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Collier Bankruptcy Case Update

CURRENT BANKRUPTCY CASES ANALYZED

February 12, 2007 Issue 2

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§ 101(10A) Definitions; "Current Monthly Income".

0207-036 **Social security income excluded from calculation of disposable income.** (*Bankr. W.D. Mo.)*

PROCEDURAL POSTURE: The debtor filed for bankruptcy relief under chapter 13 and submitted a proposed plan. The trustee objected to the plan, asserting that the debtor was not going to pay all of her projected disposable income into the plan during the applicable commitment period as required by 11 U.S.C. § 1325(b).

OVERVIEW: The debtor indicated in her amended schedule that she had a total net monthly income of $3,023 and had a total of net monthly expenses of $2,533, leaving a monthly net surplus of $489. The debtor excluded $1100 per month in income that she received from social security. The trustee asserted that the plan did not comply with 11 U.S.C. § 1325(b)(1)(B) because the debtor did not include all sources of income in her amended schedule and further that the debtor had excess monthly net income that could contribute to the plan. As proposed the plan would result in a dividend of less than 3% to nonpriority unsecured creditors. The trustee contended that the social security benefits should have been considered available for plan payments. The court held that the social security income was not required to be included in the analysis of whether or not the debtor was contributing all of her projected disposable income to her plan under section 1325(b)(1)(B) because social security income was specifically excluded under 11 U.S.C. § 101(10A).

***In re Ward**, 2007 Bankr. LEXIS 58 (Bankr. W.D. Mo. January 7, 2006) (Federman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:101.10A**

§ 101(20) Definitions; "Farmer".

0207-037 **Debtor that earned virtually all income from cattle farming properly ruled an eligible debtor under chapter 12.** (*B.A.P. 10th Cir.)*

PROCEDURAL POSTURE: Appellants sought review of an order of the Bankruptcy Court for the Western District of Oklahoma, which determined that appellee debtor qualified as a farmer as defined under 11 U.S.C. § 101(20) and that the debtor was therefore exempt from involuntary proceedings.

OVERVIEW: The debtor owned and leased almost 2000 acres of land in Oklahoma. On the property, the debtor maintained pens for 3200 head of cattle and acreage for wheat and forage crops. The debtor purchased young cattle, kept them on his property for 30 to 45 days, and then transported them to feed lots for eventual sales. Appellants filed an involuntary chapter 7 bankruptcy petition against the debtor. Appellants contended that the debtor did not derive 80% of his income from farming. After a hearing, the bankruptcy court granted the debtor's motion to dismiss the case, based in part on the debtor's tax return showing that virtually all of his income derived from farming. The court noted that the bankruptcy court considered both the tax code test and the totality of the circumstances test when making its conclusions. The bankruptcy court's decision to exclude deposition testimony from an unavailable witness was not prejudicial. The bankruptcy court did not abuse its discretion when it denied appellants' motion for a continuance. Appellants did not sufficiently preserve their objections to the debtor's testimony after the debtor invoked his Fifth Amendment rights in the deposition.

***Rinehart v. Sharp (In re Sharp)**, 2007 Bankr. LEXIS 81 (B.A.P. 10th Cir. January 22, 2007) (McFeeley, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:101.20**

§ 109(h)(1) Who May Be a Debtor; Mandatory Credit Counseling; Approved Nonprofit Agency.

0207-038 **Credit counseling obtained on petition date prior to filing was acceptable.** (*Bankr. E.D. Tenn.)*

PROCEDURAL POSTURE: The chapter 13 and United States trustees filed motions, pursuant to 11 U.S.C. § 109(h)(1), to dismiss the debtors' chapter 13 and 7 cases.

OVERVIEW: The trustees filed motions to dismiss the debtors' cases on the grounds that they received the credit counseling briefing on the same day they filed for bankruptcy. The court concluded that, so long as the 180-day outside limit was otherwise met, section 109(h)(1) simply required the debtors to receive a credit counseling briefing prior to the moment of filing the petitions, not at least one day before

the filing. The court read the "180-day" phrase in section 109(h)(1) in context with the clause that proceeded it and found that Congress' placement of the credit counseling briefing requirement in section 109 of the Bankruptcy Code as a determination of bankruptcy eligibility indicated that Congress' focus was on ensuring, at the time of the filing, that the debtors had previously undergone counseling; thus, reading "date" as used in section 109(h)(1) to mean a moment or specific time, rather than a calendar day, was consistent with the context of 11 U.S.C. § 109's eligibility requirements, other Bankruptcy Code provisions, including 11 U.S.C. § 522(p), and legislative history. The court held that Fed. R. Bankr. P. 9006(a) did not apply in computing the 180-day period of 11 U.S.C. § 109(h)(1).

In re Moore, *2006 Bankr. LEXIS 3530 (Bankr. E.D. Tenn. December 14, 2006) (Parsons, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.09[1]**

§ 333 Appointment of Patient Care Ombudsman.

0207-039 **Appointment of health care ombudsman not necessary where patient care was not affected by debtor's bankruptcy.** (*Bankr. M.D. Ga.)*

PROCEDURAL POSTURE: The United States Trustee ("UST") filed a motion for a determination as to whether the debtor was a health care business and, if so, for the appointment of a patient care ombudsman pursuant to 11 U.S.C. § 333. The UST contended that the debtor was a "health care business" and an ombudsman was necessary. The debtor objected.

OVERVIEW: The evidence showed that a physician was the chief executive officer of the debtor. She was the only physician employed by the debtor and was board certified in obstetrics and gynecology. The physician saw patients and performed physical exams, ultra sounds, and biopsies at the debtor's office. Other services were performed at two area hospitals. The court also reviewed the debtor's statement of financial affairs and bankruptcy schedules. Most of the debtor's obligations appeared to be for taxes. The obligations did not appear to arise from deficient patient care. Accordingly, the court was not persuaded that the appointment of an ombudsman was necessary for the protection of patients. Patient care had not been adversely affected by the debtor's bankruptcy filing. The debtor's obligations did not appear to arise from deficient patient care. The physician understood her obligation to maintain patient records and to provide copies of the records to patients who decided to see another physician.

In re Total Woman Healthcare Ctr. PC, *2006 Bankr. LEXIS 3411 (Bankr. M.D. Ga. December 14, 2006) (Hershner, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:333.01**

§ 362(d) Automatic Stay; Relief from Stay.

0207-040 **Relief from stay granted to creditor with motor vehicle lien due to debtor's continuing failure to make payments.** (*Bankr. S.D. Ill.)*

PROCEDURAL POSTURE: Creditor filed a motion for relief from the automatic stay, 11 U.S.C. § 362, and to abandon property. Chapter 13 debtor filed a complaint to compel turnover of property and enforce the automatic stay.

