February 2007

Collier Bankruptcy Case Update

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

0207-071 **Debtor given wrong services by credit counseling service satisfied requirement by obtaining proper counseling immediately postpetition.** (*Bankr. D. Conn.)*

PROCEDURAL POSTURE: The United States trustee ("UST") has moved to dismiss the debtor's chapter 7 case because the debtor did not timely satisfy the prepetition duties required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Specifically, the UST argued that the debtor did not properly comply with the credit counseling requirement in 11 U.S.C. § 109(h)(1).

OVERVIEW: The debtor attempted to satisfy the prepetition requirements by contacting an approved credit counseling agency. When she finally got a response from an approved agency, she was given the wrong services. After the debtor discovered that she had not received the requisite credit counseling, she immediately rectified that deficiency, albeit after she had already filed her petition. The UST contended, however, that since the statute said that credit counseling was to be done before filing the petition, and it was not, the case was required to be dismissed. The court was satisfied that the debtor was an innocent victim of miscommunication with an approved credit counseling agency. The court noted that 11 U.S.C. § 109(h) did not include a provision for mandatory dismissal. The court concluded that the debtor had satisfied the three conditions for an exemption under section 109(h)(3)(A); she was an eligible debtor. Finally, the UST incorrectly contended that the debtor was required to file the credit counseling certificate with the petition. There was no such requirement in Fed. R. Bankr. P. 1007.

In re Kernan*, 2007 Bankr. LEXIS 28 (Bankr. D. Conn. January 5, 2007) (Shiff, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.09[1]**

0207-072 **Credit briefing received on the morning of petition date prior to filing satisfied the counseling requirement.** (*Bankr. D. Idaho)*

PROCEDURAL POSTURE: The chapter 13 trustee objected to the debtor's eligibility to be a debtor under 11 U.S.C. § 109(h). The Trustee noted that the certificate of credit counseling filed by the debtor showed that he received a credit briefing at 8:28 a.m. on the day his petition was filed. The issue was whether such a "same day" briefing satisfied the section 109(h) requirement that the credit briefing be received "preceding the date of filing the petition."

OVERVIEW: The court held that the term "date of filing" as found in 11 U.S.C. § 109(h) referred to the specific calendar day and time the petition was filed. To conclude otherwise would have created obstacles for debtors where none were necessary to further the goals articulated by Congress. In the instant case, the credit briefing that the debtor obtained prior to filing but on the same day he filed his bankruptcy petition complied with 11 U.S.C. § 109(h). The court could not see how reading the Bankruptcy Code to require a one-day waiting period to file a petition could further Congress' stated purpose in enacting 11 U.S.C. § 109(h)(1). If the debtor had a credit briefing ten minutes before filing the petition, and was convinced by the counselor that he should not file, then he would not have filed. The fact that he got the briefing hours, rather than days, prior to filing would not impact that decision significantly.

In re Swanson*, 2006 Bankr. LEXIS 3639 (Bankr. D. Idaho December 21, 2006) (Myers, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.09[1]**

§ 303(b) Involuntary Cases; Commencement.

0207-073 **Creditor sustained burden of proof on involuntary petition where debtor had no more than eight bona fide creditors as of petition date.** (*Bankr. S.D.N.Y.)*

PROCEDURAL POSTURE: A creditor (mortgagee) filed an involuntary chapter 7 case, 11 U.S.C. § 303(b), against an alleged debtor, its mortgagor. The matter was before the court for a ruling following a three-day bench trial. The alleged debtor opposed the petition.

OVERVIEW: The main issue was whether the alleged debtor had 12 or more creditors as of the petition date, who held claims that were neither contingent nor subject to bona fide disputes. The creditor proved it held a claim that was neither contingent nor subject to a bona fide dispute where it held an unstayed money judgment of approximately $225 million. It also showed that it the undersecured portion of its

claim exceeded $12,300, based upon the size of its claim compared to the value of the security, *i.e.*, the hotel property. Next, the alleged debtor was generally not paying its non-contingent, undisputed debts as they became due. As to the number of creditors, the question was whether at least 10 of the remaining 105 creditors identified on the final creditor list had to be counted under 11 U.S.C. § 303(b). The court concluded that the alleged debtor had, at most, only eight creditors as of the petition date, including the mortgagee, that held claims that were not contingent or subject to bona fide disputes. Two of the eight received postpetition transfers from property of the estate on account of their prepetition claims. The creditor sustained its burden of proof on the petition.

In re Euro-American Lodging Corp., *2007 Bankr. LEXIS 15 (Bankr. S.D.N.Y. January 9, 2006) (Bernstein, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:303.03**

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

0207-074 **Lack of familiarity with requirements for employment as counsel did not justify retroactive approval of late application.** (*Bankr. D. Idaho)*

PROCEDURAL POSTURE: Chapter 11 debtor requested that its employment of counsel be approved *nunc pro tunc* to the date the bankruptcy petition was filed.

OVERVIEW: Counsel represented debtor prior to the commencement of the bankruptcy case in negotiations with creditors and in state court collection actions. Counsel, which had no significant prior exposure to bankruptcy law other than in representing creditors, filed a chapter 11 petition for debtor. They were unaware of the need for debtor to file an application to approve their employment pursuant to 11 U.S.C. § 327(a) and Fed. R. Bankr. P. 2014(a). More than seven months after the bankruptcy filing, debtor filed the instant application. In denying the request to have counsel's employment approved *nunc pro tunc* to the date the bankruptcy petition was filed, the court held that a lack of familiarity with the requirements of the Bankruptcy Code and Rules did not constitute exceptional circumstances justifying retroactive approval of the application.

In re Taylor Quality Concrete, Inc., *2007 Bankr. LEXIS 11 (Bankr. D. Idaho January 2, 2007) (Pappas, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:327.02**

§ 362 Automatic Stay.

0207-075 **Relief from stay granted to mortgagee creditor due to probable lack of equity and debtor's inability to refinance.** (*Bankr. D.N.H.)*

PROCEDURAL POSTURE: Creditor, which held a first mortgage and second mortgage on the debtor's property, filed two motions. The first was a motion for relief from the automatic stay, and the second was a motion requesting the court to instruct the United States Trustee to appoint a chapter 11 trustee.

OVERVIEW: The creditor submitted an appraisal of the property prepared for an interested purchaser. While the appraisal supported an equity cushion of approximately $400,000, the interested purchaser was no longer interested in purchasing the property at the appraised price. The debtor submitted a letter from an investment firm indicating an intent to finance the debtor in the amount of $1,050,000 based on the debtor's collateral. Other indications of interest in refinancing had not materialized, and none would have been in an amount to satisfy the obligations alleged to be owed to the creditor. This evidence cast serious doubt on whether the appraisal was realistic and whether an equity cushion existed. The debtor's inability to adequately refinance was sufficient to support the creditor's burden to show lack of adequate protection. Further, the court was skeptical whether the proposed chapter 11 plan could be confirmed. First, it relied on avoidance of the creditor's second mortgage. Second, even if the lien was avoided, unless the court reduced the amount owed, the creditor would most likely have controlled the class of unsecured creditors, making acceptance of the plan unlikely.

