of unsecured creditors' committee and major secured creditors.** (*Bankr. N.D. Tex.)*

PROCEDURAL POSTURE: The debtors in possession, related retail entities, filed for relief under chapter 11. The debtors filed a motion to approve a bid procedure and process for liquidation of certain assets, pursuant to 11 U.S.C. § 363. Some of the debtors' landlords opposed the motion. The court held a hearing and issued findings and conclusions.

OVERVIEW: The debtors had operated approximately 388 retail stores throughout the United States and Canada. The debtors spent a number of months trying unsuccessfully to attract an investor or a buyer. The debtors then began efforts to liquidate their inventory and the debtors received bids from two liquidation joint ventures. The debtors sought approval of an agreement proposed by one joint venture and approval of sale procedures. The debtors asked for the motion to be heard five days after its filing and mailing, claiming that the sale needed to go forward so that the debtors could obtain cash for continued operations. The court questioned the propriety of the shortened notice, but noted that the unsecured creditors' committee and the two major secured creditors supported the sale. The court would allow any party that claimed that it did not have notice to be heard at the hearing on sale approval scheduled for a later date. The court concluded that management engaged appropriate professionals and conducted an appropriate inquiry so as to maximize the debtors' assets and the motion to allow the sale to go forward should be granted.

In re Bombay Co.*, 2007 Bankr. LEXIS 3218 (Bankr. N.D. Tex. September 26, 2007) (Lynn, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:363.01**

§ 364(d)(1) Obtaining Credit; Secured by Lien with Priority over Existing Lien; Notice and Hearing.

1007-108 (**Commercial**) **Debtor allowed to borrow money on senior and priming lien basis.** (*Bankr. D. Mass.)*

PROCEDURAL POSTURE: Pending was the court's decision on two separate but related motions: one by debtor seeking authorization to borrow money on a senior and priming lien basis under 11 U.S.C. § 364(d)(1) (Borrowing Motion) and the other by a secured claimant seeking adequate protection in connection with that borrowing (Adequate Protection Motion).

OVERVIEW: The subject property was a 19-lot residential real estate development. It was permitted but required construction of an access road to commence, facilitate and engender lot sales. The property was subject to three secured claims: $755,982 by one claimant, $355,009 by a second claimant; and $1,230,031 by a third claimant (who brought the adequate protection motion). These secured claims were in the aggregate sum of $2,314,022. Debtor sought to borrow $2,750,000 in a new loan. The new loan would have, in part, been used to pay off the first claimant's claim and would then have been secured by a lien senior to, and hence priming, the other two liens. The new loan would also have been used, in part, to pay down the second claimant's claim by $300,000, to pay down the third claimant's claim by $200,000, to maintain a $100,000 interest reserve for the third claimant; and for road construction at a cost of $700,000. The aggregate amount of the resulting secured claims consisting of the new loan and the balance of the second and third claimants' claims would have been $3,460,000. After the new loan, the current lien holders would have been fully secured with an equity cushion.

In re 220 Ferry St. LLC*, 2007 Bankr. LEXIS 3257 (Bankr. D. Mass. September 26, 2007) (Somma, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:364.05**

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

1007-109 (**Commercial**) **Severance payments due terminated employees due to prepetition agreement were not entitled to priority.** (*Bankr. S.D. Tex.)*

PROCEDURAL POSTURE: Chapter 11 debtors filed a motion for authority to pay specified benefits to certain terminated employees under 11 U.S.C. § 503(b)(1).

OVERVIEW: The debtor sought to pay severance promised to employees terminated as part of a voluntary prepetition reduction in force. No plan of reorganization was on file. In denying the motion, the court held that severance claims arising under a prepetition agreement were not entitled to postpetition administrative priority status. The court also held that it lacked authority under 11 U.S.C. § 105(a) to permit payment because there were objections to the payments by holders of claims of higher priority. The court further held that it did not believe that payment of severance claims to employees who were already terminated would have sufficient positive effect on current employees to justify payment prior to confirmation. The court held that the claims could be paid later, at confirmation.

In re Scotia Dev., LLC*, 2007 Bankr. LEXIS 3262 (Bankr. S.D. Tex. September 21, 2007) (Schmidt, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:503.06**

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

1007-110 (**Consumer**) **Plan rejected where value of creditor's security interest in business vehicle did not reflect "replacement value."** (*Bankr. D. Mont.)*

PROCEDURAL POSTURE: Debtors filed a petition under chapter 13, an amended plan for repaying their creditors, and a motion seeking valuation of a creditor's security interest in a vehicle they owned. A trustee was appointed to the case, and he filed an objection to confirmation of the debtors' plan.

OVERVIEW: In their motion for valuation of security, the debtors sought to set the amount of the creditor's secured claim on a vehicle they owned at $7,140. The creditor countered that its claim should be allowed as filed in the amount of $12,239.90 because the claim was a purchase money security interest in a vehicle the debtors purchased within 910 days of the date they filed their petition for bankruptcy, and could not be crammed down under 11 U.S.C. § 1325(a) (hanging paragraph referencing paragraph 5). However, the debtors claimed that the hanging paragraph did not apply because they purchased the

vehicle for use in a business. The court analyzed tests other courts used to determine if a vehicle was acquired for business or personal use and found that the debtors purchased the vehicle for use in a business. That said, the court found that the value proposed by the debtors did not meet the definition of "replacement value" under 11 U.S.C. § 506(a) because they used the trade-in value of the vehicle, instead of the retail value, and the court denied confirmation of the debtors' amended plan but gave the debtors ten days to file another amended plan.

***In re Counts**, 2007 Bankr. LEXIS 3070 (Bankr. D. Mont. September 6, 2007) (Kirscher, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:506.03**

§ 506(b) Determination of Secured Status; Allowance of Interest, Fees, Costs and Charges.

1007-111 (**Consumer**) **Objection to plan sustained due to failure to provide for reasonable prepetition arrearages and discount rate of interest owed to creditor.** (*Bankr. D. Kan.)*

PROCEDURAL POSTURE: Creditor filed an objection to confirmation of the debtor's chapter 13 plan. The creditor held the first priority mortgage in the debtor's residence.

OVERVIEW: The creditor objected to the provision under the debtor's plan that proposed to pay zero percent interest on prepetition arrearages. To the extent that the prepetition arrearages constituted interest, the debtor did not have to pay interest on these arrearages and the creditor's objection to this provision was overruled. To the extent that the prepetition arrearages constituted any charge other than prepetition arrearages, then interest would accrue at the discount rate of interest and, to this extent, the creditor's objection was sustained. This did not, however, provide the creditor an unrestrained license to charge pre-confirmation fees and expenses under 11 U.S.C. § 506(b). Also, post-confirmation, fees and expenses charged by the creditor remained subject to review by the bankruptcy court as to reasonableness. Such postpetition fees and expenses were also limited pursuant to 11 U.S.C. § 362(a)(3) and subject to review under the debtor's plan, state law, Fed. R. Bankr. P. 2016(a) and 11 U.S.C. § 105(a).

