

Collier Bankruptcy Case Update

CURRENT BANKRUPTCY CASES ANALYZED

February 22, 2010

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§ 327(e) Employment of Professional Persons; Attorney Employed for Special Purpose.

0210-106 Trustee could employ law firm that represented debtors in chapter 11 adversary proceedings
(Commercial) as special counsel to continue those proceedings after conversion to chapter 7. (*Bankr. D. Minn.*)

PROCEDURAL POSTURE: In related cases commenced under chapter 11, but converted to chapter 7, the trustee sought approval of his employment of a particular law firm as special counsel for the estate. Defendants in adversary proceedings objected to the employment of that firm under 11 U.S.C.S. § 327(e).

OVERVIEW: These cases were commenced under chapter 11, but later converted under chapter 7. As debtors-in-possession under chapter 11, the debtors were represented by a particular law firm as counsel pursuant to 11 U.S.C.S. §§ 327(a) and 1107(a). That law firm represented the debtors in two adversary proceedings, which the trustee here intended to carry forward. Defendants in those adversary proceedings contended that the law firm had a conflict that rendered it ineligible to act as counsel under 11 U.S.C.S. § 327(e). The court noted that § 327(e) recognizes as disqualifying conflicts only those that arise from the matter on which such attorney is to be employed. In the case of litigation, the statute prevents the retention of counsel who represent or have represented a client that is an actual or potential opponent of the estate in the dispute for which counsel would be engaged. There was nothing of record indicating that the law firm here ever represented any of the defendants on any matter, let alone in connection with the subject matter of the adversary proceedings. Thus, the court found that the trustee met the statutory requirements for his employment of the law firm.

In re Polaroid Corp., 2010 *Bankr. LEXIS 146* (*Bankr. D. Minn. January 22, 2010*) (Kishel, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 3:327.04[9]

§ 328(c) Limitation on Compensation of Professional Persons; Grounds for Denial of Compensation.

0210-107 Approval of debtor's counsel's interim fee applications conditioned on supplemental
(Commercial) disclosure of representation of parties with adverse interests to estate. (*Bankr. D.N.M.*)

PROCEDURAL POSTURE: Debtor's counsel submitted its first interim fee application sought allowance of compensation in the amount of \$ 151,139.36 for fees and \$ 4,646.12 for expenses. Creditor filed an objection to the fee application, asserting that the debtor did not own the interests it claimed in two oil and gas leases, and that the counsel represented parties that held adverse interests, and failed to make a proper disclosure under Fed. R. Bankr. P. 2014(b).

OVERVIEW: The creditor, the Indian nation that owned the underlying property, filed primarily for plug and abandonment claims, civil penalty claims, and environmental assessment and clean up claims. The creditor asserted that counsel also represented two parties that had interests adverse to interest of the estate. One of those parties was alleged to be negotiating the funding of the debtor's plan, in which case the counsel would have a conflict in representing both the borrower and lender. If a potential conflict developed that was prejudicial to the estate, counsel's employment status by the estate and its compensation could be revisited by the court. Counsel had not disclosed until recently the efforts of its other clients to obtain an assignment of the leases, or why such action was consistent with the ultimate primary goal of the debtor. Counsel's disclosures should be made via the filing of a Fed. R. Bankr. P. 2004(a) disclosure form.

In re Platinum Oil Props., LLC, 2009 *Bankr. LEXIS 4191* (*Bankr. D.N.M. December 23, 2009*) (Jacobovitz, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 3:328.05

§ 333 Appointment of Patient Care Ombudsman.

0210-108 **Health care ombudsman granted permission to employ counsel.** (*Bankr. C.D. Cal.*)
(Commercial)

PROCEDURAL POSTURE: Debtor, a corporation that provided medical services, filed a petition under chapter 11 of the Bankruptcy Code, and the U.S. Trustee (UST) appointed a patient care ombudsman, pursuant to 11 U.S.C.S. § 333, to monitor the quality of care the debtor provided to patients. The ombudsman filed a motion seeking permission to employ counsel.

OVERVIEW: The debtor declared bankruptcy after it encountered difficulties obtaining Medicare payments from the government, and the UST appointed an experienced health care professional who specialized in restructuring of health care businesses as a patient care ombudsman under 11 U.S.C.S. § 333. The ombudsman concluded that he required legal counsel to answer questions about his duties under bankruptcy law and to help him file and serve documents, and he asked the court for permission to hire counsel and to charge attorney fees to the debtor's bankruptcy estate. The court noted that neither § 333 nor any other provision of the Bankruptcy Code contained language which allowed a patient care ombudsman to hire legal counsel at estate expense. However, the court found that it had the power under 11 U.S.C.S. § 105(a) to approve the ombudsman's request, and the ombudsman had established his need for assistance of counsel in this case.

In re Synergy Hematology-Oncology Med. Assocs., 2009 Bankr. LEXIS 4209 (*Bankr. C.D. Cal. December 29, 2009*) (Bufford, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 3:333.01

§ 362(a) Automatic Stay; Scope.

0210-109 **Relief from stay denied to credit union that violated stay by freezing debtor's account.** (*Bankr. D. Md.*)
(Consumer)

PROCEDURAL POSTURE: The debtor filed a motion to enforce the automatic stay of 11 U.S.C. § 362(a) against the creditor, a credit union, that acted unilaterally to freeze funds of the debtor on deposit with it, in order to be able to effect a setoff. The credit union filed, after the fact, a motion for relief from the automatic stay.

OVERVIEW: The debtor argued that the administrative hold on funds violated the stay in the absence of the filing of a contemporaneous motion for relief from stay, and, because she listed the savings account funds as exempt, the credit union could not set off its claim on her credit account against the funds in her account. The court found that the case turned on whether there was in place a security agreement underlying the credit card in issue. If not, then Regulation Z, 12 C.F.R. § 226.12(d)(1), was applicable. The court found that the form used by the credit union to attempt to create a security interest in the deposit account so as to enable it to set off funds that might be due on the credit card fell well short of creating a security interest. The credit union's motion for relief from stay was not filed until well after the debtor sought relief, and thus was not timely filed as required as required under *Citizens Bank of Maryland v. Strumpf* for an administrative hold to be placed on funds on deposit by debtor.

In re Okigbo, 2009 Bankr. LEXIS 4217 (*Bankr. D. Md. December 29, 2009*) (Mannes, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 3:362.03

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

0210-110 **Stay lifted to allow determination of domestic relations action, but not subsequent enforcement.** (*Bankr. M.D.N.C.*)
(Consumer)

PROCEDURAL POSTURE: Debtor filed a petition under chapter 13 of the Bankruptcy Code and movant, the debtor's spouse, filed a motion for an order under 11 U.S.C.S. § 362(d) that lifted the automatic stay so that a domestic relations action involving the debtor and his spouse could be tried in state court.

OVERVIEW: At the time the debtor declared bankruptcy on June 4, 2009, he and his spouse were parties to a civil action involving claims for equitable distribution of marital property that was pending in the Guilford County District Court (Georgia). The debtor's spouse filed a motion seeking relief under 11 U.S.C.S. § 362(d) from the stay that was imposed when the debtor declared bankruptcy, so that the state-

court action could proceed. However, the court ruled that the stay imposed by § 362 would remain in effect with regard to the enforcement of any order, judgment, or decree issued by the state court that affected property of the debtor's bankruptcy estate. The distribution of property that was part of the debtor's bankruptcy estate involved a federal question, and under 28 U.S.C.S. § 1334 federal courts had exclusive jurisdiction over all property that was part of the debtor's bankruptcy estate.