In re Whispering Pines Estate, Inc., *2006 Bankr. LEXIS 3607 (Bankr. D.N.H. December 28, 2006) (Vaughn, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.01**

§ 362(c) Automatic Stay; Duration.

0207-076 **Stay continued in debtor's second chapter 13 case due to sufficient evidence to overcome presumption of bad faith.** (*Bankr. N.D. Cal.)*

PROCEDURAL POSTURE: A chapter 13 debtor filed an uncontested motion for continuation of the automatic stay as to all creditors, pursuant to 11 U.S.C. § 362(c)(3).

OVERVIEW: The debtor filed a motion to continue the stay. The court found that a presumption of the lack of good faith arose because the previous case was dismissed for failure to perform the confirmed plan. However, the court found that the debtor provided clear and convincing evidence that the case was filed in good faith because her unexpected and unavoidable medical expenses and car repair bills led to the dismissal of her prior case, the present case was filed almost immediately after the dismissal in an attempt to retain possession of her only means of transportation, and she did not accumulate debt in the time between the cases. The case was likely to succeed in light of changes in the debtor's circumstances because, with the return of good health, she was able to return to her employment and a stable source of income, her vehicle was in good working condition, and she expressed a sincere intention to successfully complete the plan. The court found that the debtor complied with the payment requirements of 11 U.S.C. § 1325(b) and contributed all of her disposable income to the 60-month plan, which cured the arrearage on her secured debt and placed no unusual burden on the trustee.

In re Elliott-Cook*, 2006 Bankr. LEXIS 3706 (Bankr. N.D. Cal. December 20, 2006) (Morgan, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.06**

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

0207-077 **Stay annulled where debtor filed ninth petition after not making mortgage payments for 38 weeks.** (*Bankr. S.D. Tex.)*

PROCEDURAL POSTURE: A creditor filed a motion, pursuant to 11 U.S.C. § 362(c)(4) and (d), for a declaration that the automatic stay was inapplicable or an annulment of the stay to validate its foreclosure of the debtor's home. The debtor filed a motion for an order extending the stay beyond 30 days, pursuant to section 362(c)(3).

OVERVIEW: The debtor filed her 9th chapter 13 petition. The court denied the creditor's motion to declare the stay inapplicable under section 362(c)(4), which did not apply because the debtor's sixth petition was stricken as fatally defective and did not result in the commencement of a case and, thus, there was only one prior dismissal in the previous year. Under 11 U.S.C. § 362(c)(3), the court denied the debtor's motion to extend the stay, finding that the case, which was the 9th petition she and her husband had filed, was not filed in good faith as to the creditors to be stayed because she made no mortgage payments for over three years and the plan proposed to pay only $1,000 of her $3,000 monthly disposable income in violation of 11 U.S.C. § 1325(b)(1). The court found that the egregious conduct of a family with $90,000 of annual income in filing 8 petitions and not making mortgage payments over 38 months warranted its exercise of its discretionary power to annul the stay under 11 U.S.C. § 362(d). The court found that the facts that the couple apologized, were not driving luxury automobiles, and were employed were overwhelmed by their overall financial irresponsibility.

In re Maxey*, 2006 Bankr. LEXIS 3625 (Bankr. S.D. Tex. December 27, 2006) (Isgur, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.06[3]**

§ 503(b)(9) Allowance of Administrative Expenses; Types of Expenses Allowed; Value of Goods Sold to Debtor Within 20 Days Prior to Filing Date in Ordinary Course of Business.

0207-078 **Payment of administrative expense claims denied due to potential prejudice to debtor in possession and its ability to borrow.** (*Bankr. D. Del.)*

PROCEDURAL POSTURE: Movant creditor, a vendor of debtor, sought the allowance and immediate payment of its claim brought pursuant to 11 U.S.C. § 503(b)(9). Debtors in possession were operating their business pursuant to 11 U.S.C. §§ 1107 and 1108. Debtors had purchased approximately 122,986 pounds of aluminum from the creditor in the ordinary course of debtors' business during the twenty days immediately preceding the petition date.

OVERVIEW: Debtors in possession ("DIP") were dependent on two large revolving lines of credit to continue to function. Moving creditor requested allowance of its claim for the aluminum as an administrative expense claim to be paid within three business days of the court's entry of an order granting the motion. Creditor argued it would be inequitable to delay the payment of the administrative expense claim in light of the administrative expense priority afforded it by the recent amendments to the Bankruptcy Code, and to provide adequate protection of its interest in cash collateral. DIP argued that the final financing order prohibited the payment as not authorized under the DIP financing agreements or the DIP budget. DIP argued that requiring immediate payment of section 503(b)(9) claims would expose debtors to financial risk by adversely affecting DIPs' borrowing availability. The aggregate section 503(b)(9) claims far exceeded the company's availability to borrow. There were more than twenty creditors seeking immediate payment of administrative claims, and the DIPs would be prejudiced if the court were to grant the motions for administrative expense claims.

In re Global Home Products, LLC*, 2006 Bankr. LEXIS 3608 (Bankr. D. Del. December 21, 2006) (Gross, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:503.16**

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

0207-079 **Claim for postpetition creditor's attorneys' fees incurred in collecting debt was allowed.** (*Bankr. W.D. Ark.)*

PROCEDURAL POSTURE: An oversecured mortgage creditor amended its claim in debtors bankruptcy to include postpetition attorneys fees, pursuant to 11 U.S.C. § 506(b), for bankruptcy-related services and for defending the debtors' state-court appeal of a decision in favor of the creditor. The debtors objected to the creditor's amended claim.

OVERVIEW: The creditor contended that it was entitled to recover fees incurred in participating in the meeting of creditors, filing a proof of claim, objecting to the debtors' plan, objecting to a sale of the debtors' property, resisting the debtors' motion for relief from the bankruptcy stay to pursue the state-court-appeal, and defending the appeal which affirmed the creditor's entitlement to insurance proceeds for damage to the mortgaged property. The debtors argued that the mortgage agreement only provided for reimbursement of attorney fees incurred in collection of the debt. The bankruptcy court held that the claimed attorney fees of the creditor were incurred in collection of the mortgage debt and were thus payable under section 506(b). The creditor's actions in the bankruptcy case were directed to protection of the creditor's collateral or obtaining eventual payment of the debt, and thus attorney fees were incurred in collection of the debt. Similarly, the creditor's efforts to obtain affirmance of the judgment that the insurance proceeds were applicable to the debt, rather than payable to the debtors, were in the nature of actions to collect the debt.