OVERVIEW: Debtor owed creditor a debt that was secured by an automobile. Shortly prior to debtor's chapter 13 bankruptcy filing, creditor repossessed the automobile as a result of debtor's non-payment of the debt. Debtor filed an adversary complaint seeking to have possession of the automobile returned to her. The court confirmed debtor's plan over the objection of creditor as a result of debtor tendering payments to make herself current to the chapter 13 trustee. Debtor soon fell behind in her monthly plan payments. In granting creditor's motion, the court held that debtor lacked the reasonable ability to comply with the terms of her plan. The court held that stay relief was proper pursuant to section 362(d)(1) because debtor's continuing failure to make her plan payments led to the obvious conclusion that debtor was unable to provide adequate protection to creditor. The court also held that creditor was entitled to stay relief pursuant to section 362(d)(2) because there was no equity in the vehicle for debtor, and debtor had failed to prove that the vehicle was necessary for an effective reorganization.

Roswell v. GCS Fed. Credit Union (In re Roswell), *2007 Bankr. LEXIS 57 (Bankr. S.D. Ill. January 12, 2007) (Fines, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.07**

§ 362(g) Automatic Stay; Burden of Proof.

0207-041 **Relief from stay granted where debtor had no chance of filing feasible plan within reasonable time.** (*Bankr. D. Ariz.)*

PROCEDURAL POSTURE: In a chapter 11 proceeding, movant creditor, a holder of a second consensual lien on certain commercial property, moved for relief from the automatic stay under 11 U.S.C. § 362(d). Debtor had filed no plan of reorganization. Debtor and her husband, who had filed his own separate chapter 11 proceeding, submitted a proposal for purchase of the property. The proposal was inadequate to pay debtor's unsecured creditors.

OVERVIEW: Congress intended that stay relief proceedings be summary in nature, wherein the only issues were to be the lack of adequate protection, the debtor's equity in the property, and the necessity of the property to an effective reorganization of the debtor, or the existence of other cause for relief from the stay. Here, stay relief was warranted. The court found, *inter alia*, that, with no plan before it, and with the proposed sale offer being inadequate to pay any of debtor's unsecured creditors, there was no effective plan of reorganization that could be proposed by debtor. The creditor proved that the property in question had no equity per 11 U.S.C. § 362(g)(1). As there was no equity in the property for the benefit of the unsecured creditors, cause existed to lift the stay so that the secured creditors, whose interests were eroding daily, could protect themselves through foreclosure. Additionally, with no schedule or proposed plan of reorganization, and with only a "short" sale proposed by debtor (*i.e.*, inadequate to pay all liens and costs of sale), debtor had no chance of proposing a feasible plan within a reasonable period of time per 11 U.S.C. § 362(g)(2).

***Cedar Funding, Inc. v. Bach (In re Bach)**, 2007 Bankr. LEXIS 50 (Bankr. D. Ariz. January 5, 2007) (Marlar, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.10**

§ 362(k)(1) Automatic Stay; Remedies for Violation; Damages For Willful Violation of Stay.

0207-042 **Creditor sanctioned for continuing to contact debtor in willful violation of stay.** (*Bankr. M.D. Ala.)*

PROCEDURAL POSTURE: Chapter 13 debtors filed a motion seeking sanctions against a creditor for violating the automatic stay under 11 U.S.C. § 362(k).

OVERVIEW: The creditor held a mortgage on the debtors' home when the bankruptcy petition was filed, and the plan proposed to cure the mortgage delinquency and maintain current payments. After the debtors defaulted, the creditors filed a motion for relief from the automatic stay, and the parties negotiated an adequate protection agreement. In response to the creditor's letter to the debtors asserting continued default, the debtors' attorney explained why the debtors were current in their payments and attached supporting bank records. The creditor did not respond to the attorney's letter and made numerous calls directly to the debtors, threatening foreclosure. The court concluded that the creditor's continued dunning of the debtors was a violation of the stay under 11 U.S.C. § 362(a)(6). The creditor's violation was willful because the creditor knew of the bankruptcy filing; thus, the debtors were entitled to actual damages under 11 U.S.C. § 362(k)(1) based on the number of calls made and letters written. The court found that the creditor engaged in a pattern of willful conduct in violating the stay, and it awarded punitive damages and attorney's fees to the debtors.

***In re Hildreth**, 2006 Bankr. LEXIS 3513 (Bankr. M.D. Ala. December 14, 2006) (Sawyer, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.11[3]**

§ 549 Postpetition Transactions.

0207-043 **Postpetition stock transfer by corporate debtor's owner was avoidable.** (*Bankr. N.D. Iowa)*

PROCEDURAL POSTURE: Plaintiff chapter 7 trustee and defendant rental company filed motions for summary judgment on the trustee's claim that the transfer by the debtor's owner of his stock in the debtor to the rental company was void in violation of the automatic stay under 11 U.S.C. § 362 and was a voidable postpetition transfer under 11 U.S.C. § 549.

OVERVIEW: The debtor's owner formed the rental company prepetition on March 29, 2005. Postpetition, on March 15, 2006, he transferred all of his shares in the debtor to the rental company. In a separate adversary proceeding, the bankruptcy court ruled that the debtor's subchapter S status was property of

the estate and that the owner's attempt, as the debtor's officer and shareholder, to revoke that status violated the automatic stay and was voidable as a postpetition transfer. The owner's appeal was pending in the district court. The trustee filed the present adversary action challenging the stock transfer. The court concluded that the owner's transfer of his stock in the debtor to the rental company was void as a violation of the automatic stay under 11 U.S.C. § 362 and voidable as a postpetition transfer under 11 U.S.C. § 549. The court held that the effect of the transfer was to destroy the debtor's subchapter S status, which was property of the estate protected by the stay.

Hanrahan v. Walterman - The Rental Co. (In re Walterman Implement, Inc.)*, 2006 Bankr. LEXIS 3761 (Bankr. N.D. Iowa September 19, 2006) (Kilburg, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:549.01**

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

0207-044 **Means test for chapter 7 eligibility was not conclusive where debtor's ability to pay exceeded threshold.** (*Bankr. N.D. Ohio)*

PROCEDURAL POSTURE: The United States Trustee moved to dismiss debtors' chapter 7 case for abuse under 11 U.S.C. § 707(b)(3), asserting that debtors were both employed, and had excess income over expenses of $300 per month that is available to pay a substantial portion of their unsecured non-priority debt. Debtors argued they had passed the means test under 11 U.S.C. § 707(b)(2), and based on that conclusive evidence, debtors should be granted a discharge.

OVERVIEW: Although it was undisputed that debtors qualified under means test calculation under section 707(b)(2) for chapter 7 relief, the trustee argued that abuse could be found under section 707(b)(3), since debtors' bankruptcy schedules I and J, still showed approximately $300 of excess monthly income over expenses, that was available to pay a substantial portion of their unsecured non-priority debt. Debtors argued that the means test was conclusive for purposes of determining abuse based on a debtor's ability to pay and, that the post-Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 code expressly excluded a 26 U.S.C. § 401(k) plan loan repayments from the disposable income calculation. The court ruled that in the instant case, debtors' actual ability to pay at least $18,000 a year exceeded the $10,000 abuse threshold set forth in 11 U.S.C. § 707(b)(2)(A)(i). Debtors were thus obligated to convert their case to a chapter 13 plan, or would suffer dismissal.