In re Montague, 2009 Bankr. LEXIS 4182 (Bankr. M.D.N.C. December 11, 2009) (Stocks, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 3:362.07

§ 362(d)(4)(B) Automatic Stay; Relief from Stay; Scheme to Delay, Hinder and Defraud Creditors With Claims Secured by Real Property; Multiple Filings.

0210-111 **Mortgage creditor granted in rem relief to prevent further stays against foreclosure due to (Consumer) debtor's serial filings.** (Bankr. E.D.N.Y.)

PROCEDURAL POSTURE: Movant creditor, the mortgage lender on debtors' real property, moved for in rem relief regarding the mortgaged premises, asserting that the debtors had filed ten separate serial bankruptcy cases for the purpose of hindering and delaying the creditor's attempts to foreclose against the real property.

OVERVIEW: The creditor made a purchase money mortgage loan in August 1994. The debtors executed a note and mortgage. At the close of the last hearing, the court lifted the stay in one of the debtor's cases to allow the creditor to proceed with its foreclosure. The creditor detailed the debtors' numerous filings. The court found that, because the debtors had engaged in serial bankruptcy filings to prevent the foreclosure process from being completed, they were part of a scheme to hinder, delay, and defraud the creditor under 11 U.S.C.S. § 362(d)(4)(B). The court granted in rem relief.

In re Blair, 2009 Bankr. LEXIS 4195 (Bankr. E.D.N.Y. December 21, 2009) (Trust, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 3:362.07[6]

§ 365(e)(1) Executory Contracts and Unexpired Leases; Insolvency and Bankruptcy Clauses; Invalidation.

0210-112 **Swap agreement provision calling for shift in debtor's priority in event of default was an (Commercial) unenforceable ipso facto clause.** (Bankr. S.D.N.Y.)

PROCEDURAL POSTURE: Plaintiff bankruptcy debtor brought an adversary proceeding against defendant trustee of a multi-issuer secured obligation program which held collateral for the benefit of a note-holder and the debtor as a counter-party under swap agreements, seeking a declaration that the debtor's priority in the collateral did not transfer to the note-holder due to the bankruptcy of the debtor's parent corporation. The debtor moved for summary judgment.

OVERVIEW: The trustee contended that the bankruptcy court should defer to a foreign court's determination that the parent's bankruptcy constituted a default which triggered the priority-shifting provisions of the swap agreements, and that the debtor's priority in the collateral ceased to exist prior to the debtor's subsequent bankruptcy and was not protected under bankruptcy law. The bankruptcy court held, however, that the provisions in the swap agreements modifying the debtor's payment priority upon the event of default constituted unenforceable ipso facto clauses which violated 11 U.S.C.S. §§ 365(e)(1), 541(c)(1)(B), and that any action to enforce such provisions as a result of the parent's bankruptcy filing violated the automatic stay. The operative bankruptcy filing to invoke the bankruptcy protections against adverse consequences of filing a bankruptcy petition was not limited to the commencement of the debtor's bankruptcy case, and was the case filed by the parent as the debtor's credit support provider. Thus, at the time the debtor filed its petition, the debtor's priority in the collateral was property of the debtor's estate which was not subject to the priority-shifting provisions.

Lehman Bros. Special Fin. Inc. v. BNY Corporate Tr. Servs. (In re Lehman Bros. Holdings Inc.), 2010 Bankr. LEXIS 141 (Bankr. S.D.N.Y. January 25, 2010) (Peck, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 3:365.07

§ 522 Exemptions.

0210-113 **Plan confirmed over objections of trustee to homestead exemption.** (*Bankr. D. Kan.*)
(Consumer)

PROCEDURAL POSTURE: This matter was before the court on the Chapter 13 Trustee's Objection to Confirmation of Debtors' Plan and Motion to Dismiss. Both asserted that the plan did not meet the best interest of creditors test. The Trustee also filed an Objection to Debtors' Claim of Exemptions in real estate located in Pleasanton, Kansas. The court heard the evidence and was prepared to rule.

OVERVIEW: The Trustee argued that circumstantial evidence indicated that debtors had effectively abandoned this homestead, and that they were not entitled to any homestead exemption, since they mostly lived in a rented apartment. The court stated that once a debtor established that a homestead interest existed in the first instance, which the Trustee never really disputed, the party attempting to defeat the homestead exemption had the burden of establishing by positive and clear evidence, Fed. R. Bankr. P. 4003, that the homestead had been abandoned. Debtors demonstrated that they established the homestead as early as the 1990s, so it became the Trustee's burden to demonstrate both debtors had permanently left the Pleasanton home, and that they had the intent to not return to it. Although there was considerable evidence demonstrating that debtors had left the Pleasanton home, at least eight months of the year, for debtor husband's employment in Topeka, there was undisputed evidence that the parties always retained the intent to return to the Pleasanton home at some point in the future. Under Kansas law, if debtors intended to return to the Pleasanton home, then it remained their homestead.

In re Curry, 2009 Bankr. LEXIS 4187 (*Bankr. D. Kan. December 23, 2009*) (*Karlin, B.J.*).

Collier on Bankruptcy, 15th Ed. Revised 4:522.01

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

0210-114 **Debtor's motion to avoid judicial liens in residence held by the entireties denied due to**
(Consumer) **insufficiency of motion and numerous legal issues.** (*Bankr. E.D. Tenn.*)

PROCEDURAL POSTURE: Debtor filed a Motion to Avoid Judicial Liens on Residential Real Estate, which was amended, and by this Motion sought to avoid, pursuant to 11 U.S.C.S. § 522(f)(1)(A), judicial liens in a residence allegedly asserted by lienholders.

OVERVIEW: There were a number of procedural issues in the case the court was concerned about. First, with the exception of a street address for the property, Bankr. E.D. Tenn. R. 4003-2 had not been complied with. In this regard, inter alia, there was nothing in the Motion setting forth the value of the property; the Motion did not state whether there was or was not a first, second, or third mortgage on the property, the Motion did not set forth the amounts of any mortgages encumbering the property, and it did not set forth the amounts of the judgment liens. Next, with the exception of one entity who appeared, the other entities were not before the court. Fed. R. Bankr. P. 9014(b) said that motions were to be served in accordance with Fed. R. Bankr. P. 7004. There were substantive issues also. Debtor was not residing on the property at the commencement of his bankruptcy case so he was not entitled to claim a homestead exemption. Another concern the court had was that he did not claim an exemption. More importantly, the property was owned by debtor as a tenancy by the entireties.

In re Parton, 2009 Bankr. LEXIS 4175 (*Bankr. E.D. Tenn. December 22, 2009*) (*Stair, B.J.*).