In re Dwiggins*, 2007 Bankr. LEXIS 33 (Bankr. W.D. Ark. January 9, 2006) (Mixon, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:506.04**

§ 522(p) Exemptions; Limitation on Homestead Exemption.

0207-080 **Joint debtors could exert state homestead exemption up to amount of cap.** (*Bankr. M.D. Fla.)*

PROCEDURAL POSTURE: The chapter 7 trustee filed an objection to the debtors' claimed homestead exemption. The parties filed cross-motions for summary judgment.

OVERVIEW: The debtors insisted that they were each entitled to the homestead exemption pursuant to the Florida law, thereby making the 11 U.S.C. § 522(p) cap in this joint case $250,000. The court found it unnecessary to determine whether the debtors were entitled to exempt the homestead up to $125,000 each. The court held that the equity passively resulting from market appreciation was not to be counted against the $125,000 cap of 11 U.S.C. § 522(p). Passive market appreciation was not an interest that a debtor "acquired" during the 1,215-day period. In the instant case, there was nothing in the record to have indicated that the debtors actively increased their equity by anything other than the scheduled amortization payments. These principal reductions presumably increased the debtors' equity, but only nominally and nowhere near $125,000. Although the court did not need to address the "exemption stacking" issue, the court nevertheless noted that each debtor, in a joint case involving a "1,215 homestead," was eligible to assert a homestead exemption up to the $125,000 cap, for a total exemption of up to $250,000.

In re Chouinard*, 2006 Bankr. LEXIS 3711 (Bankr. M.D. Fla. December 20, 2006) (May, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:522.13**

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

0207-081 **Repayment of loans from voluntary retirement accounts could not be deducted from monthly income to rebut presumption of abuse.** (*Bankr. E.D. Pa.)*

PROCEDURAL POSTURE: Before the court was the Motion of the U.S. Trustee to dismiss debtor's chapter 7 bankruptcy case pursuant to 11 U.S.C. § 707(b).

OVERVIEW: At issue was whether debtor could deduct $836 from his current monthly income to account for payments on two loans from debtor's 401(k) plan and therefore avoid or, if not avoided, rebut the presumption of abuse under the means test in 11 U.S.C. § 707(b)(2)(A). Debtor's ability to deduct the payment determined whether the presumption of abuse applied in the case. The court concluded that repayment of loans from voluntary retirement accounts through mandatory payroll deduction did not meet the necessary expense test under the IRS Manual, the standard adopted by the means test. It further rejected debtor's assertion that such an interpretation led to an absurd result or rendered other provisions of the Code superfluous. Because the monthly loan payment had to be excluded from debtor's deductions under the means test, the chapter 7 relief he sought was presumptively abusive. Debtor rebutted the presumption by demonstrating "special circumstances" that allowed him to deduct the loan payments. As a result, the Trustee bore the burden of proving that granting debtor relief under chapter 7 would be an abuse under section 707(b)(3), a burden that the court found had been met.

In re Lenton*, 2006 Bankr. LEXIS 3649 (Bankr. E.D. Pa. December 15, 2006) (Sigmund, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.04**

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

0207-082 **Car payments not required for debtors to claim ownership allowance in chapter 13 plan.** (*Bankr. M.D.N.C.)*

PROCEDURAL POSTURE: The chapter 13 trustee objected, pursuant to 11 U.S.C. § 1325(b)(1)(B), to confirmation of the debtors' proposed plan on the ground that it did not apply their projected disposable income to make payments to unsecured creditors.

OVERVIEW: The trustee objected to the proposed chapter 13 plan on the ground that the debtors claimed the ownership allowance of the Internal Revenue Service Local Standard for transportation for an automobile that they were not making payments on. The trustee alleged that, because the debtors did not have a car payment, they were not entitled to claim the ownership allowance and that their plan, thus,

did not commit all of their projected disposable income to the plan as required by 11 U.S.C. § 1325(b)(1)(B). The court overruled the objection and confirmed the plan. The court held that the chapter 13 debtors were not required under 11 U.S.C. § 707(b)(2)(A)(ii) to have a car payment in order to claim the ownership allowance under the Internal Revenue Service Local Standard for transportation as a monthly expense for purposes of computing disposable income under 11 U.S.C. § 1325(b)(2).

***In re Crews**, 2006 Bankr. LEXIS 3632 (Bankr. M.D.N.C. December 22, 2006) (Stocks, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[2]**

§ 727(a)(11) Discharge; Grounds for Denial; Failure to Complete Instructional Course.

0207-083 **Financial management course requirement waived for debtor with dementia and memory loss.** (*Bankr. M.D.N.C.)*

PROCEDURAL POSTURE: A chapter 7 debtor filed a certification of exigent circumstances, requesting a waiver of the requirement that she complete the personal financial management course required by 11 U.S.C. § 727(a)(11).

OVERVIEW: The debtor sought a waiver of the requirement that she complete the personal financial management course under 11 U.S.C. § 727(a)(11). The court found good cause to grant a waiver of the requirement that the debtor complete a financial management course. The court found that the debtor possessed the requisite incapacity, as defined in 11 U.S.C. § 109(h)(4), because her son, attorney in fact, and principal care giver testified that the debtor had dementia and memory loss, migrated in and out of a general state of confusion, and was capable of participating in short telephone conversations but was not capable of fully comprehending such conversations. The court found that the son's testimony was credible and uncontradicted, that the debtor submitted numerous records to substantiate her recent and lengthy hospital stays for a stoke and heart attack, and that expert medical testimony was not required.

***In re Faircloth**, 2006 Bankr. LEXIS 3620 (Bankr. M.D.N.C. December 18, 2006) (Waldrep, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.12A**

§ 1123(a)(5)(D) Contents of Plan; Mandatory Provisions; Adequate Means of Implementation; Sale or Distribution of Property.

0207-084 **Non-operating entity with no prospect of rehabilitation could file chapter 11 case to challenge preclusive effect of foreign court's valuation order.** (*Bankr. D. Conn.)*

PROCEDURAL POSTURE: A creditor filed motions to dismiss a debtor's chapter 11 bankruptcy case under 11 U.S.C. § 1112(b)(1) or, in the alternative, for abstention under 11 U.S.C. § 305(a), or, in the alternative, for relief from the automatic stay under 11 U.S.C. § 362(d)(1).

OVERVIEW: The creditor's motion to dismiss stated that the chapter 11 case was filed in bad faith because the debtor's motivation for commencing the case was to relitigate a controversy that had been decided by a Bahamian order. The debtor's objection stated that it filed to protect the value of its stock for the benefit of all creditors who would be paid in full upon the confirmation of an anticipated liquidating plan. The court held that the undisputed facts that the debtor was not an operating entity, had no prospect for a rehabilitative reorganization, and had debts consisting of the costs of litigation did not, by themselves, establish cause for dismissal of the case. The court held that liquidating plans were not per se filed in bad faith. The court held that the debtor was to be given an opportunity to challenge the preclusive effect, under the doctrine of comity or other legal theory, of the Bahamian order on the value of its stock in the creditor. The court found that the debtor argued that it intended to preserve the fair market value of the stock and pay all allowed claims under a liquidating plan.