In re Mestemaker*, 2007 Bankr. LEXIS 78 (Bankr. N.D. Ohio January 10, 2007) (Whipple, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05**

§ 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.

0207-045 **No presumption of abuse existed where debtor's deductions were properly claimed and disposable income was a negative figure.** (*Bankr. N.D. Ohio)*

PROCEDURAL POSTURE: A United States Trustee asserted that bankruptcy debtors, in calculating their monthly disposable income, improperly claimed deductions for mortgage debt secured by realty upon which a mortgagee previously foreclosed, and for ownership/lease expenses for vehicles which the debtors owned free and clear. The trustee moved to dismiss the case based on a presumption of abuse under 11 U.S.C. § 707(b)(2)(a)(i).

OVERVIEW: The trustee contended that the mortgagor reduced the debtors' promissory note to judgment, and thus the debtors were not entitled to deduct future payments on the mortgage debt because the mortgagee's rights under the note were extinguished. The trustee also argued that the debtors were not entitled to the ownership/lease deductions for their vehicles which were not subject to any security interests or debt payments. The bankruptcy court held that no presumption of abuse arose since the debtors properly claimed deductions and their monthly disposable income was a negative amount. There was no authority for finding that the foreclosure judgment extinguished the debtors' rights under the note, and thus the debtors properly claimed the mortgage debt deduction. Despite the debtors' stated intention to surrender the realty, the debtors continued to occupy the realty and there was no contractual act by the debtors to relinquish the realty to the mortgagee. Further, the debtors were entitled to the

vehicle deductions based solely on their ownership of the vehicles, regardless of the fact that they currently had no monthly vehicle payments.

***In re Zak**, 2007 Bankr. LEXIS 88 (Bankr. N.D. Ohio January 12, 2007) (Woods, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[2]**

§ 1129(a)(8) Confirmation of Plan; Requirements; Classes Generally.

0207-046 **Creditors' failure to return ballot rejecting plan did not constitute deemed acceptance.** (*Bankr. C.D. Ill.)*

PROCEDURAL POSTURE: A debtor filed a motion to confirm its chapter 11 plan of reorganization.
OVERVIEW: Three of the six impaired classes of creditors created under the plan did not cast ballots. The court joined the majority in holding that the impaired creditors' failure to return a ballot rejecting the plan did not constitute deemed acceptance of the plan. Since none of the three non-voting creditors returned a ballot or otherwise affirmatively accepted the plan, such as by stipulation, those three impaired classes did not accept the plan; therefore, the court denied the debtor's motion to confirm its plan by consensual confirmation under 11 U.S.C. § 1129(a) because the requirements of 11 U.S.C. § 1129(a)(8) were not satisfied. The court held that, if Congress had intended otherwise, it would have used the phrase "if such plan has not been rejected by creditors" in 11 U.S.C. § 1126(c). The court found that the confirmation process contemplated that the debtor would actively solicit creditors to vote to accept the plan and that the debtor, as the plan's drafter, was responsible for how it chose to classify claims.

***In re Vita Corp.**, 2007 Bankr. LEXIS 51 (Bankr. C.D. Ill. January 11, 2007) (Perkins, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 7:1129.03[8]**

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

0207-047 **"Hanging paragraph" did not apply to trailer and secured creditor's claim could be bifurcated.** (*Bankr. S.D.N.Y.)*

PROCEDURAL POSTURE: Creditor filed an objection to the confirmation of chapter 13 debtor's plan.
OVERVIEW: Debtor purchased a 2001 Starcraft Travel Trailer. Creditor financed the purchase, and duly perfected its purchase money security interest in the trailer. Debtor filed his chapter 13 petition less than 910 days following debtor's purchase of the trailer. Debtor's plan proposed to bifurcate creditor's claim into an allowed secured claim and an allowed unsecured claim pursuant to 11 U.S.C. § 506(a), with debtor treating the allowed unsecured portion of the claim as an unsecured obligation, to be paid at approximately 40 percent under the plan. Creditor objected on the grounds that section 506(a) did not apply to the claim, based upon the hanging paragraph at the end of 11 U.S.C. § 1325(a), because the trailer was a motor vehicle as defined in 49 U.S.C. § 30102(6). The court held that the trailer was not a motor vehicle pursuant to section 30102(6) because it was made primarily to provide temporary shelter for persons, not to traverse the public streets, roads, and highways. The court held that, therefore, the hanging paragraph was inapplicable and debtor could bifurcate creditor's claim as set out in 11 U.S.C. § 506(a).

***In re Green**, 2007 Bankr. LEXIS 72 (Bankr. S.D.N.Y. January 12, 2007) (Gerling, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

0207-048 **Surrender of vehicle subject to hanging paragraph did not result in full satisfaction of claim.** (*Bankr. N.D. Ill.)*

PROCEDURAL POSTURE: Creditor filed an objection to the confirmation of chapter 13 debtor's plan.
OVERVIEW: Debtor owed creditor debt secured by a lien on a motor vehicle. Debtor's plan purported to surrender the vehicle in full satisfaction of creditor's entire claim. The parties agreed that the hanging paragraph at the end of 11 U.S.C. § 1325(a) applied because creditor possessed a purchase money security interest in the vehicle acquired for debtor's personal use, and the debt secured by the vehicle was incurred within 910 days of the filing of the petition. In sustaining creditor's objection, the court held that surrender of the vehicle did not result in full satisfaction of the claim, thus allowing creditor to seek whatever state law remedies could be available including right to a deficiency as an unsecured claim in the chapter 13 plan. The court held that, when a debtor surrendered a vehicle and the estate no longer had an interest in the property that secured a claim, there was no reason to use the valuation process

provided in 11 U.S.C. § 506 to determine the amount of the allowed secured claim; rather, once the vehicle was surrendered to the creditor pursuant to 11 U.S.C. § 1325(a)(5)(C), the value of the creditor's secured claim was determined under state law.

***In re Morales**, 2007 Bankr. LEXIS 97 (Bankr. N.D. Ill. January 11, 2007) (Schmetterer, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

0207-049 **Vehicle purchased by debtor for spouse's business use was not subject to hanging paragraph and secured creditor's claim could be bifurcated.** (*Bankr. M.D. Pa.)*

PROCEDURAL POSTURE: Creditor bank filed a proof of claim for $22,577.68, secured by a 2004 Dodge Grand Caravan financed in the name of debtor. Debtor proposed to cram down its claim to the value of the collateral. Creditor objected, asserting that the plan could not be confirmed because debtor's proposed treatment of the claim was prohibited by the "hanging paragraph" following 11 U.S.C. § 1325(a)(9).