Collier on Bankruptcy, 15th Ed. Revised 4:522.11

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

0210-115 **Nondischargeability complaint claiming inadequate information and misrepresentations in**
(Consumer) **investment advice provided by debtor dismissed for lack of evidence.** (*Bankr. N.D. Ind.*)

PROCEDURAL POSTURE: Plaintiff investors brought an adversary proceeding against defendant bankruptcy debtor alleging that debts to the investors were nondischargeable under 11 U.S.C.S. § 523(a) based on the debtor's fraud, fiduciary defalcation, and willful and malicious injury. The debtor moved to dismiss the complaint for failure to state a claim.

OVERVIEW: The investors alleged that the debtor was involved in the management of their investments, that the debtor provided inadequate information and made misrepresentations concerning the status of the investments, and that the investors lost virtually every dollar of their investments. The bankruptcy

court held that the investors failed to allege any basis for nondischargeability of any debt to the investors. There were no allegations concerning the circumstances of the alleged misrepresentations, and the debtor did not obtain any property by misrepresentation since the alleged falsehoods all occurred after the investments were made. Further, allegations of what the debtor should have done were insufficient to support a claim for fiduciary defalcation, and vague allegations of interference with contract or business opportunity did not satisfy the requirements for alleging a willful and malicious injury.

Lazzaro v. Weichman (In re Weichman), 2010 Bankr. LEXIS 123 (Bankr. N.D. Ind. January 21, 2010) (Klingenger, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 4:523.07

0210-116 **Alleged debt to attorney with whom debtor had working relationship for alleged failure to compensate dismissed due to lack of credible evidence.** (Bankr. W.D. Ky.)
(Consumer)

PROCEDURAL POSTURE: Plaintiff creditor, an attorney that had shared office space, television advertising for legal services, and had some informal working relationship with the debtor, sought to deny the debtor a discharge under 11 U.S.C.S. § 523(a)(2)(A), 523(a)(4) and 523(a)(6). The creditor alleged he worked on numerous cases and paid many expenses for which he was not compensated, and that the debtor hid files and fees from him.

OVERVIEW: The creditor presented memos and unsigned draft agreements for a joint venture with the debtor and two other attorneys. The court found the documents were largely self-serving and were not evidence of a clear business arrangement. from any source, as the property of the joint venture The creditor presented files as evidence demonstrating work he had done on behalf of the business relationship for which he had never received compensation. He argued that the debtor secreted away other files to hide partnership fees generated by the advertising. Finally, after much prodding, he submitted copies of numerous checks that he claimed represented his payment for expenses benefitting the business venture. The debtor presented evidence, and the court agreed that the original or copied checks had been altered and then photocopied. The creditor later testified that he altered the checks as part of his record keeping system, which the court found was not credible. There was ultimately no credible proof that the debtor made material representations to creditor or intended to defraud him, that any fiduciary relationship existed, or that any funds due the creditor were withheld from him.

Streich v. Smith (In re Smith), 2010 Bankr. LEXIS 89 (Bankr. W.D. Ky. January 20, 2010) (Fulton, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 4:523.07

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

0210-117 **Default judgment of nondischargeability granted for debtor's taking creditor's equipment, selling it and installing it on premises of third party.** (Bankr. N.D. Ind.)
(Consumer)

PROCEDURAL POSTURE: Plaintiff creditor asked that defendant debtor's debt to it be excepted from discharge pursuant to 11 U.S.C.S. § 523(a)(4), (a)(6). Before the court was the Motion for Default Judgment filed by the creditor against debtor. The creditor sought judgment pursuant to Fed. R. Civ. P. 55, made applicable by Fed. R. Bankr. P. 7055.

OVERVIEW: The court initially determined that the requirements for entitlement to entry of default under Fed. R. Civ. P. 55(a) had been met. Next, the court addressed the motion for default judgment. Said motion satisfied the dictates of Rule 55(b). The court then turned to 11 U.S.C.S. § 523(a)(4), (a)(6). The creditor alleged debtor's knowing and intentional taking of the creditor's equipment, its sale to a third party, and its installation in a third party's location. It labeled that conduct "larceny" and "embezzlement" pursuant to § 523(a)(4). Applying the definitions of larceny and embezzlement, as found in federal common law for nondischargeability purposes, the court found that the Complaint sufficiently stated a claim under § 523(a)(4). Moreover, the affidavit of the creditor's credit manager validated the underlying facts and gave substance to the Complaint's allegations. The court concluded that the allegations of the Complaint were well pled, had merit, and served as a sufficient basis for the entry of a judgment of nondischargeability under 11 U.S.C. § 523(a)(4). The court further found that the creditor's claim, as itemized in the Complaint and affidavits, was for a sum certain.

Superior Distrib. of Indiana, Inc. v. Shaffer (In re Shaffer), 2010 Bankr. LEXIS 92 (Bankr. N.D. Ind. January 21, 2010) (Dees, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 4:523.10

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

0210-118 **Attorney and firm sanctioned for seeking to collect fees in violation of discharge injunction.**
(Consumer) (Bankr. D. Idaho)

PROCEDURAL POSTURE: A chapter 7 debtor filed a motion seeking a contempt citation against an attorney and her law firm for violation of the discharge injunction under 11 U.S.C.S. § 524(a). The attorney opposed the motion.

OVERVIEW: Any liability that the debtor had to the attorney for unpaid legal fees, to the extent it arose prepetition, was discharged under 11 U.S.C.S. § 727, despite the debtor's failure to list it in his schedules, in the absence of any allegation that the unpaid fees qualified as debt covered by 11 U.S.C.S. § 523(a)(3)(B). Once the attorney knew that the discharge existed, she bore the risk of all intentional acts that violated the injunction regardless of her doubts concerning the validity of the discharge. The debtor's unpaid legal bills constituted dischargeable debt to the extent that the attorney's right to payment arose prior to the petition date, regardless of the fact that the bills became due and owing after that date. However, the attorney's right to payment for legal services performed on or after the petition date arose postpetition, regardless of the fact that a retainer was signed prepetition, and any amount that the debtor owed for those services was not subject to discharge. The court awarded compensatory sanctions against the attorney for lost wages and attorney's fees. The debtor could not recover damages for emotional distress from violation of the discharge injunction.

In re Urwin, 2010 Bankr. LEXIS 102 (Bankr. D. Idaho January 14, 2010) (Myers, C.B.J.).

Collier on Bankruptcy, 15th Ed. Revised 4:524.02

§ 541 Property of the Estate.

0210-119 **Employment discrimination cause of action dismissed as not disclosed in debtor's bankruptcy.**
(Consumer) (D.S.C.)

PROCEDURAL POSTURE: Plaintiff former employee sued defendant former employer's executive director, arguing that while acting in his official capacity, he violated 42 U.S.C.S. § 1983 by terminating her for exercising her constitutional right to free speech. The executive director moved to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and (h)(3), or alternatively, Fed. R. Civ. P. 12(c).