***In re Nattel**, 2006 Bankr. LEXIS 3603 (Bankr. D. Conn. December 28, 2006) (Shiff, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 7:1123.01[5]**

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

0207-085 **Confirmation denied as debtor could not surrender vehicle to secured creditor in full satisfaction of debt where value of car was less than creditor's claim.** (*Bankr. N.D. Ga.)*

PROCEDURAL POSTURE: The debtor moved for confirmation of his chapter 13 plan. The plan proposed to surrender a car in full satisfaction of the purchase money debt owed to creditor secured by that car, even though the car was worth less than the amount of the debt. The creditor, which obtained stay relief, repossessed the car, and sold it, objected to the plan because it did not provide for payment of the deficiency claim.

OVERVIEW: The court reasoned that a chapter 13 plan proposing to surrender a car acquired for the debtor's personal use within 910 days of the bankruptcy filing (a 910-day car) in satisfaction of debt was a plan to distribute property on account of the secured claim pursuant to 11 U.S.C. § 1325(a)(5)(B) rather than a true surrender under 11 U.S.C. § 1325(a)(5)(C), notwithstanding the plan's use of the word "surrender." Under 11 U.S.C. § 1325(a)(5)(B), a plan could be confirmed if it proposed to distribute on account of a secured claim, property having a value "not less than the allowed amount of the claim." Hence, if the debtor had wanted to retain the car and had proposed to make periodic cash payments, the present value of those payments could not have been less than the amount of the creditor's claim. The debtor proposed to "distribute" to the creditor the car in which the creditor had a security interest. The value of that car was less than the amount of debt owed to the creditor. For that reason, the debtor could not distribute the car to eliminate the entire debt under 11 U.S.C. § 1325(a)(5)(B).

In re Leaks*, 2006 Bankr. LEXIS 3673 (Bankr. N.D. Ga. December 21, 2006) (Massey, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

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

§ 330 Compensation of Officers.

0207-086 **Compensation denied for services described in insufficient detail and services that did not benefit estate.** (*Bankr. N.D. Cal.)*

PROCEDURAL POSTURE: The special counsel for a chapter 11 debtor filed an application, pursuant to 11 U.S.C. § 330, for a final allowance of compensation and expense reimbursement.

OVERVIEW: Special counsel was appointed to represent the debtor in claims against creditors. The court allowed $586,207 in compensation and $16,515 in expenses because counsel's services conferred a substantial benefit to the estate in that it produced high quality work, worked with its client and a demanding managing member in developing strategy in a fluid situation, and presided over multiple hearings and motions in complex real estate litigation. The court found compensable the periodic hourly rate increases and reasonable services for participating in settlement conferences, responding to fee objections, and communicating with the member's counsel. Counsel, pursuant to Cal. Evid. Code § 958, properly disclosed confidential client communications in support of its response to the member's fee objection. The court denied compensation for services that were inadequately described, participation by multiple attorneys in conferences in which the client did not participate, non-compensable clerical services that were clumped with compensable services, services that did not benefit the estate, including preparing an unfiled amendment, and services incurred in terminating counsel's employment.

In re Dimas, LLC*, 2006 Bankr. LEXIS 3694 (Bankr. N.D. Cal. December 29, 2006) (Morgan, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:330.01**

§ 348(e) Effect of Conversion; Termination of Service of Trustee or Examiner.

0207-087 **Fees incurred by chapter 7 trustee's counsel prior to approval of employment and conversion to chapter 13 denied except for small administrative expense.** (*Bankr. E.D. Cal.)*

PROCEDURAL POSTURE: Applicant, counsel for the chapter 7 trustee, sought approval of attorney's fees and costs totaling $33,504.90 for services provided during the first chapter 7 proceeding, during a second period while the case was converted to a chapter 13, and during a latter period after the case was reconverted to chapter 7.

OVERVIEW: The fee application had to be considered in three parts because 11 U.S.C. § 348(e) terminated the chapter 7 trustee's authority upon the conversion to chapter 13. For the initial chapter 7 period, counsel sought compensation and reimbursement of expenses of $32,270 in fees and $1,234.90 in expenses, for a total request of $33,504.90. However, counsel's employment had not bee approved until October 28, 2006, before which most of the fees had been incurred. There was not an earlier effective date nor an extraordinary circumstance to warrant making the employment date retroactive. No compensation was available to counsel for the period the case was administered under chapter 13, and fees and costs of $18,586.01 were disallowed. Although the same chapter 7 trustee was reappointed, he was effectively a "new" trustee in the reconverted case, and was obligated to comply with employment provisions. Once the case was reconverted to chapter 7, counsel had to be rehired, and none of the provisions of 11 U.S.C. § 503 applied to allow an award as an administrative expense.

In re Chavez, *2006 Bankr. LEXIS 3729 (Bankr. E.D. Cal. November 21, 2006) (Holman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:348.06**

§ 362 Automatic Stay.

0207-088 **Reinstatement of case did not retroactively impose stay so as to prevent foreclosure.** (*Bankr. D. Kan.)*

PROCEDURAL POSTURE: Bankruptcy debtors' case was dismissed and a mortgage creditor accomplished a confirmed foreclosure sale of the debtors' real property before the debtors' case was reinstated. The debtors moved to void the sale.

OVERVIEW: The debtors contended that voiding the sheriff's sale was warranted because, in view of the reinstatement, the automatic bankruptcy stay was retroactively in effect during the period of dismissal. The debtors also argued that their confirmed plan, which allowed the debtors to cure the mortgage arrearage, precluded the foreclosure, and that the creditor's failure to object to reinstatement estopped the creditor from challenging the retroactive reinstatement of the stay. The bankruptcy court held, however, that the debtors failed to establish any ground for voiding the foreclosure sale. The sale did not violate the stay since dismissal of the creditor's case terminated the stay and revested the property in the debtors, and there was no authority for retroactive imposition of the stay after reinstatement. Further, the creditor was not bound by the debtors' plan which was never consummated and, since the sale did not contravene bankruptcy law, there was no reason for the creditor to object to reinstatement of the debtors' case.

In re Leroy, *2007 Bankr. LEXIS 25 (Bankr. D. Kan. January 8, 2007) (Karlin, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.01**

§ 362(b)(4) Automatic Stay; Exceptions; Governmental Unit's Enforcement of Police or Regulatory Power.