***In re Andrews**, 2007 Bankr. LEXIS 3290 (Bankr. D. Kan. September 26, 2007) (Berger, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:506.04**

§ 522(b)(3) Exemptions; Choice Between Federal and State Law; Alternative Exemptions.

1007-112 (**Consumer**) **Debtor who recently moved could also claim exemptions of prior domicile state and was not required to make federal exemptions.** (*B.A.P. 9th)*

PROCEDURAL POSTURE: Appellant, the chapter 13 trustee, challenged a final order of the Bankruptcy Court for the District of Montana, that rejected the trustee's challenge to the constitutionality of 11 U.S.C. § 522(b)(3) on uniformity grounds, and overruling the trustee's objection to the debtor's claimed exemptions based on California law, where the case was filed in Montana.

OVERVIEW: The debtor had moved to Montana from California prior to filing his petition. The basis of the trustee's objection was that, under section 522(b)(3), the debtor was not entitled to claim exemptions under Montana law because he had not been domiciled there for the full 730-day (2-year) period prior to filing his bankruptcy petition; he was therefore required to claim exemptions under California law. The trustee claimed the California exemptions were more liberal than Motana's, which they were in the abstract. The appeals panel pointed out there was little difference in the actual application of California versus Montana exemptions, and the analysis should be based upon the debtor's equity in the exempt assets. Such a debtor need not be required to use the federal exemptions in 11 U.S.C. § 522(d). The trustee also argued that U.S. Const. art. I, § 8, cl. 4 required that Congress enact uniform bankruptcy laws. Even though the different laws of the states may lead to different results in different states, that did not run afoul of the uniformity provision.

***Drummond v. Urban (In re Urban)**, 2007 Bankr. LEXIS 3171 (B.A.P. 9th August 29, 2007) (Hollowell, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:522.10**

§ 525(b) Protection Against Discriminatory Treatment; Discrimination by Private Employer.

1007-113 **Private employer's failure to hire debtor due to past bankruptcy filing was not discriminatory.**
(**Consumer**) (*Bankr. D. Kan.)*

PROCEDURAL POSTURE: Plaintiff debtor filed an adversary proceeding against defendant prospective employers claiming that they had violated the anti-discrimination provisions contained in 11 U.S.C. § 525(b) by refusing to hire her solely on the basis that she had previously filed a bankruptcy petition. Defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b), as incorporated by Fed. R. Bankr. P. 7012.

OVERVIEW: Plaintiff filed an adversary proceeding in which she claimed that defendants had violated section 525(b) by refusing to hire her solely because she had filed a bankruptcy. Defendants moved to dismiss. The court granted dismissal and awarded costs on a finding that defendants were the prevailing party, but it denied a cognate request for an attorney fee award. Rejecting plaintiff's claim that section 525(b) protected against private refusals to hire or terminations of employment based solely on past or present status as a debtor in bankruptcy, the court rejected the position taken by the Bankruptcy Court for the Southern District of New York, which apparently stood alone in ruling that the scope of the limitations imposed on private employers by section 525(b) was coterminous with that imposed on public employers by section 525(a). Specifically, the court concluded that such an interpretation was at odds with the plain language of the statute as written, would improperly require the court to ignore parts thereof, and was otherwise inconsistent with Congressional intent. However, as the case was not filed in bad faith or with an improper motive, attorneys fees were not properly awarded.

Martin v. American Family Mut. Ins. Co. (In re Martin)*, 2007 Bankr. LEXIS 3278 (Bankr. D. Kan. September 28, 2007) (Karlin, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:525.04**

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

1007-114 **Trustee not entitled to turnover of debtor's rental security deposit.** (*Bankr. N.D. Ohio)*
(**Consumer**)

PROCEDURAL POSTURE: A debtor filed a voluntary petition for relief under chapter 7, and plaintiff trustee was appointed to represent the bankruptcy estate. The trustee filed an action against defendant lessor, seeking an order requiring the lessor to turn over a security deposit, pursuant to 11 U.S.C. § 542, which he received from the debtor. The trustee filed a motion for summary judgment.

OVERVIEW: Before he declared bankruptcy, the debtor entered into a residential lease with the lessor, and he gave the lessor a $750 security deposit. When the trustee learned about lease and the security deposit, he filed an action against the lessor, seeking an order requiring the lessor to turn over the security deposit. The court denied the trustee's request. The debtor had not claimed that the funds were exempt, the trustee's right to the security deposit was derived from the debtor's interest in the deposit, pursuant to 11 U.S.C. § 541(a), and the debtor's interest was limited to the right to return of the security deposit when the lease ended. 11 U.S.C. § 542(a) did not trump 11 U.S.C. § 541(a) by providing the trustee with a substantive right for the immediate possession of the security deposit, and although the trustee could have obtained the security deposit by assuming the lease, pursuant to 11 U.S.C. § 365, he had not assumed the lease.

French v. Johnson (In re Coomer)*, 2007 Bankr. LEXIS 3095 (Bankr. N.D. Ohio August 17, 2007) (Speer, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:542.02**

§ 553(a) Setoff; Preservation of Creditor's Right to Offset Mutual Debt.

1007-115 **Administrative priority claim which arose prepetition was subject to setoff.** (*B.A.P. 9th)*
(**Commercial**)

PROCEDURAL POSTURE: Appellee creditor claimed administrative priority under 11 U.S.C. § 503(b)(9) for the value of goods received by appellant bankruptcy debtor, a grocery store chain, within 20 days of the debtor's bankruptcy, and the debtor claimed a right of setoff under 11 U.S.C. § 553(a). The debtor appealed the judgment of the Bankruptcy Court for the Western District of Washington which allowed the administrative claim and denied setoff.

OVERVIEW: The debtor contended that the creditor, the debtor's primary supplier, had a security interest in the debtor's stock in the creditor to secure all indebtedness to the creditor, and that the creditor's claim was ineligible for administrative priority because it was secured. The debtor also argued that the creditor breached agreements and that the debtor was entitled to set off such claims against the creditor's claim. The bankruptcy appellate panel first held that the plain language of 11 U.S.C. § 503(b)(9) allowed administrative priority for the creditor's claim based on 20-day sales regardless of whether the claim was secured or unsecured. Although there was no express statement that the priority applied to secured claims, there was also no express limitation of the priority to unsecured claims. Further, unlike most administrative priority claims, the creditor's claim arose prior to the debtor's bankruptcy and was thus subject to setoff. Moreover, the debtor's failure to advise the creditor of its contemplated bankruptcy was not an equitable basis for denial of setoff, but the debtor had not yet established viable claims to support setoff.