OVERVIEW: Debtor filed her bankruptcy petition after the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, and 710 days after she incurred the debt. Debtor testified that the vehicle had 85,000 miles on the date of the hearing and that it was in fair condition. She estimated the vehicle was worth approximately $11,000 after reviewing values in Kelley Blue Book. Creditor introduced evidence that the National Automobile Dealers Association book retail value of the vehicle as of the filing of the petition was $15,325, subject to a high mileage deduction of $1,725, or $13,600. Debtor asserted that the "hanging paragraph" prohibition on cramdown did not apply, because she bought the vehicle for her husband's business use. Although the vehicle was titled in her name, her husband claimed the vehicle and related expenses as business deductions. Therefore, the hanging paragraph following section 1325(a)(9) did not apply, and debtor could invoke 11 U.S.C. § 506(a) to bifurcate creditor's claim.

***Sovereign Bank v. Finnegan (In re Finnegan)**, 2006 Bankr. LEXIS 3793 (Bankr. M.D. Pa. November 30, 2006) (France, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

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

0207-050 **Confirmation denied due to debtor's failure to commit all projected disposable income to plan.** (*Bankr. N.D. Cal.)*

PROCEDURAL POSTURE: A debtor sought confirmation of his amended chapter 13 plan, but the trustee and an unsecured creditor objected to the confirmation. The debtor contended that the plan should be confirmed because the payments constituted more than his "projected disposable income" under 11 U.S.C. § 1325(b)(1)(B).

OVERVIEW: In calculating projected disposable income, the debtor multiplied his disposable income, which was the average of his earnings during the six month before the bankruptcy filing, by the number of months of the plan. The trustee and the creditor disagreed with this calculation, asserting that the debtor's post-filing income should have been used. The court concluded that the plan could not be confirmed because it did not provide for the payment of the debtor's "projected disposable income" during the term of the plan. In determining whether a plan provided all of a debtor's "projected disposable income," a court should attempt to predict what the debtor's disposable income during the term of the plan would be, using the definition of "current monthly income" in 11 U.S.C. § 101(10A). This construction gave meaning to every word in the phrase, and it was consistent with one of the primary purposes of the Bankruptcy Abuse Prevention and Consumer Protection Act's amendments, which was to force "can-pay" debtors to pay what they could through chapter 13 plans. This construction of the word "projected" was also consistent with past practice, contrary to the debtor's contention.

***In re Pak**, 2006 Bankr. LEXIS 3437 (Bankr. N.D. Cal. December 14, 2006) (Tchaikovsky, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08[4]**

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

§ 1412 Change of Venue.

0207-051 **Action regarding business service agreement that was one of debtor's principal assets transferred to bankruptcy court in neighboring state where debtor's case was pending.** (*S.D. Tex.)*

PROCEDURAL POSTURE: Plaintiff consultant filed a suit in a Texas court against defendants, a dentist and his professional corporation, alleging that they breached the terms of the parties' business service agreement ("BSA"). The state court abated the action and, thereafter, the consultant filed a chapter 11 bankruptcy petition. It removed the suit to the court and moved to transfer the case to the District Court for the Eastern District of Louisiana.

OVERVIEW: The consultant, along with its parent corporation and some affiliates, filed bankruptcy petitions in the bankruptcy court. The bankruptcy court thereafter consolidated various suits related to BSAs that the consultant and the other debtors had executed. The consultant removed its suit against defendants to the court and then asked the court to transfer it to the Eastern District of Louisiana district court pursuant to 28 U.S.C. § 1412, arguing that the transferee court could then refer the suit to the bankruptcy court, for consolidation with the other BSA-related litigation. Defendants did not file a written response or brief opposing the transfer motion. The court agreed that it was appropriate to transfer the case. Because the BSA was one of the principal assets of the consultant's bankruptcy estate, it fell within the bankruptcy court's core jurisdiction. All of the consultant's claims and defendants' counterclaims related to the BSA. It would promote efficient administration of the bankruptcy estate and judicial economy to transfer the suit, especially given that other suits involving similar BSAs had been consolidated in the bankruptcy court.

Orthodontic Ctrs. Of Tex., Inc. v. Corwin*, 2007 U.S. Dist. LEXIS 3670 (S.D. Tex. January 18, 2007) (Werlein, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 1:4.04**

BANKRUPTCY RULES (Post-2005 Act)

Rule 9011 Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers.

0207-052 **Attorney ordered to disgorge all fees and pay auditor's fee due to defrauding and overcharging of clients.** (*Bankr. S.D. Tex.)*

PROCEDURAL POSTURE: The chapter 13 trustee filed a motion under Fed. R. Bankr. P. 2016 and 11 U.S.C. 329 for a further examination of an attorney's transactions with debtors in several chapter 13 cases, for imposition of sanctions, and for disgorgement of fees.

OVERVIEW: The trustee hired an auditor to review the fees that the attorney received. The audit found that the attorney was actually overpaid $22,963.42. Further, the attorney did not accurately report the retainer paid to him. The testimony presented at trial indicated that in many cases the attorney filed the bankruptcy petition but never paid the filing fee, resulting in case dismissal and a waste of the retainer paid. The evidence further suggested that clients rarely, if ever, met the attorney at all in the process of their bankruptcy. Nor were clients counseled on the requirements and options available to a debtor in bankruptcy. Moreover, the attorney's conduct constituted fraud or defalcation while acting in a fiduciary capacity because the attorney violated his fiduciary duty to his clients by accepting retainers and fees higher than that disclosed to or approved by the court. The court further found that by failing to disclose accurately the retainer paid and fees collected, which resulted in collection of fees in excess of the fixed fee application approved by the court, the attorney violated Fed. R. Bankr. P. 9011(b).

In re Lira*, 2006 Bankr. LEXIS 3549 (Bankr. S.D. Tex. December 15, 2006) (Schmidt, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 10:9001.01**

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

§ 109(f) Who May Be a Debtor; Chapter 12.

0207-053 **Debtor who received at least 50% of gross income from farming was an eligible chapter 12 debtor.** (*Bankr. N.D. Iowa)*

PROCEDURAL POSTURE: The debtor filed a petition in bankruptcy under chapter 12. The Farm Service Administration ("FSA") filed a renewed motion to dismiss, contending that the debtor was not an eligible debtor under chapter 12.

OVERVIEW: The FSA had originally filed a motion to dismiss that had been continued to be addressed when a lien priority issue was addressed as part of the plan confirmation. The lien priority issue was pending on appeal, and the FSA filed a renewed motion to dismiss. The FSA claimed that the debtor received significantly less than 50% of her gross income from farming and was thus not eligible for relief under chapter 12. Debtor claimed in her statement of financial affairs that for the year at issue the debtor earned a total salary of almost $20,000 and that less than $3,000 of that income came from farm activity. The debtor's federal tax return for the taxable year preceding the year the petition was filed showed that the debtor sold farm products in a total gross amount of $25,220, and that she claimed a loss for the year at issue of more than $21,573. The court held that based upon the tax return, the debtor's farm income was $20,124. Debtor had thus established that she had received at least 50% of her gross income from her farming operation during the 2004 taxable year.