0207-089 **ERISA enforcement action fell within regulatory exception to stay.** (*D. Ariz.)*

PROCEDURAL POSTURE: Plaintiff, the Secretary of Labor, filed a motion under Fed. R. Civ. P. 55(a) for entry of default in an action against defendants, an individual, a corporation, and a profit-sharing plan, under 29 U.S.C. § 1132(a) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 et seq. The individual and corporation subsequently filed notices of bankruptcy filings.

OVERVIEW: The complaint alleged that the individual and the corporation violated ERISA by breaching their fiduciary duties and failing to administer the plan in compliance with plan documents and various ERISA provisions. In responding to the notices of bankruptcy filings, the Secretary argued that the action was excepted from the automatic stay provisions of 11 U.S.C. § 362(a)(1) under the regulatory provision of section 362(b)(4). The court agreed that the case fell within the exception established by section 362(b)(4) because it was an ERISA enforcement action brought pursuant to the Secretary's police and regulatory power. The court found that the stay should be lifted because the claims were exempt under both the pecuniary purpose test and the public policy test. The court, however, concluded that the motion for entry of default should be denied without prejudice because it did not appear from the record that defendants acted in bad faith in failing to file a responsive pleading or that the Secretary would be prejudiced by the denial of default.

Chao v. Morris, *2007 U.S. Dist. LEXIS 2344 (D. Ariz. January 10, 2007) (Campbell, D.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 3:362.05[5]**

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

0207-090 **Rejection of settlement between city and debtor who operated "go-go club" denied due to substantial performance.** (*Bankr. D.N.J.)*

PROCEDURAL POSTURE: Chapter 11 debtor filed a motion seeking the entry of an order pursuant to 11 U.S.C. § 365(a), rejecting a settlement agreement with a city previously reached in related state and federal court litigations.

OVERVIEW: Debtor operated an adult entertainment club. After prolonged litigation, debtor and the city reached a settlement agreement which, after being amended, authorized debtor to continue to operate the club for two more years as a "go-go club." The agreement also provided for the city to designate the property for redevelopment and establish a redevelopment plan. After the passage of two years, the city filed a motion in the state court to enforce the agreement. Debtor challenged the redevelopment plan. Debtor filed for chapter 11 relief and sought to reject the agreement, contending that the agreement remained executory due to the city's alleged failure to designate the property as an area in need of redevelopment and adopt an enhanced redevelopment plan permitting development of high density residential housing. In denying debtor's motion, the court held that there was no reference in the agreement to an obligation imposed upon the city to adopt an enhanced redevelopment plan permitting development of high density residential housing. The court held that the city had substantially performed its obligations under the agreement.

***In re S.A. Holding Co., LLC**, 2006 Bankr. LEXIS 3649 (Bankr. D.N.J. December 22, 2006) (Kaplan, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:365.03**

§ 365(c)(1) Executory Contracts and Unexpired Leases; When Trustee May Not Assume or Assign; Other Parties to Contract or Lease.

0207-091 **Franchisee rights to consent to assignment and certain rights of first refusal were enforceable pursuant to "applicable law" exception.** (*Bankr. S.D.N.Y.)*

PROCEDURAL POSTURE: The court had before it the executory contract assignment issues, under 11 U.S.C. § 365, associated with debtors' contemplated transfer of their cable operations to affiliates of two asset purchase buyers. Though debtors had been able to consensually resolve the section 365 issues with all but about 14 of the approximately 2,500 local franchising authorities ("LFAs") that had issued franchises, issues with respect to the remaining 14 remained.

OVERVIEW: The two issues were whether the franchise agreements could be assigned and whether rights of first refusal in favor of certain LFAs – which would have entitled them to buy the cable assets related to their franchises, were enforceable in light of section 365(f). The court concluded that though the LFAs' rights of consent, under their franchise agreements or ordinances, would not, under section 365(c)(1) or otherwise, impair a debtor in possession's ability to assume them, many of the LFAs' rights to consent to assignments were enforceable. Rights to consent to the assignment of executory contracts (like franchises) plainly were provisions that "prohibited, restricted or conditioned" assignment, which generally were unenforceable under section 365(f). But many of the ordinances satisfied the section 365(c)(1) "applicable law" exception. Next, the court found that the rights of first refusal, triggered upon the proposed assignment of cable franchises, were unenforceable, at least in the first instance, under section 365(f)(1). They "prohibited, restricted or conditioned" assignment to an unacceptable degree. However, some of them were subject to the section 365(c)(1) exception to section 365(f)(1), and were enforceable.

***In re Adelphia Communs. Corp.**, 2007 Bankr. LEXIS 30 (Bankr. S.D.N.Y. January 11, 2007) (Gerber, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:365.06[1]**

§ 523(c) Exceptions to Discharge; Automatic Discharge of Certain Debts Absent Creditor Objection.

0207-092 **Civil penalty under False Claims Act was nondischargeable but punitive damages and fees were dischargeable due to failure of U.S. Government to filed adversary proceeding.** (*Bankr. W.D. Tenn.)*

PROCEDURAL POSTURE: Plaintiff debtor brought an adversary claim seeking the discharge of a civil judgment and related obligations entered against him in favor of defendant United States, based upon violations of the False Claims Act, 31 U.S.C. §§ 3729–33. The Government moved for summary judgment of nondischargeability under 11 U.S.C. § 523. The Government had failed to timely file a complaint under 11 U.S.C. § 523(c).

OVERVIEW: The district court remitted a jury award to enter a judgment for $602,565.43 in pecuniary damages, and imposed a civil penalty of $10,000. The district court also awarded the United States attorney's fees, expenses, and costs associated with the litigation. The Government never filed a complaint to determine the dischargeability of the debt, but merely requested that the court declare the debt to be nondischargeable in its answer to debtor's complaint. Because the United States failed to timely file a complaint to determine its dischargeability in accord with Fed. R. Bankr. P. 4007(c), or to request an extension of time to do so, its request that the debt be declared nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) was untimely and was denied as a matter of law. It was not relevant that debtor had raised the issue in his complaint. Also, the false claims allegations did not clearly rise to the level of scienter required for purposes of rendering a debt nondischargeable. The civil penalty was clearly nondischargeable under 11 U.S.C. § 523(a)(7), but the other items were presumptively dischargeable.

Winters v. United States (In re Winters)*, 2006 Bankr. LEXIS 3678 (Bankr. W.D. Tenn. December 27, 2006) (Latte, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.26**

§ 524 Effect of Discharge.

0207-093 **Large, sophisticated, international corporation sanctioned for knowing and indifferent disregard of discharge injunction.** (*Bankr. M.D. Fla.)*

PROCEDURAL POSTURE: Chapter 11 reorganized debtor filed a motion for sanctions against creditor for violating 11 U.S.C. § 1141, the permanent injunction under 11 U.S.C. § 524, and injunctions in debtor's confirmed plan.