Brown & Cole Stores, LLC v. Associated Grocers, Inc. (In re Brown & Cole Stores, LLC)*, 2007 Bankr. LEXIS 3172 (B.A.P. 9th August 17, 2007) (Montali, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:553.03**

§ 706(d) Conversion; Debtor Must be Eligible.

1007-116 **Voluntary conversion from chapter 7 to chapter 13 vacated due to debtors' bad faith in**
(**Consumer**) **converting nonexempt assets into exempt homestead.** (*Bankr. M.D. Fla.)*

PROCEDURAL POSTURE: The chapter 7 trustee filed an objection to the debtors' purported conversion of their case from a chapter 7 to a chapter 13 claim, asserting that the debtors had acted in bad faith, because they converted nonexempt assets into an alleged exempt homestead when they had debts of at least $50,000. The trustee noted that the Supreme Court's recent ruling in *Marrama v. Citizens Bank of Mass.* was controlling precedent.

OVERVIEW: The debtors filed a voluntary notice of conversion of their case, and the husband debtor testified that he secured new employment and intended to make payments to their creditors. The chapter 7 trustee argued that the debtors' income was not sufficient, stable, or regular enough, to enable them to make payments under a chapter 13 plan, but the court rejected the argument, accepting the debtor's evidence of new employment and regular income. The trustee argued that the debtors converted their case to avoid an upcoming hearing on the objection to whether the purchased property qualified as exempt homestead. The trustee argued that the broad description of the right to convert as absolute failed to give full effect to the express limitation in subsection of 11 U.S.C. § 706(d). The court agreed with the trustee that the debtors' actions were taken in bad faith; if the court determined that the homestead property was not exempt, the debtors' would be required to pay their creditors the present value of $63,349.54, or at least the portion of the homestead determined to be nonexempt under their chapter 13 plan, and not the $5,400 they currently proposed.

In re Mercado*, 2007 Bankr. LEXIS 3248 (Bankr. M.D. Fla. September 24, 2007) (Proctor, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:706.05**

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

1007-117 (**Consumer**) **Court declined to dismiss case for substantial abuse due to anticipated termination of child support and alimony payments.** (*Bankr. N.D. Ohio)*

PROCEDURAL POSTURE: Movant, a U.S. trustee, sought an order pursuant to 11 U.S.C. § 707(b)(1) dismissing a chapter 7 case filed by debtor. At issue was whether debtor's chapter 7 filing was an "abuse" within the meaning of section 707(b)(1) and (b)(3).

OVERVIEW: In connection with her chapter 7, debtor disclosed unsecured priority and nonpriority debt as well as secured claims relating to her residence and her car. She intended to surrender the residence but to reaffirm the debt relating to the car. Her income included wages, child support, and alimony. The trustee claimed that the filing constituted an abuse and that dismissal was warranted. The court denied the motion. While, given anticipated increases in her income resulting from the reduction of debt that surrender of the house would yield, debtor's overall present circumstances were such that she probably would be able to liquidate her unsecured debts in full, the court considered anticipated decreases resulting from the termination of child support and alimony. Though discontinuance of child support was probably offset by reductions in household expenses attributed to her children, termination of alimony would result in a 15% reduction in monthly income with concomitant strain on debtor's finances. The court concluded that because the same would place debtor on a "razor's edge," it was proper to err in favor of debtor and allow the case to proceed.

In re Masella*, 2007 Bankr. LEXIS 3094 (Bankr. N.D. Ohio July 20, 2007) (Speer, 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.

1007-118 (**Consumer**) **Debtor entitled to deduct full IRS transportation expense despite lack of car payments** (*Bankr. D. Md.)*

PROCEDURAL POSTURE: The U.S. Trustee filed a motion to dismiss an above-median income debtor's chapter 7 case pursuant to 11 U.S.C. § 707(b)(2).

OVERVIEW: The trustee argued that the debtor's case was abusive because the debtor was not entitled to deduct the full amount allowed by the IRS Local Transportation Expense Standards for a motor vehicle she owned because it was not encumbered and she had no obligation to make car payments to retain the vehicle. In denying the trustee's motion, the court held that the debtor could claim the deduction specified in the IRS Local Transportation Expense Standards for a motor vehicle she owned that was not encumbered by any debt, pursuant to 11 U.S.C. § 707(b)(2)(A)(ii)(I), because "applicable monthly expense amounts" in section 707(b)(2)(A)(ii)(I) did not refer to the actual expenses, but rather referred to the expense amounts under the IRS National Standards and Local Standards for the geographical area in which the debtor lived.

In re Megginson*, 2007 Bankr. LEXIS 3112 (Bankr. D. Md. September 5, 2007) (Schneider, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[2]**

1007-119 (**Consumer**) **Nondischargeable student loans did not create "special circumstances" that would rebut presumption of abuse.** (*Bankr. N.D. Ohio)*

PROCEDURAL POSTURE: The United States Trustee ("UST") moved to dismiss the debtor's chapter 7 case pursuant to 11 U.S.C. § 707(b)(2) based on the presumption of abuse of the provisions of chapter 7. In what was a matter of first impression for the court, the primary issue was whether the debtors' student loans constituted "special circumstances" to overcome the presumption of abuse in the means test.

OVERVIEW: The presumption of abuse arose because the debtors' current monthly income, as defined in 11 U.S.C. § 101(10A), exceeded the threshold of $10,950 in 11 U.S.C. § 707(b)(2)(A)(i). The debtors failed to meet the requirement in 11 U.S.C. § 707(b)(2)(B)(ii)(II), which required a detailed explanation of the special circumstances that made such expenses or adjustment to income necessary and reasonable. The debtors' provided no explanation about why the student loan payments constituted special circumstances that rebut the presumption of abuse. Further, the court was not persuaded that merely because a debt

was not dischargeable, like the student loans in the instant case, it constituted a special circumstance. If Congress had wanted to make any or all of the exceptions to discharge a special circumstance, it could have chosen to do so. It did not. Finally, the debtors acknowledged that, even after including payment of both of their student loans, they still had disposable income that exceeded the presumptive abuse standard.