In re Vantiger-Witte*, 2006 Bankr. LEXIS 3763 (Bankr. N.D. Iowa December 20, 2006) (Kilburg, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.07**

§ 330(a)(1) Compensation of Officers; Determination of Amount; Awards to Trustees, Examiners or Professional Persons.

0207-054 **Trustee who hired outside counsel for more complicated tasks entitled to fees for administrative activity only.** (*Bankr. D. Idaho)*

PROCEDURAL POSTURE: A chapter 7 trustee filed his proposed final account and a request for compensation with the court, and at the court's request, he filed an affidavit in support of the fee request. There were no objections made by any interested party or by the U.S. Trustee.

OVERVIEW: The trustee generated the monies in the estate in three ways. The debtors turned over cash from their bank accounts and tax refunds at the trustee's request, and there was no indication that the trustee was required to take any significant actions to recover these funds. Additional funds were generated after the trustee discovered the title certificate to a boat that had never been properly transferred to the new owners. The trustee hired attorneys who sued the transferees to enforce the sale. Finally, the trustee, through counsel, received cash from a bank to settle a preference claim. In reviewing the fee request, the court determined that the trustee was entitled to compensation under 11 U.S.C. §§ 330(a)(1) and 326(a) but in an amount less than requested. The court concluded that the time spent was reasonable and necessary. However, because the trustee had hired outside attorneys to perform the more complicated tasks, most of the services provided by the trustee were the usual administrative activities. The trustee provided no factual basis for the valuation of his administrative services; thus, the court set a reasonable rate.

In re Mason*, 2006 Bankr. LEXIS 3516 (Bankr. D. Idaho December 14, 2006) (Pappas, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:330.03**

§ 330(a)(4)(B) Compensation of Officers; Determination of Amount; Compensation Disallowed; Exception in Cases Under Chapters 12 and 13.

0207-055 **Debtor's attorney's fees approved in reduced amount due to excessive research and unnecessary court hearings attributable to attorney's conduct.** (*Bankr. W.D. Pa.)*

PROCEDURAL POSTURE: Chapter 13 debtors' attorney sought recovery of attorney's fees under 11 U.S.C. § 330(a)(4)(B). Trustee objected to the fee petition.

OVERVIEW: The attorney represented debtors in an underlying Truth in Lending action. Debtors agreed to a fee of $7,500, however, the attorney asserted that he should have received attorney's fees in the amount of $17,837 because a substantial benefit accrued to the estate and debtors. In awarding $11,837 in attorney's fees, the court reduced the number of hours from the 116.58 requested to 76.58 hours. The court held that to spend 47 hours in research and brief writing was over-lawyering. The court also held that the attorney could not recover for the time spent for one of two hearings because the second hearing was necessitated by his alleged argument with debtors outside the courtroom. The court further held that the attorney could not recover for all of the time spent for a contested confirmation hearing that was held because he failed to appear for the first hearing. The court also held that the attorney was not entitled to 14 hours that were part of the "no-look" fee that the court awarded at the outset of the case.

Younger v. Pennsylvania Res. Corp. (In re Younger)*, 2006 Bankr. LEXIS 3475 (Bankr. W.D. Pa. December 14, 2006) (Fitzgerald, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:330.04[1][b]**

§ 350 Closing and Reopening Cases.

0207-056 **Defendants in debtor's medical malpractice action lacked standing to appeal reopening of case to amend schedules and include claim.** (*N.D. Okla.)*

PROCEDURAL POSTURE: On motion of appellee trustee, a debtor was allowed to reopen her bankruptcy case to amend her schedules to include an omitted medical malpractice action against appellants, underlying defendants. Appellants were not notified of the motion and moved to vacate the order allowing the case to be reopened. The motion was denied. Appellants challenged the bankruptcy court's denial. A magistrate recommended denying their appeal. Appellants objected.

OVERVIEW: Appellants argued that the bankruptcy court erred by refusing to apply judicial estoppel to the request to reopen and by denying their motion to vacate. The magistrate found that appellants lacked standing to appeal under the "persons aggrieved" test and, alternatively, that the bankruptcy court did not err by refusing to apply judicial estoppel. The court agreed that although the bankruptcy court found that appellants had standing as parties in interest under 11 U.S.C. § 350, they failed the more stringent "persons aggrieved" test for appellate standing. The mere act of reopening a closed bankruptcy case did not afford any party substantive relief; it was a purely ministerial act with no legal significance for the underlying bankruptcy. The decision to reopen the case had an indirect effect on appellants' defense in a separate lawsuit, but that did not mean that they had a particular and direct stake in the underlying bankruptcy proceedings. As it stood, appellants owed nothing to the debtor, nor had they shown that reopening the bankruptcy would disrupt any defense to the merits of the debtor's claim. As mere potential debtors of a debtor, they lacked standing to appeal.

In re Quarles*, 2007 U.S. Dist. LEXIS 3834 (N.D. Okla. January 18, 2007) (Eagan, C.D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:350.01**

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

0207-057 **Plan confirmation rendered creditor's argument for adequate protection moot.** (*Bankr. N.D. Ill.)*

PROCEDURAL POSTURE: Chapter 11 secured creditor filed a motion pursuant to Fed. R. Civ. P. 59(e) to alter or amend the court's judgment, which determined the value of a security interest that creditor held in debtor's lease of maintenance space at an airport. Creditor sought an award of adequate protection pursuant to 11 U.S.C. § 363(e).

OVERVIEW: Creditor filed an adversary complaint against debtor, seeking to value the interest that creditor had in debtor's leasehold and to obtain a declaration that creditor had an allowed secured claim in that amount. The complaint also sought an award of adequate protection pursuant to section 363(e). Before trial on the complaint began, debtor's chapter 11 plan was confirmed. Claim valuation was the only question that the parties addressed at the trial. Debtor argued that creditor could not seek adequate protection after trial because creditor did not raise the issue at trial. The court exercised its discretion to consider creditor's adequate protection argument because creditor's pleadings raised the issue, and the parties argued its merits in the context of the instant motion based entirely on the evidence adduced at trial. The court, however, held that creditor was not entitled to adequate protection because confirmation of debtor's plan terminated the automatic stay as to creditor's interest and rendered moot creditor's request for adequate protection. The court also held that debtor's plan treated creditor's claim in a manner that foreclosed the providing of adequate protection.