OVERVIEW: Creditor filed a final proof of claim in debtor's case. All debts forming the basis of the claim were discharged. Shortly thereafter, creditor filed a complaint in the district court seeking the same amount as claimed in its proof of claim. The court held that creditor violated the discharge injunction of 11 U.S.C. §§ 524 and 1141. The court held that creditor, a large, sophisticated international corporation with extensive resources and experience to appreciate and comply with bankruptcy law, was represented by competent counsel with widespread commercial litigation experience, was actively involved during debtor's bankruptcy case, and should have been fully aware of each claim filed. The court held that creditor's knowledge of and indifference to debtor's bankruptcy discharge constituted a reckless disregard of debtor's protected rights, warranting an award of monetary sanctions pursuant to the court's inherent contempt power and its statutory contempt power of 11 U.S.C. § 105(a). The court also held that an award of punitive damages was appropriate to deter further offensive conduct by creditor.

In re Dynamic Tours & Transp., Inc.*, 2006 Bankr. LEXIS 3645 (Bankr. M.D. Fla. December 19, 2006) (Briskman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:524.01**

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

0207-094 **Trustee could retain funds recovered from other creditors that debor claimed were not estate property.** (*Bankr. W.D. Tenn.)*

PROCEDURAL POSTURE: Movants, the debtor and his non-debtor wife, sought an order requiring respondent chapter 7 trustee to abandon his interest in certain funds paid over to him by creditors. These funds were obtained by the creditors as the result of a writ of garnishment. The trustee demanded that the funds be paid over to him because they represented a preferential transfer to the creditors.

OVERVIEW: Movants contended that the funds were taken from a joint bank account and belonged solely to the non-debtor wife (they represented a reimbursement of travel expenses incurred by her). Movants contended that the wife had never been indebted to the creditors. The trustee acknowledged that the funds were originally taken from a joint account but asserted that he did not receive the funds from the joint account, but rather from the creditors in response to his demand that they turn over to him the fruits of an avoidable transfer. The trustee contended that the wife's dispute was with the creditors, not with him. The court agreed. Movants' reliance on 11 U.S.C. § 554(b) was misplaced for at least two reasons. First, the section only applied to property of the estate. Movants' contention was that the joint account was not property of the bankruptcy estate. Second, the funds that were returned, in the amount of $5,810.86, were neither burdensome nor of inconsequential value. There was no apparent cost or burden to the trustee to maintain these funds on deposit until time to make distribution to creditors, who would receive a substantial benefit.

Brooks v. Stevenson (In re Brooks), *2006 Bankr. LEXIS 3621 (Bankr. W.D. Tenn. December 27, 2006) (Latta, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:544.09**

§ 546(b) Limitations on Avoiding Powers; Perfection of Interest in Property.

0207-095 **Creditor's postpetition recording of financing statement did not relate back to date of loan.** (*1st Cir.)*

PROCEDURAL POSTURE: Appellant lenders made a loan to debtor. The next day, debtor's creditors filed an involuntary chapter 11 petition. Unaware of the bankruptcy petition, appellants did not record a financing statement relating to their loan until five days after the loan was made. The bankruptcy court permitted the trustee to invoke 11 U.S.C. § 547, the "strong-arm" provision, to avoid appellants' interest in debtor's assets. They appealed.

OVERVIEW: On appeal, appellants argued, *inter alia*, that the bankruptcy court's decision ignored exceptions to the trustee's strong-arm power that permitted their recording to "relate back" to the date of the loan and that it offended the underlying equitable principles of the Bankruptcy Code by conferring a "windfall" upon creditors. Appellants' argument that section 547(c) and (e) were exceptions to 11 U.S.C. § 544(b)'s avoidance provisions was foreclosed, since 11 U.S.C. § 547(c) and (e) did not constitute generally applicable relation-back law under 11 U.S.C. § 546(b). In addition, the bankruptcy court appropriately rejected appellants' argument that the involuntary case did not "commence" on December 12, but on January 21 once an order for relief was entered. Finally, respecting the equitable arguments, the bankruptcy court aptly noted that appellants could have avoided their predicament by the simple expedient of recording (thus perfecting) their security interest prior to advancing the $500,000, particularly in light of debtor's representation that it was so short on cash that it might need to cease operations.

Ostrander v. Gardner (In re Milivision, Inc.), *2007 U.S. App. LEXIS 873 (1st Cir. January 16, 2007) (Cyr, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:546.03**

§ 546(e) Limitations on Avoiding Powers; Margin or Settlement Payments.

0207-096 **Settlement payment by financial institution was protected from avoidance.** (*Bankr. D. Del.)*

PROCEDURAL POSTURE: Plaintiff liquidating trust brought an adversary claim against defendant transferee, seeking to avoid and recover $575,000 as a fraudulent transfer pursuant to 11 U.S.C. §§ 548(a)(1)(B) and 550. The transferee moved for summary judgment, asserting that the transfer was a non-avoidable settlement payment pursuant to 11 U.S.C. § 546(e). Transferee and the trust also filed motions *in limine* concerning expert witness testimony.

OVERVIEW: The trust amended the complaint to remove a preference claim. The court found that no material fact was in dispute and concluded that the transfer from the debtor to transferee was a settlement payment and thus is not avoidable under section 548(a)(1)(B). The result was compelled by Third Circuit precedent, which the court was obligated to follow. In this case, Citibank was a financial institution which was used by the debtor to wire transfer the $575,000 payment to the transferee to complete a purchase of its stock. Although the case did not involve a leveraged buyout, publicly traded stock, or a clearing agency, Third Circuit case law mandated a conclusion that section 546(e) was broad

enough to protect from avoidance a settlement payment made by a financial institution. Therefore, summary judgment in the transferee's favor was warranted.

Official Comm. of Unsecured Creditors v. Acres of Diamonds, LP (In re The IT Group, Inc.), *2006 Bankr. LEXIS 3616 (Bankr. D. Del. December 29, 2006) (Walrath, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:546.06**

§ 547(b) Preferences; Avoidable Transfers.

0207-097 **Avoidance safe harbor not available where creditor could not establish perfection within 20 days of debtor receiving possession of collateral.** (*Bankr. D. Kan.)*

PROCEDURAL POSTURE: Defendants, chapter 7 debtor and creditor, filed motions for summary judgment in trustee's action, which sought to avoid a transfer of an interest in property pursuant to 11 U.S.C. § 547(b).

OVERVIEW: Creditor financed debtor's purchase of a truck. Debtor granted creditor a security interest in the truck. Instead of perfecting its interest by delivering or mailing a properly completed notice of security interest ("NOSI") pursuant to Kan. Stat. Ann. § 8-135(c) (Supp. 2004), creditor faxed to the state department of vehicles a front-side copy of the truck's Manufacturer's Statement of Origin ("MSO") with a hand-written notation that creditor held a lien on the truck. It was unclear when, if ever, the department received from debtor the original MSO and application for title. The court held that, because creditor did not file an NOSI, it had to prove that it timely perfected its security interest. The court held that there was nothing in the record that established when, if ever, the department received the properly completed official forms necessary to trigger the issuance of a certificate of title with creditor's lien noted thereon. Absent such information, there was insufficient proof that the security interest was perfected within 20 days after debtor received possession of the truck, as required for creditor to take advantage of the safe harbor of 11 U.S.C. § 547(c)(3).