***In re Vaccariello**, 2007 Bankr. LEXIS 3181 (Bankr. N.D. Ohio August 22, 2007) (Woods, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[2]**

1007-120 (**Consumer**) **Mortgage payments scheduled within 60 months postpetition could be claimed as expenses regardless of intent to surrender.** (*Bankr. D. Mass.)*

PROCEDURAL POSTURE: Bankruptcy debtors' schedules indicated secured mortgage debt and the debtors included mortgage payments in their current monthly expenses, but the U.S. Trustee asserted that the mortgage payments were not expenses because the debtors intended to surrender the mortgaged property. The trustee moved to dismiss the debtors' case based on a presumption of bankruptcy abuse under 11 U.S.C. § 707(b)(2).

OVERVIEW: Under 11 U.S.C. § 707(b)(2), the debtors were entitled to claim an expense for amounts scheduled as contractually due to secured creditors in each of the 60 months following the date of the debtors' petition. The Trustee argued that, since the debtors intended to surrender the property and would be making no payments, the debtors were not entitled to claim the mortgage payments as expenses and were only entitled to claim the Internal Revenue Service standard mortgage/rent expense. The bankruptcy court held, however, that no presumption of bankruptcy abuse arose since the debtors properly claimed the mortgage payments as expenses and thus had negative disposable income. The mortgage payments were scheduled for payment and were contractually due in the future from the debtors at the time their petition was filed, regardless of whether the debtors surrendered the property. Further, while the intent of the presumption of abuse might be to identify debtors who were able to pay their creditors to some extent, it was also the intent of the means test to remove judicial discretion from the determination by establishing a mathematical formula for income and expenses.

***In re Hayes**, 2007 Bankr. LEXIS 3252 (Bankr. D. Mass. September 26, 2007) (Boroff, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[2]**

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

1007-121 (**Consumer**) **Case ordered converted or dismissed for substantial abuse where 82% of debtors' income went to mortgage and nothing to unsecured creditors.** (*Bankr. D. Neb.)*

PROCEDURAL POSTURE: The matter was before the court following a hearing on the motions to dismiss debtors' cases for abuse pursuant to 11 U.S.C. § 707(b)(3) filed by the U.S. Trustee ("UST").

OVERVIEW: Even where the presumption of abuse did not arise under 11 U.S.C. § 707(b)(2), the court must was required to determine whether the granting of chapter 7 relief in the two cases would have constituted an abuse. Section 707(b)(3) provided the standard for such consideration, namely bad faith or the totality of the circumstances. The U.S. Trustee was proceeding under the totality of the circumstances. Debtors' mortgage payments totalled $5,134 per month. The loans required interest-only payments. Debtors' mortgage payments constituted approximately 82 percent of their combined income. To summarize the U.S. Trustee's argument, it was an abuse of the provisions of the Bankruptcy Code to allow debtors to spend more than 82 percent of their income on a brand-new luxury home while paying nothing to unsecured creditors. The court noted that the cases were precipitated by payment problems related to contractors who provided work on debtors' residence. Debtors could have substantially reduced their expenses, particularly their housing expense, without being deprived of necessities. Under the totality of the circumstances, the cases appeared to be an abuse of the provisions of chapter 7.

***In re Nissen**, 2007 Bankr. LEXIS 3190 (Bankr. D. Neb. August 21, 2007) (Saladino, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[3]**

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

1007-122 (**Consumer**) **Trustee could proceed with bad faith dismissal regardless of earlier determination that there was no presumption of abuse.** (*Bankr. W.D. Ark.)*

PROCEDURAL POSTURE: Movant, the U.S. Trustee ("UST"), sought dismissal of debtor's case per 11 U.S.C. § 707(b)(3). The motion was opposed by creditor, a bank, and by debtor. At issue was whether the UST was required to file a statement within 10 days of the first meeting of creditors stating whether the case was presumed to be an abuse under section 707(b), as required by 11 U.S.C. § 704(b)(1), prior to filing a motion to dismiss the case under 11 U.S.C. § 707(b)(3).

OVERVIEW: Ten days after the first meeting of creditors, the UST filed an initial statement stating that she could not determine whether debtor's case would be presumed to be an abuse per 11 U.S.C. § 707(b). A month later, the UST moved to dismiss for bad faith and abuse per section 707(b)(3)(A) and (B). However, the UST then filed a statement that debtor's case was not presumed to be an abuse per section 707(b)(2). When briefs contra were filed, the UST argued that the statement required by 11 U.S.C. § 704(b)(1) only applied where there was an 11 U.S.C. § 707(b)(2) presumption of abuse and that as her dismissal motion was filed per section 707(b)(3), the filing of such a statement was not a prerequisite. The court agreed, overruled objections to the motion, and held that it was timely. After reviewing section 707(b)(1) and 11 U.S.C. § 704(b)(1), the court held that the 10-day statement under the latter statute was superfluous to a filing under 11 U.S.C. § 707(b)(3) for bases other than a presumed abuse. That meant that the UST still had the right to proceed under section 707(b)(3) where, as here, a debtor had represented that a presumption did not arise. It thereupon overruled the objections to the motion.

In re Byrne*, 2007 Bankr. LEXIS 3268 (Bankr. W.D. Ark. September 24, 2007) (Barry, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[3]**

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

1007-123 (**Commercial**) **Case converted to chapter 7 due to debtor's continuing losses and mismanagement.** (*Bankr. M.D. Pa.)*

PROCEDURAL POSTURE: Movants, creditors and former corporate officials and other creditors of respondent bankruptcy debtor-in-possession, asserted that the debtor was suffering continuing losses and was subject to gross mismanagement. The movants filed a motion under 11 U.S.C. § 1112(b) to convert for cause the debtor's Chapter 11 reorganization case to a chapter 7 liquidation case.

OVERVIEW: The debtor contended that it had valuable assets consisting of licenses and leases to operate wireless broadband services which the debtor was selling, and that a cash infusion would allow the debtor to reorganize by buying new equipment and serving additional customers. The bankruptcy court held, however, that conversion of the debtor's case to chapter 7 was warranted based on continuing losses and mismanagement, and the absence of unusual circumstances showing that conversion was not in the best interest of creditors. The debtor's monthly operating reports clearly reflected a pattern of declining assets, substantial continuing losses, and a sharp decline in the debtor's cash position, and the debtor's plans for reorganization were based upon optimistic hypothetical projections of undocumented future deals and unidentified future customers. Further, the debtor lacked a focused reorganization management team, consisting of only one director who had full-time outside employment and an acting president with health problems, and current management lacked the time and experience to restructure a business of the debtor's size and complexity.

Nester v. Gateway Access Solutions, Inc. (In re Gateway Access Solutions, Inc.)*, 2007 Bankr. LEXIS 3279 (Bankr. M.D. Pa. September 24, 2007) (Opel, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 7:1112.04**

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

1007-124 (**Consumer**) **Claim secured by mobile home that was not real property under state law was not protected from bifurcation.** (*Bankr. M.D. Ala.)*

PROCEDURAL POSTURE: A creditor filed an objection to confirmation of debtor's chapter 13 plan.