HSBC Bank USA v. United Air Lines, Inc. (In re UAL Corp.)*, 2007 Bankr. LEXIS 101 (Bankr. N.D. Ill. January 22, 2007) (Wedoff, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:363.05**

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

0207-058 **Claimed prepayment penalties on commercial loans properly denied as unreasonable.** (*D.R.I.)*

PROCEDURAL POSTURE: Appellant creditor appealed from an order of the bankruptcy court denying its claim for prepayment penalties on two commercial loans that appellant made to appellee debtor. The question presented was whether the bankruptcy court correctly determined that the prepayment penalties were not reasonable fees, costs, or charges within the meaning of 11 U.S.C. § 506(b).

OVERVIEW: Because the creditor failed to establish that the prepayment penalties were "reasonable," the bankruptcy court properly denied the creditor's claim. The debtor's estate had several million dollars more than what was needed to pay creditors and the value of the property securing the creditor's loan was far in excess of the claim. The creditor failed to carry its burden of showing that the prepayment penalties, viewed as of the time that the loans were made, amounted to a reasonable estimate of the loss that it was likely to sustain in the event of a breach. The bankruptcy judge found that the creditor's witness was "clueless" as to how the formula prescribing the prepayment penalties was established. That finding was supported by the record. Even if the determination of reasonableness were based on any actual losses sustained by the creditor, the creditor would not have been entitled to recover for the debtors' prepayment for two reasons. First, if its actual losses could have been proven, there would have been no justification for a prepayment penalty. In addition, the creditor failed to satisfactorily prove what actual damages, if any, it sustained.

UPS Capital Bus. Credit v. Gencarelli*, 2006 U.S. Dist. LEXIS 94760 (D.R.I. November 3, 2006) (Torres, C.D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:506.04**

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

0207-059 **Default judgment for breach of fiduciary duty was nondischargeable.** (*Bankr. D. Md.)*

PROCEDURAL POSTURE: Plaintiff filed a complaint against chapter 7 debtors, a husband and wife, seeking a determination that certain debt was nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

OVERVIEW: Plaintiff's grandmother was placed in the care of debtor wife, who operated assisted living facilities. The grandmother was an 86-year-old widow diagnosed with Alzheimer's disease, dementia, delusional thoughts, and paranoia. After the grandmother died, plaintiff learned that the grandmother had executed a power of attorney in favor of the wife and that debtors had withdrawn substantial sums of money from the grandmother's bank accounts and spent the money. Plaintiff obtained a default judgment against debtors in state court in an action seeking to recover damages for breach of constructive trust, breach of fiduciary duty, conversion, unjust enrichment, and civil conspiracy, based upon fraud. The court held that debtors were bound by the determination made by the state court that debtors were liable to plaintiff for fraud, conspiracy, and unjust enrichment because, even though the determination of liability was based upon debtors' default, and not after a trial, debtors were afforded a full and complete

opportunity to timely plead their defenses, which they failed to do. The court awarded compensatory damages of $200,000 and punitive damages in the amount of $500,000.

***Drummond v. Freeland (In re Freeland)**, 2006 Bankr. LEXIS 3787 (Bankr. D. Md. December 21, 2006) (Schneider, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.08[1]**

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

0207-060 **Widowed, cancer-stricken debtor in no-asset case entitled to undue hardship discharge of student loan debt.** (*Bankr. D. Neb.)*

PROCEDURAL POSTURE: Plaintiff debtor filed a complaint against defendant creditor to determine dischargeability of the debtor's student loans under 11 U.S.C. § 523(a)(8). The debtor claimed that discharge was warranted because of an undue hardship.

OVERVIEW: The debtor and her husband filed a proceeding under chapter 7. The case was determined to be a "no asset" case and a discharge was entered. Before the petition was filed, the debtor had been diagnosed with breast cancer, and had incurred substantial medical bills. Additionally the debtor husband was very ill and the debtors could not make ends meet. The debtor husband died while the chapter 7 proceeding was still pending. The debtor received approval to reopen the proceeding to file an adversary proceeding concerning the student loan obligation. The student loan had been used by the debtor to obtain an associate's degree in printing, layout, and design. The debtor had not been able to obtain employment in that field after graduation. Applying a totality of the circumstances approach, the court determined that the debtor's student loan obligation should be discharged. The debtor's expenditures and income revealed that she would not be able to make a payment toward the student loan. Additionally, the debtor faced additional medical expenses in the foreseeable future and would need to replace her 12-year-old vehicle in the near future.

***Duncan v. Educational Credit Mgmt. Corp. (In re Duncan)**, 2007 Bankr. LEXIS 47 (Bankr. D. Neb. January 16, 2007) (Saladino, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.14**

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

0207-061 **Transfers by debtor to brokerage firm with intent to hinder, delay or defraud creditors were avoidable.** (*Bankr. S.D.N.Y.)*

PROCEDURAL POSTURE: Chapter 11 trustee and defendant brokerage firm filed cross-motions for summary judgment in trustee's action, which sought to avoid margin payments deposited in debtor's account at the firm pursuant to 11 U.S.C. § 548(a)(1)(A).

OVERVIEW: Debtor was an investment fund whose manager operated a massive Ponzi scheme. Debtor had a margin account with the firm. Funds transferred into the account were used by debtor to engage in securities trading. The firm had a security interest in any funds transferred, it held the funds as collateral for short sales, it had the right to prohibit and actually prohibited debtor from withdrawing any of the funds as long as any short position remained open, and it had the right to use and actually did use the funds to purchase covering securities, with or without debtor's consent. The firm was compensated for its services out of the account funds. The court held that the transfers were presumed to have been made with actual intent to hinder, delay, or defraud other creditors. The court also held that the firm was an initial transferee from which an avoided transfer could be recovered under 11 U.S.C. § 550(a)(1) because it exercised dominion and control over the funds. The court further held that the firm failed to establish good faith under 11 U.S.C. § 548(c) because the firm was on inquiry notice for over a year before it closed the account.

***Gredd v. Bear, Stearns Sec. Corp. (In re Manhattan Inv. Fund, Ltd.)**, 2007 Bankr. LEXIS 49 (Bankr. S.D.N.Y. January 9, 2007) (Lifland, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:548.04**

§ 550(a) Liability of Transferee of Avoided Transfer; Trustee's Right to Recover Transferred Property.

0207-062 **Recovery of preferential payments from subsequent transferors allowed solely to the extent of postpetition payments to debtor.** (*Bankr. S.D. Fla.)*

PROCEDURAL POSTURE: The debtor filed for relief under chapter 7. The trustee was granted a judgment on the pleadings for a preferential transfer that the debtor made to the father. The trustee filed a subsequent action to recapture money that the father had transferred to defendants, a son and daughter-in-law, and a daughter, as subsequent transferees under 11 U.S.C. § 550(a). The court issued findings and conclusions.