Redmond v. MHC Fin. Servs. (In re Barker), *2007 Bankr. LEXIS 37 (Bankr. D. Kan. January 9, 2006) (Berger, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:547.03**

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

0207-098 **Property tax assessments were not reliable indication of market value in determining if conveyance was fraudulent.** (*W.D. Wis.)*

PROCEDURAL POSTURE: Pursuant to 11 U.S.C. § 548, plaintiff chapter 7 trustee filed an adversary proceeding complaint against defendant, a Wisconsin village, seeking to recover an alleged fraudulent conveyance made to the village by two chapter 7 debtors. The trustee appealed, pursuant to 28 U.S.C. § 158, after the bankruptcy court granted summary judgment to the village on his fraudulent conveyance claim.

OVERVIEW: The trustee alleged that a $16,000 fraudulent conveyance had occurred with regard to real property that the debtors sold to the village. The evidence showed that the debtors had purchased the property in 1992 for $25,000; the property was vacant and in a state of disrepair; its value for tax assessment purposes had dropped from $41,800 to $3,000; the agreed-upon sales price was $41,800; and the had debtors received $25,000 in cash and had treated the remaining amount, $16,000, as a gift to the village. The bankruptcy court found that the property tax bills were not credible evidence of the property's value. It held that the trustee failed to meet his burden of showing that the debtors had not received reasonably equivalent value, within the meaning of 11 U.S.C. § 548(a)(1)(B)(i), for the property. The court found no error. The bankruptcy court reasonably rejected the tax assessments as a reliable market value measure. The $25,000 cash purchase price, which was arrived at in an arms' length transaction, was the best evidence of the property's value. The gift language was added for the sole purpose of procuring a tax benefit for the debtors at no cost to the village.

Mangiulli v. Rameker (In re Mangiulli), *2007 U.S. Dist. LEXIS 2280 (W.D. Wis. January 9, 2006) (Shabaz, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:548.05**

§ 706(a) Conversion; By the Debtor.

0207-099 **Denial of motion to convert to chapter 13 vacated due to misapplication of good faith standard.** (*B.A.P. 6th Cir.)*

PROCEDURAL POSTURE: Appellant debtor challenged the Bankruptcy Court for the Southern District of Ohio's denial of his motion to convert his chapter 7 case to chapter 13. The bankruptcy court found that his motion to convert was filed in bad faith. Appellees were representatives of a certified class of persons who sued debtor for tortious conduct in the District Court for the Southern District of Ohio.

OVERVIEW: The appellate issue was what factors a bankruptcy court should examine to determine whether a debtor's motion to convert from chapter 7 to chapter 13 should be denied because of lack of good faith. The panel found that the bankruptcy court erred as a matter of law when it relied exclusively on the plan confirmation standard of good faith and the corresponding burden of proof in its analysis of debtor's motion. The panel concluded that bankruptcy courts should apply the same good faith standard when evaluating a debtor's motion to convert to chapter 13 as was utilized when considering dismissal under 11 U.S.C. § 1307(c). It followed that bankruptcy courts should exhibit the same "reluctance" to deny a motion to convert to chapter 13 that they employed when dismissing a petition for lack of good faith under 11 U.S.C. § 1307(c). The burden of proving a lack of good faith in the context of 11 U.S.C. § 706(a) was on the party opposing conversion. Under this standard, the key inquiry as to good faith was whether a debtor was seeking to abuse the bankruptcy process. When the appropriate legal standard was applied, the current findings of fact did not support the conclusion below.

Condon v. Brady (In re Condon)*, 2007 Bankr. LEXIS 34 (B.A.P. 6th Cir. January 12, 2007) (Gregg, B.A.P.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:706.02**

§ 726(a)(3) Distribution of Property of the Estate; Order of Distribution; Tardily Filed Claims.

0207-100 **Proof of claim filed more than 30 days after close of adversary proceeding from which it arose was to be treated as an untimely, unsecured claim.** (*Bankr. D. Idaho)*

PROCEDURAL POSTURE: A chapter 7 trustee filed a motion seeking approval of a proposed final accounting and distribution of the assets from two joint debtors' bankruptcy estate. A creditor filed an objection, contending that it had timely filed its unsecured claim under 11 U.S.C. § 502(h) and was entitled to full payment of it.

OVERVIEW: The trustee succeeded in avoiding a preferential transfer to the creditor pursuant to 11 U.S.C. § 547(b). The creditor filed a proof of claim a month after the adversary proceeding closed and more than a year after the deadline for filing claims had passed. Several months later it filed an amended proof of claim. In his final accounting, the trustee proposed to pay all the outstanding, timely-filed unsecured claims in full, but he proposed to make only a partial payment to the creditor. The trustee argued that the creditor could have filed a timely claim and that, having failed to do so, its claims were properly treated as tardily-filed under 11 U.S.C. § 726(a)(3). The creditor argued that its claims were timely filed under 11 U.S.C. § 502(h), which allowed for the filing of a claim arising from the adversary proceeding. The court agreed that the claims were filed pursuant to section 502(h). They were not timely-filed under Fed. R. Bankr. P. 3002(c)(3), however, because the creditor waited more than 30 days after the adversary proceeding judgment became final to file its first claim. Its claims were properly treated as tardily-filed, unsecured claims under 11 U.S.C. § 726(a)(3).

In re Larison*, 2006 Bankr. LEXIS 3718 (Bankr. D. Idaho December 20, 2006) (Myers, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:726.02[3]**

§ 727(a) Discharge; Grounds for Denial.

0207-101 **Discharge denied due to sophisticated debtor's false oaths and failure to keep adequate records.** (*Bankr. N.D. Tex.)*

PROCEDURAL POSTURE: Plaintiff judgment creditor brought an adversary proceeding against defendant bankruptcy debtor, alleging that a discharge was not warranted under 11 U.S.C. § 727(a)(3), (4) and (5) based on the debtor's false oaths in his schedules and statements, the debtor's failure to maintain adequate records, and the debtor's failure to account for a significant asset. The bankruptcy court conducted a trial.