OVERVIEW: The creditor filed a claim in the amount of $17,242, the alleged payoff on a mobile home loan on the date of the petition. Debtor's plan proposed to bifurcate the claim into secured and unsecured components, assigning a value of $7,636 to the mobile home. The creditor contended that debtor's plan impermissibly modified its claim, which was protected from modification under 11 U.S.C. § 1322(b)(2). The parties agreed that the mobile home did not constitute real property under Alabama law. The creditor asserted that the definition of "debtor's principal residence" expanded the reach of § 1322 to prevent modification of a claim secured by a mobile home that retained its character as personal property. The court stated that it had to consider and give meaning to the words "real property" found in section 1322(b)(2). Although federal bankruptcy law determined whether the mobile home constituted "debtor's principle residence," state law determined whether that same mobile home constituted real property. It was important to note that the phrase "debtor's principal residence" modified "real property," not the other way around.

***In re Bartolome**, 2007 Bankr. LEXIS 3263 (Bankr. M.D. Ala. September 21, 2007) (Williams, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1322.06**

§ 1325 Confirmation of Plan.

1007-125 (**Consumer**) **Court could modify Form B22C disposable income calculation based on anticipated changes in financial circumstances.** (*Bankr. W.D. Wis.)*

PROCEDURAL POSTURE: Debtors filed for relief under chapter 13 and submitted a proposed plan. A trustee objected to the plan, challenging the income figure used by the debtors, pursuant to 11 U.S.C. § 1325.

OVERVIEW: The debtor husband worked in a paper mill. During the six-month period prior to filing the bankruptcy petition, the debtor husband was injured and not able to work. The debtors received disability payments, which were substantially less than the normal wages received by the debtor husband. The debtor husband was able to go back to work and receive his regular salary. In their Form B22C, the debtors used the money they were receiving from the disability income to calculate their current monthly income. The trustee objected, contending that the debtors' disposable income should not be calculated by an average that was uncharacteristically low because of a job interruption. The court held that it was not constrained to use the current monthly income figures put forth in the Form B22C when considering the debtors' actual income available for payment into a chapter 13 plan. The disposable income figure calculated on the form can be modified by anticipated changes in financial circumstances in order to arrive at a figure for projected disposable income.

***In re Manci**, 2007 Bankr. LEXIS 3084 (Bankr. W.D. Wis. August 24, 2007) (Utschig, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

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

1007-126 (**Consumer**) **Bankruptcy court improperly denied creditor's deficiency claim secured by motor vehicle.** (*B.A.P. 9th)*

PROCEDURAL POSTURE: Appellee bankruptcy debtor proposed a chapter 13 plan which provided that the debtor's vehicle would be surrendered to appellant creditor secured by the vehicle in full satisfaction of the creditor's claim. The creditor appealed the orders of the Bankruptcy Court for the Western District of Washington which disallowed the creditor's claim and overruled the creditor's objection to the debtor's plan.

OVERVIEW: The debtor contended that the creditor's appeal was moot because the debtor amended her plan to provide that surrender of the vehicle did not fully satisfy the debt to the creditor. The creditor argued that the appeal was not moot and that 11 U.S.C. § 1325(a) (hanging paragraph referencing paragraph 5), which precluded bifurcation of the creditor's claim into secured and unsecured claims

under 11 U.S.C. § 506, did not preclude the creditor's claim for any deficiency after surrender of the vehicle. The bankruptcy appellate panel first held that the appeal was not moot since the plan amendment only resolved the creditor's objection to the plan and did not resolve the creditor's challenge to the disallowance of its claim. Further, because 11 U.S.C. § 1325(a) (hanging paragraph referencing paragraph 5) caused no change when the debtor surrendered the vehicle, the creditor remained entitled to its deficiency claim after disposition of the vehicle. 11 U.S.C. § 506 merely provided a method of valuing the property securing the creditor's claim to the extent that the bankruptcy estate had an interest in the vehicle, and the estate had no such interest after surrender.

Wells Fargo Fin. Acceptance v. Rodriguez (In re Rodriguez), *2007 Bankr. LEXIS 3173 (B.A.P. 9th August 28, 2007) (Montali, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

1007-127 (**Consumer**) **Secured claim against "910" vehicle required to be paid in full where vehicle was purchased for personal use even though subsequently used for business.** (*Bankr. M.D.N.C.)*

PROCEDURAL POSTURE: The debtors filed for relief under chapter 13 and the debtors submitted a proposed plan. A creditor that had provided financing for the debtors' vehicle objected to confirmation of the proposed plan.

OVERVIEW: The debtors filed a petition on April 27, 2007. Less than 910 days preceding the petition, the debtor wife had purchased a vehicle and the creditor had provided the purchase money financing for the vehicle. On their petition, the debtors listed the vehicle and another car as the sole property of the debtor wife. The debtors proposed in their plan to value the vehicle at $18,115 and to pay that amount as a secured claim with an interest rate of 9.5%. As of July 2007, the amount owed under the financing agreement was $25,522. The creditor contended in its objection that the debtors were required to pay the creditor's claim in full, pursuant to 11 U.S.C. § 1325(a), including the hanging paragraph. The court found that the vehicle was acquired for the personal use of the debtors even though the vehicle was currently being used for the debtor husband's farrier business. There was no evidence that the debtors used the vehicle for a business purpose until after the petition was filed.

In re Davis, *2007 Bankr. LEXIS 3301 (Bankr. M.D.N.C. September 25, 2007) (Carruthers, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

§ 1325(a)(9) Confirmation of Plan; Conditions for Confirmation; Filing of Tax Returns.

1007-128 (**Consumer**) **Claim secured by "910" vehicle used interchangeably by debtor and non-debtor spouse could not be bifurcated.** (*Bankr. S.D. Ohio)*

PROCEDURAL POSTURE: Creditor filed an objection to confirmation of the debtor's chapter 13 plan, arguing that the plan's proposed treatment of its secured claim violated the requirements imposed by the unnumbered, hanging paragraph following 11 U.S.C. § 1325(a)(9). The issue was whether the debtor's vehicle, which was purchased within 910 days of filing, was "a motor vehicle acquired for the personal use of the debtor" for purposes of the hanging paragraph.