OVERVIEW: The debtor filed a chapter 7 bankruptcy proceeding in July 2005. In March, 2005, through the debtor's attorney the debtor made a payment to her father for $20,000. The $20,000 transfer arose from the proceeds of a personal injury claim settled for the debtor. The trustee obtained a judgment against the father for a preferential transfer under 11 U.S.C. § 547. The father testified that he had transferred the proceeds to defendants, prepetition, for use as the debtor as needed. Defendants paid the debtor $12,000 before she filed bankruptcy and $8,000 postpetition. The court held that the trustee could not recover the $20,000 transferred to defendants, because such a recovery would be a result that was not intended by 11 U.S.C. § 550. To permit the trustee to recover $20,000 from defendants would create a windfall of $12,000 that would violate the single satisfaction rule of 11 U.S.C. § 550(d). The court also found that defendants should be credited for prepetition payments made to the debtor pursuant to 11 U.S.C. § 105(a). The court found that the trustee was entitled to recover against defendants to the extent that defendants made postpetition payments to the debtor.

Bakst v. Sawran (In re Sawran)*, 2007 Bankr. LEXIS 92 (Bankr. S.D. Fla. January 10, 2007) (Hyman, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:550.02**

§ 706(a) Conversion; By the Debtor.

0207-063 **Chapter 7 discharge vacated and case converted to chapter 13 upon second, higher appraisal of debtor's home.** (*Bankr. N.D. Ill.)*

PROCEDURAL POSTURE: Chapter 7 debtors filed a combined motion to convert their chapter 7 case to chapter 13 pursuant to 11 U.S.C. § 706(a) and vacate the discharge entered in the chapter 7 case. Trustee opposed the motion, and in the alternative moved that debtors' case be reconverted to chapter 7 should conversion from chapter 7 to chapter 13 be permitted.

OVERVIEW: Debtors owned a home. Based on an appraisal obtained from a real estate brokerage firm pre-bankruptcy, the value of the home was less than the combined amount of debtors' claimed homestead exemption and the amount due under a mortgage note. Therefore, initially there appeared no possibility that the real estate could be used to satisfy unsecured claims of creditors. Trustee, after the discharge had entered, had debtors' home appraised for a value significantly greater than the pre-bankruptcy appraisal. In an effort to save their home from a sale by trustee, debtors filed the instant motion. The court held that debtors' discharge had to be set aside if they wished to subject the debts listed in their chapter 7 case to terms of a chapter 13 plan. The court held that it had the authority to vacate debtors' discharge on debtors' own motion and convert the case to Chapter 13 because the higher appraisal of debtors' home constituted newly discovered evidence within the meaning of Fed. R. Civ. P. 60(b)(2), made applicable in bankruptcy by Fed. R. Bankr. P. 9024. The court held that cause was lacking to warrant debtors' case being reconverted to chapter 7 on trustee's motion.

In re Starling*, 2007 Bankr. LEXIS 67 (Bankr. N.D. Ill. January 11, 2007) (Schmetterer, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:706.02**

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

0207-064 **Discharge denied due to debtor's conversion of non-exempt assets into exempt property with intent to hinder, delay and defraud creditors.** (*Bankr. M.D. Fla.)*

PROCEDURAL POSTURE: Plaintiffs filed a complaint against chapter 7 debtor, seeking a denial of debtor's discharge pursuant to 11 U.S.C. § 727(a)(2)(A).

OVERVIEW: Debtor and his wife were citizens of California. Debtor was a salesperson for a corporation that operated an investment scheme. After the federal government shut down the operation, several suits were filed against debtor, including a suit filed by plaintiffs. Debtor and his wife traveled to Florida and opened a bank account at a Florida bank. They met with a bankruptcy lawyer and, thereafter, applied for Florida driver's licenses. They then purchased a home in Florida. After they sold their home in California, they paid off the mortgage on the Florida home. Despite having a clear intent to move to Florida at the time, debtors in their depositions initially denied an intention to move to Florida but later changed their deposition testimony to reflect an intended move. In denying a discharge pursuant to section 727(a)(2)(A), the court held that plaintiffs had established by a preponderance of the evidence that debtor and his wife transferred non-exempt assets into exempt property with the specific intent to hinder, delay, and defraud plaintiffs and other creditors.

Wilson v. Smith (In re Smith)*, 2006 Bankr. LEXIS 3770 (Bankr. M.D. Fla. December 13, 2006) (Paskay, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.02**

§ 727(a)(5) Discharge; Grounds for Denial; Failure to Explain Losses.

0207-065 **Discharge denied where debtor failed to explain prepetition loss of large sums of money.** (*Bankr. S.D. Ill.)*

PROCEDURAL POSTURE: Creditor filed an adversary proceeding against chapter 7 debtor, objecting to debtor's discharge pursuant to 11 U.S.C. § 727(a)(5).

OVERVIEW: Shortly before filing bankruptcy, debtor wrote creditor checks. In exchange for the checks, creditor issued debtor money orders. The checks written by debtor did not clear her bank and were returned for non-sufficient funds. Debtor had an account of her own and a joint account with her mother. Debtor made deposits into both accounts shortly before filing for bankruptcy. The bank records also indicated large withdrawals from the accounts, but there was no clear record of what happened to the monies. Debtor did not disclose her interest in her mother's account on her bankruptcy schedules, nor did she account for or explain her continuing deposits in that account or her withdrawals from it. The court held that debtor's discharge should be denied because, not only did debtor not satisfactorily explain the loss of large sums of money she received shortly before filing for bankruptcy relief, but debtor did not explain the loss of those monies at all.

Gale Aulabaugh, Inc. v. Madison License & Check Exp. (In re Stordahl)*, 2007 Bankr. LEXIS 56 (Bankr. S.D. Ill. January 12, 2007) (Fines, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.08**

§ 1325 Confirmation of Plan.

0207-066 **Debtor whose plan proposed paying four percent of unsecured claims could not use disposable income to buy vehicle not necessary to plan completion.** (*Bankr. M.D. Ala.)*

PROCEDURAL POSTURE: The debtor filed a motion to incur a debt. The debtor contended his current vehicle was both unreliable and uneconomical. For that reason, the debtor sought authority to borrow money to purchase either a new automobile. Further, the debtor proposed to pay this claim directly instead of through the chapter 13 trustee.

OVERVIEW: The first problem with the debtor's motion was that his confirmed chapter 13 plan did not pay unsecured creditor claims in full. Rather, the plan provided payment of only about four percent of unsecured claims. Further, the debtor did not show that a new vehicle was essential for the debtor to complete the plan. Instead, his desire to buy a new vehicle appeared entirely optional and not borne of necessity. Using disposable income for this purpose was improper under 11 U.S.C. § 1325. In addition to

the disposable income concern, the debtor's motion lacked the requisite specificity. In particular, the motion did not specify the amount that the debtor intended to borrow or the amount he would have been required to pay in servicing the new debt. Further, the motion did not address the issue of the disposition of the debtor's current vehicle, which was still being paid for under the chapter 13 plan.