OVERVIEW: The creditor contended that the debtor failed to disclose interests in pension and profit sharing plans, a wholly owned company, bank accounts, and income. The creditor also asserted that the debtor failed to produce records concerning a lawsuit, an art collection, loans to the debtor, and a sales commission, and that the debtor failed to explain how the commission was spent. The bankruptcy court held that the debtor was not entitled to a discharge based on false oaths and failures to maintain records and to account for the commission. The debtor omitted and misrepresented significant assets where it was obvious that disclosure of the assets was required, and the assets were only disclosed after the creditor discovered them. Further, although the debtor's business dealings were complex and involved numerous entities, the sophisticated debtor failed to document significant transactions or maintain records sufficient to allow a determination of the debtor's financial condition. Also, there was no documentation concerning the commission payment, no record that the commission was deposited in any account, and only an insufficient explanation that the commission was spent on expenses.

Buckeye Retirement Co., LLC, Ltd. v. Bullough (In re Bullough)*, 2007 Bankr. LEXIS 23 (Bankr. N.D. Tex. January 4, 2006) (Houser, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.01**

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

0207-102 **Proceeding for revocation of discharge properly dismissed as untimely where creditor should have been capable of filing within time limits.** (*N.D. Ill.)*

PROCEDURAL POSTURE: Appellant creditor filed an adversary complaint to revoke appellee debtor's chapter 7 discharge in the bankruptcy court. The bankruptcy court dismissed the complaint with prejudice and the creditor appealed.

OVERVIEW: The creditor filed an action claiming fraud under 11 U.S.C. § 727(d)(1). The bankruptcy court dismissed the creditor's complaint as untimely because it was filed after the cut-off date to file objections. On review, the court affirmed the dismissal on different grounds. First, the complaint was not filed until April 2006, more than one year after the deadline to file objections had passed and, therefore, was still untimely. Moreover, the complaint failed to state a claim under section 727(d)(1) because it was clear that the creditor could have obtained the information earlier. The creditor was on notice of the bankruptcy proceedings, in possession of relevant information provided in the bankruptcy petition, schedules, and statement of affairs, and perfectly capable of inquiring further into the debtor's financial affairs or seeking another extension to file his objections prior to either February 2005, or 2006 when he first made his allegations of fraud. The fact that the creditor's prior counsel was not diligent in investigating the debtor's financial affairs did not excuse the creditor under section 727(d)(1). Therefore the complaint failed to plead the elements required under section 727(d)(1).

In re Habash*, 2007 U.S. Dist. LEXIS 2080 (N.D. Ill. January 9, 2006) (Bucklo, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.15[2]**

§ 1327 Effect of Confirmation.

0207-103 **Fraud was not grounds for converting chapter 13 case after confirmation completion and discharge.** (*Bankr. M.D. Fla.)*

PROCEDURAL POSTURE: The United States Trustee filed a motion to convert debtors' reopened chapter 13 case to chapter 7 for the administration of undisclosed assets.

OVERVIEW: Debtors' plan was confirmed, their performance under the plan was completed, and a discharge order was entered. The trustee later alleged that debtors knowingly concealed the existence of debtor wife's one-third interest in the probate estate of her late mother. Relying on 11 U.S.C. § 554(d), the trustee contended that, because debtors knowingly concealed the wife's interest in her mother's probate estate and failed to schedule that interest, the concealed property did not vest in debtors at the conclusion of their chapter 13 case, but instead remained property of the estate. In denying the trustee's motion to convert, the court held that the more specific language of 11 U.S.C. § 1327, which vested all property of the estate in debtors upon confirmation, governed. The court held that the sole remedy was revocation of the order of confirmation for fraud pursuant to 11 U.S.C. § 1330(a); however, the remedy was time barred because more than 180 days had elapsed since confirmation.

In re Kelly*, 2007 Bankr. LEXIS 14 (Bankr. M.D. Fla. January 9, 2006) (Paskay, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1327.01**

§ 1327(a) Effect of Confirmation; Parties Bound by Confirmed Plan.

0207-104 **State tax claim was settled through confirmation process when revenue department did not object to reduced payment.** (*C.D. Ill.)*

PROCEDURAL POSTURE: In appellee debtors' chapter 13 proceeding, the bankruptcy court confirmed the debtors' plan and sustained an objection by appellee chapter 13 trustee to proofs of claim filed by appellant, the Illinois Department of Revenue. The Department appealed.

OVERVIEW: The Department asserted a claim for sales and withholding taxes in the total amount of $104,635.22. The Department's proofs of claim stated that the claim was secured but did not identify any collateral. The debtors disputed the Department's claim and proposed in their chapter 13 plan to pay $10,500 in full satisfaction. The Department did not object to the plan. Following confirmation, the bankruptcy court found that the Department's claim was disallowed to the extent that it exceeded $10,500. The district court found that the binding effect of a confirmed plan under 11 U.S.C. § 1327(a) extended to issues, including objections to confirmation and objections to claims, that were litigated as contested matters and did not have to be resolved in an adversary proceeding. Although the Department argued that confirmed plans were not binding as to disputed secured claims, the bankruptcy court did not clearly err in finding that the Department's claim was unsecured. Disputed claims could be resolved through the confirmation process. The provision for payment of the disputed claim did not violate the requirement under 11 U.S.C. § 1322(a) that priority claims be paid in full.

Illinois Dept. of Rev. v. Ayre (In re Ayre)*, 2007 U.S. Dist. LEXIS 2962 (C.D. Ill. January 16, 2007) (Scott, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1327.02**

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

§ 157(d) Procedures; Withdrawal of Reference by District Court.

0207-105 **Motion for withdrawal of reference of non-core legal malpractice claim against debtor's prepetition counsel granted.** (*S.D.N.Y.)*

PROCEDURAL POSTURE: Plaintiff, the official committee of unsecured creditors, filed an adversary proceeding against defendants, several former partners of a dissolved law firm that represented the debtor, and asserted malpractice claims based on their alleged failure to advise the Debtor to seek chapter 11 protection in a timely manner. Defendants filed a motion to withdraw reference and filed a jury demand.

OVERVIEW: Defendants argued that the committee's legal malpractice claim against the debtor's prepetition counsel was not a core proceeding under the Bankruptcy Code, and that defendants were entitled to a jury trial and all the rights afforded them by the Federal Rules of Civil Procedure in defending themselves against this claim. The committee argued that defendants' motion was untimely under 28 U.S.C. § 157(d), but the court disagreed. It was abundantly clear that the claim for prepetition malpractice against the debtor's former lawyers was a non-core proceeding and the court's finding that the claim was non-core coupled with defendants' jury demand was sufficient cause to withdraw the reference. However, withdrawal of the reference also promoted the efficient use of judicial resources. Since the bankruptcy court's determination of this non-core claim would be subject to de novo review in

the district court, unnecessary costs could be avoided by a single proceeding in the instant court. Moreover, contrary to the committee's contention, the underlying professional malpractice claim at issue was more appropriate for resolution by a district court.

VWE Group, Inc. v. Amlicke (In re VWE Group, Inc.)*, 2007 U.S. Dist. LEXIS 2911 (S.D.N.Y. January 5, 2007) (McMahon, D.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 1:3.04**