OVERVIEW: The precise question was whether the debtor acquired the vehicle for his personal use even though he claimed that it was used by his non-filing spouse. There was no question that at the time he purchased the vehicle, the debtor was not using the vehicle due to his military deployment. Nevertheless, the evidence simply failed to persuade the court that, at the time the vehicle was acquired, it was not anticipated that the debtor's use of the vehicle would have been significant and material. The testimony made it clear that both the debtor and his spouse used the vehicle as their family vehicle on weekends. In fact, it was the only vehicle owned by the couple that was large enough to accommodate their entire family. The story that unfolded from the testimony at the hearing was that of a typical family with multiple vehicles used by both husband and wife interchangeably as necessary and practical under the circumstances. Thus, the court concluded that the debtor intended as of the date he acquired the vehicle to utilize the vehicle for personal use.

In re Cross, *2007 Bankr. LEXIS 3306 (Bankr. S.D. Ohio September 27, 2007) (Hoffman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.07C**

§ 1325(b) Confirmation of Plan; Objections.

1007-129 **Standard deduction allowed for second vehicle owned free and clear.** (*Bankr. C.D. Ill.)*
(**Consumer**)

PROCEDURAL POSTURE: Chapter 13 debtors submitted a proposed plan where, in the calculation of their disposable income pursuant to 11 U.S.C. §§ 1325(b) and 707(b)(2), they claimed an ownership deduction for a second vehicle on their official bankruptcy form B22C. The debtors owned that second vehicle free and clear of liens, and they made no secured debt payment associated with that vehicle.

OVERVIEW: The above-mean income debtors owned two vehicles: one valued at $1,500 and subject to a $4,000 lien, and a second valued at $1,200 and owned free and clear. On their form B22C, the debtors took the standard ownership deduction for the second car in the amount of $332 per month. The trustee objected to that deduction, asserting that no ownership deduction was available with respect to a vehicle for which no debt or lease payment was being made. The debtors claimed that, notwithstanding the lack of a secured debt payment, they still had ownership expenses related to the second vehicle and were entitled to the deduction. The court noted that bankruptcy courts were split on the issue. The court, following the statutory formula, held that a debtor with no secured debt payment should receive the entire standard deduction. The debtors' plan was thus due to be confirmed.

***In re Moorman**, 2007 Bankr. LEXIS 3269 (Bankr. C.D. Ill. September 28, 2007) (Gorman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08**

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

1007-130 **Debtor rebutted presumption of projected disposable income as calculated on Form 22C by demonstrating future reduction in income.** (*Bankr. M.D. Ala.)*
(**Consumer**)

PROCEDURAL POSTURE: A debtor filed for relief under chapter 13 and submitted a proposed plan. A chapter 13 trustee objected, claiming that the proposed plan did not satisfy the "projected disposable income test" of 11 U.S.C. § 1325(b)(1).

OVERVIEW: During the six-month period preceding the filing of the case, the debtor received an average monthly income of $6,664 from three sources. The debtor's income was above the median for a similarly-sized household in Alabama. The debtor's husband did not have any income. In May, 2007, the debtor's income was reduced by $350 per month, and an additional $800 per month was due to be exhausted in August, 2008. The debtor claimed that her disposable income was $354 per month, to be devoted to the payment of unsecured creditors. The court concluded that the Form 22C submitted by the debtor created a presumptive starting point for determining projected disposable income that could be rebutted by evidence of the debtor's loss of a source of income. The court concluded that the debtor had rebutted the presumption in his case because she had shown that her disposable income as scheduled in the Form 22C was going to be reduced.

***In re Warren**, 2007 Bankr. LEXIS 3106 (Bankr. M.D. Ala. September 6, 2007) (Williams, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08[2]**

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

1007-131 **Objection to plan sustained where debtor failed to devote all projected disposable income as declared on schedules.** (*Bankr. N.D. Cal.)*
(**Consumer**)

PROCEDURAL POSTURE: A chapter 13 trustee filed an objection to the confirmation of a plan filed by a debtor, alleging that the proposed plan did not dedicate all of the debtor's projected disposable income to the plan in accordance with 11 U.S.C. § 1325(b)(1)(B).

OVERVIEW: The trustee contended that the debtor's telephone, food, and storage expenses as listed on his schedule were not reasonably necessary for his maintenance or support within the meaning of 11 U.S.C. § 1325(b)(2). The debtor did not argue that those expenses were reasonably necessary. Instead, he argued that his actual income and expenses as scheduled were irrelevant to the calculation of his disposable income because 11 U.S.C. § 1325(b)(2) and (3) mandated that the court determine his income

and expenses in accordance with the means test under 11 U.S.C. § 707(b)(2). The court rejected the debtor's interpretation, finding first that because the debtor's income did not exceed the state median, 11 U.S.C. § 1325(b)(3)'s reference to the means test in 11 U.S.C. § 707(b)(2) was not applicable. The court held that the calculation of the debtor's projected disposable income was governed by the information he provided in his schedules and that he was not entitled to a fixed allowance of any expense that was in excess of his actual expense even if that fixed allowance might be included in the means test under 11 U.S.C. § 707(b).

***In re Bateman**, 2007 Bankr. LEXIS 3276 (Bankr. N.D. Cal. September 21, 2007) (Jellen, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08[4]**

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

§ 501(c) Filing of Proofs of Claims or Interests; Debtor or Trustee.

1007-032 (**Consumer**) **Court declined to pay claims filed by trustee on behalf of non-filing creditors in attempt to increase trustee's fee.** (*Bankr. N.D. Ohio)*

PROCEDURAL POSTURE: Debtors filed a petition under chapter 7, and a chapter 7 trustee was appointed to manage the bankruptcy estate. The trustee filed a Final Report and Application for Compensation, and asked the court for a hearing after the court disapproved the amount of compensation the trustee requested.

OVERVIEW: After a meeting of creditors, the trustee determined that there were assets in the bankruptcy estate that were available for distribution to creditors. However, only two creditors filed a claim by the bar date. When the trustee realized that other creditors were not going to file claims, he filed claims in their behalf and asked the court for permission to pay all the claims in full and to distribute a surplus to the debtors. The court denied the trustee's request to pay claims which he filed on behalf of creditors who did not file they own claims. Although the court stated that it would allow a chapter 7 trustee to file claims on behalf of creditors, pursuant to Fed. R. Bankr. P. 3004 and 11 U.S.C. § 501(c), it would do so only if it found that the trustee provided: (1) a valid reason for filing the claims, such as to protect debtors from tax liability; (2) proof that the creditor's name and address was correct for each claim; and (3) proof that the amount listed in each claim was correct, and the trustee had not done so in this case. Instead, it appeared that the trustee filed the claims and asked for permission to pay the claims he filed so he could increase his fee.

***In re McLaughlin**, 2007 Bankr. LEXIS 3041 (Bankr. N.D. Ohio August 31, 2007) (Kendig, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:501.04**

§ 507(a)(3) Priorities; Order of Priorities; Wages, Salaries, or Commissions.