***In re Hammett**, 2007 Bankr. LEXIS 73 (Bankr. M.D. Ala. January 11, 2007) (Williams, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

§ 1327 Effect of Confirmation.

0207-067 **Creditor was bound by confirmation order given evidence of proper notice and absence of fraud.** (*Bankr. E.D. Ky.)*

PROCEDURAL POSTURE: The creditor sought a motion to vacate or reconsider an earlier order of the court confirming the debtors' plan under chapter 13. The debtors objected to the motion.

OVERVIEW: The debtors' amended chapter 13 plan indicated that the debt secured by the creditor's second mortgage was unsecured, due to an allegedly defective notarial acknowledgment on the mortgage document. The confirmation hearing was held without an objection from any creditor and the court entered an order confirming the debtors' amended plan. Thereafter, the creditor filed a secured proof of claim and moved to vacate or reconsider the order of confirmation. The creditor claimed that the address listed by the debtors in their petition was not correct for notice or correspondence purposes. The court determined initially that 11 U.S.C. § 1330 did not provide a basis upon which the creditor could seek revocation. There was no evidence that the confirmation order was procured by fraud. The creditor did not provide sufficient evidence to rebut the strong evidence of record that the copies of the bankruptcy notices were properly mailed to a valid address of the creditor. The court further found that the creditor was bound, pursuant to 11 U.S.C. § 1327, by *res judicata* because the creditor's issue could have been raised prior to the confirmation hearing.

***In re Blackaby**, 2006 Bankr. LEXIS 3799 (Bankr. E.D. Ky. September 21, 2006) (Scott, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1327.01**

§ 1329(a) Modification of Plan After Confirmation; Types of Modification Allowed.

0207-068 **Bankruptcy court properly allowed modification that provided greater payment to unsecured creditors where there was substantial change and denied in second case absent change.** (*4th Cir.)*

PROCEDURAL POSTURE: In two bankruptcy cases before the District Court for the Eastern District of Virginia, the chapter 13 trustee sought to modify a confirmed chapter 13 plan to increase the amount to be paid to the unsecured creditors. The bankruptcy court denied the motion to modify in case one, but granted it in case two and the district court affirmed the decisions. The trustee appealed in case one and the debtor appealed in case two.

OVERVIEW: In case one, through the cash-out refinancing, the debtors did not experience a substantial change in their financial condition. All the debtors did was to eliminate a portion of their equity in the property for cash in exchange for a corresponding amount of debt. Thus, even when one considered that the debtors' residence appreciated in value post-confirmation, at most, they simply received a large loan in place of a small one. Under the doctrine of *res judicata*, there being no substantial change to the debtors' financial condition, the cash-out refinancing could not provide a basis for modifying the debtors' confirmed plan pursuant to 11 U.S.C. § 1329(a)(1) or (a)(2). In case two, the debtor experienced a substantial and unanticipated change in his post-confirmation financial condition, so the doctrine of *res judicata* did not prevent the modification of his confirmed plan pursuant to section 1329(a)(1) or (a)(2). By selling his condominium, the debtor received a substantial amount of readily available cash without any debt. Accordingly, the bankruptcy court did not abuse its discretion when it modified the confirmed plan to provide for full payment of the pending unsecured claims.

***Murphy v. O'Donnell (In re Murphy)**, 2007 U.S. App. LEXIS 1018 (4th Cir. January 18, 2007) (Hamilton, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1329.04**

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

§ 1334 Bankruptcy Cases and Proceedings.

0207-069 **Dispute over promissory note in favor of debtor was related to debtor's bankruptcy and appropriate for determination by bankruptcy court.** (*Bankr. N.D. Tex.)*

PROCEDURAL POSTURE: In an adversary proceeding brought by chapter 11 trustee, defendant filed a motion to withdraw reference pursuant to 28 U.S.C. § 157(d).

OVERVIEW: Trustee filed an adversary complaint against defendant to recover on a promissory note executed by defendant in favor of debtor. Defendant filed counterclaims against debtor, and third-party claims against the principal officer of debtor. The officer filed a proof of claim, contending that he was entitled to assert indemnity, contribution, and/or reimbursement claims against debtor for any and all claims that were asserted against him based upon his association with debtor. Defendant sought a withdrawal of the reference as to the entirety of the claims asserted in the proceeding. The court held that it had subject matter jurisdiction over all of the claims and defenses because they were related to debtor's chapter 11 case within the meaning of 28 U.S.C. § 1334. In recommending that the district court deny defendant's motion, the court held that core issues predominated in the adversary proceeding, no party had asserted a right to a jury trial, withdrawal would not facilitate judicial economy because the court had numerous other claims to determine, and the court was very familiar with debtor and its estate and the nature of the claims pending by and against the estate.

Faulkner v. Berg (In re Heritage Org., LLC)*, 2006 Bankr. LEXIS 3470 (Bankr. N.D. Tex. December 15, 2006) (Houser, B.J.).*

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

BANKRUPTCY RULES (Pre-2005 Act)

Rule 1007 Lists, Schedules and Statements; Time Limits.

0207-070 **Debtor properly sent notice of bar date to creditors where creditors' attorney failed to request service.** (*N.D.N.Y.)*

PROCEDURAL POSTURE: In appellee debtor's chapter 11 petition, appellant creditors were named on the debtor's list of creditors but their counsel was not listed. The creditors filed unsecured proofs of claim nearly three months after the deadline to file claims (bar date), and the bankruptcy court denied the creditors' motion seeking to enlarge the period in which to file proofs of claim. The creditors appealed.

OVERVIEW: The creditors claimed that they were entitled to file late proofs of claim because notice of the bar date was not delivered to their counsel. The court held that the bankruptcy court properly denied the creditors' motion to enlarge the period in which to file proofs of claim under Fed. R. Bankr. P. 3003(c)(3) and 9006(b)(1). The court found that the debtor complied with Fed. R. Bankr. P. 1007 and N.D.N.Y. Bankr. R. 1007-2 by filing a list of the names and addresses of each creditor on a mailing matrix submitted to the bankruptcy court, that when the creditors' counsel failed to request that the debtor send notices to it instead of to the creditors, the debtors complied with Fed. R. Bankr. P. 2002(g) by sending the bar date notice directly to the creditors, and that the creditors' failure to file proofs of claim before the bar date was not the result of excusable neglect, pursuant to Fed. R. Bankr. P. 9006(b)(1). The court further found that the bankruptcy court had jurisdiction to approve a settlement with a different creditor out of the proceeds of the debtor's insurance policy because the debtor's insurance policy was property of the debtor's estate under 11 U.S.C. § 541(a)(1).

Borden v. Brunswick Baptist Church (In re Brunswick Baptist Church)*, 2007 U.S. Dist. LEXIS 3319 (N.D.N.Y. January 16, 2007) (Kahn, D.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 9:1007.01**