OVERVIEW: Four months after filing the present complaint, the employee filed a bankruptcy petition. She represented under penalty of perjury that she had no contingent and unliquidated claims and also failed to identify the existence of the present lawsuit. Her bankruptcy plan was confirmed. The executive director argued that the court should dismiss the claims under Rule 12(b)(1) and 12(h)(3) for lack of subject matter jurisdiction because the employee no longer had standing to sue in light of her bankruptcy petition, or alternatively, under Rule 12(c) because her claim was barred by the doctrine of judicial estoppel. Since the employee's claim was prepetition, her claim was an asset of the bankruptcy estate, and she lacked standing to pursue the claims. The present court lacked subject matter jurisdiction over her. While it appeared that the employee, since the filing of the motion to dismiss, had amended her bankruptcy petition to disclose the present lawsuit, her amendment did not save her claim from the application of judicial estoppel. The employee argued unsuccessfully that her failure to disclose the present lawsuit was inadvertent.

Wright v. Guess, 2010 U.S. Dist. LEXIS 5532 (D.S.C. January 25, 2010) (Anderson, D.J.).

Collier on Bankruptcy, 15th Ed. Revised 5:541.01

§ 547 Preferences.

0210-120 **Preference period payments were not avoidable due to subsequent new value and ordinary**
(Commercial) **course of business exceptions.** (*Bankr. D. Md.*)

PROCEDURAL POSTURE: Plaintiffs, a bankruptcy plan administrator for a chapter 11 debtor and a chapter 11 debtor, filed an adversary proceeding against defendant furniture company, seeking a determination that three payments the debtors made to the furniture company were avoidable transfers under 11 U.S.C.S. § 547, and an order disallowing a claim in the amount of \$ 475,678 which the company filed against their bankruptcy estates.

OVERVIEW: Shortly before the debtors declared bankruptcy, they purchased furniture from a furniture company and made three payments to the company totaling \$ 85,967. After the company received the first payment, but before it received the second and third payments, it sold and delivered additional goods worth \$ 63,804 to the debtors. After the debtors declared bankruptcy, they filed an adversary proceeding against the furniture company, seeking a determination that by all three payments were preferential transfers that were avoidable under 11 U.S.C.S. § 547. The court found that the first payment the debtors made was not avoidable under 11 U.S.C.S. § 547(c)(4) because the furniture company gave the debtors subsequent new value for that payment. The court also found that the second and third payments the debtors made were not avoidable under 11 U.S.C.S. § 547(c)(2) because the payments were made in the ordinary course of business between the parties. One of the debtors did business with the furniture company for more than 20 years before it declared bankruptcy and routinely paid amounts it owed the furniture company when it was convenient to do so.

Englander v. Hekman Furniture Co. (In re Mastercraft Interiors, Ltd.), 2009 Bankr. LEXIS 4218 (Bankr. D. Md. December 30, 2009) (Mannes, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 5:547.01

§ 553 Setoff.

0210-121 **Net operating loss earned postpetition, carried back and applied against prepetition income,**
(Commercial) **was a prepetition claim that could be set off against prepetition taxes owed.** (*Bankr. D. Del.*)

PROCEDURAL POSTURE: Debtor filed a petition under chapter 13 of the Bankruptcy Code and a plan for repaying his creditors. A bank filed an objection to the debtor's plan because it proposed to pay a mortgage on a house he inherited from his mother under his plan, and also filed a motion for relief from the automatic stay.

OVERVIEW: The debtor's mother borrowed \$ 79,500 from a bank and gave the bank a mortgage on her home. The loan matured when the debtor's mother died in May 2008, and the debtor inherited a 20% interest in his mother's home, claimed the home as his homestead after he declared bankruptcy, and proposed to pay \$ 40,372 that was owed on the mortgage at 5.25% interest over 59 months, under his bankruptcy plan. The bank filed an objection to the debtor's plan, claiming that because there was no privity of contract between the debtor and the bank, the debtor could not use his bankruptcy plan to pay the amount the bank was owed. The bankruptcy court disagreed. The house belonged to the debtor, the bank held an in rem claim against the house, and under U.S. Supreme Court precedent, that claim was subject to inclusion in the debtor's bankruptcy estate and could be discharged through his bankruptcy plan. Established case law also held that 11 U.S.C.S. § 1322(c)(2) allowed bankruptcy debtors to pay mortgages that matured prepetition over the course of their bankruptcy plans.

In re Flying J, Inc., 2009 Bankr. LEXIS 4200 (Bankr. D. Del. December 28, 2009) (Walrath, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 5:553.01

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

0210-122 **Case ordered converted to chapter 13 or dismissed based on totality of circumstances.** (*Bankr.*
(Consumer) *M.D. Ga.*)

PROCEDURAL POSTURE: Debtor filed a petition under chapter 7 of the Bankruptcy Code, and the United States Trustee (UST) filed a motion to dismiss the debtor's case pursuant to 11 U.S.C.S. § 707(b)(2)

and (3), contending that it would have been an abuse of chapter 7 to grant the debtor a discharge under chapter 7. The UST's motion was tried to the court.

OVERVIEW: At the time the debtor declared bankruptcy in 2009, his annual income was above \$ 39,253, the median income for a single debtor in the state of Georgia. The UST asked the court to dismiss the debtor's case, claiming that allowing the debtor to discharge his debts under chapter 7 would have been an abuse of chapter 7. The court found that 11 U.S.C.S. § 707(b)(2)(A)(iii)(I) allowed the debtor to deduct payments due on secured debts he owed, even though he intended to surrender the collateral, and when those deductions were allowed, there was no presumption under 11 U.S.C.S. § 707(b)(2) that allowing the debtor to discharge his debts under chapter 7 would have been an abuse of chapter 7. Even though there was no presumption of abuse under § 707(b)(2), the court found that the totality of the circumstances warranted a decision granting the UST's motion under § 707(b)(3). The debtor had an annual income of \$ 77,233, stable employment, and the ability to fund a plan under chapter 13 of the Bankruptcy Code. The debtor's ability to fund a chapter 13 plan was grounds, in and of itself, for granting the UST's motion.

In re Altman, 2009 Bankr. LEXIS 4185 (Bankr. M.D. Ga. December 18, 2009) (Laney, C.B.J.).

Collier on Bankruptcy, 15th Ed. Revised 6:707.05

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

0210-123 Case dismissed as filed in bad faith to impair foreclosure. (Bankr. N.D. Ala.)

(Commercial)

PROCEDURAL POSTURE: Movant creditor, a secured lender to debtor, asked the court, pursuant to 11 U.S.C.S. § 1112(b) and/or 11 U.S.C.S. § 305, to dismiss for cause a chapter 11 case filed by debtor. In the alternative, movant sought an order granting it immediate relief from the stay pursuant to 11 U.S.C.S. § 362(d)(1).

OVERVIEW: Movant made several loans to debtor, which loans were cross-collateralized and were represented by two promissory notes, one of which had been renewed numerous times. On debtor's default, movant filed a state court complaint (Case 1) and exercised its power of sale. Just prior to the sale, set for October 2007, debtor filed pleadings to forestall the sale. When those proceedings were concluded in movant's favor and it again noticed a non-judicial foreclosure sale, debtor and others moved to vacate the judgment in another state court suit that movant had filed and dismissed without prejudice (Case 2). Debtor also filed additional motions in Case 1. Motions in Case 1 were still pending before the state supreme court on the date on which debtor filed chapter 11 in September 2009. The court granted dismissal per § 1112(b). Applying the six Piccadilly factors for assessing whether a petition has been filed in bad faith, the court pointed to various facts, including that movant was debtor's only creditor and that the chapter 11 was nothing more than a two-party dispute, as justifying dismissal. It also found that dismissal was a proper response to debtor's blatant forum-shopping.