1007-033 (**Commercial**) **National Labor Relations Board wage claim allowed with priority to be determined if NLRB succeeded in obtaining award.** (*Bankr. E.D.N.Y.)*

PROCEDURAL POSTURE: The National Labor Relations Board ("NLRB") filed an amended proof of claim in an involuntary chapter 7 bankruptcy filed against the debtor, an employer. The NLRB contended that it was entitled to a priority wage claim under 11 U.S.C. § 507(a)(3), but the trustee filed a motion to disallow or expunge the proof of claim in its entirety.

OVERVIEW: The NLRB asserted that the debtor was liable for unfair labor practices resulting from the closing of the debtor's facility, and it sought back pay on behalf of employees working at the time that the debtor ceased operations. The trustee argued that the debtor's termination of the employees did not constitute an unfair labor practice because its actions were based on sound business reasons due to economic necessity. The NLRB opposed the trustee's motion on the ground that it had exclusive jurisdiction over the adjudication of alleged unfair labor practices. The court denied the trustee's motion, concluding that a determination of whether the debtor violated 29 U.S.C. § 158(a)(1) and (5) was exclusively under the jurisdiction of the NLRB. However, that determination would not bind the court in granting priority to the claim. Thus, the court allowed the claim to go to the NLRB to be decided. If the NLRB obtained an award against the debtor, then the court would decide what priority would be afforded the claim.

In re Wallace Packaging Corp., *2007 Bankr. LEXIS 3080 (Bankr. E.D.N.Y. June 28, 2007) (Rosenthal, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:507.13**

§ 523(a)(1)(B) Exceptions to Discharge; Types of Debt Excepted; Taxes; Late or Unfiled Return.

1007-034 **State taxes for which debtor failed to file returns were nondischargeable.** (*Bankr. N.D. Ga.)*
(**Consumer**)

PROCEDURAL POSTURE: Plaintiff debtor filed an adversary proceeding against defendant, the Georgia Department of Revenue for a determination that a state tax liability owed by the debtor in the amount of $52,321 was dischargeable pursuant to 11 U.S.C. § 523(a)(1)(B)(i). The Department filed a motion for summary judgment and when that was denied obtained leave and filed a second motion for summary judgment.

OVERVIEW: Employees from the Department submitted affidavits stating that the debtor failed to file any state tax returns for the 1985 through 1987 tax years and that the debtor owed $9,984 plus accrued interest and penalties. The debtor did not file a response to the motion. The court found that the Department was entitled to summary judgment based on the undisputed evidence that the debtor did not file tax returns in the State of Georgia for the three years at issue. Under the plain meaning of 11 U.S.C. § 523(a)(1)(B)(i) the debtor's obligation for the unpaid taxes, plus interest and penalties, was not dischargeable because the debtor never filed a Georgia state income tax return for those years.

Patterson v. Georgia Dep't of Revenue (In re Patterson), *2007 Bankr. LEXIS 3056 (Bankr. N.D. Ga. July 3, 2007) (Massey, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.07[3]**

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

1007-035 **Judgment claims for child sexual abuse which were not discharged in prior chapter 7 case due to failure of notice were nondischargeable in chapter 13 case.** (*Bankr. N.D. Tex.)*
(**Consumer**)

PROCEDURAL POSTURE: Plaintiff judgment creditors brought a complaint against defendant chapter 13 debtor, alleging that its claims were not discharged in either the debtor's still-open chapter 13 case, or in his earlier-filed chapter 7 case, due to the debtor's failure to provide constitutionally sufficient written notice of his cases to the creditors and the fact that the claims stemmed from willful and malicious injuries, as defined in 11 U.S.C. § 523(a)(6).

OVERVIEW: The creditors were the children of the debtor and each held state court judgments against the debtor, entered after a post-appearance default by the debtor, arising from allegations of child sexual abuse. The debtor attempted service of notice of his chapter 7 case to the creditors through attorneys who had represented the creditors in the distant past. The debtor received a discharge in the chapter 7 case. In finding that the creditors' claims had not been discharged in the debtor's chapter 7 case under section 523(a)(3)(B), the court held that the creditors did not receive sufficient notice of the chapter 7 case, nor did the creditors have actual or constructive notice of the case in time to protect their rights. The court also held that the debtor was collaterally estopped from arguing that the creditors' claims were not of the type referred to in section 523(a)(6). The court found not credible the debtor's claim that the attorney who made an appearance on his behalf in the state court was a renegade attorney who was not acting on the debtor's behalf. The court concluded that the debtor had a full and fair opportunity to litigate the issue of willful and malicious injury in the state court.

Gold v. Gold (In re Gold), *2007 Bankr. LEXIS 3270 (Bankr. N.D. Tex. September 28, 2007) (Jernigan, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.12**

§ 524(a) Effect of Discharge; Avoidance And Injunctive Relief.

1007-036 (**Consumer**) **Mere reports of existence and amounts of debts to credit reporting agencies did not violate discharge injunction.** (*Bankr. S.D. Ill.)*

PROCEDURAL POSTURE: Plaintiffs, debtors, filed an adversary proceeding against defendant, a collection agent, alleging violation of the discharge injunction of 11 U.S.C. § 524(a) and the Fair Debt Collection Practices Act ("FDCPA"). The agent filed a motion to dismiss in which it claimed that the debtors could not prosecute an alleged violation of the discharge injunction by way of an adversary proceeding and that the court lacked jurisdiction over the FDCPA claim.

OVERVIEW: The court agreed that the debtors proceeded improperly in pursuing their violation of the discharge injunction as an adversary proceeding. Their remedy was by way of a proceeding against the creditor for contempt, which they were required to bring as a motion and not as an adversary proceeding. The court also agreed that the claim under the FDCPA did not fall within those matters referred or referable to the bankruptcy court under 28 U.S.C. § 157(a). Even if an adversary proceeding were the appropriate procedural mechanism for prosecuting a violation of the discharge injunction, the court nonetheless concluded that no violation occurred. The debtors alleged that the collection agent made reports to one or more credit reporting agencies of the existence and amount of their debts, which reflected the delinquent status of the debts and the fact that one or more of those debts were "in collection." However, 11 U.S.C. § 524(a)(2) prohibited actions to collect a debt. The mere reporting to a credit bureau of the existence of a debt, even one that was discharged, did not violate section 524(a)(2) absent other overt acts taken in an effort to collect a prepetition debt.