In re Caffey Enters., LLC, 2009 Bankr. LEXIS 4203 (Bankr. N.D. Ala. December 23, 2009) (Caddell, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 7:1112.04

§ 1129 Confirmation of Plan.

0210-124 Chapter 11 plan confirmed over objections of creditors. (Bankr. N.D. Tex.)

(Commercial)

PROCEDURAL POSTURE: Debtors, a corporation and affiliated businesses, filed voluntary petitions seeking relief under chapter 11 of the Bankruptcy Code. The court ordered joint administration of the debtors' bankruptcy estates, and the debtors filed a plan for reorganizing their businesses. Several classes of creditors voted to reject the plan.

OVERVIEW: The debtors declared bankruptcy in March 2009, and they filed a plan for reorganizing their businesses by paying some debts they owed, reincorporating, and issuing new debt and stock. Several classes of creditors voted to reject the plan because it provided that claims they had against the debtors' bankruptcy estates would be crammed down or that they would be paid nothing. The court found that the plan met all requirements for confirmation under chapter 11 of the Bankruptcy Code. The plan was proposed in good faith and not by any means forbidden by law, thereby satisfying 11 U.S.C.S. § 1129(a)(3). The plan achieved the rehabilitative and reorganizational goals of the Bankruptcy Code by restructuring the debtors' obligations and providing the means through which they could continue to

operate as viable enterprises, and was the result of arm's length negotiations among the debtors, creditors, and other key stakeholders that resolved significant, pending litigation. Other than claimant Classes 4, 6, and 7, each of which was subject to the "cram down" provisions of 11 U.S.C.S. § 1129(b), the plan satisfied the requirements of 11 U.S.C.S. § 1129(a)(8). Finally, the plan was feasible.

In re Idearc, Inc., 2009 Bankr. LEXIS 4202 (Bankr. N.D. Tex. December 22, 2009) (Houser, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 7:1129.01

§ 1322(b)(1) Contents of Plan; Discretionary Provisions; Designation of Classes of Unsecured Claims.

0210-125 **Confirmation denied where plan provision favoring student loan claims unfairly (Consumer) discriminated against other unsecured claims.** (Bankr. E.D. Tenn.)

PROCEDURAL POSTURE: Before the court was the chapter 13 trustee's objection to confirmation of debtors' proposed chapter 13 plan.

OVERVIEW: As to unsecured claims generally, the plan provided that they would be paid pro rata from the money left over after paying the debtors' attorney, the trustee's fees, and payments to particular creditors as provided in the plan. Another provision set out particular payments for three unsecured student loan debts. The plan provided that the debtor would make monthly maintenance payments on each student loan debt and would cure the arrearages on two of the debts. In this context, maintenance payment apparently meant the monthly contract payment. The trustee contended that this provision classified unsecured claims and unfairly discriminated against the class of other unsecured claims, in contravention of 11 U.S.C.S. § 1322(b)(1). The court concluded that the plan as proposed could not be confirmed because the classification to favor the student loan claims unfairly discriminated against the other unsecured claims. The court noted, inter alia, that the authority to treat an unsecured debt as a long-term debt was neither expressly nor logically an exception from the statutory rule that classifying unsecured claims could not unfairly discriminate against any of the classes.

In re Parrott, 2009 Bankr. LEXIS 4196 (Bankr. E.D. Tenn. December 29, 2009) (Stinnett, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 8:1322.05

§ 1322(c)(2) Contents of Plan; Debtor's Principal Residence; Modification of Home Mortgages.

0210-126 **Debtor could pay mortgage that matured prepetition, on house inherited from mother, over (Consumer) course of plan.** (Bankr. S.D. Tex.)

PROCEDURAL POSTURE: Debtor filed a petition under chapter 13 of the Bankruptcy Code and a plan for repaying his creditors. A bank filed an objection to the debtor's plan because it proposed to pay a mortgage on a house he inherited from his mother under his plan, and also filed a motion for relief from the automatic stay.

OVERVIEW: The debtor's mother borrowed \$ 79,500 from a bank and gave the bank a mortgage on her home. The loan matured when the debtor's mother died in May 2008, and the debtor inherited a 20% interest in his mother's home, claimed the home as his homestead after he declared bankruptcy, and proposed to pay \$ 40,372 that was owed on the mortgage at 5.25% interest over 59 months, under his bankruptcy plan. The bank filed an objection to the debtor's plan, claiming that because there was no privity of contract between the debtor and the bank, the debtor could not use his bankruptcy plan to pay the amount the bank was owed. The bankruptcy court disagreed. The house belonged to the debtor, the bank held an in rem claim against the house, and under U.S. Supreme Court precedent, that claim was subject to inclusion in the debtor's bankruptcy estate and could be discharged through his bankruptcy plan. Established case law also held that 11 U.S.C.S. § 1322(c)(2) allowed bankruptcy debtors to pay mortgages that matured prepetition over the course of their bankruptcy plans.

In re Carter, 2009 Bankr. LEXIS 4201 (Bankr. S.D. Tex. December 28, 2009) (Isgur, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 8:1322.16

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

0210-127 **Secured claim in "910" vehicle that included negative equity was a purchase money security interest and protected from bifurcation.** (*Bankr. C.D. Ill.*)
(Consumer)

PROCEDURAL POSTURE: This matter was before the court on confirmation of debtor's proposed chapter 13 plan and the objection of a credit union to confirmation.

OVERVIEW: The credit union objected to debtor's proposed bifurcation of its secured claim, asserting that the "hanging paragraph" following 11 U.S.C.S. § 1325(a)(9) protected its claim from bifurcation because its claim was secured by a purchase money security interest (PMSI) in a vehicle purchased for debtor's personal use within 910 days of the filing of debtor's petition for relief under chapter 13. Debtor asserted that inclusion of negative equity in the financing of the vehicle destroyed the purchase money character of the loan and, therefore, the loan was subject to modification and bifurcation into a secured claim for the present value of the vehicle and a general unsecured claim for the balance. Following the rationale outlined in Whipple, the court concluded that the credit union held a PMSI in the vehicle for purposes of the hanging paragraph, and the fact that a portion of the loan proceeds was used to refinance negative equity in a trade-in did not affect the nature of that security interest. As the holder of a PMSI, the credit union's claim could not be bifurcated under 11 U.S.C.S. § 506.

In re Dyke, 2009 *Bankr. LEXIS* 4192 (*Bankr. C.D. Ill. December 23, 2009*) (*Altenberger, B.J.*).

Collier on Bankruptcy, 15th Ed. Revised 8:1325.07C

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

0210-128 **Plan confirmation denied due to improper deduction for mortgage expense regularly paid by non-debtor spouse.** (*Bankr. N.D. Ill.*)
(Consumer)

PROCEDURAL POSTURE: A chapter 13 standing trustee objected to the confirmation of a debtor's plan pursuant to 11 U.S.C.S. § 1325(b)(1). The debtor's attorney filed an application for compensation.