Mogg v. Consumer Collection Mgmt., Inc. (In re Mogg)*, 2007 Bankr. LEXIS 3085 (Bankr. S.D. Ill. September 5, 2007) (Meyers, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:524.02**

1007-037 (**Commercial**) **Creditor's prosecution of postpetition conversion claim did not violate discharge injunction.** (*Bankr. D. Mass.)*

PROCEDURAL POSTURE: A debtor sought compensatory and punitive damages and related injunctive relief against a corporate creditor, its principal, and its affiliate for violating his chapter 7 discharge under 11 U.S.C. § 524(a). He also sought damages for alleged fraudulent misrepresentations based on the theory that the misrepresentations were a fraud on the court.

OVERVIEW: The law firm of the debtor, an attorney, gave a bank a security interest in a receivable arising from a fee agreement in order to secure certain loans. When the attorney filed his bankruptcy petition, the partnership ended, but he continued working on that case. The bank sold its rights under the security agreement to the creditor. When the fee was released to the attorney, he paid a portion to his former partners and the remaining fee to himself. The creditor filed a conversion action against the attorney and also instigated an investigation into the attorney's bankruptcy filing. The court denied the attorney's claims for damages, holding that the district court's determination that the attorney's claim of damages arising from the creditor's alleged misrepresentation was moot was binding. Thus, the attorney's claim of damages for fraud on the court was denied. The creditor's prosecution of its conversion count was not a violation of 11 U.S.C. § 524(c) and thus not a contempt of the discharge injunction. When false information was submitted about the attorney's debt, he failed to demonstrate by clear and convincing evidence that the credit report was an act to collect a debt.

In re Schlichtmann*, 2007 Bankr. LEXIS 3258 (Bankr. D. Mass. September 25, 2007) (Somma, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:524.02**

§ 544(a)(3) Trustee as Lien Creditor and as Successor to Certain Creditors and Purchasers; Rights and Powers; Trustee's Avoidance Powers as Bona Fide Purchaser of Real Property.

1007-038 (**Consumer**) **Mortgage lacking property description was avoidable.** (*Bankr. S.D. Ohio)*

PROCEDURAL POSTURE: Plaintiff bankruptcy trustee brought an adversary proceeding against defendant mortgagee seeking to avoid a mortgage granted to the mortgagee by a bankruptcy debtor under 11 U.S.C. § 544(a)(3) based on the lack of a legal description in the mortgage of the property securing the mortgage. The trustee and the mortgagee cross-moved for summary judgment.

OVERVIEW: The trustee contended that the lack of a legal description in the mortgage rendered the mortgage invalid and thus avoidable because it did not provide constructive notice of the mortgagee's lien. The mortgagee argued that the recorded mortgage listed both a street address and a parcel number, and thus contained a sufficient description of the property to provide notice to third parties of the existence of the encumbrance. The bankruptcy court held that, although the mortgage was valid as between the debtor and the mortgagee, the mortgage was avoidable by the bankruptcy trustee as a bona fide purchaser without notice. Even though the trustee had record notice of the existence of the mortgage, neither the parcel number nor the street address, nor both together, indicated precisely what property was covered by the mortgage, and merely referred to a geographic area that could contain more or less property than the debtor intended to encumber. Further, there was no reference in the mortgage to a deed, map, or other instrument which contained a legal description, and thus there was nothing within the mortgage instrument itself which could supply the missing legal description.

Drown v. Argent Mortg. Co., LLC (In re Bunn)*, 2007 Bankr. LEXIS 3308 (Bankr. S.D. Ohio September 29, 2007) (Hoffman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:544.08**

§ 727(d)(1) Discharge; Grounds for Revocation; Fraud.

1007-039 (**Consumer**) **Discharge revoked due to debtor's failure to disclose jewelry and oil paintings as revealed in divorce decree submitted to bankruptcy court for approval.** (*Bankr. E.D. Tex.)*

PROCEDURAL POSTURE: Plaintiff bankruptcy trustee brought an adversary proceeding against defendant bankruptcy debtor, seeking revocation of the debtor's prior discharge under 11 U.S.C. § 727(d)(1) on the ground that the debtor fraudulently omitted and undervalued assets in her bankruptcy schedules. The bankruptcy court conducted a trial.

OVERVIEW: After the debtor was discharged, a property division in the debtor's divorce proceedings, which was submitted for bankruptcy court approval, indicated that the debtor was the sole owner of certain property, including jewelry and oil paintings. The trustee contended that the debtor fraudulently concealed the jewelry and grossly undervalued the paintings, as evidenced by recent sales of the paintings, but the debtor asserted that any omission or undervaluation of assets was inadvertent and unintentional. The bankruptcy court held that revocation of the debtor's discharge was warranted based on the debtor's fraudulent omission and undervaluation of assets. The debtor knew that she owned the jewelry with significant value and that the paintings were worth far more than the debtor indicated, and the debtor's knowledge and fraudulent intent was indicated by her extensive involvement in the preparation of her bankruptcy schedules. Further, the omissions and inaccuracies were clearly material to estate administration and distribution to creditors, and the trustee was unaware of the misstatements until the divorce documents were received well after the debtor's discharge.

Neary v. Darby (In re Darby)*, 2007 Bankr. LEXIS 3250 (Bankr. E.D. Tex. September 24, 2007) (Parker, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.15[2]**

§ 1127(b) Modification of Plan; After Confirmation and Before Substantial Consummation.

1007-040 (**Commercial**) **Plan modified to eliminate 180 day time limit for filing causes of action as in best interests of creditors and estate.** (*Bankr. W.D. Tex.)*

PROCEDURAL POSTURE: Plaintiff personal representative of the chapter 11 debtor's estate filed an adversary proceeding against defendants for damages for conversion of certain property of the debtor and for breach of contract, as well as exemplary damages. Defendants moved to dismiss claiming, among other things, that the claims were time-barred under the confirmed plan. The representative moved for partial relief from operation of the confirmation order.

OVERVIEW: The debtor's plan of liquidation imposed on the representative a 180-day time limit for filing causes of action. The court interpreted the representative's motion as one for post-confirmation modification of a plan under 11 U.S.C. § 1127(b). The court found that the plan should be modified and the court eliminated the 180-day time limit imposed on the representative. The only evidence in the record showed that no party opposed the modification to eliminate that provision other than defendants. Because defendants were not creditors of the estate, interest holders, or otherwise had a right to notice of the plan's provisions regarding any potential suit against them, they had no standing to object to the proposed modification of the plan. The proposed elimination of the 180-day deadline was in the best interests of creditors and the estate because it would have allowed the representative to pursue litigation which could have brought funds to the estate and allowed greater recovery for the creditors. There was no evidence of the purpose that the 180-day deadline served considering that the law would otherwise have provided a more expansive limitations period.

Kirk v. Nanni (In re Int'l Foundry Tooling, Inc.), *2007 Bankr. LEXIS 3318 (Bankr. W.D. Tex. September 25, 2007) (McGuire, B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 7:1127.04**