OVERVIEW: The debtor and her non-debtor spouse and their child resided on property owned solely by the non-debtor spouse. The debtor's spouse was solely responsible for, and paid the mortgage on, the property. On Line 19 of the debtor's B22C Form, she claimed as a marital adjustment the mortgage on her spouse's home and utility bills for maintenance of a swimming pool. The debtor calculated the deductions from her income allowed under 11 U.S.C.S. § 707(b)(2) and listed on Line 25B a standardized Internal Revenue Service (IRS) housing and utilities expense. The court held that the plain language and directions for Line 19 precluded the debtor from deducting the mortgage expense of her non-debtor spouse as a marital adjustment because the mortgage was an expense that was paid on a regular basis for the household expenses of the debtor and her son, as well as the non-debtor spouse. The debtor was entitled to deduct the standard housing expense under the IRS standards on Line 25B even though she had no housing expense. The court also disallowed the deduction for utility bills associated with the swimming pool because they were not reasonably necessary.

In re Trimarchi, 2010 *Bankr. LEXIS* 129 (*Bankr. N.D. Ill. January 25, 2010*) (*Squires, B.J.*).

Collier on Bankruptcy, 15th Ed. Revised 8:1325.08[2]

§ 1328(a)(4) Discharge; Full-Compliance Discharge; Restitution or Damages For Willful or Malicious Injury or Death.

0210-129 **Creditor could seek nondischargeability of damages for willful and malicious injury awarded after commencement of debtor's case.** (*Bankr. E.D. Pa.*)
(Consumer)

PROCEDURAL POSTURE: Plaintiff creditor brought an adversary proceeding against defendant bankruptcy debtor seeking a determination that her pending tort claim against the debtor for personal injury was not dischargeable under 11 U.S.C.S. § 1328(a)(4) based on willful or malicious conduct of the debtor. The debtor moved to dismiss the complaint for failure to state a claim.

OVERVIEW: The debtor contended that nondischargeability under § 1328(a)(4) only applied to a debt for damages which were awarded prior to the debtor's bankruptcy petition, and that the debtor filed his petition before the creditor obtained a judgment against the debtor in state court. The bankruptcy court held that, while § 1328(a)(4) excepted from discharge a debt for damages "awarded" in a civil action, the

required award of damages for willful or malicious personal injury to the creditor could be entered after the debtor commenced the bankruptcy case. In view of the ambiguity of the statute and the fundamental bankruptcy policy prohibiting discharge of debts based on intentional and wrongful conduct, any debt to the creditor could not be insulated from nondischargeability based solely on the vagaries of timing.

Morrison v. Harrsch (In re Harrsch), 2010 Bankr. LEXIS 86 (Bankr. E.D. Pa. January 19, 2010) (Frank, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 8:1328.02[3][k]

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

§ 1334 BANKRUPTCY CASES AND PROCEEDINGS.

0210-130 **State law claims "related to" debtor's bankruptcy remanded to avoid duplication of judicial**
(Commercial) **efforts.** (D.R.I.)

PROCEDURAL POSTURE: After defendant manufacturer removed claims against it in four asbestos injury cases to federal court, plaintiffs alleged injured parties moved to remand the claims to state court and sought a discretionary award of attorneys' fees, under 28 U.S.C.S. § 1447(c).

OVERVIEW: The manufacturer said another company, which filed for bankruptcy, had to indemnify it for any liability in these cases so that these claims were "related to" the bankruptcy, under 28 U.S.C.S. § 1334. The claims were related to the bankruptcy because they could conceivably impact the bankruptcy estate, but equitable remand was warranted under 28 U.S.C.S. § 1452(b), because (1) the removal split the alleged injured parties' claims into two cases, as their claims against others were still pending in state court so, absent equitable remand, there would be a duplication of judicial effort, prejudice to the alleged injured parties in trying the same claims in two courts, and a risk of inconsistent results as to apportionment of the manufacturer's liability, (2) the claims arose under state law, and the state court had substantial expertise in managing such claims, and (3) the bankruptcy court held the claims would not likely materially impact the bankrupt entity's estate and that there was no basis to enjoin them from proceeding in state court. The alleged injured parties were not entitled to attorneys' fees because nothing showed removal was objectively unreasonable when it occurred.

Messerlian v. A.O. Smith Corp., 2009 U.S. Dist. LEXIS 123982 (D.R.I. December 29, 2009) (Almond, U.S.M.J.).
Collier on Bankruptcy, 15th Ed. Revised 1:3.01

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

0210-131 **Mandatory abstention not applicable to core proceeding for invalidation of deed of trust.**
(Consumer) (N.D.W. Va.)

PROCEDURAL POSTURE: Plaintiff debtor filed a voluntary petition in bankruptcy. The debtor then sued defendants, corporations, and alleged unconscionable inducement of the loan, misconduct by a notary public, breach of contract, estoppel preventing foreclosure on the loan, illegal debt collection, and illegal return of payment. The action sought, inter alia, invalidation of the deed of trust and damages. The corporations removed the case. The debtor moved to remand.

OVERVIEW: In the debtor's motion to remand the case to state court, with respect to the removal under the bankruptcy statute, the debtor contended that mandatory abstention was required, and that, in the alternative, the court should have remanded the case under equitable remand. The court found that mandatory abstention under 28 U.S.C.S. § 1334(c)(2) was not applicable because the action was, at least in part, a core proceeding under 28 U.S.C.S. § 157(b)(2) since a substantial part of the relief sought was the invalidation of the lien of the deed of trust. Moreover, even if the case were not a core proceeding, mandatory abstention would not apply because the case could have been brought in federal court, since there was complete diversity between the debtor and the corporations. While the debtor included a claim against the notary public, the court found that the notary had been fraudulently joined where given the

fact that the debtor did not contest the fact that she, in fact, signed the deed of trust, there could be no damage emanating from the notary public's failure to properly acknowledge that signature.

Wolfe v. Greentree Mortg. Corp., 2010 U.S. Dist. LEXIS 6005 (N.D.W. Va. January 26, 2010) (Bailey, D.J.).
Collier on Bankruptcy, 15th Ed. Revised 1:3.05[2]

§ 1412 Change of Venue.

0210-132 **State class action removed and transferred to district court where defendant's bankruptcy was**
(Commercial) **pending.** (E.D. Tenn.)

PROCEDURAL POSTURE: Plaintiffs, borrowers, initiated a state action against defendant corporation and sought damages under Tenn. Code Ann. § 45-15-111, § 45-2-210, and § 47-18-101 et seq. The borrowers were granted class action certification. The corporation filed a notice of filing of bankruptcy in the state action and a notice of removal under 28 U.S.C.S. §§ 1334, 1446, 1452, and 157(e). The corporation sought to transfer the matter. The borrowers moved to remand.

OVERVIEW: The corporation contended that the instant matter should have been transferred to the United States Bankruptcy Court for the Southern District of Georgia in the interest of justice so it could be resolved in conjunction with the bankruptcy case. The court, after considering the 28 U.S.C.S. § 1412 factors, found that the corporation met its burden of establishing that a transfer was in the interest of justice because the proximity of creditors supported a transfer to the Southern District of Georgia, the corporation's corporate headquarters was located in Savannah, Georgia, where many witnesses would likely be used, as the action stemmed from corporate decision-making and procedures, and the majority of the corporation's parent entity's assets were located in and around Georgia, with the largest portion of its accounts receivable generated in Georgia. Moreover, because the outcome of the instant litigation could have affected the corporation's liabilities as well as the administration of the estate, it followed that judicial economy and efficiency were best served by transferring this action to the court where the bankruptcy case was already pending.

Dwight v. TitleMax of Tenn., Inc., 2010 U.S. Dist. LEXIS 4767 (E.D. Tenn. January 21, 2010) (Collier, C.D.J.).
Collier on Bankruptcy, 15th Ed. Revised 1:4.05

BANKRUPTCY RULES (Post-2005 Act)

Rule 2019 **Representation of Creditors and Equity Security Holders in Chapter 9 Municipality and Chapter 11 Reorganization Cases.**

0210-133 **Bankruptcy court denied motion of official committee of unsecured creditors to order informal**
(Commercial) **committee of bondholders to disclose information about claims.** (Bankr. D. Del.)

PROCEDURAL POSTURE: In this chapter 11 case, the Official Committee of Unsecured Creditors filed a motion to compel an informal committee of bondholders to comply with Fed. R. Bankr. P. 2019 by disclosing information about their claims against the debtor.

OVERVIEW: There were multiple committees in this case, including an informal committee of bondholders. The issue before the court was whether the informal committee was a committee representing more than one creditor under Fed. R. Bankr. P. 2019. If so, the members of the informal committee would be subject to the disclosure requirements set forth in that rule. The court held that, under the plain meaning of the rule's language, such a group was not a "committee" because it was a self-appointed subset of a larger group and, in order for a group to constitute a committee under Rule 2019, it would need to be formed by a larger group either by consent, contract, or applicable law -- not by "self-help." In addition, the legislative history behind Rule 2019 and its predecessor supported the court's interpretation based upon plain meaning. In so ruling, the court respectfully declined to follow the holding in two recent cases addressing the virtually identical question: *In re Washington Mutual, Inc. et al.*, 419 B.R. 271 (Bankr. D. Del. 2009); and *In re North-west Airlines Corp. et al.*, 363 B.R. 701 (Bankr. S.D.N.Y. 2007).

In re Premier Int'l Holdings, Inc., 2010 Bankr. LEXIS 98 (Bankr. D. Del. January 20, 2010) (Sontchi, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 9:2019.01

Rule 8005 Stay Pending Appeal.

0210-134 **Stay pending appeal of conversion from chapter 13 to chapter 7 denied due to debtor's pattern of abuse.** (*Bankr. W.D. Tex.*)
(Consumer)

PROCEDURAL POSTURE: Following a bankruptcy court's order converting a debtor's case from chapter 13 to chapter 7, the debtor filed a motion for stay pending appeal pursuant to Fed. R. Bankr. P. 8005.

OVERVIEW: The court found that a serious question of law was involved on the issue of whether it could convert a chapter 13 case to a chapter 7 case on the oral motion of a party in interest when facts were adduced at the hearing to indicate that dismissal would be inappropriate. The debtor would claim lack of notice and by implication, a denial of due process. However, the court was less certain that a balancing of the equities favored the debtor. There were serious questions raised about the debtor's real assets, coupled with the debtor's past practice of using the state courts to enjoin lenders once they got relief from stay, leading the court to believe that the equities did not favor allowing the debtor to stay in continued possession of the rental properties that were at the heart of this bankruptcy. This would allow the debtor to have de facto if not de jure control over those properties so that he could continue the very pattern of abuse that the court found justified the decision to convert the case. Public policy counseled against affording the debtor continued special protections when the court already had probable cause to believe that a bankruptcy crime has been committed.

In re Herrera, 2009 Bankr. LEXIS 4178 (Bankr. W.D. Tex. December 23, 2009) (Clark, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 10:8005.01

0210-135 **Stay pending appeal of judgment that debtor's counsel allowed debtor to exhaust cash collateral denied.** (*Bankr. W.D. Tex.*)
(Commercial)

PROCEDURAL POSTURE: A chapter 7 debtor's counsel sought a stay pending appeal from an order finding him in contempt and assessing a judgment against him, payable to a creditor whose cash collateral the court found was dissipated in violation of two court orders and in violation of 11 U.S.C.S. § 363(c).

OVERVIEW: The debtor's counsel was assessed a judgment for his role in either permitting or counseling the debtor to use cash collateral in violation of 11 U.S.C.S. § 363(c). If the debtor's counsel had posted a supersedeas bond, he would have been entitled to a stay as of right under Fed. R. Bankr. P. 7062(a). Because he did not, the court had discretion under Fed. R. Bankr. P. 8005 to grant or deny the stay. The court considered the same factors used for preliminary injunctions. A balancing of the equities did not favor the debtor's counsel. It was the creditor's collateral that was exhausted, and all that it held in place of those funds was a judgment that gave it nothing more than the right to try to collect them from the debtor's counsel. Equity required the debtor's counsel to post a bond for the privilege of imposing further delay on the creditor's efforts. With respect to public policy, the court held that 11 U.S.C.S. § 105(a) gave it the power to craft appropriate relief to give effect to the strict prohibition in 11 U.S.C.S. § 363(c)(2). Granting a stay without bond would only exacerbate the injury caused by the violation of the stricture against the use of cash collateral.

In re Fiesta Inn & Suites, LP, 2009 Bankr. LEXIS 4176 (Bankr. W.D. Tex. December 21, 2009) (Clark, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 10:8005.01

Rule 9010 Representation and Appearances; Powers of Attorney.

0210-136 **Individual debtor lacked standing to file motions on behalf of debtor entities.** (*Bankr. W.D.N.Y.*)
(Commercial)

PROCEDURAL POSTURE: A chapter 7 debtor filed various motions, including motions for authority to use cash collateral pursuant to 11 U.S.C.S. § 363(c), a motion to remove trustee pursuant to 11 U.S.C.S. § 324, a motion authorizing the sale of property pursuant to 11 U.S.C.S. § 363(b), motions to impose sanctions pursuant to Fed. R. Bankr. P. 9011, and a motion to convert the case from chapter 7 to chapter 13 pursuant to 11 U.S.C.S. § 706(b).

OVERVIEW: The individual debtor filed four motions for authority to use cash collateral. The court denied the motions he filed on behalf of the debtor entities, as he had no standing. Those motions, and the motion brought on the individual's own behalf, were also denied on the grounds that 11 U.S.C.S. § 363(c)(1) was not applicable in these chapter 7 cases, as the court had not authorized the operation of the debtors' businesses under 11 U.S.C.S. § 721. The motion to remove a debtor entity's trustee was denied, as the individual debtor had no standing to bring the motion and because none of the allegations demonstrated cause. The motion to authorize a sale of a debtor entity's property was denied, as the individual had no standing. The motions to impose sanctions were denied, as the individual debtor failed to comply with the notice provisions of Fed. R. Bankr. P. 9011(c)(1)(A), and the sanctions were not warranted. The motion to convert was denied because the individual debtor was not eligible to be a chapter 13 debtor. He did not have regular income as required by 11 U.S.C.S. § 109(e) and he forfeited his right to convert due to his bad faith conduct subsequent to filing these four cases.

In re Rising Tide Enter. LLC, 2010 Bankr. LEXIS 138 (Bankr. W.D.N.Y. January 15, 2010) (Ninfo, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 10:9010.01

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

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

0210-137 **Purchaser of creditor's claim allowed administrative expense claim incurred in successful challenge to special litigation counsel's fee application.** (Bankr. N.D. Cal.)

PROCEDURAL POSTURE: Movant, a claim holder by purchase of a creditor's claim, sought an additional \$ 300,000 in fees and expenses as an allowed an administrative claim pursuant to 11 U.S.C.S. § 503(b)(3) and (4), incurred in challenging an application for a final award of compensation from a law firm that had served as special litigation counsel for certain matters. The claim holder had revealed deficiencies in the special litigation counsel's performance.

OVERVIEW: Both debtor's general counsel and the special litigation counsel were found to have consented to, and implemented a de facto waiver of a right to priority of a creditor with which they negotiated a settlement, which act greatly benefitted three note-holding creditors, whose attorney exerted improper influence in the proceedings. The counsel were found to have committed other errors and taken shortcuts damaging to the debtor's estate. The claim holder instigated and pursued the litigation and discovery that unearthed the issues. The United States trustee moved to appoint a chapter 11 trustee and to disqualify debtor's general counsel for its failure to disclose its conflict of interest with the note-holders the trustee, and filed three separate adversary proceedings. Although the trustee elected not to bring an adversary proceeding against the special litigation counsel, that counsel did agree to waive its claim for \$750,000 in additional legal fees and expenses. The court found that the claim holder, which had been awarded almost \$ 700,000 already, was entitled to an additional \$ 300,000 for its work on the case against the special litigation counsel.

In re SONICblue Inc., 2009 Bankr. LEXIS 4190 (Bankr. N.D. Cal. December 29, 2009) (Morgan, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 4:503.04

§ 524 Effect of Discharge.

0210-138 **Financial service company's counterclaim in debtor's state court action violated discharge injunction.** (Bankr. D. Mont.)

PROCEDURAL POSTURE: Plaintiff chapter 7 debtor filed an adversary proceeding against a financial services company and two other businesses, alleging, inter alia, that the financial services company violated 11 U.S.C.S. §§ 362 and 524 and engaged in unfair and deceptive practices in violation of the Montana Unfair Trade Practices and Consumer Protection Act of 1973 (UTPCPA), Mont. Code Ann. § 33-14-101 et seq. The parties filed cross-motions for summary judgment.

OVERVIEW: The debtor declared bankruptcy in 2001, 2003, and 2004, and a financial services company filed claims against the debtor's bankruptcy estates. The debtor's liability on two notes the company held

was discharged in the third case in 2005, before the debtor sued the company in a Montana court in 2008. The company filed a counterclaim in the state-court action, seeking payment of the notes that were discharged, and the debtor filed an adversary proceeding against the company in the bankruptcy court, claiming that the company violated 11 U.S.C.S. §§ 362 and 524(a)(2) and the Montana UTPCPA. The bankruptcy court found that the debtor was entitled to summary judgment on her claim that the financial services company violated § 524(a)(2) when it filed a counterclaim in the state-court action seeking payment of obligations that were discharged in the bankruptcy case she filed in 2004. However, there were genuine issues of material fact that precluded the court from granting the debtor's motion for summary judgment and the financial services company's motion for summary judgment on the debtor's claims that the company violated 11 U.S.C.S. § 362 and the Montana UTPCPA.

Jarvar v. Title Cash of Montana, Inc. (In re Jarvar), 2009 Bankr. LEXIS 4188 (Bankr. D. Mont. December 18, 2009) (Kirscher, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 4:524.01

§ 544 Trustee As Lien Creditor And As Successor To Certain Creditors And Purchasers.

0210-139 **Amended final judgment in adversary proceeding could be further amended to reflect avoided (Commercial) transfers.** (*Bankr. M.D. Fla.*)

PROCEDURAL POSTURE: On remand from the U.S. Court of Appeals for the Eleventh Circuit, the court entered an amended final judgment in favor of plaintiff chapter 11 debtor, finding that transfers to defendants, former owners of the debtor, were avoidable under N.J. Stat. Ann. §§ 25:2-27(a) and 25:2-25(b). The former owners filed a motion to vacate or, in the alternative, to amend the amended final judgment. The debtor filed a motion to dismiss a counterclaim.

OVERVIEW: The debtor sought to avoid two transfers to the former owners that resulted from a settlement agreement. On remand, the court found that both transfers were voidable, and the former owners filed the instant motion. The debtor waived seeking avoidance of the first, smaller transfer. The court denied the former owners' motion with respect to the second transfer, as they introduced no new evidence and cited no new or changed law. The former owners' affirmative defenses of release and waiver were without merit, as the release and waiver were also avoidable fraudulent transfers. Any fraud or inequitable conduct by the debtor did not impair the trustee's authority to recover fraudulent transfers under 11 U.S.C.S. § 544. The defenses of set-off and recoupment failed, as the release was an avoidable fraudulent transfer; thus, a claim based on the release was without merit. The former owners could not assert as affirmative defenses the protections in 11 U.S.C.S. § 550(b)(1) and N.J. Stat. Ann. § 25:2-30(b)(2), as they did not provide reasonably equivalent value for the transfer. Given the determination that they gave no value, the court could not reduce the judgment under § 25:2-30(d).

Advanced Telecom. Network v. Allen (In re Advanced Telecom. Network), 2010 Bankr. LEXIS 84 (Bankr. M.D. Fla. January 15, 2010) (Jennemann, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 5:544.02

§ 1325 Confirmation of Plan.

0210-140 **Oral settlement of dispute over creditor's compliance with plan was enforceable.** (*Bankr. E.D. Pa.*)

PROCEDURAL POSTURE: In this adversary proceeding, plaintiff debtor alleged that defendant mortgage creditor failed to abide by the terms of his confirmed chapter 13 plan and requested that the court fashion a remedy to enforce the confirmed plan. The creditor filed a Motion to Enforce and Approve Settlement Agreement and for Imposing Fees and Costs Against the Amount of the Settlement.

OVERVIEW: Where the existence of a settlement agreement was disputed, ordinary principles of contract law were applied to resolve the matter. Here, the issue was whether the parties--and more specifically, debtor--manifested an intention to be bound by the sufficiently definite terms prior to the memorialization of the settlement terms in a signed writing. Debtor testified that on October 21, 2009, he believed that he would not be bound by any of the terms the parties negotiated and agreed upon unless and until he signed a written agreement. The agreement included a confidentiality provision. Because debtor decided that he did not wish to be bound by such a restriction before signing a written settlement agreement, in his view, no enforceable settlement was reached. The court found that (1) the parties

reached a settlement agreement on October 21, 2009, (2) their agreement was intended to be final, and (3) their agreement was not conditioned or dependent upon being reduced to writing. In short, this was a case of buyer's remorse. Debtor's misgivings regarding his acceptance of the confidentiality provisions of the settlement were an insufficient basis to negate the settlement agreement.

Janssen v. Chase Home Fin., LLC (In re Janssen), 2009 Bankr. LEXIS 4197 (Bankr. E.D. Pa. December 29, 2009) (Frank, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 8:1325.01